**Submission to the UN Working Group on Business and Human Rights**

**multi-stakeholder consultation on**

**“Connecting business and human rights and anti-corruption agendas”**

Transparency International makes this submission in response to the call for input by the UN Working Group on Business and Human Rights on making the connection between the business and human rights and anti-corruption agendas. We welcome the Working Group’s focus on these linkages and its plan to submit a report on this subject to the UN Human Rights Council in 2020, and we appreciate the opportunity to make an input.

Too often corruption is treated as a “victimless” crime, including in the context of large-scale cross-border business corruption. This is far from the case. The linkages between corruption and human rights abuses suggest that there should be more policy coherence in the two fields with regard to both prevention and enforcement.

We endorse the approach of the UN Working Group on Business and Human Rights to develop guidance on how to integrate human rights due diligence into anti-corruption and anti-bribery measures at the corporate compliance level, as recommended by the UN Guiding Principles on Business and Human Rights.[[1]](#footnote-1) We also recommend integrating a consideration of human rights impacts into foreign bribery enforcement as well as other enforcement against international corruption.

This submission focuses on issues relating to the cross-border activities of multinationals and is divided into the following five sections: I. The corruption and human rights nexus; II. Foreign bribery, human rights impact and victims’ remedies; III. Anti-corruption and human rights compliance IV. Sectors at high risk of human rights abuses due to corruption; and V. The role of civil society as watchdog

We are responding to the Working Group’s Guiding questions 1, 4 and 6 in sections II – IV and the relevant questions are listed at the top of each section, with recommendations at the end of all but the first section.

**I. The corruption and human rights nexus**

***Guiding question 1:*** *What are the key areas where corruption causes, contributes or is linked to human rights abuses and negative impacts for right holders*?

Transparency International defines corruption as “the abuse of entrusted power for private gain”.[[2]](#footnote-2) This definition encompasses the full range of corrupt behaviours listed in the UN Convention against Corruption (UNCAC) and other relevant international anti-corruption instruments and conventions. These include the criminal offences in chapter III of the UNCAC on criminalisation as well as other behaviours implicitly or explicitly targeted in chapter II on prevention, such as in Article 7.3 on enhancing transparency in the candidatures for elected public office and the funding of political parties; Article 12.2(c) on promoting transparency among private entities; Article 12.2(d) on preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities; and Article 12.2(e) on prevention of conflicts of interest created by the revolving door between public and private sector. Human rights are derived from a comprehensive set of international agreements setting out state obligations towards individuals.

There is an extensive body of literature on how corrupt behaviour and activities, whether by state actors or business enterprises, causes and contributes to human rights violations.[[3]](#footnote-3) This include the 2010 joint report by the International Council on Human Rights Policy and Transparency International that explained how “all forms of corruption tend either directly, indirectly or remotely to violate human rights”.[[4]](#footnote-4) The connection is supported by corruption indices, such as Transparency International’s Corruption Perceptions Index, which show a strong correlation between those states with high levels of corruption and those with widespread human rights abuses.[[5]](#footnote-5) The rights in question may be civil political, economic, social or cultural.

This nexus has been widely acknowledged by relevant international bodies. The Office of the High Commissioner for Human Rights recognises the connection between corruption and human rights abuses, and its website hosts resolutions of the Human Rights Council from 2012 onwards on the negative impact corruption exerts on the enjoyment of human rights.[[6]](#footnote-6) Likewise, a number of resolutions emanating from sessions of the UNCAC Conference of States Parties have reflected the linkages between human rights and corruption.[[7]](#footnote-7) More recently, in December 2019 the Inter-American Commission on Human Rights announced the completion of a report on the subject of the connection between corruption and human rights.[[8]](#footnote-8)

*Business corruption and its human rights impacts*:Commentators and policy makers have also increasingly highlighted the fact that corruption by private sector entities contributes to and exacerbates human rights violations and that there is a need for greater policy coherence between anti-corruption efforts on one hand and the business human rights agenda on the other.[[9]](#footnote-9) They comment on a trend towards convergence in company preventive measures with respect to anti-corruption and human rights.[[10]](#footnote-10)

Business corruption can come in various guises, from bribery to trading in influence to money laundering. As documented in Transparency International’s 2018 *Exporting Corruption* report, enforcement cases related to foreign bribery alone reveal that business corruption can be found in a wide range of sectors and processes, including among others the results of government procurement and licensing procedures, regulatory and legislative outcomes, the actions of law enforcement bodies and courts, and even the integrity of elections.[[11]](#footnote-11)

Human rights impacts may result from a range of corrupt activities and behaviours by private sector actors. Corrupt procurement of defective material may cause injury. Bribes paid by businesses or by producers in their supply chains to evade compliance with safeguards and regulations, including environmental regulations, may have harmful impacts on large groups of people. Bribes to secure a licence to mine can have a consequent negative impact on local communities.[[12]](#footnote-12) Through undue influence on public officials, companies may be permitted to distribute harmful products to consumers; to construct and use unsafe buildings; and to systematically exploit workers, including the use of slave labour. One of the most well-known examples of corporate corruption being linked to large-scale human rights disasters is the Rana Plaza factory collapse in 2013.[[13]](#footnote-13)

The human rights impact may be indirect but no less harmful when business corruption diverts public finances, skews procurement processes towards unqualified firms, and distorts government decision-making. One example is illicit lobbying to pay reduced taxes, which means money may not be available to provide essential services to the public. Companies may also use opaque campaign contributions, conflicts of interest and revolving doors to influence legislative and regulatory processes in ways leading to adverse human rights impacts. Where unscrupulous businesses are able to exercise undue influence over public policy decisions, they may use that influence to induce official to commit serious human rights violations in their interests.[[14]](#footnote-14)

In the most serious cases, business corruption enables or results in the commission of atrocity crimes, which can amount to crimes against humanity, for example, where companies pay bribes to repressive regimes to gain use of land. In light of cases of corruption with severe negative human rights impacts, Transparency International proposes a new definition of grand corruption and proposes that such cases be associated with special measures.[[15]](#footnote-15) This is discussed further in section II below.

In addition, businesses that enable, aid or abet the laundering of proceeds of corruption can indirectly contribute to negative human rights impacts. Such enablers include financial services providers, company formation agents, lawyers, real estate agents and accountants. They facilitate the laundering of the corruption proceeds, including through the use of opaque company ownership structures to conceal bribe payments and tax evasion.[[16]](#footnote-16)

These abuses can contravene almost all of the fundamental rights listed in the Universal Declaration of Human Rights and related documents.[[17]](#footnote-17) Apart from direct individual impacts, they often have large-scale indirect impacts, by depriving states of the resources needed to provide crucial public services and programmes that give effect to economic, social and cultural rights, including access to health and education, and services to strengthen the institutions that uphold civil and political rights. By obstructing important public policies, such as those designed to mitigate the effects of climate change, corporate corruption can have potentially enormous adverse impacts on the rights to life, food, water, health, housing and development.

Some key sectors with high risk of corporate corruption with adverse human rights impacts are considered in Section IV.

**II. Foreign bribery, human rights impacts and victims’ remedies**

***Guiding question 3:*** *What are the ways States should address the issue of corruption which has a connection to business-related human rights abuses? Are there areas where States should extend existing anti-corruption policy and regulations to encompass requirements for businesses to also respect human rights)?*

***Guiding question 6****. Are there ways in which victims of business and human rights related abuses used anti-corruption mechanisms to seek remedies for human rights abuses?*

One area where the adverse impact of corruption on human rights should be identified and addressed is in the context of foreign bribery enforcement. While to date this is seldom the case, there are some signs of slow change, with obstacles to overcome.

**Enforcement against foreign bribery as a human rights obligation**

Criminalisation of foreign bribery by companies is required under multiple international anti-corruption conventions, including the UN Convention against Corruption (UNCAC) and the OECD Anti-Bribery Convention.[[18]](#footnote-18) Major exporting countries have to a large extent followed through with the requisite legislative framework but thus far only a handful of countries - including the US and the UK– have over time introduced robust enforcement, including enforcement against companies. Enforcement against foreign bribery is lacking in most countries. [[19]](#footnote-19)

In that regard, the *UN Guiding Principles on Business and Human Rights* states that “failure to enforce existing laws that directly or indirectly regulate business respect for human rights is often a significant legal gap in State practice.[[20]](#footnote-20) Anti-bribery laws are then mentioned as part of “existing laws”. The failure to enforce laws against foreign bribery does indeed represent a failure of states to protect human rights and should be challenged as such by anti-corruption and human rights activists alike.

**Foreign bribery enforcement and victims’ compensation**

In international discussions about foreign bribery and in the national enforcement context, there is thus far little recognition of the impact of corruption on victims or on human rights, although there are signs of change. This is the case with respect to the companies or individuals paying the bribes as well as those facilitating them, including law and accounting firms and financial institutions.

*International legal framework*: The leading international instrument on the subject, the OECD Anti-Bribery Convention, makes no mention of harm or human rights and its monitoring process thus far does not generally cover the question of compensation or restitution to victims.

The United Nations *Declaration of Basic Principles of Justice for Victims of Crime and the Abuse of Power* adopted by the UN General Assembly in 1985 provides some guidance in terms of general principles covering the topics of access to justice and fair treatment, restitution, compensation, assistance and victims of abuse of power.[[21]](#footnote-21) On the question of compensation it states:

8. Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

This was supplemented in 2005 by the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* recognising the victims right to adequate, effective and prompt reparation for harm suffered and access to justice.[[22]](#footnote-22)

The 2003 UN Convention against Corruption (UNCAC) in its Article 32 calls on States Parties to protect and enable victims to have their views and concerns presented and considered during criminal proceedings against offenders. UNCAC Article 35 provides for States Parties to introduce measures ensuring that those who have suffered damage from corruption “have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.” Other provisions in UNCAC also address victims’ remedies, including Articles 53 and 57 in the chapter on asset recovery.[[23]](#footnote-23)

More recently, the UN Guiding Principles includes a chapter on access to remedy which includes as a foundational principle: “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”.

