Operational Guide for an Ethical Procurement Policy (EPP)

Palestinian BDS National Committee

The largest coalition in Palestinian society and leads the global Boycott, Divestment and Sanctions (BDS) movement.

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INTRODUCTION: WHAT IS AN ETHICAL PUBLIC PROCUREMENT?

This document presents an operational guide for European public bodies, including municipalities and city councils that decide to adopt an ethical and international law-compliant public procurement procedure. The purpose of such public procurement procedures is for these public bodies to avoid rewarding and contributing to serious international crimes, and gross or systematic human rights violations — including those perpetrated in the contexts of armed conflicts or military occupation — as well as other violations of the basic rules of international humanitarian law.[1]

Although several guidelines have been adopted to guide local authorities towards implementing sustainable procurement, these guidelines are lacking when it comes to the procurement relationship with businesses involved in conflict areas where heightened due diligence is required. As the UN Sustainable Development Goals include aims like world peace, ending poverty, hunger and granting access to water, the framework of "Sustainable Procurement" indeed covers the scope of this guide, as none of these goals can be achieved by tendering companies involved in gross or systematic violations of peremptory norms of international law, including international crimes, such as genocide, apartheid, crimes against humanity, and war crimes. By addressing these violations of international law, this guide complements the existing toolkits — which often address environmental harm and labour rights violations.

The thesis of this guide is that public procurement is meant to be not only sustainable, but also ethical. Ethical public procurement means using public purchasing power in a manner consistent with moral principles (acting with integrity, fairness, and responsibility), so that public funds support suppliers who respect human rights, uphold the rule of law, and avoid practices that harm people, local communities, or the environment.

This can be achieved by refusing to tender companies that are complicit in international crimes, including gross or systematic human rights violations. In fact, local authorities are under the obligation to exclude such businesses from tendering procedures, under both international law (Section A) and European Law (Section B). There are many ways to do so. Section C outlines concrete procedural avenues through which local authorities can prevent public funds from supporting businesses implicated in systematic violations of human rights (including international humanitarian law) or other serious breaches of international law. It explains that EU procurement law already provides several exclusion

1 International Law Commission (ILC), Peremptory Norms, Conclusion 23; ILC State Responsibility, Art. 43.

mechanisms that can be used before or during tendering on the basis of grave professional misconduct or non-compliance with international environmental, social and labour standards, and that these grounds can be operationalised through contract clauses, due-diligence requirements, and verification procedures. The section also highlights complementary measures, such as disengaging from institutional partnerships with complicit public bodies, and describes practical procedural guidance to ensure exclusion criteria are transparent, legally certain, and aligned with international obligations. For example, human rights clauses should be introduced in public procurement contracts, so that a company that is involved in systematic breaches of human rights, and has therefore committed grave professional misconduct, can lawfully be denied access to the procurement process.

This operational guide will show that such a policy is not only allowed, but actually endorsed and mandated by international and European law.[2] States and state actors have obligations under international law that are mandatory, not discretionary. This means that **only local authorities that decide to adopt ethical procurement considerations in their tendering procedures are fully compliant with international, European and domestic law obligations**.

2 For more, see Habitat International Coalition, Extraterritorial Human Rights Obligations of Local Government, available at *https://hlrn.org/img/documents/ETOs-LGs.pdf*.

LEGAL FRAMEWORK

Municipalities and other public authorities are organs of the State within the meaning of Article 4 of the International Law Commission Articles on State Responsibility.[3] This qualification comes with two implications: first, in the exercise of their functions, local authorities are bound by the state's international obligations,[4] not just by regional and domestic law; second, their acts may be attributed to the state,[5] which could therefore incur international (legal) responsibility.

Any regional and domestic norms should be interpreted in conformity with international treaty and customary norms binding upon the state. Additionally, both principles of international law and international courts and tribunals' decisions guide the interpretation of other sources of international law, as well as of regional and domestic laws, as they carry authoritative normative weight.

Against this background, local authorities should be guided by a harmonious and mutually supportive approach that ensures that a legal rule is not interpreted in a legal vacuum, but rather in the broader context of all relevant laws and regulations applicable at the time of the implementation. Thus, while acknowledging the fragmented nature of international law,[6] a harmonious and mutually supportive approach calls for the "parallel application of divergent norms… to the highest possible extent",[7] with a view to maintaining a harmonious balance among the different rules and regimes applicable to the situation at hand. Such an approach helps clarify the scope of state obligations and the content of the action to be undertaken, especially where the public authority enjoys a degree of discretion.

In line with this perspective, three different layers of laws and regulations inform local authorities' mandate with regard to public procurement: **A. the international legal system**, **B. the regional framework**, and **C. domestic laws and regulations of the concerned state**. Below is an account of the international legal system, followed by an appraisal of the regional – EU-specific – legal regime. The analysis will not account for point C., because that is specific to each single state, although in the EU it should be largely harmonised, as it is all based on the same EU directive on public procurement. A few considerations will be shared in that regard too.

3 International Law Commission, Responsibility of States for Internationally Wrongful Acts 2001, available at *https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.*

4 United Nations Human Rights Council, Report of the United Nations High Commissioner for Human Rights, Local government and human rights, 22 July 2022, paras 48, 67-69, available at *https://docs.un.org/en/A/HRC/51/10*.

5 Ibid, para 70.

6 Report of the Study Group of the International Law Commission, finalized by Mr. Martti Koskenniemi, "Fragmentation of international law: difficulties arising from the diversification and expansion of international law", 13 April 2006, available at *https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf*.

7 N Matz-Luck, "Harmonization, Systemic Integration, and Mutual Supportiveness as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation" (2006), vol. 17 Finnish Yearbook of International Law 39-53, p. 44.

A INTERNATIONAL LAW OBLIGATIONS

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. These are: i) the duty of non-recognition of and non-assistance in maintaining situations arising out of the violation of peremptory norms of international law; ii) international humanitarian law; iii) international human rights law; iv) the principle of sustainable development; v) the WTO Government Procurement Agreement; vi) the United Nations Guiding Principles on Business & Human Rights. Below is a cursory overview of each of these rules.

i) Jus cogens and the duty of non-recognition and non-assistance

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] The International Law Commission (ILC) authoritatively identified a list of norms that acquired such status: (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 and (h) the right of self-determination.[9] Significantly, this list is non-exhaustive, meaning that other norms may progressively acquire the status of jus cogens.

By virtue of the overarching significance of jus cogens norms within the international legal order, all states and international organizations must strive for their continuous respect. In line with their importance, a serious breach of a jus cogens norm has consequences for third states — i.e. states other than those directly involved in the violation in question.

Notably, pursuant to Article 41 of the ILC's 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), states have to "cooperate to bring to an end through lawful means any serious breach",[10] which adds to and goes beyond 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".[11]

Accordingly, states have to refrain from any type of relationships — including

8 International Law Commission, 'Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens)', Conclusion 2, available at *https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf*.

9 Ibid.

10 Article 41(1) ARSIWA (full citation at note n. 3).

11 Article 41(2) ARSIWA.

economic or political — that directly or indirectly sustain the unlawful situation that originated from the breach of a peremptory norm of international law. In particular, as authoritatively affirmed by the International Court of Justice, States must "take steps to prevent trade or investment relations that assist in the maintenance of the illegal situation created by" such breach.[12] 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.

Local authorities are also bound by international law, and should act in line with the broad scope of the duty of non-recognition and non-assistance. This implies that they must refrain from entering into any relationships — including economic ones — that might contribute to the maintenance or consolidation of the illegal situation arising out of the breach of a jus cogens norm. While under national laws public authorities normally enjoy a certain degree of discretion as to how to exercise their competences and powers — including in designing and conducting procurement procedures (e.g. by defining needs, setting technical specifications, choosing award criteria, and determining exclusion grounds) — such discretion must be used to comply with their obligations under international law, even when their government fails to do so.

