

Adopting an Ethical Procurement Policy

Introduction

This document presents a policy guide for municipalities/city councils, state and federal legislators, and governments to adopt an ethical procurement policy (EPP) that is in compliance with international law. Its overall objective is to guide public policy makers to promote and ensure consistent respect for international law, and in some cases avoid complicity in violations undertaken directly or indirectly by companies.

This is achieved through ensuring the implementation of public procurement procedures that exclude from tenders companies that are causing, contributing to, or otherwise involved in breaches of peremptory norms of international law or international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression), through their activities, operations, goods or services, business relationships, or supply chains.

I. The responsibility of States, including all public organs of States

States should not engage in conduct that constitutes a breach of international law.¹ Furthermore, they should not render aid or assistance to an internationally unlawful situation by another State.² These obligations extend to all organs and public authorities of the State—whether national, regional, or local—as the conduct of any State organ, including autonomous or decentralized institutions exercising public powers, is legally attributable to the State.

Municipalities and other public authorities are “organs of the State” within the meaning of the law on State Responsibility.³ As such, they are bound by the international obligations of the State in the exercise of their functions. Accordingly, their acts or omissions, which may give rise to complicity in human rights violations,⁴ should be in line with the positive general human rights duties of States—e.g., to individually and jointly in cooperation with the United Nations (UN) and other States promote human rights,⁵ ensure respect of international humanitarian law (IHL),⁶

¹ Arts. 1, 2, [Articles on the Responsibility of States for Internationally Wrongful Acts](#) (ARSIWA), International Law Commission (ILC), 2001.

² Arts. 16, 41(2), ARSIWA.

³ Art. 4, ARSIWA.

⁴ UN Human Rights Council (UNHRC), “[Local government and human rights](#)”, Report of the United Nations High Commissioner for Human Rights, 22 Jul 2022, para.48.

⁵ Arts. 55, 56, UN Charter; UNHRC, “[Local government and human rights](#)”, paras.48.

⁶ Common Article 1, Geneva Conventions (1949); Art. 1, First Protocol Additional to the Geneva Conventions (1977).

and prevent, bring to an end, and punish violations of peremptory norms of international law, particularly genocide.⁷

Mindful of the significant financial capacities of States, their public bodies, local/regional organs and state owned companies, they are in a unique position, when they act as contracting authorities, to promote respect for international law, including human rights, by companies with which they do business. In view of this, contracting authorities should include human rights clauses in their public procurement policies that allow them to exclude from tendering processes economic operators that are directly or indirectly involved in international crimes or breaches of peremptory norms of international law.

II. The content of the legal obligations of States, including municipalities as organs of State

A number of international rules of treaty and customary law bind States' exercise of powers at the national and international level, including in the implementation of public procurement law.

A- Peremptory norms of international law

Peremptory norms of international law, also known as "*jus cogens* norms," are hierarchically superior norms of international law that "reflect and protect fundamental values of the international community."⁸ A non-exhaustive list of norms that acquired such status includes: (a) the prohibition of aggression; (b) the prohibition of genocide; (c) the prohibition of crimes against humanity; (d) the basic rules of international humanitarian law; (e) the prohibition of racial discrimination and apartheid; (f) the prohibition of slavery; (g) the prohibition of torture; (h) the right of self-determination.⁹

Any serious breach of peremptory norms of international law creates obligations for Third States, i.e., States other than those directly involved in the violation in question: States have to "cooperate to bring to an end through lawful means any serious breach," including their duty not to recognize "as lawful a situation created by a serious breach" of a peremptory norm of international law, nor "render aid or assistance in maintaining that situation."¹⁰

States shall refrain from engaging in any type of relationships, including economic or political, that directly or indirectly sustain the unlawful situation that originated from the breach of a peremptory norm of international law. As authoritatively affirmed by the International Court of Justice (ICJ), States must "take steps to prevent trade or investment relations that assist in the

⁷ Art. 1, Convention on the Prevention and Punishment of the Crime of Genocide (1948); Conclusions 19, 23 (Annex), ['Draft conclusions on identification and legal consequences of peremptory norms of general international law \(jus cogens\)'](#) (Conclusions on *jus cogens*), ILC, 2022.