The concurrent revision of the *OECD Guidelines for Multinational Enterprises* (OECD MNE Guidelines) also emphasises remediation in its new human rights chapter which states that multinational enterprises should “[p]rovide for or co-operate through legitimate processes in the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts,” including due to bribery. The associated *OECD* *Guidelines Commentary on General Policie*s addresses due diligence (applicable to both human rights and bribery) and includes a requirement to address actual impacts through remediation.[[24]](#footnote-24) The *OECD* *Due Diligence Guidance for Responsible Business Conduct* (OECD Due Diligence Guidance) characterizes legal processes such as prosecution as common examples of state-based processes that enable remediation.[[25]](#footnote-25)

It is noteworthy that at the May 2016 London Anti-Corruption Summit with 42 participating countries, the final Communiqué stated that “Compensation payments and financial settlements, in countries whose legal systems and domestic policies accommodate, can be an important method to support those who have suffered from corruption. Those countries that accommodate such payments will work to develop principles to ensure that such payments are made safely, fairly and in a transparent manner to the countries affected.”[[26]](#footnote-26) In their country statements for the eight OECD Convention countries - Australia, Italy, Mexico, the Netherlands, New Zealand, Norway, Switzerland and the United Kingdom- included commitments to develop common principles governing the payment of compensation to the countries affected. [[27]](#footnote-27) A ninth country, Nigeria also made this commitment, specifically referencing foreign bribery.[[28]](#footnote-28)

*National law in general*: National law on the compensation of victims in the context of criminal law enforcement is summarised in a 2016 Note by the United Nations Office on Drugs and Crime (UNODC).[[29]](#footnote-29) Many States accord victims the right to participate in criminal proceedings as “*partie civile*” and to be awarded compensation as part of the judgement of conviction. In some States, the amount may be awarded out of a fine or from money in the possession of the offender. In others, the victim, his/her legal representative or the prosecutor on instructions from the victim may apply for compensation after conviction and prior to sentencing. Many States permit a victim to seek compensation through civil or administrative proceedings either in lieu of these avenues or as an additional one.

Taking the example of the United States, the Crime Victims Rights Act (CVRA) provides crime victims with a list of rights, including the right to timely notice of any proceeding involving the accused, the right not to be excluded from these proceedings, the right to be reasonably heard at sentencing, and the right “to full and timely restitution as provided in law.”[[30]](#footnote-30) The CVRA defines a “crime victim” as “a person directly and proximately harmed as a result of the commission of a Federal offense.” The Mandatory Victim Restitution Act and the Victims and Witness Protection Act also provide rights for victim*s*, including restitution*.*[[31]](#footnote-31) Further, a multiplicity of guidelines for prosecutors, including the US Justice Manual[[32]](#footnote-32) and the US Sentencing Guidelines[[33]](#footnote-33) foresee remediation and compensation by companies in the context of criminal law enforcement.[[34]](#footnote-34)

Under the French Criminal Procedure Code, victims who have been harmed, including states, may apply to be a *partie civile* and be a full party to the criminal proceedings. Under Article 2 of the Code, victims can bring a claim and obtain civil compensation from a criminal court when they can show personal and direct damage from the crime.

*National law on mitigation of liability through voluntary remediation*: In some countries, such as Spain and Czech Republic, a mitigating circumstance in relation to criminal liability includes “mitigation of damages caused as a consequence of the offense before the trial hearing takes place” (Spain)[[35]](#footnote-35) or “effort to restore damage or eliminate other harmful effects of the criminal act.” (Czech Republic) [[36]](#footnote-36)

Likewise, in the United States, among the factors prosecutors should consider in conducting an investigation, determining whether to bring charges, and negotiating pleas and other agreements, are “the corporation’s remedial actions, including any efforts to pay restitution.” [[37]](#footnote-37) This is included in the US Sentencing Guidelines[[38]](#footnote-38) as well as in the US Justice Manual Title 9 section on principles of federal prosecution of organisations which includes a subsection on restitution and remediation providing **as a general principle:**

“Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation's willingness to make restitution and steps already taken to do so.” It further says: “A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its acceptance of responsibility and … may be considered in determining whether to bring criminal charges.” [[39]](#footnote-39)

*National law on settlements/non-trial resolutions*: The UNODC report on compensation of victims also notes that various forms of settlements are used in criminal and civil proceedings to compensate victims. Some states permit procedures similar to settlements in the context of criminal proceedings through the use of plea agreements that can include victim compensation.

A 2019 OECD report on non-trial resolutions in foreign bribery cases outlines the opportunities for direct compensation to victims in such cases in the 27 jurisdictions surveyed.[[40]](#footnote-40) In Australia, a Deferred Prosecution Agreement (DPA) can require compensation to victims and Canadian Remediation Agreements can require reparations to victims. Under the French Sapin II law, a Public Interest Judicial Agreement (CJIP) can include an obligation to compensate any identified victims in an amount and following modalities determined in the CJIP. In the Netherlands, the Code of Criminal Procedure provides that victims can make claims in connection with settlements.[[41]](#footnote-41) A handful of OECD Convention countries provide for payments to a foreign charity or NGO. On the other hand, in some countries, like Germany, the legal reasoning is that in bribery of public officials the legal interest to be protected is the integrity of the office and this does not produce victims.

In the United States, compensation can be made in line with Victims and Witness Protection Act and the Mandatory Victim Restitution Act[[42]](#footnote-42) and consistent with the US Justice Manual section on plea agreements with corporations which states that “in the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures”. Whenever a bribe-payer is found guilty of, or pleads guilty to, conspiring to violate the Foreign Corrupt Practices Act (FCPA), thenunder both the Victims and Witness Protection Act and the Mandatory Victim Restitution Act[[43]](#footnote-43) a foreign government ‘directly harmed’ by the conspiracy has a claim for damages.” [[44]](#footnote-44) The court may also order, if agreed to by the parties in a plea agreement, “restitution to persons other than the victim of the offense”.

The United Kingdom has taken the lead in giving policy priority to compensation for victims in foreign bribery cases. The Crime and Courts Act states that a Deferred Prosecution Agreement (DPA) may impose on companies a requirement to compensate victims of an alleged offence. The Crown Prosecution Service (CPS), the National Crime Agency (NCA) and the Serious Fraud Office (SFO) have adopted a Common Framework of Principles, published in June 2018, with respect to providing compensation to victims as part of the resolution of foreign bribery cases, whether affected countries, companies or people.[[45]](#footnote-45)

Pursuant to these principles, the agencies work collaboratively with DFID, the Foreign and Commonwealth Office (FCO), Home Office and the Treasury to identify potential victims overseas, assess the case for compensation, obtain evidence in support of compensation claims, ensure the process for the payment is “transparent, accountable and fair”, and identify means by which compensation can be paid to avoid the risk of further corruption.

These provisions go in the right direction as called for in Transparency International’s 2015 proposals on settlements[[46]](#footnote-46) and the 2016 joint letter to the OECD from four civil society organisations on this subject in which we called for “compensation to victims, based on the full harm caused by the corruption, must be an inherent part of a settlement”.[[47]](#footnote-47)

*National practice*: There is only very limited experience of victims’ compensation in foreign bribery enforcement proceedings, whether on the basis of contractual restitution, tort damages, unjust enrichment or otherwise.[[48]](#footnote-48) Such experience as exists relates largely to state victims rather than non-state victims. Reasons for this are multiple - the remoteness of the location, the definition of victims, the difficulties in identifying direct victims and showing causation and the challenge of calculating damages. Furthermore, enforcement agencies in some supply-side countries reportedly reason that if they provide compensation to victims via the victims’ state, the funds will be recycled into further corruption.[[49]](#footnote-49)

As the OECD observed in its 2019 report, practice shows that compensation “has only occasionally been used when resolving foreign bribery offences. In these complex cases, those harmed by foreign bribery are, with the exception of competitors, often difficult to identify, or may be the population of a country as a whole, and restitution may present particular challenges because the harm may be difficult to quantify or because the money could be corruptly diverted again.”[[50]](#footnote-50)

Consequently, state treasuries in the supply-side countries carrying out foreign bribery enforcement are often filled with fines and disgorgement of profits from companies that have engaged in foreign corruption, while the state and people affected by the corruption are “left out of the bargain.”[[51]](#footnote-51)

In the United States, out of an estimated 500 Foreign Corrupt Practices Act cases[[52]](#footnote-52), restitution has been included in only a handful of settlements or judgements, with all the awards made to the state where the bribery occurred.[[53]](#footnote-53) This may in part be because of limitations resulting from the Crime Victims Restitution Act’s definition of crime victim as “a person directly and proximately harmed as a result of the commission of a Federal offense.” Additionally, the Mandatory Victims Restitution Act provides an exception to compensation for cases where determining the amount would be so complex that it would unduly delay resolution of the criminal case.

In the UK too, restitution and compensation have been granted in very foreign bribery few cases, with the process thus far focused on compensation to the state where the foreign bribery occurred and an agreed use of the funds.[[54]](#footnote-54) In the recent large-scale Rolls Royce and Airbus foreign bribery cases, the Serious Fraud Office did not seek compensation.[[55]](#footnote-55) The judgements in those cases suggest this is because compensation orders should only be applied in clear and simple cases.

In both the US and the UK and many other countries, existing standards regarding compensation of victims lead to the unfortunate situation where the more egregious, widespread and complex a bribery scheme, the less likely compensation will be sought despite the greater harm caused by such a scheme.

*Direct and indirect harm*: These standards do not, however, rule out compensation in cases where victims can demonstrate direct harm. Clearly, those persons should receive compensation in connection with criminal enforcement against the persons responsible. There may in some cases, for example, be individuals whose health or livelihood has been damaged due to foreign bribery, such as through the corrupt granting of a permit or licence.[[56]](#footnote-56) It may also be possible to identify the members of a broad class of victims that have suffered a direct, personal, concrete injury, for example where the bribery can be shown to have led to the consumption of tainted food or medicine or other specific harms.

However, in some large-scale corruption cases, such as those involving major procurements, the harm may be diffuse, indirect and widely shared. There may also be difficulties in identifying the victims, in measuring the harm and proving causation.[[57]](#footnote-57) Such difficulties should not mean that there are the fewest remedies for victims in the worst case of international corruption causing major losses to government treasuries.

The law on diffuse harm in many states is evolving as it did when environmental crimes first became actionable. OECD Convention states that already allow a compensation claim for diffuse harm from corruption include France where courts have granted reputational damages[[58]](#footnote-58) and moral damages[[59]](#footnote-59) and Costa Rica, which recognises social damages.[[60]](#footnote-60) The general rule appears to be that they should not be disproportionate.[[61]](#footnote-61) Interestingly, US law recognises the possibility of “community restitution” in connection with certain drug offenses where there is no identifiable victim but the offence causes “public harm.”[[62]](#footnote-62)

Where there is a large number of victims indirectly harmed, it is possible to develop a simple formula for compensation – for example, even if insufficient, it could consist in the amount of profits from the foreign bribery, which could be disgorged and applied to compensation of victims.

