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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”**

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Context

The 'state duty to protect' under Pillar I of the UN Framework and Guiding Principles on Business and Human Rights (UNGPs) calls for states to fulfil their obligations and address their potential impacts on human rights as an economic actor, including in the area of public procurement.

Public procurement is the purchase by the public sector of the goods and services it needs to carry out its functions. It has an essential role to play in facilitating States' fulfilment of their duties to protect, respect, and fulfil human rights. Equally, government buying accounts for a significant proportion of the overall global economy. Worldwide, it has a value of approximately €1000 billion per year and it comprises, for instance, on average 12% GDP in OECD countries.

· Note: In addition to specifically cited works, this submission generally draws on and in parts reproduces elements of the following: International Learning Lab on Public Procurement and Human Rights (C Methven O'Brien et al), Public Procurement and Human Rights: A Survey of Twenty Jurisdictions, 2015 DIHR and ICAR, available at: <http://www.hrprocurementlab.org/blog/reports/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions/> (hereafter 'A Survey of Twenty Jurisdictions'); C. Methven O'Brien and O. Martin-Ortega, 'The SDGs, human rights and procurement: An urgent need for policy coherence', in UNOPS, *High Impact Procurement. Supporting sustainable development. Thematic Supplement to the 2016 Annual Statistical Report on United Nations Procurement*, 2017, pp. 10-14, available at <https://www.unops.org/english/News/Publications/Pages/High-impact-procurement-ASR-supplement-2016.aspx>; and O. Martin-Ortega and C. Methven-O'Brien, 'Advancing respect for labour rights globally through public procurement', *Politics and Governance* (2018, forthcoming).

Therefore, as “mega-consumers,” governments have the purchasing power to set standards that can shift markets towards sustainable production, to exercise leverage over suppliers towards this goal – and to lead by example in introducing human rights into supply chain management by establishing arrangements for human rights due diligence.

In the past, however, little consideration has been given to the human rights impacts of the central state and other public bodies in terms of their role as a consumer, by comparison, for instance, to that focused on transnational corporations via their supply chains.

This lack of policy coherence undermines fulfilment of the UN Framework and UNGPs, both directly, as government fail to require their own suppliers to respect human rights, and indirectly, as governments weaken the “business case” for companies to respect human rights and due diligence, by failing to send the right market signals and undermine the moral case because they fail to lead by example.

Aims and focus of the submission

This submission addresses this gap by starting to clarify states’ human rights responsibilities regarding public procurement in line with the UNGPs and identifying emerging good practices through which public buyers can fulfil these responsibilities while still meeting their organisational needs.

The submission aims to support the implementation of UNGP6 by highlighting measures to operationalise the state “duty to protect” and the “corporate responsibility to respect” in the context of public procurement. It also highlights the need to integrate human rights into public procurement as essential to the achievement of the Sustainable Development Goals (SDGs).

It defines public procurement and provides a brief account of its role, scale and relevance in the business and human rights context; outlines how public procurement is currently regulated under international and regional legal frameworks, with reference to instruments such as the WTO Agreement on Government Procurement (GPA), EU procurement rules and the UNCITRAL Model Law, as well as relevant policy frameworks, including those concerning “responsible global value chains” that have recently emerged from the OECD and G7, for example.

It then demonstrates how human rights can be integrated into the procurement cycle with reference to concrete examples which we along with others have previously reported on.¹ These examples signal emerging good practices implemented by governments and subsidiary public authorities in different world regions. Measures promoting respect for human rights in public procurement emerging from National Action Plans on business and human rights (NAPs) are also considered.

Finally, it presents recommendations for states and other procurement regulators, and other relevant stakeholders, including national human rights institutions (NHRIs), civil society organisations (CSOs), the UN system and business associations regarding the further development of public procurement as an element of the obligation to protect human rights in the context of business operations.

Main Recommendations

- States must “lead by example” and demonstrate to the corporate sector their commitment as well as practical techniques for integrating respect for human rights into supply chain management. Accordingly, states must urgently align public procurement law and policy frameworks with their international responsibilities to respect, promote and protect human rights when purchasing goods and contracting services.

- Policy guidance should be developed on aligning public procurement with requirements on states and businesses under the UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises, and the United Nations Sustainable Development Goals.
- National and local buying authorities should assess current, needs, challenges and opportunities to support integration of human rights safeguards in public procurement and develop practical guidance for public buyers to address all stages of the procurement cycle:
 - the planning stage;
 - technical specifications or criteria;
 - identifying qualifying bids, evaluating, and selecting bids;
 - monitoring and evaluating supplier performance on human rights.
- Specifically, guidance should be provided on how to include requirements for suppliers to develop human rights due diligence in the supply chain, allowing public buyers to be involved in monitoring and remediation processes. Guidance should also address how grounds for exclusion from eligibility for public contracts when suppliers do not respect human rights or develop appropriate due diligence in their supply chain.
- Governments should support knowledge and capacity development of public sector procurement professionals on human rights risks and measures to address them, e.g. by supporting online tools to identify higher risk product categories and countries of origin; e-learning courses; and/or an online hub or portal for public buyers to share good practices and experiences on human rights.
- Governments should consider establishing public procurement and human rights Working Groups at national level to include the relevant public administration departments, procurement professional associations, buyers from large public bodies, representatives of relevant sustainable procurement initiatives and civil society organisations, and procurement law professionals, to develop proposals for relevant and practical initiatives as part of a work plan on procurement and human rights on an ongoing basis.

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I. Introduction

A. Background, aims and outline

The 'state duty to protect' under Pillar I of the UN Framework and UN Guiding Principles on Business and Human Rights (UNGPs) calls for states to fulfil their obligations and address their potential impacts on human rights as an economic actor, including in the area of public procurement.

Public procurement is the purchase by the public sector of the goods and services it needs to carry out its functions. Government buying accounts for a significant proportion of the overall global economy. Worldwide, it has a value of approximately €1000 billion per year and it comprises, for instance, on average 12% GDP in OECD countries.²

The scope of goods and services bought by public authorities ranges widely, from infrastructure and urban development projects, to the acquisition of complex items such as weapon systems, to the commissioning of essential public services in the health and social care sector, to buying common goods such as stationery, furniture, and foodstuffs.

Public procurement has an essential role to play in facilitating States' fulfilment of their duties to protect, respect, and fulfil human rights. For example, only with infrastructure development, procurement of goods such as medical equipment and drugs, and services under contract can a State fulfil its duty to protect the human right to the highest attainable standard of health.

As "mega-consumers," governments have the purchasing power to set standards that can shift markets towards sustainable production, and to exercise leverage over suppliers towards this goal. In the past, however, little consideration has been given to the human rights impacts of the central state and other public bodies in terms of their role as a consumer, by comparison, for instance, to that focused on transnational corporations via their supply chains.

This submission starts to address this gap by clarifying states' human rights responsibilities regarding public procurement in line with the UNGPs and identifying emerging good practices through which public buyers can fulfil these responsibilities while still meeting their organisational needs. The submission supports the implementation of UNGP6 by highlighting measures to operationalise the state "duty to protect" and the "corporate responsibility to respect" in the context of public procurement. It also highlights the need to integrate human rights into public procurement as essential to the achievement of the Sustainable Development Goals (SDGs).

The remainder of **Section I** defines public procurement and provides a brief account of its role, scale and relevance in the business and human rights context, while also explaining the scope and limits of the submission. **Section II** outlines how public procurement is currently regulated under international and regional legal frameworks, with reference to instruments such as the WTO Agreement on Government Procurement (GPA), EU procurement rules and the UNCITRAL Model Law, as well as relevant policy frameworks, including those concerning "responsible global value chains" that have recently emerged from the OECD and G7, for example.

Section III demonstrates how human rights can be integrated into the procurement cycle with reference to concrete examples. These signal emerging good practices implemented by governments and subsidiary public authorities in different world regions. Measures promoting respect for human rights in public procurement emerging from National Action Plans on business and human rights (NAPs) are also reported.

Section IV presents conclusions and recommendations for states and other procurement regulators, and other relevant stakeholders, including national human rights institutions (NHRIs), civil society organisations (CSOs), the UN system and business associations.

B. Defining public procurement

Public procurement refers to the purchase by the public sector of the goods and services it needs to carry out its functions.³ Government purchasing represents a significant share of the total global economy. Worldwide, it has a value of approximately €1000 billion per year, while across OECD countries it accounts for 12% of GDP, on average.⁴

Public purchases can be divided into three categories: i) goods (supply of products); ii) services; and iii) works (construction). In practice, the scope of goods and services bought by public authorities ranges widely, from infrastructure and urban development projects, to the acquisition of complex items such as weapon and information and communication technology systems, to the commissioning of essential public services in the health and social care sector, to buying common goods such as stationery, furniture, uniforms, electrical items and foodstuffs.