In section C below, we highlight a set of procedural steps that national procurement bodies may undertake to issue tendering calls and implementing rules to ensure that both international and domestic laws are implemented lawfully and consistently with the state's international obligations (regardless of their respective governments' compliance with the same obligations). Moreover, as it will be shown in Section iii) and B below, the implementation of procurement law at the national or regional level may render this duty more stringent, effectively requiring local authorities to exclude business entities involved in breaches of international law from public tenders.

ii) International humanitarian law

International humanitarian law (IHL) lays down a set of overarching obligations on states and its agents during situations of armed conflict, including occupation, governing the treatment of civilians and the conduct of hostilities. This set of norms is aimed at protecting individuals not involved in such conflict and regulating methods and means of warfare.

IHL core obligations are laid down in the four 1949 Geneva Conventions. Common Article 1 provides for the obligation on all States "to respect and to ensure respect for [the Conventions] in all circumstances".[13]

IHL obligations do not only bind states and the organised armed groups and soldiers materially engaged in the conflict. As

12 See paragraph 278 and paragraphs 273-281 of the International Court of Justice's Advisory Opinion of July 2024 on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, available at *https://www.icj-cij.org/index.php/node/204160*.

13 Common Article 1 of the 1949 Geneva Conventions.

authoritatively observed by the International Committee of the Red Cross (ICRC), such obligations also bind "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".[14]

Captured within the obligation to ensure respect for IHL, states must regulate business in a consistent and effective way, ensuring that their activities do not contribute to violations of IHL, for which there is a heightened risk in conflict-affected areas. Companies operating in conflict-affected areas risk involvement in various breaches of IHL, most notably pillage, forced displacement, transferring civilians into occupied territory, and the unlawful appropriation of property. Businesses themselves also have legal obligations not to be involved in any of those breaches, but that falls outside of the scope of this guide.[15]

iii) International human rights law

The United Nations Charter establishes States' duty to promote respect for human rights, both individually and jointly in cooperation with the United Nations (UN).[16] In addition, States are bound by customary rules of international law reflecting the content of human rights norms as well as by international and regional human rights treaties which they have ratified. As to the former, most of the rights provided for in the Universal Declaration on Human Rights are largely deemed as having acquired the status of customary international law. These include all basic rights protecting the personal integrity of the individual, such as the right to life or the right to be free from slavery and torture. As to international and regional human rights treaty norms, one would need to proceed with a case-by-case assessment, identifying the treaties specifically binding upon a given state, yet bearing in mind the customary nature of some of the treaty norms in question.

Assessing all international and regional norms relevant for the present analysis would go beyond the scope of this guide. Instead, we offer an overview of the state's human rights obligations, especially looking more closely at their nature and scope with a view to appreciating how states and their respective agents — including local authorities — are bound by them.

States' human rights obligations may be grouped under two main categories, namely negative and positive obligations. The first category requires states to abstain from any arbitrary interference with one's enjoyment of their rights. The second category, instead, imposes positive conduct on the state, which is therefore required to take action to protect one's enjoyment of human rights from other individuals, including private actors.[17] This

14 ICRC, Business and International Humanitarian Law: An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law, 2006, p. 14, available at *https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc_002_0882.pdf*.

15 See Private Businesses and Armed Conflict: An Introduction to Relevant Rules of International Humanitarian Law, ICRC, available at *https://shop.icrc.org/private-businesses-and-armed-conflict-an-introduction-to-relevant-rules-of-international-humanitarian-law-pdf-en.html.*

16 Articles 55 and 56 UN Charter.

17 As authoritatively held by the United Nations Human Rights Committee, states must ensure that "individuals are protected by the State, not just against violations (...) by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities". Human Rights Committee (HRC), General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8.

second category is particularly relevant for the present analysis.

States' positive obligations may require states to take any necessary measures to ensure respect for someone's human rights, including short-term and long-term measures. Significantly, measures may pertain to the whole range of state powers, including legislative, administrative, enforcement, and judiciary measures. The specific content of the measures depends on the right to be protected or fulfilled, so we do not analyze each individual measure that could possibly be adopted. Instead, we draw attention to the state's margin of appreciation in determining the necessary measures.

States' obligations to ensure protection of human rights from other actors' interference are so-called 'due diligence obligations'. Due diligence obligations leave states a degree of discretion in identifying the necessary measures to be adopted in a given situation. However, international courts and tribunals have clarified that they cannot take "whatever measures [they] deem necessary".[18] Instead, their margin of appreciation is objectively limited by factors such as international rules and standards relating to the matter at hand and available means and capabilities of the state concerned.[19]

In this respect, local authorities are under the obligation to implement public procurement laws in such a way as to reconcile the three pillars of the sustainable development principle described below (environmental, social, and economic pillars),[20] in conformity with international rules and standards relating to the whole range of policy objectives underpinning public procurement laws and regulations. This includes the adoption of measures aimed at excluding corporations complicit in the violations of international human rights law, international humanitarian law, and international crimes, so long as it is within the concerned state's means and capabilities.[21] This is upheld by the General Comment number 24 of the Committee on Economic Social and Cultural Rights, which provides an interpretation of the International Covenant on Economic, Social and Cultural Rights in respect to the duties of States parties to the Covenant to prevent and address the adverse impacts of business activities on human rights. The Committee recommended that "*States parties should [...] revise [...] public procurement contracts*"[22] and that "*in their public procurement regimes, States could deny the awarding of public contracts to companies that have not provided information on the social or environmental impacts of their*

18 International Tribunal of the Law Of the Sea, Advisory Opinion on climate change and international law, 2024, para. 206, available at *https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf*.

19 Ibid, para. 207. Upheld by the International Court of Justice in the Advisory Opinion of 2025.

20 Not to be confused with the Pillars of the United Nations Guiding Principles on Business and Human Rights, addressed below.

21 For further details and practical examples, see section C below.

22 Committee on Economic, Social and Cultural Rights General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, Para 15, available at *https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf*.

activities[23] ***or that have not put in place measures to ensure that they act with due diligence to avoid or mitigate any negative impacts on the rights under the Covenant.***"[24]

UN Guiding Principles on Business & Human Rights

The UN Guiding Principles on Business and Human Rights (UNGPs) constitute the authoritative global framework delineating the respective duties and responsibilities of states and business enterprises with regard to human rights. 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. 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.

Under Pillar I, states are required not only to refrain from directly infringing human rights but also to take positive steps to prevent, mitigate and remedy violations committed by private actors, including through public procurement.[25] Specifically, Principle 6 mandates that states "promote respect for human rights by business enterprises with which they conduct commercial transactions". Its commentary clearly explains that states should be extremely careful when contracting with businesses, making sure to comply with their human rights obligations under international law. This implies a duty to adopt adequate legal, administrative and policy measures to ensure that entities benefiting from public contracts do not contribute to human rights abuses. Failure to prevent or address such risks, particularly when contracting with corporations implicated in violations abroad, may amount to a breach of the state's international obligations to protect human rights. Moreover, Principle 7, which addresses conflict-related risks, states that local authorities have a duty to avoid contributing to heightened risks of gross human rights abuses in conflict-affected areas, which requires them to withhold public contracts from companies involved in such abuses or that refuse to cooperate in addressing them.

Pillar II of the UNGPs establishes that businesses have an autonomous responsibility to respect human rights, independently of state action. According to Principle 11, this requires them to "avoid infringing on the human rights of others and to address adverse human rights impacts with which they are involved". Principles 13 and 17 specify that this entails conducting human rights due diligence to identify, prevent, mitigate and account for adverse impacts, including those directly linked to their operations, products or services through business relationships (as well as end-user obligations), even if they have not contributed to such impacts themselves. Moreover, Principle 12 clarifies that this responsibility extends to all internationally

23 Negative social and environmental impacts of businesses usually affect human rights (see https://www.ohchr.org/en/press-releases/2022/07/human-rights-and-environmental-due-diligence-laws-crucial-combat#:~:text=%E2%80%9CBusinesses%20operating%20in%20the%20global%20economy%20routinely%20abuse,UN%20Special%20Rapporteur%20on%20human%20rights%20and%20environment. for more). The affected rights by such impacts, like labour rights, the right to health, economic and land rights (see https://www.ohchr.org/en/land for more) directly affect human rights and must be respected by local authorities to fulfill their human rights obligations.