*Standards for transfer of compensation and restitution*: For cases of return of proceeds of corruption or transfer of compensation to states or non-state representatives, there are emerging standards for the transparent and accountable return of assets and models for organising the return that make it possible to meet those standards, most prominently the 2017 Global Forum on Asset Recovery (GFAR) *Principles for Disposition and Transfer of Stolen Assets in Corruption Cases*.[[63]](#footnote-63) In practical terms, possible arrangements could include a multi-stakeholder oversight body such as the BOTA Foundation in Kazakhstan established to administer returned funds;[[64]](#footnote-64) or Nigerian arrangements for the administration and monitoring of US$322 million in Abacha funds embezzled returned by Switzerland.[[65]](#footnote-65)

**Civil proceedings**

In civil as in criminal proceedings, state and non-state victims of corruption lack access to civil remedies for the impact of foreign bribery, something they have in common with victims of human rights abuses unrelated to corruption.

As noted in a 2019 study by the European Parliament on *Access to legal remedy by victims of corporate human rights abuses in third countries,* victims of corporate human rights abuses face many hurdles when attempting to hold corporations to account in the country where the abuses occurred. [[66]](#footnote-66) Against this backdrop, victims of corporate human rights abuses have increasingly relied on bringing legal proceedings in the home states of the corporations. However, there are hurdles in the home states of the corporations as well and effectively a lack of access to remedies for those affected by human rights abuses and environmental harms cause by EU companies.[[67]](#footnote-67) Likewise, a February 2020 study by the European Commission *on Due diligence requirements through supply chains* identifies some of the barriers to access to remedies within the EU and notes serious problems with respect to the states international obligations to ensure access to justice and effective civil remedies. [[68]](#footnote-68)

Furthermore, even if some of the barriers identified were surmounted, there is a need to ensure recognition that harms from foreign bribery (and other corruption offences) may, as mentioned above, be diffuse, indirect, and widely shared, something given little recognition in modern legal frameworks. These harms may be greater than those suffered directly by individuals and this area needs joint innovative thinking by anti-corruption and human rights practitioners.

**Grand corruption**

In recognition of the particular gravity of large-scale corruption involving high level officials, TI is proposing a definition of grand corruption that includes gross human rights violations, meaning that the two subjects would be considered together in a given case.[[69]](#footnote-69) Some foreign bribery cases would fall under the rubric of grand corruption. For example, when private sector actors bribe high level public officials or participate in the commission of corruption offences involving such officials, leading to a significant misappropriation of public funds, or when systemic corruption prevails, including state capture.

Among the potential implications of the introduction of such a definition into national legislation would be the recognition of standing for non-state representatives to initiate cases in foreign jurisdictions on behalf of the injured population, claiming assets and reparations. This is necessary because in states where grand corruption occurs, the injured population is usually denied recourse by a flawed justice system where public prosecutors or judges fail carry out their duties faithfully, because they are either unwilling or unable due to interference.[[70]](#footnote-70) Any compensation awarded would of course need to be administered carefully,

**Recommendations:** It is time to make progress on international standards on compensation to victims for harms and human rights impacts, including recognition of social damages. National legislation and practice should ensure that victims are represented and their harm is remedied in enforcement proceedings and consideration should be given to special measures to address grand corruption, including special standing for non-state victims. National governments should also ensure that victims have access to civil remedies for the harm from foreign bribery.

More specifically, foreign bribery enforcement should include as standard practice: notifications to victims, where possible; victim impact assessments; avenues for state and non-state victims claims for compensation or restitution; and, provision for other remedies for foreign bribery impacts. Countries should also use avenues for companies to mitigate liability by voluntarily remediating harm in the context of foreign bribery enforcement.

The damages recognised from foreign bribery, and corruption more generally, should include social and collective damages – justice requires that harms to the population and its institutions also be remediated. In the case of return of funds to affected states or into the hands of representatives of a class of victims, the Global Forum on Asset Recovery (GFAR) Principles should be followed.

The Working Group on Business and Human Rights could play an important role in fostering discussions and collaboration on these subjects, including facilitation of interdisciplinary, multi-stakeholder discussions on this subject, involving the UN Human Rights Council, the OECD Working Group on Bribery and the UNCAC Conference of States Parties, among others.

**III.** **Anti-corruption and human rights compliance**

***Guiding question 4****. How can anti-corruption compliance and human rights due diligence be better coordinated within companies as part of an overall approach to responsible business conduct? What are examples of good practice?*

Corporate compliance and due diligence have evolved separately for anti-corruption and human rights but there is a welcome trend towards combining the two processes, supported by internationally agreed guidelines and this should advance further in light of the linkages between efforts to prevent corruption and to prevent adverse human rights impacts.

**Separate approaches to foreign bribery and human rights**

Over the last two decades, many companies have introduced robust anti-corruption and anti-money laundering compliance programmes as a result of sectoral, domestic and international anti-corruption standards, combined with significant enforcement action in some countries against international corruption involving corporations which can result in substantial fines.[[71]](#footnote-71) However, their anti-corruption due diligence only extends to third party partners, including the first tier of the supply chain.

Key models are UK Bribery Act’s provisions on “adequate procedures” to prevent foreign bribery and the US reference to “adequate and effective” compliance systems in criminal procedures including sentencing, discussed below. Potential debarment from procurement and sanctions in the export credit context for corporate bribery have undoubtedly also influenced companies’ approaches to corruption risks.

In contrast, in the absence of mandatory due diligence requirements and enforcement on the part of states regarding multinationals’ adverse human rights impacts, the majority of companies have not yet developed similar levels of organisational capacity and structure to conduct human rights “due diligence”, let alone building full-scale human rights compliance programmes.[[72]](#footnote-72) This is confirmed by the Corporate Human Rights Benchmark for 2019.[[73]](#footnote-73)

Human rights and ESG[[74]](#footnote-74) assessments and associated due diligence are usually performed by Corporate Social Responsibility (CSR) departments, which do not always collaborate productively with the legal and compliance departments that deal with anti-corruption compliance.[[75]](#footnote-75) Moreover, since to date companies have not generally faced significant financial or other penalties for their human rights abuses, corporate managers may view CSR as less of a priority than compliance with foreign bribery legislation.

**New international standards combining corruption and human rights**

Since the adoption of the UN Guiding Principles by the UN Human Rights Council in 2011 there are signs of change in the disparate approaches to anti-corruption and business human rights, both in terms of international guidelines and company practices. As a first step, the OECD MNE Guidelines*,* revised in 2011[[76]](#footnote-76), its OECD Due Diligence Guidance adopted in 2018[[77]](#footnote-77) and various sector-specific guidances[[78]](#footnote-78) provide for similar due diligence in private sector entities with regard to both human rights and anti-corruption.

By incorporating elements from the UN Guiding Principlesin the 2011 revision, the OECD MNE Guidelines extended the scope of due diligence and supply chain management to cover human rights in a comprehensive approach that also includes the areas of employment, environment and anti-corruption. The OECD Due Diligence Guidance covers policies and measures that companies can voluntarily adopt to prevent and mitigate both human rights abuses and corruption. It identifies six steps, including provision for cooperation in victim remediation, to avoid adverse impacts related to workers, human rights, the environment, bribery, consumers and corporate governance that may be associated with their operations, supply chains and other business relationships. It foresees combined approaches to corruption and human rights in codes of conduct, trainings, KPIs, tone from the top, operating policies, public declarations, and international reporting.

In view of the trend towards combining anti-corruption and human rights compliance, the UN Global Compact’s noteworthy 2016 *Good Practice Note* on *Linking Human Rights and Anti-Corruption Compliance* offers some valuable recommendations.[[79]](#footnote-79)

Furthermore, societal expectations are changing. As part of an emerging shift towards a broadened “Purpose of a Company”[[80]](#footnote-80) beyond profit maximization, the discourse in at least two business forums calls for companies to have a responsibility to act for the benefit of the societies in which they operate.[[81]](#footnote-81) These responsibilities include payment of living wages and a fair share of local taxes, preventing corruption in their business dealings and upholding human rights standards.[[82]](#footnote-82)

These developments recognise that companies should see anti-corruption and respect for human rights as part of one holistic business challenge and that human rights due diligence should be embedded into existing risk management and compliance systems. It should go beyond addressing identified risks for the company and take rights-holders into account, “assessing responsibility across its value chain and considering risk to others including to victims”. [[83]](#footnote-83) A horizontal integration between different departments of a company is crucial, where findings from human rights impact assessments are embedded across relevant internal functions and processes, including compliance, anti-corruption and CSR.[[84]](#footnote-84)

**Anti-corruption compliance programmes incentivised by foreign bribery enforcement**

Anti-corruption compliance standards in the foreign bribery enforcement context have not been updated to reflect the push towards convergence in the new international standards mentioned above. In contrast to human rights due diligence, anti-corruption compliance is driven by the risk of enforcement sanctions for the prohibited conduct and not the risk of adverse impacts on people, the environment and society that enterprises cause, contribute to, or to which they are directly linked through their business relationships.

*International compliance standards:* International guidance on adequate compliance systems for preventing bribery was adopted by the OECD Working Group on Bribery in 2009, in the form of *Good practice guidance on internal controls, ethics and compliance* for companies. This is an annex to the 2009 Anti-Bribery Recommendation, which is currently under review.[[85]](#footnote-85) Given that the OECD Anti-Bribery Convention makes no mention of victims and human rights impacts, likewise the proposed compliance process does not include any elements with respect to preventing any adverse human rights impacts or ensuring remediation of harm to victims. Further, it does not refer to the whole supply chain, only going to the level of third party partners, including first tier suppliers.

The guidance includes twelve recommendations for effective internal controls, ethics, and compliance programmes to prevent and detect foreign bribery including: (1) senior management support and commitment; (2) a corporate policy; (3) compliance is the duty of individuals at all levels; (4) oversight by senior corporate officers, including the authority to report matters to independent monitoring bodies; (5) ethics and compliance programmes applicable to all levels and applicable to all entities over which a company has effective control and covering specified areas; (6) ethics and compliance programmes applicable to third parties such as agents and other intermediaries, consultants, representatives, distributors, contractors and suppliers, consortia and joint venture partners- this should include risk-based due diligence; (7) financial and accounting procedures; (8) communication and training; (9) support to compliance measures; (10) disciplinary procedures; (11) internal reporting procedures; (12) periodic review.

With respect to the concept of responsible business conduct which includes human rights and anti-corruption, Transparency International has recommended to the OECD Working Group on Bribery that it use of the six steps of due diligence developed in the OECD *Due Diligence Guidance for the Good Practice Guidance on Internal Controls, Ethics, and Compliance* when revising the 2009 *Recommendation on Further Combating Bribery of Foreign Public Officials in International Business Transactions*.[[86]](#footnote-86)

*National level compliance standards*: The approaches in France, on the one hand and the United Kingdom and the United States, on the other hand, provide two different models of anti-corruption compliance standards, with a mandatory anti-corruption preventive model in France and a non-mandatory enforcement-based model in the UK and the US.[[87]](#footnote-87)

In France, the Sapin II legislation passed in 2016 lays down an obligation for large companies to implement **a corruption prevention plan, with eight measures including a code of conduct, a risk mapping, due diligence procedures, employee training, an internal whistleblower mechanism, a disciplinary regime to sanction violations of the code and procedures to assess the efficiency of compliance**.[[88]](#footnote-88) The French Anticorruption Agency can penalise any failings with regard to these obligations, including issuing a formal warning or imposing a fine of up to €1 million for legal entities and €200,000 for natural persons, and make the proposed penalty public. This can be done even where no corrupt activity has taken place.