In legal terms, procurement can be seen as comprising three main phases: procurement planning; the procurement process; and contract management. In the second phase, the relevant government body establishes and executes a tender procedure with the aim of concluding a contract. At this stage, a contractor is selected and terms and conditions are drafted for the contract based on requirements established and publicised during the planning process. A third phase is a process of contract administration or management with the objective of securing effective performance.⁵

Government purchases that lie within the scope of public procurement laws may be subject to relevant general laws at national level (for example, administrative or contract law, environmental regulations and anti-corruption rules) as well as to rules at international level, for instance, under the WTO GPA and international finance instruments, depending on the obligations entered into by the state, the monetary value and subject matter of the procurement in question.⁶

C. Impacts of public procurement on human rights

Public procurement has an essential role to play in facilitating States' fulfilment of their duties to protect, respect, and fulfil human rights. For example, only with infrastructure development, procurement of countless goods such as medical equipment and drugs, and services under contract can a State fulfil its duty to protect the human right to the highest attainable standard of health.

Yet, like other consumers, governments currently procure goods and services via supply chains in which serious human rights abuses are widespread.⁷ In recent years, civil society organisations, media, and national human rights institutions have exposed weak controls leading to public purchasing practices associated with human rights abuses. Examples which we along with others have previously highlighted include:⁸

- **Prohibition of child labour:** In a Bangladeshi factory that produced licensed apparel for U.S. military stores, a third of the workforce were children.⁹ In the electronics sector, governments purchase commercial items from manufacturers that source from countries where child labour is prevalent in factories that produce electronics.¹⁰ Child labour is also common in the extractive industries that supply raw materials required by the electronics sector: as many as 1.5 million children work in gold mines, for example.¹¹
- **Prohibition of forced labour:** Plastic gloves procured by the public health-care sector in Denmark have been documented to contain rubber from plantations relying on forced labour.¹² A U.S. government contractor transported Nepali construction workers into a combat zone against their will.¹³ *En route*, their unarmed convoy was

attacked by insurgents, who executed some of the workers and posted video of their deaths on the Internet. In a recent report, Danwatch exposed human rights violations and forced labour in information technology supply chains, revealing systematic exploitation of Chinese students forced to work at electronics factories that produce servers for brands Danish universities most commonly use.¹⁴

- **Illegal wages and hours:** A contractor that made camouflage clothing for the U.S. government regularly failed to pay overtime wages at its factory in the Dominican Republic.¹⁵ In Chinese factories that supply many governments, working conditions were so harsh that 17 workers tried to commit suicide over an eight-month period. One had worked 286 hours the month before he died whereas the legal limit was 36 overtime hours.¹⁶
- **Unsafe working conditions:** The licensed insignia for U.S. military services were found in the rubble of a factory fire that killed 112 workers in Bangladesh.¹⁷ In Peru, workers who extract minerals for the electronics industry are exposed to mercury.¹⁸ A large proportion of simple surgical instruments, such as scissors and forceps, used by healthcare providers in Sweden and the U.K. are manufactured in Sialkot, Pakistan, where Swedwatch has exposed hazardous working conditions. For example, workers operating machinery without personal protective equipment.¹⁹
- **Freedom of association:** The Danish government has ordered military uniforms from a Bangladeshi factory within an Export Processing Zone where trade unions are prohibited.²⁰ Rather than recognize a union, a Mexican subcontractor in the supply chain for public employee uniforms shut down a factory and then blacklisted 400 workers who supported the union.²¹ It is illegal to organize an independent union in China, where factories supply electronics to companies that in turn supply ICT to many governments.²²

Given its ubiquity across all states, along with its vast scale and market value, public procurement embodies an enormous opportunity for governments to leverage their spending power to promote respect for human rights in the private sector and the necessary global transition to sustainable production and consumption. As “mega-consumers,” and often the dominant – and sometimes exclusive – purchaser for specific categories of goods and services, governments ought in principle to be able to define buying standards that stimulate progressive transformation towards greater respect for human rights in sourcing and production processes.

Besides their legal duties under international human rights instruments in the procurement context therefore, there is an enormous opportunity for governments to promote human rights and sustainable development by integrating appropriate protections in the procurement norms, policies and practices.

D. Scope and limits of the submission

This submission focuses primarily on UNGP6. Under the heading of the “state-business nexus”, UNGP 5 recalls that the state duty to protect human rights extends to the privatisation or “contracting-out” of public services. In this situation, states retain their human rights obligations to service users 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.

Public services such as education, healthcare, housing and social services (for example, residential care or personal care and support services for the elderly, persons with disabilities and children) as well as utilities such as water, energy and communications are essential for the enjoyment of human rights. Some human rights, such as the right to education, that are recognised by international instruments establish entitlements to such services directly.²³ Others imply the need for such public services.²⁴

Governments increasingly rely on private companies to deliver public services. Many states have “privatised” formerly public industries, utilities or services. Alongside, in the context of services that, overall, remain in the public sector, central government or municipal authorities may subject the delivery of certain of their elements to “contracting-out” or compulsory competitive tendering. Hence certain components of core state functions are today frequently delivered by private companies, even if other aspects remain with the state. Companies providing such services have been allegedly implicated in human rights abuses, for example, in relation to health and social care for the elderly,²⁵ immigration detention and removals²⁶ and prison management.²⁷

Consequently, states need to ensure that the specific terms of service contracts concluded between public bodies and private companies embody operational standards that are fully aligned with the human rights of service users, as well as adequate arrangements for monitoring and enforcement of contractual compliance. Depending on the jurisdiction, subject matter and value, such service contracts may be categorized as public procurement. However, arrangements for the provision by the private sector of essential services raise distinct issues and are hence beyond the scope of the current submission.

UNGP 4 relates to the state duty to protect as it applies to state-owned or controlled enterprises (SOEs), providing that states should, where appropriate, require SOEs to exercise human rights due diligence.²⁸ In many countries, SOEs represent a significant component of the business sector. The energy, natural resource extraction, agriculture, transportation and communications sectors, for example, are sometimes dominated by such entities. In addition, with the extension of market liberalisation, many such enterprises have evolved from national into global corporations. Worldwide there are over 550 state-owned transnational corporations (TNCs) with more than 15,000 foreign affiliates and which own foreign assets of over USD 2 trillion.²⁹ By 2015, SOEs accounted for 70 per cent China’s total investment in the EU.³⁰

Although purchasing by SOEs may, depending on the circumstances, be categorised as public procurement, again, as the SOE scenario raises distinct legal issues, this issue is not specifically addressed in the current submission.³¹

II. Normative and policy frameworks relating to public procurement

A. State duty to protect

The UNGPs affirm the duty of States to protect against human rights abuses by businesses. UNGP 1 provides that “States shall take appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulation and adjudication.”³² The UNGPs also indicate that business actors themselves have a “responsibility to respect” human rights including through the performance of human rights due diligence; and that the victims of business-related human rights abuses have a right to access an effective remedy.³³

More specifically, Pillar I of the UN Framework, the “State duty to protect” extends to situations where a commercial “nexus” exists between public actors and businesses. As UNGP 6 notes, this entails that states should promote awareness and respect for human rights by businesses in the context of public procurement. In further support of this goal, under the heading of “policy coherence”, UNGP 8 provides that states should ensure alignment with human rights of policies and practice across all governmental departments, agencies and institutions that shape business practices.³⁴

Unanimously endorsed by the UN Human Rights Council in 2011, the UNGPs have subsequently won support from the European Union,³⁵ the Organisation for Economic

Cooperation and Development (OECD),³⁶ and the International Standards Organisation (ISO),³⁷ as well as numerous businesses, civil society organisations, and government actors.