24 Ibid, Para 50.

25 See United Nations Guiding Principles on Business and Human Rights, Pillar I B (3) commentary (p. 13) and Pillar II B (16) commentary, available at https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

recognised human rights, encompassing those set out in the International Bill of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.

In the context of ethical public procurement, these principles have a direct bearing on the assessment of an operator's professional integrity under EU law. A company's failure to comply with its due diligence obligations, or its participation in operations that contribute to grave human rights abuses, international crimes, or breaches of peremptory norms of international law, may reasonably be considered "grave professional misconduct", a ground for exclusion from tendering procedures under Article 57(4)(c) of Directive 2014/24/EU, which will be further explained below in section B.ii). As the UNGPs make clear, the corporate duty to respect is not discharged by mere formal compliance with domestic law if the underlying activity contributes to internationally recognised human rights violations.

iv) The principle of sustainable development

The principle of sustainable development is a fundamental principle of state action across a wide range of sectors at the local, regional and international level such as trade, environmental protection, agriculture. Sustainable development is "a process to meet the needs of the present without compromising the ability of future generations to meet their own needs".[26] The principle is largely accepted by states, as testified by its inclusion in a number of key international treaties[27] and acknowledgment by the International Court of Justice.[28]

Following its incorporation into the corpus of international law, sustainable development has acquired a key role for international cooperation following the adoption of the United Nations Sustainable Development Agenda in 2015 (so-called '2030 Agenda').[29] This has marked a shift in the international community's reception of this principle, which is today a driving force and a key objective of state action across its functions.

Its effective implementation rests on the adequate balance of three "pillars", namely economic development, environmental development and social development, which are all interdependent and mutually reinforcing.[30] Its normative power lies in its capacity to influence states to fight poverty and inequality, preserve the planet, and ensure long-term prosperity for all. As reiterated in the 2025 Sustainable Development Report's interpretation of sustainable development as contingent upon peace, security, stability, and respect for human rights and fundamental freedoms, including the right to development, as well

26 Brunterland Report, 1987, World Commission on Environment and Development', available at https://digitallibrary.un.org/record/139811?v=pdf.

27 See https://sustainabledevelopment.un.org/index.php?menu=122 for more.

28 Case law: Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997; and the International Court of Justice's Advisory Opinion of July 2025 on Obligations of States in Respect of Climate Change, available at https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf.

29 General Assembly resolution 70/1 of 25 September 2015, available at https://ia600509.us.archive.org/12/items/agenda2030/agenda2030.pdf#:~:text=70%2F1.%20Transforming%20our%20world%3A%20the%202030%20Agenda%20for,seeks%20to%20strengthen%20universal%20peace%20in%20larger%20freedom.

30 United Nations, Report of the World Summit on Sustainable Development Johannesburg, South Africa, 26 August- 4 September 2002, available at https://docs.un.org/en/A/CONF.199/20.

as cultural diversity,[31] **states must embrace a multi-layered harmonious approach to their actions while anchoring them in democratic values and respect for human rights.** Involvement in war crimes, military aggression and crimes like genocide is clearly against the values at the core of sustainable development goals and threatens them, obligating local authorities to distance themselves from such grave crimes also under the sustainable development framework.

In addition, sustainable development is progressively being incorporated into companies' Corporate Social Responsibility and Environmental, Social, and Governance policies.[32] This evolution results in the progressive emergence of private companies' direct commitments and obligations in respect of sustainable development, showing a clear progressive trend and creating legal obligations for those corporations to adhere to these standards.

Against this background, the principle of sustainable development is particularly relevant for the public procurement context.[33] First and foremost, the principle may rightly be deemed as falling among the economic-oriented objectives of public procurement policies, so-called "primary objectives". As mentioned above, sustainable development rests on the synergy between economic development and both environmental considerations, social considerations, and respect for human rights. From this perspective, the principle must inform other primary objectives such as efficiency, non-discrimination and open competition. Authoritative literature shows that sustainable public procurement can improve long-term efficiency[34] (through life-cycle costing, reduced operating expenses and induced innovation) while remaining compatible with principles of non-discrimination and open competition,[35] provided sustainability criteria are transparent, proportionate, and designed with equivalence clauses and open contracting safeguards.

Second, sustainable development contributes to the promotion of other policy aims (so-called "horizontal objectives") including respect for the environment and human dignity. While not being strictly connected with the specific object of the procurement contract, horizontal objectives still retain a fundamental role in evaluating the state's performance and compliance with international obligations. Notably, implementing sustainable development principles in the context of public procurement helps the state fulfil its commitments and obligations laid down in numerous international law instruments, such

31 Available at https://s3.amazonaws.com/sustainabledevelopment.report/2025/sustainable-development-report-2025.pdf.

32 See https://commission.europa.eu/business-economy-euro/doing-business-eu/sustainability-due-diligence-responsible-business/corporate-social-responsibility-csr_en and https://worldcivilsociety.org/how-corporate-social-responsibility-aligns-with-sustainable-development-goals/ for more.

33 This relevance is evident from the numerous references to the principle in key public procurement instruments such as the EU package Directive from 2014 on public procurement. This will be treated more extensively in Section B of this opinion.

34 "Green public procurement as an effective way for Sustainable development: A systematic literature review and bibliometric analysis" Pablo Ortega Carrasco, Fabio Iannone, Vera Ferrón Vílchez, Francesco Testa, DOI:10.1002/sd.3234, available at https://www.iris.sssup.it/retrieve/48eb25ab-75e6-4742-9fc5-ee4ca204e014/Sustainable%20Development%20-%202024%20-%20Ortega%20Carrasco%20-%20Green%20public%20procurement%20as%20an%20effective%20way%20for%20sustainable%20development.pdf .

35 See "Public Procurement and Human Rights: A Survey of Twenty Jurisdictions", July 2016, available at https://globalnaps.org/wp-content/uploads/2018/08/public-procurement-and-human-rights-a-survey-of-twenty-jurisdictions.pdf.

as international and regional human rights conventions, international humanitarian law treaties, and the non-binding but relevant United Nations Guiding Principles on Business & Human Rights, and the Sustainable Development Goals.[36]

v) WTO Government Procurement Agreement

The Agreement on Government Procurement (GPA) as amended in 2012 is the multilateral WTO instrument governing international government procurement among its Parties. Its overarching purpose is to promote transparency, non-discrimination and open competition in public purchasing, while recognising that procurement systems may also reflect broader policy objectives. This is underscored by the inclusion of a work programme on sustainable procurement in the Committee on Government Procurement.[37]

While the GPA provides that public authorities should usually bid the most economically advantageous tender, article III(2)(a-b) explicitly allows exceptions where procurement measures are **necessary to protect public morals, safety or human, animal or plant life or health.** These clauses are broad in scope and provide the normative space for states to integrate human-rights and ethical considerations into procurement, rather than only base their evaluation of tendering businesses on economic factors. In practice, this means that a contracting authority may lawfully exclude companies complicit in grave breaches of international law (such as forced labour, environmental destruction or violations of peremptory norms, including international humanitarian law) on the basis that contracting with them would undermine fundamental public morals or endanger human life and dignity. Thus, the exclusion of companies based on ethical considerations finds its legal basis in the GPA.

Moreover, Article XV(5) of the GPA states that contracting entities may award the contract to the "most advantageous tender" **where price is the sole criterion.** This opens up the possibility of integrating non-price factors (such as ethical, social or sustainability considerations) into procurement decisions.[38] For ethical public procurement, this means that excluding or favouring suppliers based on their human-rights performance or sustainability credentials can be accommodated under the GPA's award-criteria flexibilities, so long as the applicable criteria are transparent and non-discriminatory. WTO jurisprudence supports this approach by recognising that states may adopt trade-restrictive measures grounded in non-economic public interests, including considerations of public morality.[39] This confirms that non-economic factors (such as social, environmental, or ethical concerns) can legitimately influence procurement decisions, allowing contracting

36 Especially numbers 1,2,3, 6, 10, 12 and 16.

37 See https://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pd

38 See https://www.publictendering.com/the-wto-government-procurement-agreement-assessing-the-scope-for-green-procurement and "Deploying the WTO Agreement on Government Procurement Deploying the WTO Agreement on Government Procurement (GPA) to Enhance Sustainability and Accelerate Climate Change Mitigation" (2023), Robert D. Anderson, Antonella Salgueiro, Steven L. Schooner, Marc Steiner, available at https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2951&context=faculty_publications, p. 232.