⁸ Conclusion 2, Conclusions on *jus cogens*.

⁹ *Ibid*, Annex.

¹⁰ Arts. 41(1), 41(2), ARSIWA (full citation at note n. 1).

maintenance of the illegal situation created by” such a breach.¹¹ This includes, for instance, the State’s duty to suspend trade relationships with the wrongdoing State, as well as to prevent national companies, whether State-owned or privately owned ones, from entering into economic dealings that in any way sustain or consolidate the resulting illegal situation.¹²

B- International human rights and humanitarian law

States’ human rights obligations may be grouped under two main categories: negative and positive obligations. The first category requires States to abstain from any arbitrary interference with one’s enjoyment of one’s rights. The second category imposes a positive conduct on the State: it must take action to protect rights against infringements undertaken by others.¹³ States not only must refrain from undertaking acts or omissions that cause or contribute to human rights violations, but they must also promote universal respect for, and observance of, human rights, both individually and jointly in cooperation with the UN.¹⁴

Likewise, States have both negative and positive obligations under the law applicable in the context of armed conflict and military occupation, i.e., international humanitarian law (IHL). IHL not only describes acts proscribed, but it also provides for a core obligation that all States undertake “to respect and to ensure respect for [the Geneva Conventions and the First Protocol] in all circumstances.”¹⁵

The category of positive obligations of States under international human rights and humanitarian law forms the core of the present guide.

Obligations during armed conflict and military occupation, as outlined in IHL, do not *only* bind the State(s) and non-state armed actor(s) involved; they also apply to “all actors whose activities are closely linked to an armed conflict,” including “a business enterprise carrying out activities that are closely linked to an armed conflict.”¹⁶ States must therefore regulate business in accordance with IHL rules, including those regulating the treatment of civilians, protection of public and private property, avoiding forced displacement, prohibition of the transfer of

¹¹ *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*, ICJ, [Advisory Opinion](#), 19 July 2024, paras. 278, 273-281.

¹² *Ibid*, para. 278; United Nations Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, [Legal analysis and recommendations on implementation of the International Court of Justice, Advisory Opinion of 17 July 2024](#), 18 Oct. 2024, para. 29

¹³ International Covenant on Civil and Political Rights, UN Human Rights Committee, [General Comment 31](#): Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 Mar. 2004, para. 8.

¹⁴ Arts. 55, 56, UN Charter; UNHRC, “[Local government and human rights](#)”, paras.48-50.

¹⁵ Common Article 1, Geneva Conventions (1949); Art. 1, First Protocol Additional to the Geneva Conventions (1977).

¹⁶ ICRC, [Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law](#), 2006, p. 14.

population to an occupied territory, protection of the natural environment, working conditions, food, water and other essential supplies.¹⁷

The UN Guiding Principles on Business and Human Rights (UNGPs) constitute, currently, the authoritative global framework delineating the respective duties and responsibilities of states and business enterprises with regard to human rights. Although the UNGPs are formally non-binding, they reflect existing international legal obligations and have been widely recognised as a benchmark for assessing both state and corporate conduct. They rest upon three mutually reinforcing pillars: (i) the state duty to protect human rights, (ii) the corporate responsibility to respect human rights, and (iii) access to remedy.

Pillar I of the UNGPs affirms that States must not only refrain from violating human rights but must also take affirmative measures to prevent, mitigate, and remedy abuses committed by private actors, including within public procurement processes.¹⁸ Principles 6 and 7 of the UNGPs make clear that these obligations extend to all organs of the State, irrespective of their autonomy under domestic law. Accordingly, municipal and other sub-national authorities are required to ensure that commercial transactions conducted on behalf of the State do not facilitate, enable, or otherwise contribute to human rights violations, and to refrain from awarding or maintaining public contracts where heightened risks of such abuses—particularly in conflict-affected contexts—are identified.