B. Sustainable Development Goals and “responsible global value chains”

The 2030 Agenda for Sustainable Development was adopted by UN Member States in September 2015. This has set new objectives on public procurement, as part of the drive towards sustainable production and consumption, decent work and more inclusive economies. Sustainable Development Goal 12.7 calls on all countries to promote sustainable public procurement practices and to implement sustainable public procurement policies and action plans.³⁸ The coming years will see actions by governments realise these goals, which should include removing legal and policy barriers to integrating human rights into public purchasing.³⁹

In parallel, other global actors are promoting a renewed focus on “responsible global value chains” as key to sustainable and inclusive growth – with a strong emphasis on the contribution of the private sector, through “responsible business conduct” and the decent work agenda, in achieving this goal, while at the same time they acknowledge the joint responsibility of governments and business to foster sustainable supply chains. In 2015, for instance, the G7 Leaders’ Declaration called for tools to support public procurers in meeting social and environmental commitments.⁴⁰

In addition, in 2011, following the review of its Guidelines for Multinational Enterprises the OECD published its Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and two supplements on 3Ts and gold.⁴¹ In addition to the 35 OECD Members, 8 non-Members, namely Argentina, Brazil, Colombia, Costa Rica, Lithuania, Morocco, Peru and Romania, have subscribed the Guidance by adhering to the Council Recommendation which approved it. In 2017 the OECD Guidance for Responsible Supply Chain in the Garment and Footwear Sector was published, to help companies identify and prevent potential negative impacts related to human rights, labour, the environment and corruption in garment and footwear global supply chains.⁴²

C. Public procurement frameworks

In general, government contracts are subject to the ordinary private⁴³ or administrative⁴⁴ law of the State concerned. Public authorities should also comply with their obligations under domestic rules during public contracting, for instance, in the areas of environment and anti-corruption. However, multiple levels of specific regulation typically apply to public procurement, including: national (state and federal) regulations; supranational (European Union); and international (such as the WTO GPA and the regulation of procurement under international finance instruments).⁴⁵ This section highlights three of the most significant regulatory frameworks in the procurement context.

The Agreement on Government Procurement (GPA) is a pluri-lateral agreement within the framework of the World Trade Organisation (WTO).⁴⁶ It has a limited membership applying only to those WTO members who have additionally acceded to it.⁴⁷ The objectives of the GPA are, in summary, greater liberalisation and expansion of international trade; non-discrimination (that is, measures prepared, adopted, or applied to public procurement must not afford greater protection to domestic suppliers, goods, or services, or discriminate against foreign suppliers, goods, or services); integrity and predictability, to ensure efficient and effective management of public resources; and transparency, impartiality, avoidance of conflicts of interest and corruption.

In the European Union (EU), 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 EU’s legal regime, namely, free movement of goods, services, capital, and people within EU boundaries⁴⁸ as well as principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, and transparency. Hence, it may restrict cross-border flows in these four areas only if restrictions are imposed in pursuit of the public interest and meet certain other conditions.⁴⁹

Accordingly, the EU has established Directives providing rules for public procurement, most recently updating these in 2014,⁵⁰ and for effective review procedures.⁵¹ Together these describe how public authorities should purchase: i) “works” which extends to building and civil engineering contracts; ii) “supplies” which refers to contracts for the purchasing of goods and supplies; and iii) “services” which includes contracts for advertising, property management, cleaning, management consultancy, financial, and ICT related services. The 2014 Directives are intended to modernise public procurement by increasing the efficiency of public spending, facilitating the participation of small and medium-sized enterprises (SMEs), and enabling procurers to use procurement to further common societal goals, including sustainability.

The UN Commission on International Trade Law (UNCITRAL) is an organ of the UN General Assembly established to promote the harmonisation and unification of international trade. It has devised a *Model Law on Public Procurement*. This is intended to promote alignment of procurement law across jurisdictions while aiming to support the same principles of competition guiding the two regimes mentioned above.

The *Model Law on Public Procurement* provides an outline for national public procurement legislation.⁵² It contains principles and procedures intended to achieve value for money and avoid abuses in the procurement process, for instance, corruption. It is currently used by 23 states and 6 organisations and development banks to form the basis or shape their public procurement regimes, including the OSCE and the World Bank.⁵³ In its *Preamble*, the Model Law sets out six main objectives: economy and efficiency; international trade; competition; fair and equitable treatment; integrity, fairness, and public confidence in the procurement process; and transparency.⁵⁴ A *Guide to Enactment* accompanying the Model Law suggests detailed procurement regulations and provides supporting guidance.

International finance institutions such as the World Bank,⁵⁵ the European Bank for Reconstruction and Development (EBRD),⁵⁶ the African Development Bank,⁵⁷ and the Asian Development Bank have their own procurement rules, policies, and guidance. These set out the principles that apply to borrowers’ procurement of goods, services, and works financed in whole or in part by each bank respectively. Typically, such policies do not refer to human rights, though some include terms promoting green procurement.

D. “Primary” and “secondary” aims of public procurement

Whether national, supranational or international, typically the principal policy objectives or “primary” aims of procurement laws include: a) achieving value for money (“efficiency”) in public purchasing; b) non-discrimination as between tenderers; and c) open competition.

However when engaging in procurement, public bodies may not only be concerned with such goals but also with achieving policy aims such as environmental sustainability⁵⁸ and non-discrimination, equality and integration of marginalised or disadvantaged groups into the labour market, though notably typically concentrating on populations within the domestic jurisdiction, rather than in the context of global supply chains.⁵⁹

In addition, though still a nascent practice, public buyers in some jurisdictions now refer in tenders to “fair trade” and ethical considerations, at least for certain products, usually commodities. Along with the new human rights and supply chain policy frameworks mentioned above, this has triggered an increasing focus on the idea and need to achieve

sustainable public procurement (SPP)⁶⁰ which refers to public authorities' application of socially and environmentally responsible practices when contracting to buy public works, services, or supplies.⁶¹

Previously SPP typically implied a strong environmental focus.⁶² "Green" procurement" following the 1992 the Earth Summit in Rio, which marked a turning point with Agenda 21 calling for governments to exercise environmental leadership through government purchasing.⁶³ By the end of the 1990s, green procurement policies were in place in many developed countries, encouraged by international organisations including the UN and OECD.

Gradually however more emphasis has been put on balance between the three pillars of sustainable development: economic, social, and environmental. In this context socially responsible procurement objectives may be understood as referring *inter alia* to the creation of local employment opportunities, or promoting equal opportunities for groups that have been disadvantaged, such as women, persons with disabilities, or persons from specific ethnic or other minority groups, thus overlapping with historical "secondary" public policy objectives of government purchasing.⁶⁴ Such objectives may be achieved, for example, by including "social clauses" in public procurement contracts, discussed further in the following section.⁶⁵

Importantly, however, whereas governments sometimes seek to use public procurement to promote such aims, the means that may be deployed to give effect to "secondary" considerations have historically been legally conditioned and restricted with reference to the primary aims mentioned above. This is because ultimately, procurement law regimes have been interpreted to have as their defining element the need to preserve competition and eliminate any distorting elements. As a result, courts have historically approached the insertion of social considerations within the procurement process restrictively – and without consideration of human rights obligations of the State and public authorities which the law, arguably and depending on circumstances, may require to be afforded legal precedence over procurement rules.⁶⁶

In recent years, a more flexible approach has started to emerge, however, as can be observed with reference to developments affecting the three major procurement law frameworks described in the previous section.⁶⁷

A Revised GPA text adopted in 2012 seeks to encourage broader acceptance by States *inter alia* by introducing new exceptions for environmental and social policy linkages. First, the scope of the revised Agreement excludes "procurement conducted for the specific purpose of providing international assistance, including development aid."⁶⁸ Second, it includes a general exception in cases where derogation is "necessary to protect human, animal or plant life or health."⁶⁹ Third, it explicitly provides for the possibility to address environmental considerations via technical specifications and award criteria.⁷⁰ The possibility of addressing social characteristics by these means is not mentioned, but may not be prohibited, provided such measures are in accordance with the other provisions of the Agreement.⁷¹

Under EU procurement law, public authorities may now take multiple factors into account when awarding a contract and during the contract management phase, through contract performance conditions, as long as they are "linked" to the subject matter of the procurement. Such factors may now include sustainable development considerations, subject to various conditions, pursuant to decisions of the CJEU⁷² and the Public Sector Directive 2004/18/EC which established a legislative basis for public authorities to take "secondary" environmental and social considerations into account during the procurement process.⁷³

Further case law has addressed the use of "fair trade" labels, considering under what conditions this is consistent with EU law.⁷⁴ Building on this jurisprudence, Public Sector

Directive 2014/24 establishes that contracting authorities that seek to purchase works, supplies or services with specific environmental, social or other characteristics can refer to particular labels, as long as the requirements for the label are linked to the subject matter of the contract.⁷⁵

As to UNCITRAL, there is currently no specific mention of human rights in the Model Law. Despite this, the Model Law does allow for the integration of social and economic criteria into procurement processes, such as promoting accessibility of procurement to small and medium sized enterprises (SMEs) or disadvantaged groups, environmental criteria and ethical qualification requirements.⁷⁶ The *Guide to Enactment* further notes that human rights can feature as social aspects of sustainable procurement, and can be addressed through socio-economic evaluation criteria.⁷⁷

The Guide also provides that the Public Procurement Agency or a similar body can be tasked to review procurement proceedings to ensure that procuring entities have respected applicable law; though this provision was drafted with the intention of referring to procurement law, it might be given broader application so as to extend to human rights laws, especially where they are incorporated into domestic law or where human rights receive constitutional protection.⁷⁸

E. Public procurement and human rights: State of play

Despite these developments and the new frameworks that highlight the need for States to take active steps to avoid involvement in human rights abuses through their purchasing practices, neither procurement law and policy, nor actual government purchasing practices, have yet been brought into alignment with the UNGPs, the 2030 Sustainable Development Agenda, or new initiatives on “responsible value chains”.