39 For an analysis of the debate around the public morals exception, see Mark Wu, "Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine", 33 The Yale Journal of International Law 215 (2008).

authorities to assess the value of a tender not solely on the basis of price, but also in light of broader societal objectives.[40]

Article VIII(4)(d-e) of the GPA gives procuring entities the discretion to exclude suppliers that have been the subject of a final judgment for serious offences (d) or have committed “professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier” (e). From an ethical procurement perspective, these sub-provisions create a direct link between supplier integrity and eligibility: a company that contributes to systematic violations of human rights or international peremptory norms (or repeatedly misrepresenting its compliance) can legitimately be excluded from tender processes under the GPA. This reinforces the rationale that procurement should not support operators whose conduct undermines fundamental public values or legal obligations.

Article VIII(4)(b) further empowers contracting authorities to exclude economic operators in cases of **false declarations.** In the context of ethical public procurement, this means that **a supplier’s failure to truthfully disclose involvement in human rights breaches or supply chain violations may serve as a ground for exclusion.** It supports the proposition that integrity, transparency and truthful disclosures are central to responsible public spending and lawful access to procurement markets under the GPA.

40 For an analysis of the linkage between international trade and sustainable development under the disciplines of the World Trade Organization (WTO)
see O. De Schutter, Trade in the Service of Sustainable Development. Linking Trade to Labour Rights and Environmental Standards, Oxford, Bloomsbury, 2015.

B REGIONAL EU LAW PROVISIONS

The European Union has very detailed binding provisions regarding public procurement and human rights.

i) European Human Rights Law

All EU member states — as well as European non-EU members such as the United Kingdom, Norway, and Switzerland — are parties to the European Convention on Human Rights (ECHR), which binds them to respect fundamental civil and political rights, including the right to life[41] and the prohibition of torture and inhuman or degrading treatment,[42] as interpreted by the European Court of Human Rights.

Within the EU legal order, the Charter of Fundamental Rights of the European Union (CFR), which has the same legal value as the EU Treaties under Article 6(1) of the Treaty on the European Union, applies whenever EU institutions or member states implement EU law.[43] The Charter mirrors many ECHR rights but also enshrines additional guarantees, such as human dignity,[44] the prohibition of slavery and forced labour,[45] the right to fair and just working conditions (Article 31 CFR), and environmental protection (Article 37 CFR).

Consequently, when national authorities carry out public procurement under EU law, they are required to ensure compliance with both the ECHR and the Charter, since a breach of either would amount to a violation of the Union's fundamental rights framework.

ii) EU Directive of 2014 on Public Procurement

The European Union Directive of 2014 on public procurement (hereinafter, the Directive), clarifies what public entities can and cannot do when it comes to achieving social goals through public procurement, also known as sustainable or ethical public procurement, including with relevance to this specific case of implementing the legal duties of states to prevent violations of international norms.

a) Legitimacy of taking into account social/humanitarian/environmental considerations in public tendering procedures

The Directive often addresses the potential and importance of public procurement to tackle social and sustainability problems. Public entities are justified and encouraged to do so, rather than considering only

41 European Convention on Human Rights, Article 2, available at *https://www.echr.coe.int/documents/d/echr/Convention_ENG*.

42 Ibid, Article 3.

43 Charter of Fundamental Rights of the European Union, Article 51(1), available at *https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF*.

44 Ibid, Article 1.

45 Ibid, Article 5 and Article 4.

economic factors for tendering procedures. This is particularly logical because public procurement utilises public tax money, namely resources coming from the citizens — as well as non-citizen residents — that should be used to achieve goals that benefit the overall health and wealth, and that should promote the values that both the State and the EU sustain and aim to achieve. The Directive introduces this concept already in its preamble, in recital 2, which states that public procurement is recognised as a central tool for achieving the EU's objectives of smart, sustainable and inclusive growth, and that procurement rules were therefore modernised to improve the efficiency of public spending and "**to enable procurers to make better use of public procurement in support of common societal goals**."

Moreover, recital 40 states that:

"***Control of the observance of the environmental, social and labour law provisions*** *should be performed at the relevant stages of the procurement procedure, when applying the general principles governing the* ***choice of participants*** *and the* ***award of contracts****, when applying the* ***exclusion criteria*** *and when applying the provisions concerning* ***abnormally low tenders****.*"

Recital 91 confirms that other grounds **besides economic ones** should be taken into account, recalling that article 11 TFEU requires environmental protection to be integrated into all EU policies, and the Directive shows how contracting authorities can apply this by factoring environmental and sustainability goals into procurement.

More specifically, article 18.2 of the Directive **sets an obligation for Member States** and their local authorities **to verify that the entities they hire are not in breach of any laws**, including international norms (this is in line with the obligation for states to respect and protect human rights under the United Nations Guiding Principles on Business and Human rights):

"Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X."

While Article 18(2) confirms the legitimacy of taking social, environmental and labour considerations into account throughout the procurement process, its reference to international law is textually limited to the international environmental, social and labour standards listed in Annex X. **Consequently, the Directive cannot be read as importing all international human-rights norms as such, but rather obliges contracting authorities to ensure compliance with the specific instruments enumerated there**. Many of the "social and labour law" obligations referred to in Article 18(2) are expressly defined by international instruments listed in Annex X, including core ILO Conventions on forced labour (Nos. 29 and 105), discrimination in employment (No. 111), equal remuneration (No. 100), minimum age (No. 138), and freedom of association and collective bargaining (Nos. 87 and 98). These conventions are recognised in international law as part of the core international human rights framework governing labour rights and non-discrimination. They protect fundamental human rights such as freedom of association, equality, protection from forced labour and child labour, and are binding on all EU Member States. Article 18(2) therefore imports some specific human-rights obligations directly into EU procurement rules, and it cannot be argued that compliance with international human rights norms lies outside the scope of the Directive.[46]

This means that under article 18(2), public authorities are not only allowed to exclude entities that are in breach of those **specific** norms of international environmental, social and labour law, but they actually **must** do so. As it will be shown in sections b) and c) below, the implementation of procurement law at the national or regional level may render this duty more stringent, effectively requiring local authorities to exclude business entities involved in systematic human rights breaches or breaches of international law from public tenders

Article 56.1 allows in fact for the exclusion of the most economic advantageous tenderer (which is usually the winning criteria, if the latter fails to respect such criteria:

"Contracting authorities may decide not to award a contract to the tenderer submitting the most economically advantageous tender where** they have established that **the tender does not comply with the applicable obligations referred to in Article 18(2)."

The fact that this provision mentions that "contracting authorities… have established" gives discretion to the public entities, including local municipalities, to make their own (objective) evaluation of a candidate tenderer's compliance with such laws.

In the Case 395/18 Tim SpA, the European Court of Justice, on article 18(2) clarified that: "The EU legislature sought to establish [Art. 18(2)] as a principle, like the other principles referred to in par. 1 of that article, […]. It follows that such a requirement constitutes, in the general scheme of that Directive, a cardinal value with which the MS must ensure compliance pursuant to the wording of Art. 18 (2)".

Moreover, at the time of submitting a request to participate in a tender, economic operators must provide the European Single Procurement Document (ESPD), a self-declaration serving as preliminary evidence that they meet the eligibility requirements. Contracting authorities, such as municipalities or other public bodies, must accept the ESPD as proof that the tenderer is not in any of the exclusion situations listed in Article 57 of the Public Procurement Directive, which includes cases where companies must or may be excluded for breaching obligations under EU, national, or international law.

Accordingly, it would be unlawful under EU public procurement law for contracting authorities to admit or award contracts to

46 See https://link.springer.com/content/pdf/10.1007/s12027-022-00718-5.pdf for more.

economic operators involved in such violations, since **doing so would contravene their duty to ensure that only legally reliable and compliant bidders participate in public tenders**.[47]

Additionally, article 67 specifies that:

"*The most economically advantageous tender"* (which is the economic actor that should be awarded the public contract) "***may include the best price-quality ratio, which shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects***".

