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**STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)**

**FEASIBILITY STUDY ON CORPORATE SOCIAL
RESPONSIBILITY IN THE FIELD OF HUMAN RIGHTS**

76th meeting

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I. Introduction

1. It is recalled that at its 1127th meeting (22-24 November 2011), the Ministers' Deputies decided to give terms of reference of intergovernmental structures for the period 2012-2013. With regard to the terms of reference of the Steering Committee for Human Rights (CDDH), the Ministers' Deputies asked the CDDH under the item "Expected results" that: "*(ii) studies are conducted to examine the feasibility and added value of standard-setting work regarding ... corporate social responsibility in the human rights field;*"

2. At its 73rd meeting (6-9 December 2011), the CDDH had an exchange of views on a roadmap to execute work on the various themes mentioned in its terms of reference, amongst them corporate social responsibility in the field of human rights. It instructed the Secretariat to elaborate a preliminary study on this topic, taking stock of existing instruments of the Council of Europe and other international bodies¹. This study was entitled "Corporate social responsibility in the field of human rights: existing standards and outstanding issues" (CDDH(2012)012) and was presented and discussed at the 75th meeting in June 2012 (see CDDH(2012)R75, paras. 20-22).

3. At that meeting, the CDDH exchanged views on possible ways to involve the Council of Europe in this field with Mrs. Lene Wendland (Office of the United Nations High Commissioner for Human Rights, Geneva) who presented the relevant international standards and work, in particular the "UN Guiding Principles for the Implementation of the UN 'Protect, Respect and Remedy' Framework" (hereinafter: the UN Guiding Principles). The CDDH stressed the central place of the UN Guiding Principles, which were an authoritative reference point, already reflected as such in the work of other international organisations, and that any Council of Europe work should be coherent with them and should aim to enhance their effectiveness.

4. The CDDH instructed the Secretariat to submit a draft study on the feasibility and added value of standard-setting or other work in this field for consideration and possible adoption at its next meeting. In view of the elaboration of the study, the CDDH asked the Secretariat to explore the feasibility and added value of the various options for Council of Europe involvement, namely: reaffirming the UN Guiding Principles; providing sectorial guidance; providing thematic guidance; focusing on vulnerable groups; elaborating on the implications of the principle of access to effective remedy; addressing legal/governance gaps not covered by the UN Guiding Principles. The Secretariat was also asked to explore other avenues for action, such as the identification and recognition of good business practices and awareness-raising initiatives involving the private sector. Amongst the issues deserving particular attention in the study, delegations mentioned the effective

¹ For an overview of Council of Europe activities in this area, see also J. Polakiewicz, "Corporate Responsibility to Respect Human Rights - Challenges and Opportunities for Europe and Japan", Nagoya University Center for Asian Legal Exchange, October 2012, pp. 7 et seq. and pp. 41-43 (http://cale.law.nagoya-u.ac.jp/_src/sc618/CALE20DP20No.209-121010.pdf).

implementation of the UN Guiding Principles, the prevention of human rights violations, possible gaps in access to effective remedies, extraterritorial issues and social rights.

5. The CDDH considered and discussed the draft feasibility study at its 76th meeting and adopted it on 28 November 2012.

II. The feasibility of new standard-setting work of the Council of Europe in the field of corporate social responsibility

The importance of the UN Guiding Principles as a global standard

6. The United Nations Human Rights Council unanimously adopted on 16 June 2011 the Guiding Principles for the Implementation of the UN “Protect, Respect and Remedy” Framework which were elaborated by the UN Special Representative John Ruggie.² The UN Guiding Principles provide an authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. They clarify the meaning of the corporate responsibility to respect human rights which calls on business to support and respect the protection of internationally proclaimed human rights. The principles rest on three pillars: firstly, the state duty to protect against human rights abuses by third parties, including business; secondly, the corporate responsibility to respect human rights; and thirdly greater access by victims to effective remedy, both judicial and non-judicial.

7. The UN Guiding Principles present for the first time globally agreed standards, which have been taken up by other intergovernmental organisations, governments and business. The UN framework has been well received by key stakeholder groups, governments, private sector and NGOs alike. The Guiding Principles have achieved a result which seemed impossible only a few years ago: a worldwide consensus among all stakeholders on a series of key principles relating to corporate responsibility to respect human rights.