Indeed, while a handful of public buyers are innovating to integrate human rights considerations into the purchasing process,⁷⁹ in large part, existing procurement laws and practices in most countries are still as likely to undermine human rights, as to promote them. According to previous work:⁸⁰

- i. International and national procurement laws and policies do not clearly and explicitly define the human rights responsibilities of public bodies in connection with their purchasing activities. At the same time, existing procurement laws and policies appear to have a ‘chilling effect’ on human rights and sustainability efforts by public buyers in some jurisdictions, including within the EU, due to fear of litigation to contest procurement processes or decisions that include human rights-related conditions, for instance, in selection or award criteria.
- ii. In the small minority of cases where public procurement rules do explicitly address human rights issues, they generally single out specific issues such as child labour, rather than addressing the full range of human rights risks relevant to the supply chain in question.
- iii. Monitoring of conditions in government supply chains is an extremely rare occurrence. This is true even where, as in the Netherlands, government policy requires the inclusion of “social conditions” addressing basic labour standards, to certain public contracts.
- iv. Mechanisms to facilitate effective access to remedy by victims of human rights abuses in government supply chains are lacking.
- v. There is an urgent need for guidance and capacity development support for public buyers on techniques and tools that they can lawfully deploy to avoid or reduce the incidence of human rights abuses in the delivery of government contracts. At the

same time, new actions on public procurement and human rights must build on and capture synergies with existing sustainable, green, ethical, or social public procurement initiatives.

- vi. Given the scale of government spending within the overall economy, the lack of policy coherence in relation to public procurement and human rights poses a significant obstacle to the implementation of the UNGPs and achievement of the Sustainable Development Goals. It also undermines responsible business conduct, both directly, via contract terms for government purchases that fail to safeguard human rights of workers, service users, and communities, and indirectly, by denying a competitive advantage and market rewards to those companies that do seek to operate on a socially and environmentally sustainable basis. Finally, it represents a significant source of inefficiency in public expenditure, with regard to those resources allocated via development assistance to supporting, for example, improving working conditions in agriculture or industrial production in developing countries – goals which the terms of government contracts may in parallel undermine.⁸¹

Yet given the scale of government purchasing, noted at the outset, there is a pressing need to ensure that public buyers enjoy adequate legal discretion so as to be able to leverage their buying preferences in favour of suppliers that respect human rights in their own operations and activities, as well as in their supply chains and other relationships with business partners. Equally, it is essential that public buyers exploit this leverage in practice, implying the need for policies, guidance, capacity building and innovation to ensure effective monitoring. The next section highlights good practices in each of these areas.

III. Leading by example: operationalizing human rights in public procurement

Despite the general lack of efforts to detect and address human rights risks in government supply chains, innovative practices are emerging amongst first-movers, at federal, national and local levels, by individual public buyers, and via collaborative multi-stakeholder initiatives as well as prompted by CSOs, NHRIs and other human rights defenders.

A. National government initiatives

A number of individual governments are moving towards measures to expand and extend supply chain responsibility and disclosure obligations, including in relation to human rights.

The **U.S.** federal government prohibits contractors and subcontractors from supporting or engaging in human trafficking, which is defined to include, amongst other things, forced labour and fraudulent or coercive recruitment or employment practices.⁸² Contractors are required to report any credible allegations of trafficking to the contracting agency's Inspector General, and must cooperate with government investigations.⁸³ For contracts for goods (excluding commercially available off-the-shelf items⁸⁴) or services sourced outside of the United States that exceed \$500,000, the Government also requires that contracting businesses prepare compliance plans detailing due diligence procedures to assess, prevent, mitigate, and remediate any suspected involvement.⁸⁵

The U.S. Federal Government prohibits forced child labour in contracts sourced abroad that exceed a "micro" purchase threshold.⁸⁶ The U.S. Department of Labor is required to prepare a "List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor."⁸⁷ Contractors must certify that they either (a) will not sell a product on the list, or (b) they have made a good-faith effort to determine whether forced child labour was used.⁸⁸

Additionally, the U.S. Federal Government prohibits federal agencies from purchasing sweatshop goods for contracts of a value greater than \$10,000.⁸⁹ However, the U.S.

Secretary of Labor has exempted imported goods, thus the Act only applies to goods produced in the United States, Puerto Rico, and the Virgin Islands.⁹⁰

Finally, for contracts performed within the U.S, the federal government requires contractors to pay the prevailing wages and benefits for the locality in which the work is performed. This applies to construction contracts over \$2,000 and all other contracts over \$2,500.⁹¹

In the **Netherlands**, the Dutch national sustainable procurement policy requires companies supplying goods and services to public bodies in the Netherlands to respect human rights as part of the “social conditions” applicable to all central government EU contract award procedures since 1 January 2013.⁹² Suppliers may meet the social conditions by a variety of means, such as participating in a multi-stakeholder supply chain initiative or undertaking risk analysis. PIANOo, the government’s tendering expertise centre, has published a step-by-step guide addressing how to meet the Social Conditions at each phase of the tender-procedure.⁹³

However, various studies have questioned the effectiveness of the “social conditions” in practice, due to failure to incorporate them into public contracts, lack of contract performance monitoring, and low awareness by both public buyers and suppliers of relevant risks.⁹⁴ In this context, the Dutch National Action Plan on business and human rights⁹⁵ commits to evaluate the social conditions for consistency with the OECD Guidelines for Multinational Enterprises and UNGPs, and their potential extension to municipal, provincial, and water authorities.

In the **U.K.** the recent Modern Slavery Act (2015) includes certain public buyers among the commercial organisations which have to report under its Transparency in Supply Chains provision (s.54) (see below). There have been initiatives, including a Private Members Bill to amend the Modern Slavery Act to extend the obligation to report on their efforts to identify, prevent and mitigate the risks of modern slavery and human trafficking in their supply chain to all public buyers and to exclude non-compliant companies from tender processes.⁹⁶

The **Scottish Government** has developed a Sustainable Procurement Prioritisation Tool for public buyers to support adoption of a consistent structured assessment of spend categories according to social and environmental sustainability parameters.⁹⁷ The tool is part of a suite of approaches, which also includes methodologies for evaluating life cycle impacts and designing appropriate sustainability measures for contracts.⁹⁸

In **Norway** public authorities are obliged to advance contract clauses on wages and decent working conditions when purchasing services such as construction, facility management, and cleaning services. Public authorities are also required to follow up with suppliers on performance of such clauses, for instance by requiring the supplier to make a self-declaration.⁹⁹

National action plans on business and human rights (NAPs), called for by the UN HRC, are also providing a platform for new commitments by governments in the area of public procurement.¹⁰⁰ Most published NAPs refer to the need for measures to integrate human rights into public procurement practices.¹⁰¹

For instance, the U.K. NAP commits “to review the degree to which the activities of U.K. State-owned, controlled or supported enterprises, and of State contracting and purchasing of goods and services are executed with respect for human rights, and make recommendations to ensure compliance with the UNGPs.”¹⁰²

The Dutch government in its NAP asserts that Government suppliers should perform a risk analysis to show that they respect human rights in accordance with the UNGPs, and commits to undertake an evaluation of its sustainable procurement policy’s social conditions for consistency with the OECD Guidelines for Multinational Enterprises and the UNGPs.¹⁰³

Denmark’s NAP highlights that public authorities should assume social responsibility relating to human rights as well as environmental, social, and economic conditions. It goes on to say

the Government will invite Danish municipalities and regions to jointly prepare guidelines for public authorities on how to avoid adverse impacts as a result of purchasing.¹⁰⁴

In Finland, the NAP proposes a number of measures to integrate human rights into procurement, including updating the State procurement manual's "responsibility themes," and developing a report on "product groups that pose the highest risk for human rights violations."¹⁰⁵

B. Initiatives by local government and other subordinate public bodies

Sweden's County Councils are responsible for healthcare, public transportation, and regional planning, and they spend about 13 billion euros per year through procurement.¹⁰⁶ Since 2010, the County Councils started to collaborate in using a common code of conduct for suppliers, follow-up questions to review suppliers' compliance with the code, and targeted factory audits conducted either by the County Councils themselves or by an independent party. In 2012 the Councils established a formalised structure with a National Coordinator for social responsibility, Steering Committee, National Coordinator, Expert Group, and point of contact at each county council. The Councils have prioritized seven categories of goods for social criteria in public procurement, including surgical instruments worth approximately €267,000 annually.¹⁰⁷ A 2015 study found that the measures mentioned had a substantial impact in reducing serious labour rights abuses, including child labour, amongst surgical instruments workshops in the County Council's supply chain.¹⁰⁸

Electronics Watch is an EU-wide collaboration of public bodies seeking to address human rights abuses in their ICT supply chains.¹⁰⁹ Electronics Watch provides template contract performance clauses that meet procurement law requirements while also including a Code of Labour Practices for suppliers containing human rights and labour standards safeguards. Electronics Watch contracts *inter alia* encourage suppliers to disclose factory locations to purchasers so that labour conditions can be monitored, and the organisation also produces country profiles, thematic research, factory surveys, and investigative reports to evaluate whether codes of conduct are being met.