Lastly, under article 69(3), contracting authorities are required to reject abnormally low prices of tenders when the low price results from non-compliance with the obligations set out in Article 18(2), including those relating to environmental, social and labour law, thereby preventing the award of public contracts to economic operators whose cost advantages stem from breaches of human rights or international law.

b) Requiring additional criteria or certifications

Contracting authorities can, in fact, require and refer to certifications that demonstrate compliance with certain social and environmental or other standards (for example, respect of international law and human rights) "such as the European Eco-label, (multi-)national eco-labels or any other label."[48] This provision includes some conditions for this measure to apply, including: "provided that the requirements for the label are linked to the subject-matter of the contract"[49] together with the fact that "those requirements are drawn up and adopted on the basis of objectively verifiable criteria, using a procedure in which stakeholders, such as government bodies, consumers, manufacturers, distributors and environmental organisations, can participate, and that the label is accessible and available to all interested parties" and that "labels should not have the effect of restricting innovation."[50]

Moreover, article 60 allows contracting authorities to request certificates, statements or other proof t**o verify that bidders are not subject to exclusion grounds** and meet the required selection criteria, including those relating to social, environmental or labour standards. Article 44(1) further permits authorities to demand test reports or certificates from independent conformity-assessment bodies as proof that bidders comply with technical specifications, award criteria or contract performance conditions.

c) Exclusion grounds from participation in a procurement procedure

The Directive adds certain specific grounds for which an economic contractor can be excluded from the tender during the phase of selection of participants in the procurement procedure[51], including **"inciting or aiding**

47 Article 59.1(a) Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, available at *https://eur-lex.europa.eu/eli/dir/2014/24/oj/eng#enc_1*.

48 Recital 75, Directive on public procurement, full citation in note n. 43.

49 Ibid.

50 Ibid.

51 Article 57.1, ibid.

or abetting or attempting to commit an offence"[52], as "referred to in Article 4 of the Council Framework Decision 2002/475/JHA, **or money laundering".[53] [54]** While in the case of such grounds there is a high evidence threshold required, such as a conviction or final judgment on the alleged crime, meaning that there is no discretion for local municipalities, the following grounds require a lower threshold. In fact, other grounds listed in paragraph 4 of the same article allow for more discretion to "exclude from participation in a procurement procedure any economic operator" in any of the following situations:

"(a) ***where the contracting authority can demonstrate*** *by any appropriate means* ***a violation of applicable obligations referred to in Article 18(2)";*** or *"(c) […]* ***that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;"*** without the need of an external judgement.

Importantly, Article 57(4) establishes a cumulative list of independent grounds for exclusion. This means that even if a company's involvement in violations of international human rights or humanitarian law does not neatly qualify as a breach of the "environmental, social and labour law" obligations listed in Article 18(2) and Annex X, the same conduct may still justify exclusion under Article 57(4)(c) as grave professional misconduct. In other words, the possibility of exclusion does not depend on whether such violations fall within the scope of social and labour law: the broad, autonomous category of grave professional misconduct remains fully available to contracting authorities to address corporate complicity in serious breaches of international law.

Regarding the meaning of grave professional misconduct, this concept covers any serious wrongful behaviour that casts doubt on a company's professional integrity or credibility, extending beyond breaches of professional ethics to include violations of competition, environmental or social standards. The concept is interpreted broadly by the Court of Justice of the European Union (CJEU), giving contracting authorities a degree of discretion to determine what constitutes misconduct, as long as their decision is objective, transparent, and respects EU principles of equality, non-discrimination, and proportionality. In its case law, the CJEU confirmed a broad reading of the grave professional misconduct ground for exclusion in Article 57(4)(c). It held that "*the concept of 'professional misconduct' covers all wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of ethical standards in the strict sense of the profession to which that operator belongs*".[55] This notion is an open one, "*normally referring to conduct by the economic operator at issue which denotes a wrongful intent or*

52 Article 57.1(d), ibid.

53 Article 57.1(e), ibid.

54 Ibid, "The obligation to exclude an economic operator shall also apply where the person convicted by final judgment is a member of the administrative, management or supervisory body of that economic operator or has powers of representation, decision or control therein."

55 CJEU Judgment, Forposta SA and ABC Direct Contact sp. Zoo v. Poczta Polska SA, 12 December 2012, (Case C-465/11), p. 27.

negligence of a certain gravity on its part".[56] The CJEU reiterated this approach in 2014[57] and in 2019, when it stressed that "*the concept of 'professional misconduct', which is interpreted broadly, cannot be limited only to failures and negligence committed in the performance of a public contract*".[58]

Ultimately, authorities may exclude operators whose conduct demonstrates a lack of integrity incompatible with the trust required in public contracts, provided this assessment is based on specific, individual, and proportionate reasoning. In this light, involvement in or contribution to grave violations of international human rights law or international humanitarian law may constitute "grave professional misconduct," as such complicity directly undermines an operator's professional credibility and integrity. This is especially true for long-standing and well-documented involvement in serious breaches of international law, as in this case the systematic nature of corporate involvement indicates at least gross negligence, and possibly intent.

d) Exclusion during the procedure

Public authorities can exclude economic operators not only from the participation in the tendering competition, but also during the procedure:

"where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraphs 1 and 2"; or *"where it turns out that the economic operator is, in view of acts committed or omitted either before or during the procedure, in one of the situations referred to in paragraph 4."*[59]

d)(1) Burden of proof

The Directive provides that an economic operator falling under any of the exclusion grounds in paragraphs 1 or 4 may submit evidence showing that it has taken adequate corrective measures and can still be considered reliable.[60] **Where the operator cannot substantiate its reliability through such evidence, the contracting authority should proceed with its exclusion.**

d)(2) Compensation to the victims and non-repetition assurance

Lastly, when an economic operator has breached the relevant provisions and has been excluded, a contracting authority may only readmit it if the operator not only demonstrates its reliability but also shows that it has **appropriately remedied the violations.** Under the Directive,[61] this requires proof that the operator has **paid or committed to pay compensation for the harm caused,** has **fully clarified the facts through active cooperation with investigative authorities,** and has adopted

56 Ibid.

57 CJEU Judgment, Generali-Providencia Biztosító Zrt v. Közbeszerzési Hatóság Közbeszerzési Döntőbizottság, 18 December 2014, (Case C-470/13), p.35. In this case, the Court found that "the commission of an infringement of the competition rules, in particular where that infringement was penalised by a fine, constitutes a cause for exclusion".

58 CJUE Order, Consorzio Nazionale Servizi Società Cooperativa (CNS) v. Gruppo Torinese Trasporti GTT SpA, 4 June 2019, (Case C-425/18), pp. 29-31.

59 Article 57.5 EU Directive on public procurement.

60 Article 57.6, ibid.

61 Ibid.

concrete technical, organisational, and staffing measures to prevent future misconduct. The adequacy of these steps must be assessed in light of the **gravity and specific circumstances** of the criminal offence and misconduct (and we argue that complicity in international crimes counts as the gravest circumstance), and if they are found insufficient, the authority must give a **reasoned explanation.** As Article 57.6 stipulates that the company must take "concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.",[62] it follows that cessation of the harm is obviously mandatory, since one cannot prevent future offences until the ongoing ones are ceased.

Accordingly, when public authorities exclude companies that demonstrably contribute to violations of international law (and those companies cannot prove genuine remediation, including the cessation of the violation) they act entirely within the boundaries of EU law.

iii) EU Corporate Sustainability Due Diligence Directive

The Corporate Sustainability Due Diligence Directive (CSDDD), entered into force on 25 July 2024, with national transposition set for 2026 and application from 2027;[63] strengthens the integration of human rights[64] and environmental due diligence into EU public procurement frameworks. It is important to note that the "due diligence obligations" under the CSDDD differ from the state due-diligence obligations discussed above in section A(iii). While states' due diligence duties under IHRL concern the obligation of public authorities to adopt adequate measures to prevent, mitigate, and respond to human rights harms, the CSDDD imposes corporate due-diligence obligations on companies themselves, requiring them to identify, prevent, mitigate, and remedy adverse human rights and environmental impacts within their operations and value chains.