8. In addition to the UN Guiding Principles, the UN Human Rights Council also established a Working Group on the issue of human rights and transnational corporations and other business enterprises, consisting of five independent experts of balanced geographical representation (hereinafter: the Working Group).³ Moreover, it established a Forum on Business and Human Rights under the guidance of the Working Group to discuss trends and challenges in the implementation of the Guiding Principles which will take place on 4-5 December 2012.⁴

² www.unglobalcompact.org/issues/human_rights/The_UN_SMSG_and_the_UN_Global_Compact.html.

³ <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>.

⁴ <http://www.ohchr.org/EN/Issues/Business/Pages/ForumonBusinessandHR2012.aspx>

9. In its recent report to the UN General Assembly on the issue of human rights and transnational corporations and other business enterprises of 10 August 2012, the Working Group also reported on other intergovernmental initiatives.⁵ Several major international organisations and institutions, such as the Organisation for Economic Cooperation and Development (OECD)⁶, International Organisation of Standardisation (ISO)⁷, the International Finance Corporation (IFC)⁸, the United Nations Food and Agricultural Organisation (FAO) and the European Union (EU)⁹, have already recognised the UN Guiding Principles as a basis for the development of their own business and human rights policies and standards. Moreover, a number of individual governments use the UN Guiding Principles in conducting their own policy assessments, and major global corporations are realigning their due diligence processes based on them and civil society actors employ them in their analytical and advocacy work.

10. With regard to regional initiatives in Europe and the Council of Europe in particular, the Working Group noted that:

“The Steering Committee for Human Rights of the Council of Europe has also stressed the central place of the Guiding Principles as an authoritative reference point for its work on corporate social responsibility in the field of human rights, and has decided to undertake a study on the feasibility and added value of standard-setting work by the Council in this field, taking into account existing standards, including the Guiding Principles. The Working Group stands ready to support this process.”¹⁰

The CDDH greatly appreciates the readiness by the Working Group to cooperate with the CDDH in view of possible future activities by the Council of Europe.

Previous discussion of a new Convention or complementary legal instrument

11. On 27 September 2010 – albeit before the adoption of the UN Guiding Principles - the Parliamentary Assembly adopted a report by the Committee on Legal Affairs and Human Rights (Rapporteur: Mr. Holger Haibach) on “Human rights and business”¹¹

⁵ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises”, United Nations Human Rights Council, 10 August 2012, A/67/285, paras. 22 et seq.

⁶ <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/>.

⁷ <http://www.iso.org/iso/home/standards/iso26000.htm>.

⁸ <http://www1.ifc.org/wps/wcm/connect/c3dedb0049c51e71886d99da80c2ddf3/UNGPsandIFC-SF-DRAFT.pdf?MOD=AJPERES>.

⁹ http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm.

¹⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises”, United Nations Human Rights Council, 10 August 2012, A/67/285, para. 24.

¹¹ <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm>.

together with Resolution 1757 (2010) and Recommendation 1936 (2010) in which it made several proposals. One suggestion was that the Committee of Ministers examines the feasibility of elaborating a complementary legal instrument, such as a convention or an additional protocol to the ECHR. In its reply adopted on 6 July 2011 to the Parliamentary Assembly Recommendation 1936 (2010) “Human rights and business”, the Committee of Ministers agreed with the Assembly that there could be an interest in exploring ways and means of enhancing the role of business in respecting and promoting human rights and the Council of Europe is well placed to do this. The Committee of Ministers however considered that a new convention or an additional protocol to the European Convention on Human Rights was not the most appropriate solution.