Under principle 7, in particular, States' duty to ensure that business enterprises operating in those conflict affected areas are not involved in human rights violations includes "Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation; [and] (d) Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses."

Pillar II establishes that business enterprises bear an independent and ongoing responsibility to respect all internationally recognised human rights. This responsibility requires the implementation of rigorous human rights due diligence processes designed to identify, prevent, mitigate, and account for actual or potential adverse impacts arising from their operations or business relationships. Corporate failure to meet these standards, or involvement in grave violations of human rights or international humanitarian law, may provide a lawful basis for municipal and other contracting authorities to exclude such operators from public procurement procedures.

Pillar III requires that both States and business enterprises ensure access to effective remedies for victims of business-related human rights abuses. Within the procurement context, this pillar reinforces the obligation of contracting authorities at all levels to exercise heightened due diligence, to avoid decisions that would perpetuate or legitimize human rights violations, and to ensure that public resources are not deployed in ways that undermine international human

¹⁷ ICRC, [Private Businesses and Armed Conflict: An Introduction to Relevant Rules of International Humanitarian Law](#).

¹⁸ [UNGPs](#), Pillar I B (3) commentary, p. 13; Pillar II B, commentary, p. 16.

rights obligations. In this regard, the integration of the UNGPs into municipal procurement frameworks operationalises the State duty to protect and aligns sub-national public expenditure with the broader architecture of international human rights law.

Moreover, while the UNGPs are an important baseline, they should be treated as a minimum reference point, to be complemented by stronger standards, domestic or international. In practice, this means aligning with the full range of protective instruments possible and considering, depending on the region and jurisdiction, other frameworks such as the Inter-American Court case law and the “Empresas y Derechos Humanos” standards¹⁹, African Court decisions and African Commission resolutions, as well as emerging mandatory business and human rights instruments (e.g. French and German Laws, Colombian law on criminal liability for businesses, Brazilian national policy on BHR). Together, these frameworks offer clearer guidance on Human Rights Due Diligence, supply-chain monitoring, liability for private actors, and States’ obligations moving the agenda from voluntary commitments to concrete legal and institutional obligations already existing in international law.

III. Ethical public procurement policy

States should provide clear instructions to local officials to ensure uniform, effective implementation of these policies.²⁰ The public procurement policy should:

- Include clauses to ensure compliance with international law: Requirements for corporations not to be involved in violations of international crimes and other grave breaches of international law should be included in procurement contracts, with criteria that suppliers must meet;
- Address supply chain risks: By using procurement to encourage compliance with international law, authorities can mitigate risks of harm within complex supply chains;
- Promote social and ethical goals: Procurement can be a tool to promote broader social and ethical goals, such as fair trade principles, supporting disadvantaged groups, or “blocklisting” companies directly or indirectly involved in violations of peremptory norms of international law or international criminal law;
- Enhance transparency and accountability: Local authorities should ensure management systems are in place, including monitoring procedures, and promote transparency to build trust and allow for accountability.

As ethical and international law-compliant public procurement policies and instructions may be met with challenges, legal or otherwise, it is important to consider the following points in order to sustain the policies and their implementation:

¹⁹ ORGANIZAÇÃO DOS ESTADOS AMERICANOS(org.). *Empresas y Derechos Humanos: Estándares Interamericanos*. Washington: CIDH/OEA, 2019. 2 p. (OEA/Ser.L/V/II CIDH/REDESCA/INF.1/19).

²⁰ For similar practice, see for example The Danish Institute for Human Rights, [Driving change through public procurement](#), Mar. 2020; International Institute for Sustainable Development, [Safeguarding Human Rights through Public Procurement](#), 26 Nov. 2015.