The Sapin II provision on due diligence calls for “procedures for assessing the situation of customers, first-tier suppliers and intermediaries with regard to risk mapping.” (Article 18 II 4) In this connection, the French Anticorruption Agency’s guidance on due diligence lists as third-parties with whom the company has a business relationship “customers, suppliers, agents and contractors. Going beyond that, in a section titled “Other Players” it also says that

“Organisations may do business in ecosystems involving several players, without necessarily being linked to each of them (e.g. supply chains). In such cases, organisations should ensure that the third parties they deal with do their own third-party due diligence. Organisations should also assess the level of third-party risk associated with the distribution channel used and/or the use of an agent.[[89]](#footnote-89)

This is an important step forward compared with systems in other major exporting countries.

By contrast, the Foreign Corrupt Practices Act (FCPA) in the United States, the Bribery Act in the United Kingdom and the anti-corruption laws in many countries do not specifically oblige companies to adopt a compliance programme as the French system does nor provide for sanctions for failure to do so.[[90]](#footnote-90) However, under those systems such programmes can be used as an instrument to mitigate or inhibit liability. By establishing standards in an enforcement context for what are considered adequate systems and procedures, they give strong incentives for those standards to be followed.[[91]](#footnote-91)

In terms of their due diligence requirements, in the US, the UK and other major exporting countries, guidelines in the foreign bribery enforcement context do not discuss anti-corruption due diligence beyond the first tier of the supply chain, in contrast to human rights due diligence which includes the entire supply chain. [[92]](#footnote-92)

In the US, the guidance on compliance systems relates to corporate liability for federal crimes.[[93]](#footnote-93) The US Department of Justice (DOJ) produced a guidance document in 2017 on *Evaluation of Corporate Compliance Programs*, updated in 2019.[[94]](#footnote-94) This references two other documents that incentivise effective compliance programmes. The first of these is the Principles of Federal Prosecution of Business Organizations in the *US Justice Manual*, which includes among the factors to consider in conducting an investigation of a corporation, the “adequacy and effectiveness of a company’s compliance program at the time of an offense and charging decision”.[[95]](#footnote-95) The second document is US Sentencing Guidelines chapter on Organizations which says that consideration should be given to “whether the corporation had in place at the time of the misconduct an effective compliance (and ethics) program for purposes of calculating the appropriate organizational criminal fine.”[[96]](#footnote-96) The consideration of compliance programmes in the context of investigations and sentencing provides a strong incentive to companies.

The DOJ *Evaluation of Corporate Compliance Programs* document is intended to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation’s compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution. It covers a number of areas including risk assessment, training and communications, confidential reporting structure and investigation process and third party management. Its section on Third Party Management says that

“[a} well-designed compliance program should apply risk-based due diligence to its third-party relationships. Although the degree of appropriate due diligence may vary based on the size and nature of the company or transaction, prosecutors should assess the extent to which the company has an understanding of the qualifications and associations of third-party partners, including the agents, consultants, and distributors that are commonly used to conceal misconduct, such as the payment of bribes to foreign officials in international business transactions.”[[97]](#footnote-97)

The line is drawn at direct third-party partners, albeit with some flexibility. There is no reference to management of supply chains.

In the UK, the 2010 Bribery Act created a new corporate criminal offence of failure by a commercial organisation to prevent a bribe being paid to obtain or retain business or a business advantage. As a defence, a company can prove that the organisation has adequate procedures in place to prevent bribery. As in the US, arguably more so, this creates an incentive for companies to have adequate anti-corruption compliance programmes.

In 2011, the UK Ministry of Justice issued *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing.[[98]](#footnote-98)* The guidance is formulated around six principles. Principle 3 on Risk Assessment says “The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it.” Principle 4 on Due Diligence involves “taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.” As in the US, there is no reference to management of supply chains.

In the context of discussions of combining anti-corruption and human rights compliance and due diligence, the French preventive model offers an important alternative to existing enforcement-based models.

**Mandatory human rights due diligence**

In the human rights field, new developments in the form of mandatory due diligence for some human rights issues are changing incentives. Two notable pieces of legislation in France and the Netherlands make it more likely that human rights due diligence will be taken more seriously in the future, especially if replicated in other countries.

The ground-breaking French Duty of Vigilance Law of 2016 establishes a legally binding obligation for parent companies to establish “vigilance measures” to identify risks and prevent adverse severe human rights violations, human health and safety and environmental impacts resulting from their own activities, from operations of companies they control, and from operations of their subcontractors and suppliers, with whom they have an established commercial relationship.[[99]](#footnote-99)

One noteworthy aspect of this obligation is that it requires a fully-fledged compliance programme, as is required in the context of anti-corruption prevention. Furthermore, interested parties – including affected people and communities – can hold companies accountable for failure to comply with this duty through a civil action under relevant French legal provisions seeking compensation for the harm that due diligence would have permitted to avoid. On the other hand, the law limits supply chain responsibility to established commercial relationships, rather than farther down the supply chain.

There are signs that additional countries are seriously considering mandatory due diligence legislation[[100]](#footnote-100) and in April 2020, the European Commissioner for Justice, Didier Reynders, announced that the Commission commits to introducing rules for mandatory corporate environmental and human rights due diligence.[[101]](#footnote-101)

Legislation in the Netherlands has a narrower scope but provides a model that seems to offer strong incentives. The Dutch Child Labour Due Diligence Law passed in 2019 introduced mandatory due diligence in relation to child rights.[[102]](#footnote-102) The Dutch law requires companies (including foreign companies) selling goods and services to Dutch end-users to determine whether child labour occurs in their supply chains. If so, companies must formulate a plan of action on how to combat it and issue a due diligence statement on their investigation and plan of action.[[103]](#footnote-103) If there are indications that a company’s products or services were produced with child labour, individuals and organizations can file a complaint with the regulator. The law provides for substantial enforcement measures including fines and even imprisonment of company directors.

In some countries, there are discussions about adapting regulatory mechanisms previously used in the anti-corruption field to the field of human rights. For example, there was a suggestion in a UK parliamentary report that a “duty to prevent” offence should be introduced when handling human rights violations involving business.[[104]](#footnote-104) Such an offence could be modelled along section 7 of the UK Bribery Act of 2010, transposing into a “failure to prevent human rights harms”.[[105]](#footnote-105)

In 2019, the European Union published a study on due diligence requirements looking at existing regulations as well as proposals for due diligence in companies’ own operations and through the supply chain for adverse human rights and environmental impacts, including relating to climate change. It considers regulatory options, including the possibility of introducing due diligence requirements as a legal duty of care at the European level.[[106]](#footnote-106)

*Combining anti-corruption and human rights due diligence*: Examples of combining corruption and human rights considerations and conditions are very limited to date. In France, where there are in principle two sets of compliance requirements, it seems that the Anticorruption Agency recognises that some anticorruption measures may also be used to support a vigilance plan.[[107]](#footnote-107) This seems a very promising way forward.

The EU has taken some modest steps towards combining anti-corruption and human rights conditions with reporting as well as with respect to procurement, as will be described in the next section. The 2014 EU Non-Financial Reporting Directive establishes a coherent legal framework across corruption and human rights risks.[[108]](#footnote-108) It requires large companies to disclose certain information on the way they operate and manage social and environmental challenges, including policies on respect for human rights and on anti-corruption and bribery.

However, the Directive does not address the full spectrum of corruption risks that a company should manage and be transparent about (organisational transparency, ownership transparency, corporate political engagement transparency and country by country reporting) and the Directive has other loopholes and gaps which prevent it from achieving its intended objectives. The European Commission has launched an initiative to revise the Directive which offers an opportunity to address the loopholes.[[109]](#footnote-109)

This is an evolving area with much potential. There is a compelling logic to having companies combine anti-corruption and human rights due diligence insofar as both should take account of the potential impact of company activities on the people where they operate. Additional incentives will encourage companies to go down that path.

**Recommendation**: There are important emerging new models for combining anti-corruption and human rights compliance and due diligence and avenues for jointly promoting them.

It is timely to consider mandatory comprehensive compliance and due diligence systems for multinationals for corruption and human rights, with due diligence to the end of the supply chain for both anti-corruption and human rights and effective protection of whistleblowers in one system. Due diligence processes should include identification of the beneficial owners of companies that act as agents, partners and suppliers for both types of risk and compliance and there should be appropriate due diligence in case of high exposure to risk. Requirements for companies to periodically report on their compliance systems and clarification of their liability to injured parties when they fail to fulfil these requirements should be included in new standards.

The Working Group on Business and Human Rights could play an important role in convening multi-stakeholder discussions among representatives of civil society organisations, business, national agencies and international organisations on experiences, best practices and proposals.

**IV. Sectors at high risk of human rights abuses due to business corruption**

***Guiding question 1****: Are there key sectors or key areas where corruption leads to human rights abuses with a business nexus (For example in particular actors or in specific areas such as large-scale land acquisitions or government procurement)?*

Some sectors are at greater risk of human rights abuses linked to business corruption than others. Notably at risk are the extractives, pharmaceuticals and defence industries, as well as large-scale land-based investments.[[110]](#footnote-110) The human rights abuse risks include those against labour rights, and modern slavery in corporate supply chains.[[111]](#footnote-111) These sectors share a number of common characteristics, such as potentially high value investment and significant interaction with government officials, being under significant government regulation, providing incentives and opportunities for corruption.[[112]](#footnote-112)

International standards relating to due diligence in supply chains can be extremely useful for multinational businesses in the various sectors mentioned above to build and strengthen internal systems and mechanisms to identify, detect and mitigate risks of human rights abuses. In this regard, the OECD *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* is a useful resource to help companies better manage the minerals supply chain transparently and with integrity.[[113]](#footnote-113)

Below is an overview of linkages between business corruption and human rights abuses in the mining and extractives industries; large-scale land-based investments; healthcare and defence sectors. The examples provided in this section point to the need for enforcement authorities to consistently consider potential human rights impacts in the context of enforcement cases involving business corruption and for companies to implement joint anti-corruption and human rights compliance programmes.