By explicitly allowing compliance with due diligence obligations to be used as award criteria or contract performance conditions (Recital 92, Art. 31), the Directive provides contracting authorities with a solid legal foundation to exclude companies involved in human rights or environmental violations.[65] This builds on the EU's duty under the UNGPs to protect human rights through public spending and enhances transparency, accountability, and sustainability in tendering processes.[66] As a result, the CSDDD transforms public procurement from a voluntary sustainability tool into a compliance-based mechanism that directly supports responsible corporate conduct across global supply chains.

62 Ibid.

63 See https://www.atlasmetrics.io/blog/csddd.

64 Despite the Directive including only sustainability in its name, 50 per cent of its scope is about human rights adverse impacts (see art.1.1.(a), art. 3.1.(c) and Annex, Part 1). While it could be argued that the name of the Directive is misleading, the fact that it only refers to sustainability could be interpreted as EU legislators confirming that sustainability also includes human rights protection, strengthening the connection with A(iv) of this document.

65 See https://realaw.blog/2024/06/14/csddd-bridging-due-diligence-and-public-procurement-by-ezgi-uysal-and-laura-trevino-lozano/.

66 Ibid, and https://procurementmag.com/articles/how-csddd-will-transform-procurement .

Article 31 of the CSDDD reinforces this approach by requiring Member States to treat compliance with corporate due-diligence obligations, whether mandated by national law or implemented voluntarily, as a valid environmental or social criterion in public procurement. This **allows contracting authorities to integrate due-diligence compliance into award criteria or contract-performance conditions** under Directives 2014/23/EU, 2014/24/EU and 2014/25/EU. Recital 92 further makes clear that authorities may (or must, depending on national rules) exclude economic operators where there is evidence of violations of environmental, social or labour obligations, or of grave professional misconduct. Importantly, these 'environmental, social and labour' obligations only encompass certain **specific** human rights duties, since the procurement directives define them by reference to international instruments ratified by all Member States (such as the ILO core conventions and key human rights treaties). However, as is explained above, *grave professional misconduct* is a much broader concept that encompasses **any systematic involvement in human rights breaches or any violation of international (humanitarian) law**, thereby ensuring that breaches of internationally recognised human rights standards can legitimately ground exclusion.

The CSDDD marks a turning point for sustainable public procurement in the EU. By linking companies' due diligence duties with the rules governing public contracts, it ensures that public funds support only responsible and rights-compliant businesses. The Directive not only strengthens the legal basis for excluding companies complicit in human rights or environmental abuses but also embeds sustainability into the core of procurement policy. The CSDDD sets a clear path toward a procurement system that is both ethically sound and legally enforceable, reinforcing the EU's broader (at least theoretical) commitment to human rights and sustainable development.

C SUGGESTIONS ON PROCEDURAL STEPS

Grassroot movements and civil societies are demanding that public entities distance themselves and public funds from businesses that contribute to human rights violations and international crimes. Many citizens also expect their tax money not to be used to hire such businesses through public tendering procedures and often exert considerable political pressure on elected officials to adopt ethical policies for procurement, investment, etc. However, the procedure to do so is not always clear. The following is a guide for local authorities on this matter.

a) Impact through exclusion

There are various possible ways to ensure that local authorities do not reward human rights violations and international crimes through public procurement procedures. In light of the above, considering that grounds for exclusion from public tendering processes in the EU can go beyond commercial reasons, when grave professional misconduct, interpreted broadly, occurs , four main methods apply:

1. Local authorities can **exclude companies that are involved in gross or systematic breaches of human rights by adding internationally recognised human rights clauses** — such as the UNGP, OECD Guidelines and norms of the CSDDD — to standardised public contracts. In that way, companies that are involved in those breaches can **either be excluded on the basis of not being able to adhere to the terms of the public contract**, or **the contract can legally be dissolved once such involvement becomes clear to the local authority**.

2. Local authorities can exclude companies involved in systematic breaches of human rights, **before initiation of the tendering process**, **under art. 57.1** of the 2014 Public Procurement Directive for breaches of art. 18.2 of the Directive, relating to breaches **of specific instruments of international environmental, social and labor law.**

3. Local authorities can exclude companies involved in systematic breaches of human rights, **before initiation of the tendering process**, under art. 57.1 of the Directive for having committed *grave professional misconduct*, which includes involvement in **any** systematic violations of international law, IHL and human rights.

4. Local authorities can exclude companies involved in systematic breaches of human rights, **while the tendering process is ongoing**, for breaching art. 18.2 of the Directive or for committing *grave professional misconduct***,** under art. 57.5 of the Directive.

b) Impact through other policies

In addition to the exclusion of complicit entities from public tendering, local authorities should consider more actions to cut ties with entities that routinely violate basic norms of international law. These could include breaking ties with complicit cities and states, and **creating a customary procedure of refusing to collaborate with any kind of entity, economic or governmental, that is implicated in grave human rights violations**. An example is the City of Barcelona, which interrupted its twin relationship status with the city of Tel Aviv over concerns about human rights violations committed by Israel against Palestinians.The declaration of the Ombudsman authority of Barcelona declared this decision to be lawful and necessary, affirming that:

"*the maintenance of links with Israeli municipal or state authorities that legitimise the prolongation of occupation and colonialism in Palestine entails complicity in the progressive configuration of an apartheid crime against the Palestinians.*"[67]

To then recommend that "that the Mayor of Barcelona revoke the Friendship and Cooperation Agreement between Barcelona, Gaza and Tel-Aviv." and "that the Directorate of International Relations and the Directorate of Global Justice and International Cooperation comprehensively review the Twinning Agreements and Memorandums of Understanding (MOU) signed by Barcelona City Council in order to determine if, in any of them, the other city does not respect human rights. In such a case, we recommended revocation of the agreement".

The Ombudsman recommendation demonstrates that it is possible to take a step back from involvement with entities that directly or indirectly perpetrate international crimes and human rights, and that the sole grounds of exclusion is the unlawful conduct of the economic entity, rather than the often alleged "discrimination".

c) General considerations

As outlined by the European Commission itself, taking account of social considerations in public procurement is not only legitimate but also preferable and encouraged, and the Public Procurement Directives also reflect this.[68] A list of ways to do so is offered in the Commission Notice "Buying Social — a guide to taking account of social considerations in public procurement (2nd edition)", where the Commission emphasises the need to use public procurement processes to achieve social responsibility goals, including the protection of human rights in value chains:

"Public procurement can be used to address social issues within supply chains, such as human rights or fair trade principles. Respect for basic human rights is an essential part of any business relationship entered into by a State, as set out in the UN Guiding Principles on Business and Human Rights"

67 Sindacatura de Greuges de Barcelona, Resolution of the Barcelona Ombudsman's Office Complaint regarding International Municipal Cooperation (Friendship and collaboration agreement between Barcelona, Gaza and Tel-Aviv), p. 20.

68 Recital 97 and Article 67(3)(a) of Directive 2014/24/EU, Recital 102 and Article 82(3)(a) of Directive 2014/25/EU, Recital 64 and Article 41 of Directive 2014/23/EU; European Commission, Commission Notice "Buying Social - a guide to taking account of social considerations in public procurement (2nd edition)" Brussels, 26.5.2021 C(2021) 3573 final, p. 11, available at *https://ec.europa.eu/docsroom/documents/45767/attachments/1/translations/en/renditions/native*.

Including social criteria in the procurement cycle has also been accepted by the European Court of Justice, which in Case C-368/10 Commission v Netherlands (2012) confirmed that **social considerations may feature not only in the technical specifications but also in the conditions for performance of a contract and in the award criteria.**[69] The legitimacy of using non-economic criteria by public authorities when awarding procurement contracts was likewise upheld in earlier rulings.[70] Key limits apply: **environmental, social and labour law, as well as relevant collective agreements, must be respected** (Art. 18.2). In addition, **the criteria must be directly linked to the subject-matter of the contract** (Art. 67(2) (addressed below in section D(c)); Art. 70), proportionate to its value and objectives (Art. 42; Art. 58), or suitable for defining the characteristics of the supplies, services or works (Art. 43).[71]

Moreover, this guide **explicitly does not argue for adding human rights or international law-related criteria to the award criteria of procurement procedures**. If companies involved in the most grave violations of human rights, international crimes, and violations of the highest norms of international law would be allowed to make up for their involvement in such abuses by, for example, simply offering a better price or quicker delivery, this would not only abandon the ethical duty of local authorities, but also forfeit their obligations under international and regional law as described above. **The only way to adhere to these obligations is by making sure no public money is being spent on companies involved in those violations and abuses.**

i) Procedural guidelines

How can this need for respect of international provisions be translated into action? Public entities should:

1. Establish clear exclusion criteria in the tender contracts, also based on alignment with international law

- Define specific grounds for exclusion based on knowing, persistent involvement in grave human rights violations, particularly war crimes, crimes against humanity and genocide, as part of the bid requirements.