Lead by **London Universities Purchasing Consortium (LUPC)** and awarded by Higher Education Purchasing Consortium, Wales (HEPCW) the new agreement for Apple Equipment and Services for the UK higher education sector's for the purchase of devices using the iOS operating system includes of Electronics Watch contract clauses, requiring suppliers to adopt transparent supply chain management practices and respond to reports of labour rights abuses.¹¹⁰

With input from stakeholders including the Scottish Human Rights Commission, the **Scottish Government** and COSLA developed *Guidance the Procurement of Care and Support Services* which includes advice on how human rights can be included in the commissioning and procurement of care services, with particular reference to service specifications, selection and award criteria and contractual clauses relating to services.¹¹¹

Universities in **Scotland** along with student representatives and NGOs have established, through Advanced Procurement for Universities and Colleges (APUC), the Sustain Project. This has led to development of a Code of Conduct for suppliers covering social, ethical, economic, and environmental issues.¹¹² The project uses sector spend and supplier information to identify areas of risk and opportunities for scope and influence, and assesses suppliers through a single site assessment free to suppliers.

Transport for London (TfL) has adopted an Ethical Sourcing Policy, linked to the Ethical Trading Initiative's Base Code, according to which: TfL aims to improve labour conditions in the supply chain of relevant product categories or specific products; suppliers under

contracts that include ethical sourcing provisions should monitor conditions via third party audits and provide TfL with results; TfL will collaborate with suppliers to remedy breaches.¹¹³ Transport for London is also the first mayor public authority to join Electronics Watch in Europe.

UK universities have had to produce statements in compliance with the Transparency in Supply Chains section of the UK Modern Slavery Act (2015) for the financial year 2015-2016 to report on their efforts to identify, prevent and mitigate modern slavery and human trafficking in their own supply chains.¹¹⁴

In the **United States**, the Sweatfree Purchasing Consortium (SPC) comprises 14 U.S. cities and 3 U.S. states that seek to ensure that the apparel products they buy are made without sweatshop labour.¹¹⁵ The municipal government of San Francisco, for example, requires their apparel suppliers to comply with laws in the country of production as well as ILO core labour standards.¹¹⁶ San Francisco has, in the past, retained the Worker Rights Consortium (an independent labour rights monitoring organisation) to monitor its apparel supply chains and report on contractors' compliance with their code.¹¹⁷

Another example is Madison, Wisconsin, which released a request for proposals for uniforms for its police, fire, and metro workers in 2014.¹¹⁸ Madison required all bidders to disclose information on factory location, wages, and hours, for a minimum of 60% of factories to be used in production of goods for the contract.¹¹⁹ The awarded contractor was required to increase this disclosure by 10% each year and provide compliance action plans from all manufacturers producing goods for the contract above a certain value threshold.¹²⁰

Finally, the SPC has created an online database (Sweatfree LinkUp!) where information about apparel vendors, manufacturers, and factories in government supply chains is publically available.¹²¹ The information is sourced from apparel vendors and manufacturers themselves, in and some cases government entities that require supply chain disclosures as part of the procurement process.¹²²

C. NHRIs, CSOs and others

Launched in 2015, the **International Learning Lab on Public Procurement and Human Rights** is a global network of over 100 central and local government procurement agencies and purchasing officers; representatives of other relevant government bodies, such as ministries; procurement professional associations; regional and international organizations; non-governmental organizations (NGOs); national human rights institutions (NHRIs); and relevant academics. The Lab is intended to serve as a platform and mechanism for:

- Experience-sharing among procurement actors on approaches to integrating respect for human rights into public purchasing;
- Generating knowledge about public procurement law and policy and human rights;
- Producing and disseminating tools and guidance to build capacity to integrate human rights issues among procurement professionals; and
- Promoting coherence between procurement and human rights in international and regional policy frameworks and initiatives.¹²³

The Lab's main activities to date include: undertaking research on law, policy, and practice relating to public and procurement and human rights¹²⁴; organising international workshops¹²⁵; capacity building and outreach¹²⁶; and public policy advocacy.¹²⁷ Current projects include the development of thematic reports on integration of human rights considerations into public purchasing of apparel, electronics, and security services, and into procurement by international financial institutions (IFIs),¹²⁸ and the development of guidance and e-learning resources on human rights for public buyers.

The **UK Equality and Human Rights Commission** developed guidance for public authorities on how to comply with public sector equality duty obligations at different stages of the procurement cycle.¹²⁹

The **Northern Ireland Human Rights Commission** and the **Central Procurement Directorate** (within the Department for Finance in Northern Ireland) are undertaking a pilot project on how to embed a human rights based approach to public procurement in relation to temporary worker contracts.¹³⁰

The **British Medical Association** in collaboration with the **Royal College of General Practitioners** has published guidance on how to introduce ethical and sustainable criteria into procurement by general practitioners and clinical commissioning groups.¹³¹

The **Geneva Centre for the Democratic Control of Armed Forces (DCAF)** is an international foundation that aims to promote democratic security sector governance. In light of the increasingly significant role of private security within the security sector at large, DCAF seeks to support better oversight and accountability of the private security sector, most notably via the *Montreux document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict* and the *International Code of Conduct for Private Security Service Providers*. As an extension of this work, DCAF has developed guidance on government procurement practices and human rights in the area of private security services.¹³²

V. Conclusions and recommendations

A. Conclusions

This submission has identified three current trajectories in international policy according to which public procurement as a critical lever with power to influence conditions in global supply chains in support of sustainable development. Firstly, as described above, the UNGPs explicitly affirm that States have a duty to protect human rights against business-related abuses that extends to government purchasing, “contracting-out,” and privatisation.

Secondly, the new 2030 Agenda for Sustainable Development includes targets on public procurement, as part of the drive towards sustainable production and consumption, decent work, and more inclusive economies: Sustainable Development Goal 12.7 calls on all countries to implement sustainable public procurement policies and action plans.

Thirdly, recent policy initiatives on “responsible global value chains” by actors such as the G7, OECD and EU, while they typically emphasise more targeted interventions, such as support for multi-stakeholder sector initiatives to address sector human rights risks at the country level, also acknowledge the joint responsibility of governments and business to foster sustainable supply chains.

Yet, public buyers are now documented to be implicated in serious supply chain human rights abuses. In addition, to date, there has been no substantial effort by governments to assess the extent to which existing procurement laws and policy frameworks, or actual government purchasing practices, are aligned with and support the UNGPs, the 2030 Sustainable Development Agenda, or new goals and initiatives on “responsible value chains.”

On the contrary, in general, procurement laws and practices appear to be undermining or restricting such alignment (for instance, by restricting the extent to which the award of public contracts can be linked to human rights due diligence, supply chain transparency, or non-financial reporting) rather than promoting it.

Given the scale of government spending within the overall economy, this situation represents a significant obstacle to the achievement of the UNGPs and Sustainable Development Goals. It also undermines responsible business conduct, both directly, via contract terms for government purchases that fail to safeguard human rights of workers, service users, and communities, and indirectly, by denying a competitive advantage to those companies that do seek to operate on a socially and environmentally sustainable basis. Finally, it represents a significant source of inefficiency in public expenditure, with regard to resources allocated via aid budgets to programmes that support sustainable agricultural or industrial production in developing countries.

Yet equally, this submission has identified a range of initiatives, networks, and tools that are dedicated to promoting human rights in public procurement: a few public buyers are innovating to integrate human rights considerations into the purchasing process. At the same time, more public buyers are engaged in sustainable, green, ethical procurement initiatives.

Though most of the latter do not currently reflect human rights standards or requirements, they nevertheless have the potential to serve as important vehicles and multipliers for human rights capacity building, tools, and methods. Careful analysis is therefore needed, in dialogue with stakeholders, before planning new interventions on public procurement and human rights, to ensure these exploit existing sustainable procurement initiatives and resources wherever possible. Such an integrated approach, in addition, is more likely to succeed in helping public buyers resolve any apparent dilemma between human rights responsibilities and other policy goals to which procurement may be linked, such as promoting the accessibility of public contracts to local and small and medium-sized enterprises (SMEs).