A new soft-law instrument by the Council of Europe to fill the implementation gap

12. As an alternative position, the Parliamentary Assembly suggested preparing a recommendation on European governments’ corporate responsibility in the area of human rights, possibly supplemented by flexible guidelines for national authorities, businesses and other actors.¹² During the discussions of the 75th meeting of the CDDH, some delegations were however somewhat hesitant to create an entirely new standard for the Council of Europe, risking duplication with the UN Guiding Principles and considering that other organisations, such as the European Union, have also refrained from creating their own standards. Moreover, the CDDH considers that any new soft-law instrument by the Council of Europe should not lead to the duplication or replication of the UN Guiding Principles, but offer the possibility of achieving a complementary action as a regional human rights organisation and filling the “implementation gap”. With regard to this “implementation gap”, the report of a European Union conference, hosted by the Government of Denmark in May 2012¹³, on the implementation of the Guiding Principles, concluded that when it comes to the implementation of the now universally agreed principles of corporate responsibility to respect human rights, there still exists both a “compliance gap” and a “governance gap”.

13. While the UN Guiding Principles may be described as the common reference point, offering a sound basis for new initiatives to implement the Principles, they are more basic than descriptive or illustrative and inevitably require further action at regional and national level. As the UN Special Representative John Ruggie himself emphasised repeatedly, they are only “*the end of the beginning*”¹⁴ and a “*common foundation from which thinking and action of all stakeholders would generate cumulative progress over*

¹² Recommendation 1936 (2010), para. 2.2; http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm#P38_1800.

¹³ <http://www.ihrb.org/news/2012/conference-business-and-human-rights-principles-to-practice.html>; conference report, p. 22.

¹⁴ *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, A/HRC/17/31, 2011, para. 13.

*time.*¹⁵ In this respect, the CDDH recalls Principle 10 of the UN Guiding Principles which requires states to encourage international institutions, of which they are members, to adopt policies to promote human rights in this field. Moreover, the Working Group recently recommended that “[i]nternational organizations, including regional bodies, should include business and human rights and the implementation of the Guiding Principles in the agenda of their institutions, and support dissemination, capacity-building and implementation efforts at the regional level, with all stakeholders”¹⁶.

14. Therefore, the implementation of the UN Guiding Principles may lead to the adoption of new standards, corporate, legal or otherwise, at both regional and national level. The present study consequently seeks to evaluate certain elements which could form the basis for a new Council of Europe soft-law standard which could contribute to filling such an “implementation gap”. The following chapters are based on the items which the CDDH has identified at its 75th meeting (see CDDH(2012)R75, para. 22) and the question of how they could provide any added value for future standard-setting or other work.

III. Providing sectorial and thematic guidance

15. In view of the elaboration of the study, the CDDH decided at its 75th meeting to explore the feasibility and added value of the options for Council of Europe involvement in providing sectorial or thematic guidance (see CDDH(2012)R75, para. 22).

Possible co-operation with the European Union

16. In this regard, the current work of the European Union¹⁷ should be taken into account. Having been active in this field for more than a decade, the European Union has stated that the UN Guiding Principles are the main reference point for EU policy, and it has aligned its definition of corporate social responsibility with those principles. On 25 October 2011, the European Commission published a renewed strategy for corporate social responsibility for the period 2011-2014.¹⁸ It invited member states, by the end of 2012, to develop national plans for the implementation of Guiding Principles, expecting all European enterprises to meet the corporate responsibility to respect human rights as defined therein. The European Commission is currently working with enterprises and stakeholders to develop human rights guidance for a limited number of relevant industrial

¹⁵ Quoted in *Annual Report on the OECD Guidelines for Multinational Enterprises 2011: A New Agenda for the Future* (OECD Publishing 2011), p. 178.

¹⁶ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises”, United Nations Human Rights Council, 10 August 2012, A/67/285, Recommendation No. 78, page 22.

¹⁷ See <http://www.ihrb.org/project/eu-sector-guidance/index.html>.

¹⁸ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2011) 681 final.

sectors. These sectors are namely: oil and gas, information and communications technology, employment and recruitment as well as guidance for small and medium-sized enterprises. The European Commission also seeks to publish by the end of 2012 a report on EU priorities in the implementation of the UN Guiding Principles.

17. Bearing in mind the Memorandum of Understanding between the Council of Europe and the European Union, which seeks “to intensify co-operation and ensure co-ordination of action on issues of mutual interest”¹⁹, and taking into account the suggestion by the Parliamentary Assembly²⁰ for enhanced co-operation with the European Union in the field of human rights and business, the CDDH considers that the present topic could be very suitable for closer cooperation and partnership with the European Union.