- Exclude firms that have been formally sanctioned, prosecuted, or found guilty of such violations by recognised international bodies or courts.

- Ensure procurement standards are aligned with international conventions and guidelines on human rights and anti-corruption.

69 Case C-368/10 Commission v Kingdom of the Netherlands, paragraph 91 and 92.

70 See C-31/87 Gebroeders Beentjes BV v Netherlands (1988); C-225/98 Commission v French Republic (2000); C-513/02 Concordia Bus Finland v Helsingin kaupunki and HKL-Bussiliikenne; and C-448/01 evn AG and Wienstrom GmbH v Republik Österreich.

71 "Public Procurement and Human Rights: advancing International Labour Standards at International and European Level", Giulia Botta, 2020, available at *https://rwi.lu.se/wp-content/uploads/2020/12/2020-Research-Paper_Giulia-Botta-final.pdf*.

2. Incorporate due diligence and screening procedures

- Require potential bidders to provide evidence of compliance with international human rights standards.

- Conduct comprehensive background checks using credible sources and databases to identify any involvement in human rights abuses or international crimes.

3. Mandatory disclosure and certification

- Require bidders to submit a declaration certifying they have not engaged in, and are not associated with, serious and persistent human rights violations or international crimes.

- Implement clauses to emphasise accountability for ethical conduct.

4. Implement monitoring and enforcement measures

- Incorporate ongoing monitoring during project implementation, potentially through periodic audits and reporting, to ensure continued compliance.

- Exclude businesses if credible reports or evidence come to light during execution indicating their involvement in unethical practices.

5. Transparency and accountability

- Document and publish reasons for exclusion decisions to maintain transparency and prevent arbitrary exclusions, fostering fairness as outlined in the procedures for bid evaluation.

6. Communication on the potential consequences of human rights abuses

- Clearly communicate to bidders that engaging in human rights violations or international crimes is incompatible with public procurement principles and will be grounds for automatic disqualification (impossibility to qualify for the tender).

These measures ensure that the public procurement process rejects any involvement in unethical or criminal activities, thereby promoting integrity, protecting human rights, and upholding the public trust in government initiatives.

D POSSIBLE ANTICIPATED OBJECTIONS AND HOW THEY MAY BE ADDRESSED

The introduction of a tool allowing public authorities to exclude from tendering procedures companies that are complicit in grave human rights violations or international crimes (such as those arising from armed conflicts, occupation, or genocide) may attract unfounded objections. However, such criticisms can be effectively addressed through robust legal reasoning, factual evidence, and established jurisprudence, all of which demonstrate that these exclusionary measures rest on a solid legal basis. Such an exclusion over human rights grounds is not only legitimate, but also encouraged by international and European law, including EU jurisprudence, as highlighted in previous sections, leaving little to no legal risks in implementing such measures. This section aims to be, just as a precautionary measure, a tool to be prepared for potential negative claims and objections, to demonstrate the lawfulness and legitimacy of ethical public procurement.

a) Alleged discrimination or unequal treatment

Some may argue that excluding companies implicated in grave violations of international humanitarian law or human rights amounts to discrimination or an indirect form of political boycott. This concern has no foundation in EU law.

Counterargument:

First, discrimination in EU and international law refers to prohibited grounds such as nationality, ethnic origin, political opinion or similar protected characteristics. Excluding an operator because of involvement in war crimes, grave breaches of IHL, or systemic human rights violations is a conduct-based integrity assessment, not a distinction on protected grounds. Such measures target professional misconduct, not identity, origin or ownership, and thus clearly fall outside the scope of Article 21 of the Charter or CERD. States themselves are not beneficiaries of anti-discrimination protections, which apply to individuals or groups of individuals, not governments.

Second, EU procurement law expressly authorises integrity-based exclusions. Article 57(4)(c) of Directive 2014/24/EU allows exclusion for grave professional misconduct. The CJEU interprets this concept broadly, covering any conduct casts seriousty, integrity or reliability (Vossloh Laeis, C-124/17;[72] Adusbef (Pont Morandi), C-683/22[73]). In Adusbef, the Court confirmed that contracting authorities

72 Available at https://infocuria.curia.europa.eu/tabs/document?source=document&text=&docid=206983&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1397676, paragraph 24.

73 Available at https://infocuria.curia.europa.eu/tabs/document?source=document&text=grave%20professional%20misconduct&docid=292040&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=13141862, paragraphs 95-96.

may legitimately impose particularly high requirements of integrity and reliability.[74] Complicity in serious violations of international humanitarian or human rights law clearly meets this threshold.

Third, ethical procurement that applies objective, internationally-recognised integrity criteria and does not refer to any particular state, nationality or territory cannot logically be characterised as discriminatory. ipean Court of Human Rights clarified that advocacy relating to international law compliance in procurement, even in the form of calls for boycott, falls under protected political expression under Article 10 ECHR, provided it does not cross into incitement to violence, hatred or intolerance. A measure grounded in procurement law, applied through proper procedures and based on objective standards of integrity, is lawful and fully consistent with EU law.

Accordingly, exclusions grounded in complicity in international crimes or serious human rights violations are not discriminatory and in fact reflect precisely the level of professional integrity that EU procurement law expects from tenderers.

b) Concerns about restriction of competition

Someone might contend that excluding businesses on human rights grounds could artificially restrict competition, undermining the procurement objective of obtaining the best value for money.

Counterargument:
On the contrary, **permitting companies to participate in tenders despite their involvement in international crimes undermines fair competition.** Such companies may gain an **unfair economic advantage** by exploiting conflict economies, illegal resource extraction, or forced labor. Exclusion restores a level playing field by ensuring that all participants are subject to the same baseline of legality and integrity. Moreover, the EU procurement regime explicitly allows contracting authorities to balance price considerations with ethical, social, and environmental objectives (Directive 2014/24/EU, Recitals 37 and 97).

c) Possible incompatibility with internal market freedoms

A further objection might be that such exclusions create unjustified restrictions on the freedom to provide services or the freedom of establishment under the TFEU.

Counterargument:
Even if such measures constitute restrictions, they are justified by overriding reasons of public interest. In Concordia Bus (C-513/99),[75] the Court accepted that authorities may incorporate environmental criteria into award decisions when these criteria are connected to the subject-matter of the contract, are applied transparently, and respect general principles such as non-discrimination. The judgment recognises that procurement may legitimately pursue objectives other than purely economic efficiency, including environmental or social concerns.

74 Ibid.

75 See *https://curia.europa.eu/juris/liste.jsf?language=en&num=C-513/99* paras 1, 2.

By analogy, compliance with human rights, humanitarian law, and international criminal law (all of which are reflected in EU primary law, including the Charter of Fundamental Rights) constitutes an equally legitimate objective capable of justifying restrictions on internal-market freedoms. Excluding companies involved in serious human rights abuses therefore aligns with the EU's constitutional values and its obligations under both EU and international law.

d) Risk of the "politicisation" of procurement decisions

Some may claim that introducing such exclusions risks "politicising" procurement and turning it into a "tool for foreign policy".

Counterargument:
The EU itself has explicitly endorsed the use of public procurement to promote sustainable development and corporate responsibility. The Commission's 2017 Communication on Public Procurement calls on contracting authorities to use their purchasing power to achieve "strategic" objectives, including respect for human rights. Similarly, the UN Sustainable Development Goals, endorsed by the EU, encompass not only environmental protection but also peace (SDG 16), the eradication of hunger (SDG 2), and respect for human dignity.