To eliminate such contradictions, and realise policy coherence, new action and dialogue is needed on public procurement and its role in supporting respect for human rights, responsible value chains, and the 2030 Agenda – a dialogue which governments, relevant international and professional bodies, business, and civil society organisations should now foster and support.

B. Recommendations

All actors need to support the alignment of public procurement law, policy and practice with the state duty to protect and corporate responsibility to respect as counselled by the UNGPs.

In addition to any changes in law and policy, addressing current gaps in “policy coherence” will require sustained efforts to support the building of relevant knowledge and technical capacity amongst public buyers, as well as an appropriate repurposing of resources.

Towards this goal are the following recommendations:

Recommendations to States and other procurement regulators

- States must “lead by example” and demonstrate to the corporate sector their commitment as well as practical techniques for integrating respect for human rights into supply chain management. Accordingly, they states must urgently align public procurement law and policy frameworks with their international responsibilities to respect, promote and protect human rights when purchasing goods and contracting services.
- Policy guidance should be issued with reference to the UN Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises, and the United Nations Sustainable Development Goals, highlighting means by which public

buyers can incorporate human rights safeguards into public contracts while staying on track with other legal requirements.

- A process of assessment of current knowledge, needs, challenges and opportunities amongst central government public buyers in relation to integration of human rights safeguards in public procurement should be undertaken; a similar exercise should be undertaken in relation to local government procurement functions.
- Governments and other procurement regulators should develop additional practical guidance for public buyers to address: how to integrate respect for human rights into the public procurement process, in line with national and international standards, during the planning stage; in outlining technical specifications or criteria; in identifying qualifying bids, evaluating, and selecting bids; while monitoring and reviewing contracts. Specifically, guidance should be provided on how to include requirements for suppliers to develop human rights due diligence in the supply chain, allowing public buyers to be involved in monitoring and remediation processes. Guidance should also address how grounds for exclusion from eligibility for public contracts when suppliers do not respect human rights or develop appropriate due diligence in their supply chain.
- Governments should support knowledge and capacity development of public sector procurement professionals on human rights risks and measures to address them, e.g. by supporting online tools to identify higher risk product categories and countries of origin; e-learning courses; and/or an online hub or portal for public buyers to share good practices and experiences on human rights.
- Governments should consider establishing a public procurement and human rights Working Group to include the relevant public administration departments, procurement professional associations, buyers from large public bodies, representatives of relevant sustainable procurement initiatives and civil society organisations, and procurement law professionals, to develop proposals for relevant and practical initiatives as part of a work plan on procurement and human rights on an ongoing basis.

Recommendations to NHRIs

NHRIs play a potentially important role to support and further develop guidance and capacity for public buyers. They should:

- Support the necessary process of assessment of current knowledge, needs, challenges and opportunities for public buyers in relation to integration of human rights safeguards in public procurement.
- Support developing practical guidance and practice toolkits for public buyers in line with the elements outlined above, for instance via public procurement and human rights Working Groups at national or subordinate levels.

Recommendations to international organisations and the United Nations system

Adapting the international legal regime of public procurement is one of the key challenges to achieve the integration between public procurement and human rights. Therefore:

- International and regional organisations, including WTO, OECD and EU should make this a priority in their regulatory reform agenda and work to make their regimes consistent and coherent with international human rights obligations of their member states and the responsibility to respect human rights of business enterprises.

- The UN system should assist States and promote coherence in their implementation of international guidelines on public procurement, responsible business conduct and human rights.
- They should promote such coherence when supporting States in developing national plans to meet the Sustainable Development Goals, especially given the potentially significant role that public procurement will play in this regard.
- They should support initiatives to contribute to building the knowledge base and competency of legislatures, policy makers, public procurement professionals and other relevant stakeholders with regard to respect for human rights.

Recommendations to the United Nations human rights system

- UN treaty bodies and special procedures, in examining individual communications under their complaint procedures, assessing specific countries and drafting general comments and recommendations, should examine the human rights impacts of public procurement, taking into account principle 6 of the Guiding Principles on Business and Human Rights.
- The OHCHR should put serve as a focal point for awareness raising and policy development with regard to procurement by entities within the UN system.

Recommendations to civil society organisations and academia

- Civil society organisations and academia should dedicate increased attention to the implications of State duties with respect to public procurement and its impacts on human rights. They should gather data specific to public procurement and such impacts, in order to identify gaps and good practices globally.

Recommendations to business associations

It is in the interest of business that public buyers are held to the same principles of transparency and responsibility as they are. By supporting initiatives of integration of human rights in public procurement business associations will be supporting their members to comply with their own obligations and responsibilities and placing them in a better, more competitive, position when tendering for public contracts.

- Business and employer associations, should build their own capacity around business and human rights and should use their convening power to share learning and good practices with public buyers and amongst suppliers to public buyers as regards integrating human rights into supply chain management, and in relation to respect for the right of victims to access an effective remedy for business-related human rights abuses.

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The BHRE brings together the expertise and research interests of several leading academics in the field of business and human rights, international environmental law and international criminal law. It develops high quality, policy relevant research in a number of research areas, including: business and human rights duties and responsibilities; corporate human rights due diligence; modern slavery, human trafficking and human rights in the global supply chain; socially responsible and sustainable public procurement; environmental and health governance; the extractive industries and conflict minerals; multinational corporations, human rights and land rights and business, armed conflicts and transitional justice. The BHRE also provides training and capacity building to public bodies and corporations as well as other consultancy services.

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- Olga Martin-Ortega and Rahima Islam (2017), [*UK Modern Slavery Act 2015 Transparency in Supply Chains: The First Year of Reporting by Universities*](#), BHRE Research Series, Report 1.
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Notes

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³⁵ European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 25, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0681:FIN:EN:PDF>

³⁶ The OECD Guidelines were updated in 2011 to align with the UNGPs: OECD, *OECD Guidelines for Multinational Enterprises* (2011), available at <http://mneguidelines.oecd.org/text/>; *see also* OECD, *Ministerial Communiqué on Responsible Business Conduct* (June 26, 2014), available at <https://mneguidelines.oecd.org/2014-informal-ministerial-on-rbc.htm>

³⁷ ISO 26000 was developed to align with the UNGPs: International Organization for Standardization, *ISO 26000 Guidance on Social Responsibility* (2010), available at <http://www.iso.org/iso/home/standards/iso26000.htm>

³⁸ G.A. Res. 70/1, *Transforming our World: the 2030 Agenda for Sustainable Development* (Sept. 25, 2015), available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1

³⁹ C. Methven-O'Brien and O. Martin-Ortega, 'The SDGs, human rights and procurement: An urgent need for policy coherence', *supra* n.i.

⁴⁰ *G-7 Leaders' Declaration, Schloss Elmau, Germany* (June 8, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/06/08/g-7-leaders-declaration>. For further examples, see O. Martin-Ortega and C. Methven-O'Brien, 'Advancing respect for labour rights globally through public procurement', *Politics and Governance* (2018, forthcoming).

⁴¹ OECD Due Diligence Guidance on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (2011), available at <http://www.oecd.org/corporate/mne/mining.htm>.

⁴² OECD Guidance for Responsible Supply Chain in the Garment and Footwear Sector (2017), available at <http://www.oecd.org/corporate/mne/new-oecd-due-diligence-guidance-targets-the-garment-and-footwear-sector.htm>.

⁴³ That is the case, for instance, in the United Kingdom.

⁴⁴ For example, as in France.

⁴⁵ P. Trepte, *Regulating Procurement: Understanding the Ends and Means of Public Procurement Regulation* 42 (Oxford 2006).

⁴⁶ R. Anderson, "Renewing the WTO Agreement on Government Procurement: progress to date and ongoing negotiations", 4 *Public Procurement Law Review* 255 (2007); R. Anderson, S. Arrowsmith and R. Anderson (eds.), *The World Trade Organisation Regime on Government Procurement: Challenge and Reform* (Cambridge University Press, 2011).

⁴⁷ Currently the GPA has seventeen parties. One of these is the European Union, so that the GPA applies to forty-five WTO members in total. Thirty more WTO members participate in the GPA Committee as observers, of whom ten are taking steps to accede to the Agreement: WTO, *Agreement on Government Procurement: What is the GPA?* https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm (last visited Nov. 10, 2015).

⁴⁸ Consolidated Version of the Treaty on the Functioning of the European Union art. 26 (2), May 9, 2008, 2008 O.J. (C 115) 47 available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12008E026> [hereinafter TFEU].

⁴⁹ Case 2/74 *Reyners v. Belgium*, 1974 E.C.R. 631.