**Mining and Extractives Industries**

As observed by the U4 Anti-Corruption Resource Centre, “finding examples of corruption in extractive industries is easy. Corruption is widespread and endemic in the oil, gas, and mining sectors.”[[114]](#footnote-114) This typically occurs in the form of permits, concessions, licenses, and tax collection, as well as the (lack of) enforcement of environmental and safety regulations and lack of meaningful community engagement and public participation. What is more, mining activities often mean operating in countries which are considered as “hotbeds” of corruption, or where there is the perception that it is very difficult to secure contracts without “well-connected” intermediaries.[[115]](#footnote-115)

Despite the efforts of initiatives such as the Extractive Industries Transparency Initiative, corruption in these industries flourishes as a result of complex and often highly politicised procedures vulnerable to corruption and abuse of power, such as mining approvals being granted by corrupt ministers for personal gain. It is further aggravated by widespread opacity. With billions of dollars invested and with many jobs being generated by these sectors the stakes are very high, starting from the approvals process.[[116]](#footnote-116)

Of particular concern is the fact that the lack of beneficial ownership transparency, weak due diligence processes and insufficient consultation with affected communities continue to be the norm in the mining industry, as highlighted in a recent Transparency International report.[[117]](#footnote-117) The result is that licences are frequently granted to “unqualified or unethical operators.”[[118]](#footnote-118)

Poor governance and rampant corruption in natural resource management has severe ramifications for human rights and livelihoods of people affected by the activities of business operating in the sector. This occurs through violation of traditional land rights, forced evictions/resettlements and the de facto denial of access to safe water as a result of polluted and dangerous runoff from mining operations. All too often, already marginalised groups, such as indigenous peoples and those living in extreme poverty, are disproportionately affected.[[119]](#footnote-119) In addition, corruption exacerbates existing gender discrimination and hinders women from gaining full access to their civic, social and economic rights, including health, clean environment and an adequate standard of living. Lack of women’s participation in mining-related consultations and community development plan negotiations may mean that the potential impact of the mining project on women will not be captured or taken into serious consideration and mitigated in mining operations.[[120]](#footnote-120)

A compelling example of this is the profound linkages between business corruption, conflict and human rights abuses in the extractive industry of the Democratic Republic of the Congo, where both large scale and artisanal mining are mired in corrupt networks. [[121]](#footnote-121) An estimated 58% of the world’s cobalt in 2017 originated from Congo, a metal, which is widely used in electrical vehicle manufacturing, automotive and consumer electronics industries.[[122]](#footnote-122) While many large- scale cobalt concessions have been granted with almost total opacity as to the ownership and contractual obligations of the winning entities, artisanal mines are largely controlled by people with connections to the country’s political elite.[[123]](#footnote-123) The artisanal mining sector as a whole is plagued by severe human rights violations, including child labour, slavery, dangerous working conditions, and sexual exploitation.[[124]](#footnote-124)

In this context, a recent case relating to the Kingamyambo Musonoi Tailings (KMT) cobalt and copper mine in Kolwezi, Democratic Republic of Congo (DRC) demonstrates how lack of beneficial ownership transparency and corrupt schemes including payment of bribes to high ranking officials in relation to licensing processes may lead to human rights abuses. In 2009, the DRC government confiscated the Kolwezi mine from its owner First Quantum Minerals, allegedly as a result of a corruption scheme.[[125]](#footnote-125) In 2010, the Congolese government announced that it had sold the rights to KMT to a company owned by Israeli businessman Dan Gertler. By 2011, the mining company ENRC reportedly held a majority stake in KMT through purchasing shares in a Gertler company.

In 2016, the US Department of Justice (DOJ), after an investigation that started in 2011 reached a Deferred Prosecution Agreement (DPA) with Och-Ziff Capital Management Group LLC. The DPA referred to the alleged bribery of high-level Congolese officials, as well as senior government officials in other African countries.[[126]](#footnote-126) It stated that the “DRC Partner”, an Israeli businessman, together with others, paid US$ 100 million in bribes over a decade for Och-Ziff to have “special access to and preferential prices for opportunities in” the government-controlled mining sector in the DRC. In 2017, the US Department of the Treasury placed Dan Gertler on its Global Magnitsky sanctions list describing him as is an international businessman and billionaire who has amassed his fortune through hundreds of millions of dollars’ worth of opaque and corrupt mining and oil deals in the Democratic Republic of the Congo (DRC).[[127]](#footnote-127) The following year they sanctioned “fourteen entities affiliated with corrupt businessman Dan Gertler” under the Global Magnitsky Act.[[128]](#footnote-128)

Gertler used an opaque beneficial ownership structure, profited from his “close relationship to DRC’s former president”,[[129]](#footnote-129) paid bribes to one of former Congolese president Joseph Kabila’s advisors and acted as a “middleman” in the sale of the KMT mining assets.[[130]](#footnote-130)

Having acquired the KMT mine assets through a path of opaque beneficial ownership schemes, ENRC did not work towards the economic and social benefits which were promised to the local community by the mine’s previous owner, First Quantum. The International Finance Corporation (IFC) being a major investor to First Quantum, had required it to provide social and economic benefits to the local communities and better working conditions for the local miners with a clean and measurable baseline.[[131]](#footnote-131) However, following the sudden cancellation of First Quantum’s mining licence in 2009, all community development projects for the local community of 32,000 people (including access to clean water; to education; healthcare as well as alleviation of water and air pollution) were stalled until 2018 when ENRC restarted these projects. In addition, 700 local miners lost their jobs alongside the corresponding free healthcare and other social benefits following the closure of the KMT mine.

The UK Serious Fraud Office has been investigating ENRC since 2014 focused on allegations of fraud, bribery and corruption around the acquisition of substantial mineral assets.[[132]](#footnote-132) The NGO RAID in the UK has been working to assist some of the victims to file claims together with a local NGO, and has taken up this case.

**Large-scale land-based investments**

Transparency International defines land corruption as “the abuse of entrusted power for private gain while carrying out the functions of land administration and land management.”[[133]](#footnote-133) A recent study on Liberia, Sierra Leone and Zambia found that corruption in the land sector is widespread, and that some of its most pernicious forms involving private sector investors result in human rights abuses, including forced eviction, losses of livelihood, forests, agricultural areas, social status, income and even life as well as environmental damage.[[134]](#footnote-134) Women in particular were identified as being disproportionately affected by corruption in land-based investments, facing not only social discrimination and sexual extortion, but also considerable barriers to remedy and redress.[[135]](#footnote-135) In Zimbabwe, for instance, an ethanol company, Green Fuel, started to encroach on land plots of the local community, and in some cases vulnerable women traded sex in exchange for plots as compensation for the land taken over by the company.[[136]](#footnote-136)

Private companies play a driving role in corruption in the large-scale land-based investments. This can be through building a new plant in a rural community, or redevelopment and housing projects with lack of public consultation in the design and implementation of such projects.[[137]](#footnote-137) According to TI’s research, foreign companies are known to bribe local officials or traditional leaders to acquire customary land for commercial agriculture or mining purposes, often riding roughshod over the wishes of the affected community.[[138]](#footnote-138)

Another corruption risk in awarding housing contracts and large-scale land deals is the absence of transparent procurement processes.[[139]](#footnote-139) Such opaque deals may deny citizens their right to “accessible and adequate” housing, especially those who are socially more marginalised and poorer. In the absence of sufficient laws and regulations, without adequate information on the beneficial ownership of foreign investors and with no consultation process with the local communities, large-scale land deals may render these groups further vulnerable, threatening their food security, and therefore right to adequate food. [[140]](#footnote-140)

**Healthcare**

The right to health and access to health goods, or medicines, is well-nested within international human rights law.[[141]](#footnote-141) Globally, over 7% of healthcare expenses are estimated to be lost to corruption, amounting to USD 7.5 trillion,[[142]](#footnote-142) which could have contributed to universal health coverage worldwide if that corruption had been curbed.[[143]](#footnote-143) Within the healthcare sector, pharmaceuticals stands out as the sub-sector that is particularly prone to corruption. There are abundant examples globally that display how corruption in the pharmaceutical sector endangers individuals achieving their right to health and access to healthcare services. Whether it is a pharmaceutical company bribing a doctor for prescribing its medicines irrespective of a health need or a government employee facilitating the infiltration of substandard medicines into the distribution system, public resources can be wasted and patient health put at risk, resulting in inadequate or no access to quality healthcare services around the world.[[144]](#footnote-144)

While the pharmaceutical industry has a long history of engaging in corruption and especially foreign bribery,[[145]](#footnote-145) the wider impact of these nefarious practices on human rights was rarely the focus of the prosecution. Yet the link is clearly evident in a case from 2019, in which the founder of Insys Therapeutics, was convicted of bribing doctors to prescribe opioids, a type of addictive painkillers that have claimed almost 400,000 lives in the US alone.[[146]](#footnote-146) This is not an isolated incident: in January 2020, another company, Allscripts Practice Fusion was fined US$ 145 million after admitting that it “solicited and received kickbacks from a major opioid company” in exchange for “clinical decision support alerts” that promoted unnecessary prescription opioids.[[147]](#footnote-147)

Research reveals that doctors who receive gifts from pharmaceutical companies prescribe fewer generic drugs in favour of more expensive original products, which can lead to prescribing drugs with more adverse side effects.[[148]](#footnote-148) Furthermore, research has shown that industry-sponsored clinical trials are more likely to publish favourable results.[[149]](#footnote-149)

Corruption in healthcare spans the whole health value chain, from policy-making, research and development, procurement to service delivery. What is more, undue influence of powerful industry groups and companies with disproportionate resources, and conflicts of interest of politicians that have personal connections to or financial interest in certain suppliers may all adversely affect healthcare services and treatments.[[150]](#footnote-150) Such cases of undue influence severely disrupt essential rights related health as outlined by SDG 3[[151]](#footnote-151), in particular SDG 3.8 on universal health coverage.[[152]](#footnote-152) Health corruption is often highly contextualised and the nature of cases can vary according to the context. However, the outcome is always the same – the human right to health is undermined.