1. The procurement policy *should not be directed against specific companies or against companies active in specific contexts*. Rather, it should follow a general human rights framework and only allow local authorities to exclude companies on a case-by-case basis;
2. Despite the previous point, specific sectors may be targeted and excluded automatically. This for instance includes companies active in the supply of military materiel (arms, ammunition, military parts and components), and other associated dual-use goods (such as jet-fuel and fossil fuel) to a party to a conflict that has been found by a UN body or a court of law to be plausibly committing a breach of peremptory norms of international law or an international crime;
3. Some local councils in different states and regions have already included strong human rights criteria in their procurement policies. In those cases, the focus should be on ensuring accountability and uniform (consistent), effective, and transparent implementation of the policy;
4. It is crucial that companies found to be involved in grave human rights violations are excluded in the first stages of the tendering procedure, as the exclusion is a policy objection to their inclusion in the tendering process and not a result of their tendering bid;
5. It is important that conformity with existing procurement norms is guaranteed. Such regulations often define non-financial criteria that allow for exclusion, or even encourage the adoption of criteria for exclusion of economic actors on the basis of “grave misconduct,” considerations of sustainability, or others. Such procurement policies can also be considered within the framework of National Action Plans on Business and Human Rights;
6. Notwithstanding the need to exclude companies only on a case-by-case basis, and following the adoption of a general international law- and human rights-compliant policy, there is a multitude of databases and screens of companies that can be used as an indication of possible involvement in violations of international law in specific situations, owing to the availability of conclusive legal determinations in their regard.

Template motion

This [City Council/Legislature/Government] deplores corporate profit from situations that involve serious breaches of peremptory norms of international law, international crimes, or armed conflict involving grave violations of international human rights and/or humanitarian laws. With this motion, the [City Council/Legislature/Government] seeks to encourage companies to meet their obligations to avoid contributing to unlawful situations under international law or adverse human rights impacts through their own activities, and to prevent or mitigate international law violations linked to their operations.

The [City Council/Legislature/Government] is aware of the crucial role of state authorities and their public procurement procedures in ensuring respect for human rights by companies, as well as their obligation under widely accepted business and human rights norms – as laid down in international human rights law, international humanitarian law, international criminal law, the UN

Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises – to promote respect for human rights by companies with which they do business.

The *[City Council/Legislature/Government]* takes into account that the International Court of Justice has repeatedly affirmed the obligation of states and their local/regional organs to refrain from rendering aid or assistance to internationally unlawful situations.

This *[Council/Parliament/Government]* recalls / This *[Council/Parliament/Government]* takes into account - [add section on applicable/relevant national law].

The *[City Council/Legislature/Government]* recognises the right of state authorities to exclude from public contracts companies that are implicated in grave professional misconduct, including serious breaches of peremptory norms of international law, grave human rights abuses, and international crimes (genocide, crimes against humanity, war crimes, and the crime of aggression).

The *[City Council/Legislature/Government]* appreciates that tender bids are to be reviewed on a case-by-case basis, and that no bidding company must be excluded from this *[Council/Parliament/Government]*'s tenders or contracts because of the geographical scope of activity, sourcing location, national identity, or origin.

This *[City Council/Legislature/Government]* resolves to adopt an Ethical Procurement Policy that is compliant with international law and that takes into account the involvement of bidders and members of its economic entity in severe violations of human rights and/or international law (e.g., international crimes and other violations of peremptory norms of international law) and that allows the *[Council/Parliament/Government]* to exclude bidders involved in such activities from its tender procedures. This policy will incorporate widely accepted and precisely formulated international norms and standards of business and human rights to explain clearly when exclusion from tenders is justified.

This *[City Council/Legislature/Government]* mandates the inclusion of a binding contractual clause in all municipal public contracts, including financial operations, investments, purchases, service contracts, as well as other economic activities, that ensures contractors are not involved in the above-mentioned violations.

The *[City Council/Legislature/Government]* mandates the establishment of a transparent monitoring and control mechanism in order to ensure the procurement policies and the binding contractual clauses are complied with.