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, Recital 1 [hereinafter EU Public Sector Directive]; 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 [hereinafter the Utilities Directive].

⁵¹ *E.g.* Directive 2007/66/EC of the European Parliament and of the Council of 11 Dec. 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts, 2007 O.J. (L. 335) 31.

⁵² S. Arrowsmith and C. Nicholas, *The UNCITRAL Model Law on Procurement of Goods, Construction and Services: Past, Present and Future*, in *Public Procurement Regulation in the 21st Century: Reform of the UNCITRAL Model Law on Procurement* Ch. 1 (S. Arrowsmith ed., 2009); C. Nicholas, "The UNCITRAL Model Law: an example for the global community", in *International public procurement: a guide to best practice* 19-34 (Hernández García ed., 2009); C. Nicholas, "Work of UNCITRAL on government procurement: purpose, objectives, and complementarity with the work of the WTO," in *The WTO Regime on Government Procurement: challenge and reform* 746-772 (S. Arrowsmith and R. Anderson eds., 2011).

⁵³ See http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model_status.html (visited March 2017). The organisations include: African Development Bank, Asian Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, Organization for Economic Cooperation and Development and the World Bank.

⁵⁴ UNCITRAL, Model Law on Public Procurement (2011), available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html.

⁵⁵ The World Bank, *Procurement*, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,pagePK:84271~theSitePK:84266,00.html> (last visited March 9, 2016). See, S. Williams-Elegbe, *Public Procurement and Multilateral Development Banks: Law, Practice and Problems* (2017 Bloomsbury & Hart Publishing, UK).

⁵⁶ European Bank for Reconstruction and Development, *Procurement*, <http://www.ebrd.com/work-with-us/procurement.html> (last visited Nov. 10, 2015).

⁵⁷ African Development Bank, *Procurement*, <http://www.afdb.org/en/projects-and-operations/procurement/> (last visited Nov. 10, 2015).

⁵⁸ O. Perera, N. Chowdhury and A. Goswami, (2007), *State of Play in Sustainable Public Procurement*, International Institute for Sustainable Development (IISD), Manitoba, available at: www.iisd.org/publications/pub.aspx?id%4917.

⁵⁹ C McCrudden, *Buying Social Justice. Equality, Government Procurement, & Legal Change* (Oxford University Press, 2007).

⁶⁰ S Arrowsmith and P Kunzlik eds., *Social and Environmental Policies in EC Procurement Law*, Cambridge University Press 2009. R Caranta & M Trybus eds. *The Law of Green and Social Procurement in Europe* (DJØF 2010); R Caranta, "Sustainable Procurement", Ch. 7 in *European Union Law of Public Contracts: Public Procurement and Beyond*, M Trybus, G Edelstam, & R Caranta (eds.), (Bruylant, 2014).

⁶¹ D Dragos & B Neamtu, *Sustainable Public Procurement in the EU: Experiences and Prospects*, in *Novelties in the 2014 Directive on Public Procurement 301-36* (Francois Lichere, Roberto Caranta, & Steen Treumer eds., 2014).

⁶² D D'Hollander and Marx, "Strengthening private certification systems through public regulation. The case of sustainable public procurement", *Sustainability Accounting, Management and Policy Journal*, Vol. 5 No. 1, 2014, pp. 5.

⁶³ Para. 4.23.

⁶⁴ C McCrudden, "Using public procurement to achieve social outcomes", 28 *Natural Resources Forum* 257 (2004).

⁶⁵ In the past, trade-related objections were raised against SPP, for instance, in challenges to tenders referring to fair trade labels. See C McCrudden, *Buying Social Justice: Equality, Government Procurement, & Legal Change* (Oxford University Press 2007); see also O Martin-Ortega, O Outhwaite, & W Rook, 'Buying power and working conditions in the electronics supply chain: legal options for socially responsible public procurement', 19 *International Journal of Human Rights* 341, 341-368 (2015).

⁶⁶ Northern Ireland Human Rights Commission, *Public Procurement and Human Rights in Northern Ireland* (Belfast, 2013), available at: <http://www.nihrc.org/Publication/detail/public-procurement-and-human-rights>, pp.11-13.

⁶⁷ For further analysis on this point, see O. Martin-Ortega and C. Methven-O'Brien, 'Advancing respect for labour rights globally through public procurement', *Politics and Governance* (2018, forthcoming).

⁶⁸ WTO, Agreement on Government Procurement 2012 revised at Art. II(3), available at https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.htm

⁶⁹ Ibid at Art. III(2.b)

⁷⁰ Article X (6) authorises technical specifications which "promote the conservation of natural resources or protect the environment," while the indicative list of evaluation criteria in Article X (9) includes environmental characteristics.

⁷¹ R Thrasher, *On Fairness and Freedom: The WTO and Ethical Sourcing Initiatives* (2014), available at <http://www.bu.edu/pardee/research/global-economic-governance-2/wtoethicalsourcing/>.

⁷² *Beentjes* (Case C-31/87 Gebroeders Beentjes BV v. the Netherlands, 1988 E.C.R. 4635), *Commission v French Republic* (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).

⁷³ See 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, Article 26 (stating "Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with Community law and are indicated in the contract notice or in the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations"), Recital 1 (stating "This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental and/or social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority, are expressly mentioned and comply with the fundamental principles mentioned in recital 2") and Recital 5 (stating "Under Article 6 of the Treaty [now Article 11 TFEU], environmental protection requirements are to be integrated into the definition and implementation of the Community policies and activities referred to in Article 3 of that Treaty, in particular with a view to promoting sustainable development. This Directive therefore clarifies how the contracting authorities may contribute to the protection of the environment and the promotion of sustainable development, whilst ensuring the possibility of obtaining the best value for money for their contracts"); see also id. at Arts. 27, 50, & 55.

⁷⁴ In *Wienstrom* (Case C-448/01 EVN and Wienstrom, 2003 E.C.R. I-14527) it was held lawful to use an ecological award criterion and to establish an award criterion that is related to the production method of the purchased product, as long as such criterion is relevant for the contract and if the criterion is expressly linked to the subject-matter of the contract. *Evropaiki Dynamiki v European Environment Agency* (Case T-331/06 Evropaiki Dynamiki - Proigmena Systimata Tilepikoinonion

Pliroforikis kai Tilematikis AE v European Environment Agency (AEE), 2010 E.C.R. II-136) considered whether a bidder's general policies can be considered at the award stage of a contract. The ruling provides guidance on assessing environmental criteria, and describes the level of flexibility a contracting authority has in assessing what constitutes 'equivalent' evidence. In the *Max Havelaar* case (Case C-368/10 Commission v Netherlands, delivered on 12 May 2012), it was 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 the contract performance and can be used as award criteria for public contracts.

⁷⁵ O Outhwaite and O Martin-Ortega, "Human Rights in global Supply Chains: Corporate Social Responsibility and Public Procurement in the European Union," *Human Rights and International Legal Discourse*, vol. 10(1), pp. 41-71.

⁷⁶ *Id.* at Art. 9(2)(b) (stating that suppliers or contractors shall meet such of the following criteria as the procuring entity considers appropriate and relevant in the circumstances of the particular procurement (...) That they meet ethical and other standards applicable in this State)

⁷⁷ *Id.* at Art. 11; UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* 78-82, 85-89, and commentary on socio-economic policies (2012), available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html.

⁷⁸ See UNCITRAL, *Guide to Enactment of the UNCITRAL Model Law on Public Procurement* para. (f) on 21-22, (2012), available at http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html.

⁷⁹ See further Section 5 below.

⁸⁰ International Learning Lab on Public Procurement and Human Rights (C Methven O'Brien et al), *A Survey of Twenty Jurisdictions*, supra n.i.

⁸¹ *Ibid.*

⁸² Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.17 (Combating Trafficking in Persons). The Far provisions on trafficking derive from the Trafficking Victims Protection Act of 2000 (TVPA), 22 U.S.C. 7102, and Exec. Order No. 13,672, 77 Fed. Reg. 60029 (Oct. 2, 2012) ("Strengthening Protections Against Trafficking in Persons in Federal Contracts").

⁸³ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.17 (Combating Trafficking in Persons).

⁸⁴ "Commercially Available Off-The-Shelf Item" is a subset of the definition of "commercial item." It is available in substantial quantities and sold without modification. "Commercial Item" is defined in part as "any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes" and has been sold, leased, or licensed to the general public, or offered for sale, lease or license to the general public. For full definitions of both terms, see FAR 2.101 (Definitions, "Commercial item," and "Commercially available off-the-shelf-item" (COTS)).

⁸⁵ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.17 (Combating Trafficking in Persons).