The severe and widespread corrupt practices including foreign bribery in the pharmaceutical and health sectors can be illustrated with the two following cases:

In the case of Swiss pharmaceuticals company Novartis, enforcement actions have been undertaken in the US (for illegal payments to US pharmacies and to healthcare professionals in China), in Poland (for an employee’s improper payment to gain backing for the sale of a drug)[[153]](#footnote-153) and in South Korea (for offering doctors kickbacks for recommending its drugs). [[154]](#footnote-154)There is also an ongoing investigation in Greece (as of 2019).[[155]](#footnote-155) In addition, a whistleblower has made claims in relation to Novartis’ activities in Turkey.[[156]](#footnote-156) In one US case, in 2015, the U.S. Attorney for the Southern District of New York announced a US$ 370 million civil fraud settlement (together with a US$20 million forfeiture of proceeds) against Novartis Pharmaceuticals in relation to an alleged kickback scheme involving payments to specialty pharmacies to recommend two high-priced prescription drugs.[[157]](#footnote-157) In a second US case, in 2016 Novartis agreed to pay US$ 25 million fine to settle charges that it violated the Foreign Corrupt Practices Act “when its China-based subsidiaries engaged in pay-to-prescribe schemes to increase sales”. The SEC charged that two of the Novartis China subsidiaries made illegal payments, including gifts, vacations and entertainment to healthcare professionals in China between 2009 and 2011, whereby Novartis “violated the FCPA’s internal controls and books-and-records provisions.[[158]](#footnote-158)

Another healthcare company, the Germany-based dialysis clinic operator Fresenius Medical Care was fined US$ 231 million in 2019 to resolve investigations by the US Department of Justice (DOJ) and the SEC into FCPA violations based on DOJ allegations of various corrupt schemes and bribes the company paid to public health officials in 17 countries. The company admitted to having bribed “publicly employed health and/or government officials to obtain or retain business in Angola and Saudi Arabia” between 2007 and 2016.[[159]](#footnote-159) It also admitted that in Angola and Saudi Arabia, as well as in Morocco, Spain, Turkey and countries in West Africa (including Benin, Burkina Faso, Cameroon, the Ivory Coast, Niger, Gabon, Chad and Senegal), it knowingly and wilfully failed to implement reasonable internal accounting controls over financial transactions and failed to maintain books and records that accurately and fairly reflected the transactions.”[[160]](#footnote-160)

These examples illustrate the detrimental repercussions of widespread corruption in the big pharma industry on the fundamental human right to health. Especially with the COVID-19 pandemic transparency, openness and integrity of the healthcare sector and of the respective businesses is of critical importance. Corruption during crisis times may further exacerbate the adverse impact corruption has on access to healthcare. Transparency in clinical research to cure COVID-19, delivery of high-quality equipment and supplies, whistleblower protection of healthcare professionals, and equal access to “life-saving” treatment where it is most needed during the current crisis will be of crucial importance in addressing fundamental rights related to health.[[161]](#footnote-161) Healthcare and pharma industries’ responses to COVID-19 will be a litmus test for responsible business and not to “put profit before all else”.[[162]](#footnote-162)

**Defence Sector**

The defence sector is highly vulnerable to corruption compared to other sectors, especially given the vast sums of money spent in this sector each year. In 2019, global military expenditure reached $1.9 trillion according to SIPRI, and involved high-value contracts.[[163]](#footnote-163)

Globally, the defence sector often lacks governance safeguards and standards, with little to no attention being given to transparency and accountability in this sector, due to it being considered a “national security” concern for governments.[[164]](#footnote-164) Furthermore, in many countries there is little independent oversight and audit of defence budgets. Only three OECD countries have evidence of parliamentary oversight of “secret” spending.[[165]](#footnote-165) Added to this, the secretive nature of defence sector and the necessity for quick and expert decision-making to tackle security threats often result in military decisions being excluded from traditional accountability mechanisms. Such mechanisms as exist, including parliamentary oversight committees may also not be equipped with the necessary technical knowledge to conduct effective oversight.[[166]](#footnote-166)

Contracting in the defence sector is highly political, resulting in opaque relationships between governments and defence companies. To better illustrate this close relationship, the nine largest arms manufacturers in Europe spent nearly €3.6 billion on defence lobbying in 2014.[[167]](#footnote-167)

Corruption in the defence sector may result in abuses of human rights to life and security or fuel emerging conflicts due to the secrecy around arms trade. Human rights abuses have been documented by civil society groups and the United Nations. On some occasions, civil society organisations challenged the lawfulness of arms export licencing processes, including human rights and international humanitarian law violations stemming from the European arms exports to Saudi Arabia.[[168]](#footnote-168) Secrecy around the arms trade may also contribute to long-lasting wars, which exacerbate poverty and inequality, and mean that governments pay little attention to the development and public service priorities of their societies.[[169]](#footnote-169)

Corruption and opacity within the defence sector may also result in public resources being diverted away from essential public activities and services, including provision of infrastructure, health and education, which means these are denied to rights holders.[[170]](#footnote-170). For example, in Nigeria US$15 billion was lost over 5 years due to fraudulent defence procurement contracts, which could have supported essential public services, including health and education.[[171]](#footnote-171)

A South African case shows the link between the lack of transparency often found in arms deals and the diversion of resources needed for basic and critical public services, possibly involving underlying corruption. The Strategic Defence Procurement Package offset agreements in South Africa usually include promises of investment, such as sustainable economic development, job creation, R&D and technology transfer. More specifically, such offsets have been used to “counter the cost of large-scale government procurement, often as a way of justifying the large expenditure on arms.”[[172]](#footnote-172) Depending on the amount of the defence procurement contracts, companies were required to take part in such Industrial Participation Programmes.[[173]](#footnote-173) As the Transparency International National Chapter in South Africa, Corruption Watch, points out in an article, a report from 2014 by the Department of Trade and Industry highlighted that the “fruits of these offsets have not materialised”.[[174]](#footnote-174)

In this context, the Strategic Defence Packages Performance Review Report audited 40 of the 121 offset deals signed, which were found to be unsatisfactory when it came to job creation and other benefits, in particular access to economic rights for the South African people. [[175]](#footnote-175) In some cases, job creation was not even mentioned as a specific deliverable in the contract, and “baseline figures for employment were not provided at the start, making it impossible to ascertain the number of new jobs created versus the number of existing jobs sustained.”[[176]](#footnote-176) The Performance Review Report also indicated that “other investments promised under the offset contracts have failed despite the companies being credited with the full amount promised. These include proposed investments of over US$170-million in a medical waste plant, of which only US$1.1-million was invested, and a complete failure to invest in carbon manufacturing projects, discovered during the audit.”[[177]](#footnote-177)

The findings of this report validate what critics of these Strategic Defence Procurement Packages and their offsets have been saying for a long time: that offsets have turned into “economic nonsense”, since such economic investment does “not require the state to spend billions on weapons.”[[178]](#footnote-178) In a country with such high levels of inequality, entrenched under apartheid, the jobs creation was a key government priority, and the failure to deliver on these promises denied many people the chance to improve their lives under the new more inclusive constitution.

In the end, lack of transparency during the procurement, allegations of corruption and mismanagement in the awarding of such high-value and opaque contracts, combined with the lack of sufficient monitoring and auditing of the benefits and performance may have contributed to the diversion of funds initially allocated to contribute to the improvement of fundamental human rights to economic security and work.

To avoid risks arising from the close relationship between governments and defence companies, defence companies should be required to disclose their political contributions and charitable donations, as well as publishing names of their lobbyists and their lobbying expenditures.[[179]](#footnote-179)

Defence companies active in environments with high exposure to corruption risks and risks of human rights abuses, such as situations of conflict or where atrocities are being perpetrated, should have enhanced compliance policies, procedures and mechanisms in place. This should include risk-based due diligence for both human rights and corruption risks that takes into account risks not only in the countries where they do business, but also potential end-users. [[180]](#footnote-180) These should also include recording conflict of interest declarations, especially when those companies receive services from or employ former public officials. Lastly, businesses should contribute towards transparency in reporting and information sharing with the public and civil society organisations in this opaque field. When government restrictions on information-sharing are in place, companies should advocate for and work with governments to improve transparency.

**Recommendations:** Anti-corruption and human rights groups should work together to ensure that more attention is paid by governments to sectors at high risk for corruption causing human rights abuses and stronger preventive measures are required in this regard, with risk analyses and transparency measures that are commensurate to the risk. Businesses working in these sectors should reinforce their anti-bribery and human rights due diligence, and build and implement robust anti-corruption safeguards and policies in order to prevent and mitigate risks of human rights abuses as illustrated in examples and cases mentioned above. In the law enforcement context, guidance should be established to convey standards for strengthened due diligence mechanisms and anti-corruption policies and safeguards in high risk sectors. The Working Group on Business and Human Rights could play an important facilitating role in these efforts.

**V. The role of civil society as watchdog**

Civil society plays a critical role as watchdog, monitoring both corruption and human rights abuses on the part of both businesses and states. Civil society groups fulfil a number of key functions in this regard, including:

* supporting victims in judicial and non-judicial remediation processes;
* preparing shadow and parallel reports on implementation of international conventions for submission to review mechanisms and treaty bodies, including the universal periodic review of the UN Human Rights Council and the implementation of Sustainable Development Goal 16;
* monitoring the implementation of policies, international standards, including the UN Guiding Principles;
* analysing human rights risks and responsibilities of companies;
* advocating for stronger standards and in particular for effective implementation of these standards in practice;
* developing robust communications and advocacy agendas making the connection between corruption and human rights violations clearer.[[181]](#footnote-181)

Engaging with civil society both at national and international level, in particular for businesses, will give them an opportunity to better understand universal human rights, especially in relation to the employees and workers within their supply chain. Moreover, companies should seek to support local and national human rights awareness raising initiatives[[182]](#footnote-182) that could also enhance the sensitisation of affected local communities with respect to their rights, including access to remedy.

Transparency International in particular has accumulated over 25 years of experience in the area of tackling business corruption, through the development of principles to address corporate bribery as well as of practical tools for governments and businesses, and the publication of reports tracking the transparency of major multinational corporations. In addition, Transparency International in some cases has provided access to justice for victims of corporate human rights abuses through its network of Advocacy and Legal Advice Centres.[[183]](#footnote-183)

As such, Transparency International welcomes the opportunity to provide an input into the Working Group consultation on the linkages between business corruption and human rights, and looks forward the Working Group’s forthcoming report to the UN Human Rights Council in 2020.

**Recommendations**: Anti-corruption and human rights groups, together with local and international labour organisations, should collaborate and build synergies in their work, The Working Group on Business and Human Rights could play an important role in fostering collaboration and exchange between those working in the two fields, as it has done through inviting submissions from both for its paper for the Human Rights Council.