Far from being political, such exclusions operationalise the EU's own normative commitments. Excluding businesses complicit in grave human rights violations and international crimes is firmly anchored in EU procurement law, supported by Article 57 of Directive 2014/24/EU and the broad interpretation of "grave professional misconduct" in the CJEU's jurisprudence. It strengthens rather than undermines fair competition, applies equally to all economic operators, and serves legitimate and recognised objectives of public interest. Moreover, it aligns with the EU's sustainable procurement agenda and international commitments under the SDGs.

e) Tackling the "link to the subject matter" requirement

Where contracting authorities incorporate additional social, labour or environmental criteria into technical specifications, award criteria or contract-performance clauses, EU procurement law requires that these conditions be linked to the subject matter of the contract (67(2), 70 of Directive 2014/24/EU). This requirement ensures that award decisions remain objective, transparent and connected to the contract's execution.

However, this requirement is **only applicable to situations where such norms form part of the award criteria of the tender**, after the bidder has already been admitted into the procedure. This guide argues for the **exclusion** of companies involved in systematic breaches of human rights, international law violations and violations of IHL. **For such an exclusion, there is no basis** in the Directive to argue **that there has to be any link between the breach the company is involved in, and the performance of the public contract in question**. The breach in and of itself is sufficient to be excluded from the procedure. This is especially true for exclusions based on *grave professional misconduct*, which relates to the integrity of the company in a general sense.

Moreover, human-rights-related requirements inherently fulfil this link, if it would have been required. Under Article 18(2), all public contracts must be performed in compliance with applicable social, labour and environmental obligations — including those arising from the international instruments listed in Annex X. Because respect for these obligations is a mandatory condition of lawful contract performance, any clause requiring adherence to internationally recognised human-rights standards is automatically connected to the subject matter: it governs the manner in which the contract must be executed. Accordingly, human-rights-based technical specifications, award criteria or performance conditions satisfy the subject-matter requirement without difficulty.

f) Alleged irrelevance of the CSDDD following the Omnibus package

The Omnibus package is a set of legislative amendments adopted by the European Union in December 2025 aimed at "simplifying sustainability regulation" by reducing the scope, obligations, and enforcement timelines of key instruments of the European Green Deal, notably the Corporate Sustainability Reporting Directive (CSRD) and the Corporate Sustainability Due Diligence Directive (CSDDD). Some may claim that the CSDDD is now less relevant for ethical procurement because the 2025 Omnibus package has significantly scaled back its scope, increased applicability thresholds, postponed enforcement until 2029, and removed key obligations such as climate transition plans. These changes have narrowed the number of companies subject to the Directive and delayed its practical effect.

However, even with these reforms, the CSDDD remains part of EU law and its core duty of human-rights and environmental due diligence, although narrower in scope, continues to exist and will eventually apply. Critics of the Omnibus have noted that "the core due diligence duty remains,"[76] indicating that key human-rights protections have not been fully removed, even if weakened. Therefore, the Directive cannot be dismissed entirely as irrelevant to ethical procurement.

More importantly, the legal foundations for ethical procurement in this document do not depend exclusively on the CSDDD. The principal bases discussed (Directive 2014/24/EU, especially Articles 18(2) and 57, international humanitarian law, international human-rights law, the UN Guiding Principles, and the duty of non-recognition/non-assistance) remain fully operative and binding. Even if the CSDDD's scope is limited, these other legal instruments provide independent and robust grounds for excluding companies on the basis of conduct that violates human rights or international humanitarian law.

By structuring the policy on general, conduct-based legal obligations rather than on the CSDDD alone, municipalities ensure that ethical procurement measures remain legally strong, proportionate, non-discriminatory and aligned with broader EU and international law, regardless of the evolving text of the CSDDD.

76 See: https://sustainabilitymag.com/news/omnibus-what-next-as-eu-votes-to-slash-climate-regulations.

ANNEX 1: Overview of Passed EPP Motions

NORTH OF IRELAND		Minutes	News
Derry & Strabane	January 2024	Link	Link
Newry, Mourne & Down	April 2024	Link	Link
Belfast City	March 2024	Link	Link
SOUTHERN IRELAND		**Minutes**	**News**
Dublin City Council		Link	
SDCC	March 2025	Link	
Fingal	February 2025	Link	Link
Clare County	May 2025	Link	Link
BELGIUM		**Minutes**	**News**
Mechelen	March 2025	Link	Link
Ghent		Link	Link
Wolowe Saint Lambert	May 2025	Link	Link
Seraing	June 2025	Link	Link
Scharbeek	September 2025	Link	Link
Leuven	September 2025	Link	Link
ITALY		**Minutes**	**News**
Emilia Romagna region	June 2024	Link	Link
Bologna	April 2024	Link	Link
Cesena (FC)	July 2024	Link	Link
Castel San Pietro (BO)	April 2025	Link	Link
Monza	October 2025	Link	Link
San Lazzaro di S. (BO)	November 2025		Link
Emilia-Romagna Region	December 2025	Link	Link

ANNEX 2:
General Template for EPP Motions

Below is a general template for suggested language that politicians can introduce into their local council as a motion. The motion describes why there is not only a moral, but also a legal obligation to ensure respect for international law through local procurement policies. It also describes a crucial element of such an ethical public procurement policy: they can not exclude bidders based on their geographical scope of activity, sourcing location, national identity, or origin.

ETHICAL PUBLIC PROCUREMENT

Suggested Motion for Promotion in Local Councils

This Council deplores corporate profit from protracted armed conflict and systematic violations of human rights. International crimes like aggression, apartheid, and genocide are of special concern in today's volatile times. With this motion, the Council seeks to encourage companies to meet their obligations to avoid contributing to adverse human rights impacts through their own activities, and to prevent or mitigate human rights abuses linked to their operations.

The Council is aware of the crucial role of local 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 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 Council recognises the right of local authorities like this Council to exclude from public contracts companies that are implicated in grave professional misconduct, including grave human rights abuses, war crimes and/or violations of international law.

The Council 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's tenders or contracts because of its geographical scope of activity, sourcing location, national identity, or origin.

This Council resolves to adopt an Ethical Procurement Policy (EPP) that takes into account the involvement of bidders and members of its economic entity in severe violations of human rights and/or international law and allows the Council to exclude problematic bidders from its tender procedures. The EPP 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.

ANNEX 3: Suggested HR-Clauses

This annex will provide some suggestions for language to be used in human-rights clauses that can be added to the standard tendering contracts as mentioned in section C (a) of this Operational Guide.

While many variations of human rights clauses can be possible and successful in achieving the goal at hand, there are some basic principles that need to be taken into account (see also Section D) when drafting such a clause. Implementing these considerations will make the policy safe from legal action and ensures that the policy and its motions are effective in reaching its goals.

The key points to take into account are the following:

- Any exclusion criteria need to be communicated clearly and transparently, before the selection process has started;
- Any human rights clause that is added to standard contracts needs to be clear and objective;
- The clause should be based on widely accepted human rights norms, such as those laid down in the United Nations Guiding Principles on Business and Human Rights, or the Organisation of Economic Cooperation and Development Guidelines for Multinational Enterprises
- Mentioning Israel or the OPT explicitly in the clause will weaken its effectiveness as it will make an easy target for arguments of 'discrimination'. Exclusion is typically not allowed purely based on national origin or geographical scope of operations. Adding such a specific mention will also make this work less helpful for other, intersectional struggles.

EXAMPLE A: The tendering company ensures that none of its operations violate the UN Guiding Principles on Business and Human Rights or the OECD Guidelines for Multinational Enterprises on Responsible Business Conduct.

EXAMPLE B: The tendering company ensures that, during the execution of the contract, it does not work with any corporate entity (group) that operates in unlawful settlements in occupied territory, wherever they may occur, or with any corporate entity that contributes to the unlawful situation created by the presence of a foreign army in occupied territory.

EXAMPLE C: The tendering company declares that it is not involved in any operations that (help) violate the Geneva Conventions, the Rome Statute of the International Criminal Court, or any legal opinion or jurisprudence of the International Court of Justice.

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