⁸⁶ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.15 (Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor), which implements the Child Labor Exec. Order No. 13, 126, 64 Fed. Reg. 32383 (June 12, 1999) ("Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor"), and laws that prohibit manufacture or import of goods made with forced or indentured child labor. These include 19 U.S.C. 1307, 29 U.S.C. 201, et. Seq., and 41 U.S.C. Chapter 65.

⁸⁷ 22 U.S.C.A. § 7112, Additional activities to monitor and combat forced labor and child labor.

⁸⁸ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.1503 (Procedures for acquiring end products on the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor).

⁸⁹ Sweatshop labour is defined with respect to compliance in the country of production with applicable rules regarding minimum wages, maximum working hours, child and convict labour, and health and safety. Walsh-Healy Act, 41 U.S.C. § 65; Pub. L. No. 74-846; 49 Stat. 2036 (1936); H.R. Rep. No. 74-2946, at 4 (1936).

⁹⁰ 41 C.F.R. § 50-201.603(b). While the CFR provides Dec. 8, 1960 as the date on which the current regulation was finalised and posted in the Federal Register that is merely the date of the most recent revision of the exemption. The exemption has existed, in some form, since the very first regulations ever promulgated under the Act. See 1 Fed. Reg. 1405.

⁹¹ Federal Acquisition Regulation (FAR), 48 CFR § 101 et. Seq., at 22.403-1 (Construction Wage Rate Requirements statute); Davis-Bacon Act, 40 U.S.C. § 3141 (2012); McNamara-O'Hara Service Contract Act, 41 U.S.C. §§ 6701-6707 (2012).

⁹² Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights 5 (April 2014), available at <https://business-humanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>

⁹³ PIANOO, *Social Conditions in Global Supply Chains*, <https://www.pianoo.nl/about-pianoo/sustainable-public-procurement-spp/spp-themes/social-conditions-in-global-supply-chains> (last visited 29 March, 2017); PIANOO, *Getting Started with Social Conditions in Global Supply Chains*, <https://www.pianoo.nl/about-pianoo/sustainable-public-procurement-spp/spp-themes/social-conditions-in-global-supply-chains/getting-started-with-social> (last visited 29 March, 2017)

⁹⁴ See further C Methven O'Brien et al, *A Survey of 20 Jurisdictions*, supra n.1.

⁹⁵ Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights (Apr. 2014), available at <http://businesshumanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf>.

⁹⁶ Modern Slavery (Transparency in Supply Chains) Bill (HC Bill 105), available at https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0105/cbill_2016-20170105_en_1.htm (last visited 02 May 2017).

⁹⁷ Scottish Government, The Sustainable Public Procurement Prioritisation Tool, available at <http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability/ScottishProcess/SustainableProcurementTools/SustainablePublicProcurementPrioritisationTool>

⁹⁸ Scottish Government, *Sustainable Procurement Duty Tools*, <http://www.gov.scot/Topics/Government/Procurement/policy/corporate-responsibility/Sustainability/ScottishProcess/SustainableProcurementTools> (last visited 29 March, 2017).

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- ⁹⁹ C. Methven O'Brien et al, *A Survey of 20 Jurisdictions*, supra n.1.
- ¹⁰⁰ Human Rights Council Res. A/HRC/26/22, Rep. of the Human Rights Council, 26th Sess., June 10-27, 2014 (July 15, 2014). United Nations Office of the High Commissioner for Human Rights, *State National Action Plans*, <http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx> (last visited Nov. 12, 2015).
- ¹⁰¹ C. Methven O'Brien, 'Essential Services, Public Procurement and Human Rights in Europe', [University of Groningen Faculty of Law Research Paper No. 22/2015](http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2591898.
- ¹⁰² U.K. Foreign & Commonwealth Office, *Good Business: Implementing the UN Guiding Principles on Business and Human Rights* 9 (2013), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf [hereinafter U.K. NAP]; See C. Methven O'Brien, supra.
- ¹⁰³ Dutch Ministry of Foreign Affairs, *National Action Plan on Business and Human Rights* (Apr. 2014), available at <http://businesshumanrights.org/sites/default/files/documents/netherlands-national-action-plan.pdf> [hereinafter Dutch NAP]; Sustainable development and policy House of Representatives 30 196, no. 33, May 2008, at 5.
- ¹⁰⁴ Government of Denmark, *Danish National Action Plan-Implementation of the UN Guiding Principles on Business and Human Rights* 13 (2014), available at http://www.ohchr.org/Documents/Issues/Business/NationalPlans/Denmark_NationalPlanBHR.pdf [hereinafter Danish NAP].
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- ¹⁰⁶ K. Hemstrom, TCO development webinar: Sustainable IT Webinar Series, *Best Practice Sustainable IT Procurement* (16 March, 2016), available at <http://tcodevelopment.com/news/watch-webinar-on-demand-best-practice-sustainable-it-procurement/>; Electronics Watch, *Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation* 4 (February 2016), available at http://electronicswatch.org/en/publications_1633.
- ¹⁰⁷ For a case study describing recent interactions related to violations of the Code of Conduct between Stockholm County Council and one of its IT suppliers, see Electronics Watch, *Public Procurement and Human Rights Due Diligence to Achieve Respect for Labour Rights Standards in Electronics Factories: A Case Study of the Swedish County Councils and the Dell Computer Corporation* 4 (February 2016), available at http://electronicswatch.org/en/publications_1633.
- ¹⁰⁸ Swedwatch et al., *Healthier Procurement: Improvements for Working Conditions for Surgical Instrument Manufacture in Pakistan* (March 2015), available at http://www.swedwatch.org/sites/default/files/healthier_procurement.pdf.
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- ¹¹⁰ Electronics Watch, *The UK Higher Education and National Apple Equipment and Services Framework Agreement* (2016), available at http://electronicswatch.org/the-uk-higher-education-and-national-apple-equipment-and-services-framework-agreement_2455571.pdf.
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- ¹¹⁴ O. Martin Ortega, *Modern Slavery and Human Rights in Global Supply Chains: Roles and Responsibilities of Public Buyers. Policy and practice insights for Higher Education Institutions in the framework of their obligations under the UK Modern Slavery Act*. BHRE Research Series. Policy Paper n.2 (2016), available at <http://www.bhre.org/policy-papers/> (last visited 29 March, 2017).
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- ¹¹⁸ City of Madison, Wisconsin, *Uniform Management Program Request for Proposals* (2014), available at http://buysweatfree.org/uniform_management_program.
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- ¹²¹ Sweatfree Purchasing Consortium, *Sweatfree LinkUp!*, <http://buysweatfree.org/linkup> (last visited 29 March, 2017).
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- ¹²³ International Learning Lab on Public Procurement and Human Rights, <http://www.hrprocurementlab.org/>, (last visited 29 March, 2017).
- ¹²⁴ C. Methven O'Brien et al, *A Survey of Twenty Jurisdictions*, supra n.1.
- ¹²⁵ International Learning Lab on Public Procurement and Human Rights, *Events*, <http://www.hrprocurementlab.org/events/> (last visited 29 March, 2017).

¹²⁶ E.g. Lab representatives have spoken on procurement and human rights at meetings of the International Federation of Purchasing and Supply Management (IFPSM), the International Purchasing and Supply Research and Education Association (IPSER), the Sustainable Purchasing Leadership Council and at the annual UN Forum on Business and Human Rights in 2014 and 2015.

¹²⁷ E.g. Lab representatives have provided recommendations for the new ISO 20400 standard on sustainable public procurement, met with U.S. Congressional staff to discuss the topic of public procurement and human rights (particularly focused on implementation of a U.S. federal law on disclosure of supply chain information for federal contractors), engaged with staff at various U.S. agencies, and submitted recommendations to the U.S. National Action Plan on Responsible Business Conduct regarding public procurement, see ICAR, Submission for U.S. National Action Plan on Responsible Business Conduct regarding Federal Procurement Policy, *available at* <http://icar.ngo/analysis/submission-to-the-u-s-national-action-plan-on-responsible-business-conduct-regarding-public-procurement/>.

¹²⁸ International Learning Lab on Public Procurement and Human Rights, Thematic Hubs, <http://www.hrprocurementlab.org/hubs/> (last visited 29 March, 2017).

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¹³⁰ Northern Ireland Human Rights commission, Written Evidence on Business and Human Rights (July 2016), *available at* <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/written/35141.pdf> For discussion of the differences between the use of procurement to promote social objectives (a matter of policy) and the need for public authorities to comply with human rights obligations (a matter of law), see Northern Ireland Human Rights Commission, Public Procurement and Human Rights in Northern Ireland 11-13 (Nov. 2013), *available at* http://www.nihrc.org/uploads/publications/NIHRC_Public_Procurement_and_Human_Rights.pdf.

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