14 May 2020

1. In 2011, the United Nations Human Rights Council unanimously endorsed the *UN Guiding Principles on Business and Human Rights*, a set of guidelines for States and companies to prevent and address human rights abuses committed in business operations. This implemented the UN’s 2008 “Protect, Respect and Remedy Framework”. <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> See also OHCHR on Corruption and Human Rights, https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx [↑](#footnote-ref-1)
2. Transparency International, ‘What is Corruption?’ (2020) <https://www.transparency.org/what-is-corruption#define> [↑](#footnote-ref-2)
3. A. Peters, Corruption as a Violation of International Human Rights, The European Journal of International Law (2019) vol.29 (4). <https://academic.oup.com/ejil/article/29/4/1251/5320164> ; R.Hemsley, *Human Rights and Corruption: States’ Human Rights Obligation to Fight Corruption*, Journal of Transnational Legal Issues(2015*)* vol.2(1), <https://www.unilu.ch/fileadmin/fakultaeten/rf/morawa/dok/JTLI_Vol_2_Issue_1_Hemsley.pdf> ; A. Spalding, *Corruption, Corporations and the New Human Right*, Washington University Law Review*,* vol.91(6) (2014) <https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6100&context=law_lawreview> ; B. Gebeye, *Corruption and Human Rights: Exploring the Relationships*, Working Paper No. 70 Human Rights and Human Welfare (2014)<https://www.du.edu/korbel/hrhw/workingpapers/2012/70-gebeye-2012.pdf> M. Boersma and H. Nele (eds.). *Corruption and Human Rights: Interdisciplinary Perspectives* (2010*)* <https://intersentia.com/en/corruption-human-rights-interdisciplinary-perspectives.html>; See also U4 Anti-Corruption Resource Centre, *Corruption and Human Rights* (2020) <https://www.u4.no/topics/human-rights/basics> [↑](#footnote-ref-3)
4. International Council on Human Rights Policy and Transparency International, *Integrating Human Rights in the Anti-Corruption Agenda: Challenges, Possibilities and Opportunities* (2010) <http://ichrp.org/files/reports/58/131b_report.pdf> pages vii, 7 et seq; See also ICHRP, *Corruption and Human Rights: Making the Connection* (2009) at pages 27 -28 <https://reliefweb.int/sites/reliefweb.int/files/resources/9B49DD6CB2609631492575BB001B821D-Corruption_HRts.pdf> [↑](#footnote-ref-4)
5. Transparency International, *Corruption Perceptions Index 2019* (2020)<https://www.transparency.org/files/content/pages/2019_CPI_Report_EN.pdf>; See also T. Landman and C.J. Schudel, ‘C*orruption and Human Rights, Empirical Relationships and Policy Advice*’, Working Paper, International Council on Human Rights Policy (2007) <http://www.ichrp.org/files/papers/131/131_-_Landman_and_Schudel_-_2007.pdf> [↑](#footnote-ref-5)
6. <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx>; <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/Documentation.aspx> ; see also <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/111/99/PDF/G1911199.pdf?OpenElement> [↑](#footnote-ref-6)
7. See especially UNCAC Resolution 6/10 Education and training in the context of anti-corruption (2015).See also, Resolution 8/11, Strengthening the implementation of the United Nations Convention against Corruption in small island developing States (2019); Resolution 7/2 Preventing and combating corruption in all its forms more effectively, including, among others, when it involves vast quantities of assets (2017); Resolution 6/6 Follow-up to the Marrakech declaration on the prevention of corruption (2015); Resolution 6/8 Prevention of corruption by promoting transparent, accountable
and efficient public service delivery through the application of best practices and technological innovations [↑](#footnote-ref-7)
8. <https://www.oas.org/en/iachr/media_center/PReleases/2018/053.asp>: https://ijrcenter.org/2020/01/10/new-inter-american-commission-report-analyzes-corruption-as-human-rights-problem/ [↑](#footnote-ref-8)
9. See, for example, : <https://www.theglobaltreasurer.com/2016/05/11/bribery-and-corruption-the-link-to-global-slavery/>; <https://www.csrandthelaw.com/2016/02/07/compliance-challenge-the-links-between-corruption-and-human-trafficking/>; <https://academic.oup.com/ejil/article/29/4/1251/5320164>

p.1251 in the article [↑](#footnote-ref-9)
10. <https://fcpablog.com/2020/01/03/compliance-alert-anti-corruption-and-human-rights-efforts-will-converge-in-2020/> [↑](#footnote-ref-10)
11. Transparency International. 2018. *Exporting Corruption – Progress Report 2018: assessing enforcement of the OECD Anti-Bribery Convention*: <https://www.transparency.org/exporting_corruption> [↑](#footnote-ref-11)
12. See, for example, https://iaccseries.org/blog/corruption-impeding-on-human-rights-in-south-africas-mining-sector/ [↑](#footnote-ref-12)
13. <https://www.occrp.org/en/daily/2538-bangladesh-rana-plaza-collapse-result-of-corruption> [↑](#footnote-ref-13)
14. <https://www.globalwitness.org/en/campaigns/land-deals/tainted-lands-corruption-large-scale-land-deals/> [↑](#footnote-ref-14)
15. Grand corruption means the commission of any of the offences in UNCAC Articles 15 - 25 as part of a scheme that

	1. involves a high level public official; and
	2. results in or is intended to result in a gross misappropriation of public funds or resources, or gross violations of the human rights of a substantial part of the population or of a vulnerable group. [↑](#footnote-ref-15)
16. [↑](#footnote-ref-16)
17. Transparency International. 2018. *G20: leaders or laggards? Reviewing G20 promises on ending anonymous companies.* <https://www.transparency.org/whatwedo/publication/g20_leaders_or_laggards> Those rights include: right to life, liberty and security of person; right not to be held in slavery or servitude; right to own property or other comparable rights; right to freedom of movement; right to an effective remedy and due process rights; right to take part in the government, directly or through freely chosen representatives; right to freedom of expression and freedom of information; rights of freedom of association and/or freedom of assembly; right to social security and to economic, social and cultural rights; right to work and favourable conditions of work; and right to a standard of living adequate for health and right to education [↑](#footnote-ref-17)
18. UNCAC Article 16(1) and OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions [↑](#footnote-ref-18)
19. See Transparency International, Exporting Corruption Report 2018, <https://www.transparency.org/whatwedo/publication/exporting_corruption_2018> [↑](#footnote-ref-19)
20. https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr\_en.pdf [↑](#footnote-ref-20)
21. It includes paragraph 10 which says “In cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community” Paragraph 21 says “States should …enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.” <http://www.un.org/documents/ga/res/40/a40r034.htm> [↑](#footnote-ref-21)
22. https://www.ohchr.org/en/professionalinterest/pages/remedyandreparation.aspx [↑](#footnote-ref-22)
23. UNCAC Article 34 addresses consequences of corruption and encourages States Parties to consider corruption a relevant factor in legal proceedings to annul or rescind a contract. Article 42 explicitly encourages States to increase the means of establishing jurisdiction over corruption offences, such as those committed against a State Party or its national(s), thus removing potential obstacles to the initiation of legal proceedings against alleged criminals. Article 53(b) also requires States Parties to permit their courts to order corruption offenders to pay compensation or damages to foreign States that have been harmed by corruption offences. Article 57 (3)(b) refers to “when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property” (c) refers to returning confiscated property, inter alia, to its prior legitimate owners or compensating the victims of the crime. [↑](#footnote-ref-23)
24. Commentary on General Policies, no. 14: “For the purposes of the *Guidelines*, due diligence is understood as the process through which enterprises can identify, prevent, mitigate and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can be included within broader enterprise risk management systems, provided that it goes beyond simply identifying

and managing material risks to the enterprise itself, to include the risks of adverse impacts related to matters covered by the *Guidelines*. Potential impacts are to be addressed through prevention or mitigation, while actual impacts are to be addressed through remediation.” [↑](#footnote-ref-24)
25. *Ibid* Q51, first bullet [↑](#footnote-ref-25)
26. *London Anti-Corruption Summit Communique* (12 May 2016) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522791/FINAL_-_AC_Summit_Communique_-_May_2016.pdf> In their country statements for the Summit, eight OECD Convention countries - Australia, Italy, Mexico, the Netherlands, New Zealand, Norway, Switzerland and the United Kingdom- included commitments to develop common principles governing the payment of compensation “to the countries affected”. For example, the statement from Australia said: “We will work with other countries to develop common principles governing the payment of compensation to the countries affected, to ensure that such payments are made safely, fairly and in a transparent manner.” <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522699/Australia.pdf> The other Similar statements can be found at this link: <https://www.gov.uk/government/publications/anti-corruption-summit-country-statements>. A ninth country, Nigeria also made this commitment, specifically referencing foreign bribery. [↑](#footnote-ref-26)
27. See the statement from Australia: “We will work with other countries to develop common principles governing the payment of compensation to the countries affected, to ensure that such payments are made safely, fairly and in a transparent manner.” <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/522699/Australia.pdf> The other similar statements can be found at this link:

https://www.gov.uk/government/publications/anti-corruption-summit-country-statements [↑](#footnote-ref-27)
28. “We will develop common principles governing the payment of compensation to the countries affected, (including payments from foreign bribery cases) to ensure that such payments are made safely, fairly and in a transparent manner.” https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\_data/file/523799/NIGERIA-\_FINAL\_COUNTRY\_STATEMENT-UK\_SUMMIT.pdf [↑](#footnote-ref-28)
29. UNODC, *Good Practices in Identifying Victims of Corruption and Parameters for their Compensation*, (4 August 2016) <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf>. See also, StAR Initiative, *Report on Public Wrongs, Private Actions: Civil Lawsuits to Recover Stolen Assets* (2015), pp. 96-9 and StAR Initiative, *Asset Recovery Handbook: A Guide for Practitioners* (2011) https://star.worldbank.org/sites/star/files/asset\_recovery\_handbook\_0.pdf [↑](#footnote-ref-29)
30. 18 U.S.C. § 3771, https://www.justice.gov/usao/resources/crime-victims-rights-ombudsman/victims-rights-act [↑](#footnote-ref-30)
31. https://www.govinfo.gov/content/pkg/STATUTE-96/pdf/STATUTE-96-Pg1248.pdf [↑](#footnote-ref-31)
32. https://www.justice.gov/jm/title-9-criminal [↑](#footnote-ref-32)
33. https://www.ussc.gov/guidelines/2018-guidelines-manual-annotated [↑](#footnote-ref-33)
34. The *US Sentencing Guidelines* Chapter 8 on Sentencing of Organizations in Part B.1 covers remedying harm from criminal conduct and provides “As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense. A restitution order or an order of probation requiring restitution can be used to compensate identifiable victims of the offense.” [↑](#footnote-ref-34)
35. Baker & McKenzie, Anti-Corruption in Spain <https://globalcompliancenews.com/anti-corruption/anti-corruption-in-spain/> [↑](#footnote-ref-35)
36. Council of Europe, *Training Manual on: Liability of Legal Persons for Czech Enforcement Agencies* (2015) <https://rm.coe.int/16806d11e6> [↑](#footnote-ref-36)
37. See Clifford Chance, *Deferred Prosecution Agreements and US Approaches to Resolving Criminal and Civil Enforcement Actions* (2012) <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2012/05/deferred-prosecution-agreements-and-us-approaches-to-resolving-criminal-and-civil-enforcement-actions.pdf> The federal Sentencing Guidelines Part B2 foresees that companies be given some credit for voluntary efforts at remediation. It states “First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation.” [↑](#footnote-ref-37)
38. The US Sentencing Guidelines Part B2 foresees that companies be given some credit for voluntary efforts at remediation. It states “First, the organization should respond appropriately to the criminal conduct. The organization should take reasonable steps, as warranted under the circumstances, to remedy the harm resulting from the criminal conduct. These steps may include, where appropriate, providing restitution to identifiable victims, as well as other forms of remediation.” [↑](#footnote-ref-38)
39. <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1000> [↑](#footnote-ref-39)
40. OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention,* in particular 4.5.4. Compensation to victims(2019) [www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm](http://www.oecd.org/corruption/Resolving-Foreign-Bribery-Cases-with-Non-Trial-Resolutions.htm) [↑](#footnote-ref-40)
41. https://fcpablog.com/2016/09/22/the-netherlands-tougher-foreign-bribery-laws-with-gaps-help/ [↑](#footnote-ref-41)
42. 18 U.S.C. § 3663 (a)(1)(A)  The court, when sentencing a defendant convicted of an offense under this title…,may order...that the defendant make restitution to any victim of such offense….The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense….

(3)  The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement. [↑](#footnote-ref-42)
43. 18 U.S.C. § 3663 (a)(1)(A)  The court, when sentencing a defendant convicted of an offense under this title…,may order...that the defendant make restitution to any victim of such offense….

(3)  The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement. [↑](#footnote-ref-43)
44. Richard Messick, *Legal Remedies for Victims of Bribery under US Law* (June 2016) https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-5-messick-20160601\_1.pdf [↑](#footnote-ref-44)
45. #  *New joint principles published to compensate victims of economic crime overseas* (1 June 2018) <https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>

 [↑](#footnote-ref-45)
46. Transparency International, Policy Brief: *Can justice to achieved through negotiated settlements*? (2015) <https://images.transparencycdn.org/images/2015_PolicyBrief1_Settlements_EN.pdf> In the section on REPARATION FOR VICTIMS the paper proposes that “Settlements should provide for compensation to those harmed by the offense, including victims in other countries, wherever possible.” [↑](#footnote-ref-46)
47. *CSO Letter to OECD Secretary General Angel Gurria* (2018) https://www.oecd.org/daf/anti-bribery/CSO-Letter-to-OECD-SG-Gurria-December-2018.pdf [↑](#footnote-ref-47)
48. See Stolen Asset Recovery Initiative, *Left Out of the Bargain: Settlements in Foreign Bribery Cases and Implications for Asset Recovery* (2014) https://star.worldbank.org/document/left-out-bargain [↑](#footnote-ref-48)
49. <https://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf>. [↑](#footnote-ref-49)
50. OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions: Settlements and Non-Trial Agreements by Parties to the Anti-Bribery Convention* (2019) [↑](#footnote-ref-50)
51. https://star.worldbank.org/document/left-out-bargainThe Stolen Asset Recovery Initiative publication *Left Out of the Bargain* documents the extent of this problem. [↑](#footnote-ref-51)
52. Mintz Group, *Where the Bribes Are* (2020) https://www.fcpamap.com/ [↑](#footnote-ref-52)
53. Richard Messick, *Legal Remedies for Victims of Bribery under US Law* (June 2016) https://www.opensocietyfoundations.org/sites/default/files/legal-remedies-5-messick-20160601\_1.pdf [↑](#footnote-ref-53)
54. #  <https://www.sfo.gov.uk/2018/06/01/new-joint-principles-published-to-compensate-victims-of-economic-crime-overseas/>

 [↑](#footnote-ref-54)
55. <https://www.sfo.gov.uk/cases/rolls-royce-plc/>; <https://www.sfo.gov.uk/2020/01/31/sfo-enters-into-e991m-deferred-prosecution-agreement-with-airbus-as-part-of-a-e3-6bn-global-resolution/> [↑](#footnote-ref-55)
56. Matthew Stephenson, *Standing Doctrine and Anti-Corruption Litigation: A Survey* (2016) <https://www.justiceinitiative.org/uploads/4759d161-17c9-4264-b5cc-215030ba7223/legal-remedies-2-20160202_0.pdf> [↑](#footnote-ref-56)
57. See*, Integrating Human Rights in the Anti-Corruption Agenda* (2009), <http://ichrp.org/files/reports/58/131b_report.pdf> [↑](#footnote-ref-57)
58. See the case where the town of Cannes sued for damages after their mayor had been convicted of corruption C. cass., ch. Crim 14 March 2007, no. 06-81010. The case was handled by the *Cour de cassation* which disallowed material damage but made an award in relation to moral damage. The facts of this case are as follows: the mayor, after receiving a bribe, had allocated a gambling licence to a company without complying with legal requirements. The judges recognised that loss of reputation qualifies as damage, accepting that the party suffering the said loss of reputation is in fact a legal person (in this case, the town of Cannes). The town alleged that they had suffered a loss of reputation worldwide, in the context of their role as host of the prestigious film festival. The mayor of the town was the main person involved but corruption resulted from the behaviour of the defendant who had paid the bribe. In this case, damages were quantified at €100.000 EUR. The *Cour de cassation* also reserved the possibility of compensation for the “loss of chance” in an *obiter dictum*. <https://halshs.archives-ouvertes.fr/halshs-01469762/document> [↑](#footnote-ref-58)
59. See 2007 French money laundering case against a former Nigerian energy minister Dan Etété which awarded Nigeria €150,000 as recompense for *prejudice moral* (nonpecuniary damages). [↑](#footnote-ref-59)
60. The concept of social damage is recognised in a number of states and is associated with compensation for damages to the public interest (including damage to the environment), to the credibility of institutions, or to collective rights such as health, security, peace, education or good governance. Costa Rica, a pioneer with regard to social damages, defines it as “the impairment, impact, detriment or loss of social welfare (within the context of the right to live under a healthy environment) caused by an act of corruption and suffered by a plurality of individuals without any justification whereby their material or immaterial diffuse or collective interests are affected, and so giving rise to the obligation to repair.” In Costa Rica the Attorney General is authorised to file a civil suit for compensation when the offence caused damage to society. The conference of Ministers of Justice of the Ibero‐American countries held in Madrid in 2011 (COMJIB) agreed to use Costa Rica’s proposal to create a concept of social damage. [↑](#footnote-ref-60)
61. Additionally, some states provide for compensation “in kind”, such as the issuance of a public apology or a declaration to help restore the reputation of the victim; the publication of the judgement of conviction as a means to repairing non-proprietary damage; and the publication of the case in a newspaper. [↑](#footnote-ref-61)
62. 18 U.S.C. § 3663 (a)(6) [↑](#footnote-ref-62)
63. *Global Forum on Asset Recovery, Principles for Disposition and Transfer of Stolen Assets in Corruption Cases* (2017), <https://star.worldbank.org/sites/star/files/the-gfar-principles.pdf> [↑](#footnote-ref-63)
64. The BOTA Foundation: Final Summative Report IREX (12 February 2015) <https://www.justice.gov/opa/file/798316/download> [↑](#footnote-ref-64)
65. <https://star.worldbank.org/content/gfar-principles-action-mantra-projects-monitoring-disbursement-abacha-ii-funds-nigeria>; https://www.aneej.org/poor-nigerians-receive-n23-7billion-from-recovered-322-5million-abacha-loot-mantra-report/ [↑](#footnote-ref-65)
66. *European Parliament, Access* to legal remedies for victims of corporate human rights abuses in third countries (2019) [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO\_STU(2019)603475\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU%282019%29603475_EN.pdf), p. 14 et seq. [↑](#footnote-ref-66)
67. *Ibid* at p. 12 [↑](#footnote-ref-67)
68. European Commission, *Study on due diligence requirements through supply chains* (2020), p. 228 <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en> at page 228 [↑](#footnote-ref-68)
69. See footnote 14, supra. [↑](#footnote-ref-69)
70. Other measures associated with the definition of grand corruption would include national level extraterritorial jurisdiction, unlimited statutes of limitation, higher sanctions and more. [↑](#footnote-ref-70)
71. Linking Human Rights and Anti-Corruption Compliance: A Good Practice Note endorsed by the United Nations Global Compact Human Rights and Labour Working Group on 21 December 2016, <https://www.unglobalcompact.org/library/5011> [↑](#footnote-ref-71)
72. <https://fcpablog.com/2020/01/03/compliance-alert-anti-corruption-and-human-rights-efforts-will-converge-in-2020/> [↑](#footnote-ref-72)
73. <https://www.corporatebenchmark.org/2019-results-press-release> [↑](#footnote-ref-73)
74. Environmental, social and governance [↑](#footnote-ref-74)
75. <https://fcpablog.com/2020/01/03/compliance-alert-anti-corruption-and-human-rights-efforts-will-converge-in-2020/> [↑](#footnote-ref-75)
76. OECD, *OECD Guidelines for Multinational Enterprises* (2011)

<http://dx.doi.org/10.1787/9789264115415-en> [↑](#footnote-ref-76)
77. OECD, *Due Diligence Guidance for Responsible Business Conduct* (2018), <http://mneguidelines.oecd.org/OECD-Due-Diligence-Guidance-for-Responsible-Business-Conduct.pdf> [↑](#footnote-ref-77)
78. Agricultural, extractive, financial, mineral and textile sectors, see <http://www.oecd.org/industry/inv/mne/> [↑](#footnote-ref-78)
79. <https://www.globalcompact.de/wAssets/docs/Korruptionspraevention/Publikationen/Human_Rights_and_Anti_Corruption_Compliance.pdf> [↑](#footnote-ref-79)
80. As currently discussed and promoted in numerous business fora including the World Economic Forum (WEF) and US Business Roundtable. [↑](#footnote-ref-80)
81. US Business Roundtable, “*Statement on the Purpose of a Corporation*”, August 2019,
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82. <https://voices.transparency.org/a-transparency-roadmap-to-run-a-responsible-business-four-things-that-say-you-really-mean-it-640c4b87e4b7> [↑](#footnote-ref-82)
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87. For other countries, see generally, Clifford Chance, *An International Guide to Anti-Corruption Legislation* (2019); <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/03/an-international-guide-to-anticorruption-legislation.pdf> The enforcement-based model is quite common. [↑](#footnote-ref-87)
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93. Additionally, in the US state law imposes a duty of care on directors to assure they are aware of, have assessed and have necessary oversight of key regulatory risks. This would generally require having a policy. [↑](#footnote-ref-93)
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95. <https://www.justice.gov/jm/justice-manual> [↑](#footnote-ref-95)
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The 5-step framework of the Guidance to ensure a transparent supply chain can be summarised as follows:

	* Establishing strong company management systems
	* Identifying and assessing risks in the supply chain
	* Designing and implementing a strategy to respond to any identified risks
	* Carrying out independent third-party audit of supply chain due diligence
	* Reporting annually on supply chain due diligence. [↑](#footnote-ref-113)
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