Clothing and textile

18. Possibly in cooperation with the European Union, the Council of Europe could focus on several sector-specific issues. One topic which has so far not been specifically covered is the area of clothing and textiles, in which alleged human rights abuses are frequently reported.²¹ However, neither the CDDH nor any other committee in the Council of Europe appears to have specific expertise in this particular sector. Therefore, the CDDH considers it preferable to focus on those subjects in which the Council of Europe has previous experience and has gathered sufficient expertise.

Internet governance

19. One such field is certainly the area of internet governance. It should be recalled that, in its reply adopted on 6 July 2011 to the Parliamentary Assembly Recommendation 1936 (2010) on “Human rights and business”²², the Committee of Ministers noted that many of the Committee of Ministers’ standard-setting instruments, concerning the internet and the information society, underlined the roles and responsibilities of the private sector in respecting human rights, and that internet governance was an exemplary area of the Council of Europe’s activities where the relationship between human rights and roles and responsibilities of business has been articulated in an authoritative way. The CDDH recalls that the preliminary study by the Secretariat²³ has exhaustively listed the relevant sources in which the Council of Europe has also addressed the responsibilities of the private sector, including the Council of Europe’s recent Internet

¹⁹ See http://www.coe.int/t/der/eu_EN.asp.

²⁰ Resolution 1757 (2010), para. 7.4.1; http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm#P38_1800, para. 8.

²¹ See <http://business-humanrights.org/Categories/Sectors/Appareltextile/Clothingtextile>.

²² <https://wcd.coe.int/ViewDoc.jsp?id=1812341&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>.

²³ CDDH(2012)012, p. 15 et seq.

Governance Strategy 2012-15. In this respect, the CDDH could encourage the Council of Europe (in particular the Steering Committee for Media and Information Society, CDMSI) to look at issues concerning business and human rights in the context of its internet governance strategy.

Children's rights

20. With regard to the elaboration of the study, the CDDH decided at its 75th meeting to also focus on vulnerable groups (see CDDH(2012)R75, para. 22). The CDDH considers that certain vulnerable groups may particularly be affected by corporate actions. This may concern children, older persons, women, sexual minorities, religious minorities, disabled persons, migrant workers or refugees. However, the CDDH notes that specific work-related issues of several of these vulnerable groups have already been addressed²⁴ or are currently being addressed²⁵ in the context of specific standard-setting for those groups. Therefore, the CDDH considers it to be most feasible in the present context to focus on children, also with a view to promoting the implementation of the recent *Children's Rights and Business Principles*, which were adopted on 12 March 2012 by UNICEF, the UN Global Compact and Save the Children.²⁶ This instrument is the first comprehensive set of principles to guide companies on the full range of actions they can take in the workplace, marketplace and community to respect and support children's rights. The CDDH also notes the relevant standards adopted by the International Labour Organisation (ILO)²⁷, notably ILO Convention No. 182 on "the worst forms of child labour" (1999) and ILO Convention No. 138 on "the minimum age for admission to employment and work" (1973), as well as the currently ongoing work by the UN Committee on the Rights of the Child to draft a general comment on child rights and the business sector.²⁸

21. The CDDH recalls that the Council of Europe has done previous work in the area of children's rights, notably the Council of Europe Strategy for the Rights of Children 2012-15 which seeks to implement the United Nations Convention on the Rights of the Child in Europe²⁹. However, the strategy does not particularly address the phenomenon of child labour. The CDDH further notes that Article 9 of the Council of Europe

²⁴ With regard to sexual minorities, see for example Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the Committee of Ministers on 31 March 2010, paras. 29-30 ("Employment").

²⁵ With regard to older persons, the current Drafting Group on the Human Rights of Older Persons was asked by the CDDH to consider work-related issues when elaborating a non-binding instrument on the human rights of older persons (see CDDH(2012)R75, para. 18).

²⁶ http://www.unglobalcompact.org/Issues/human_rights/childrens_principles.html.

²⁷ <http://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang--en/index.htm>.

²⁸ http://www2.ohchr.org/english/bodies/crc/callsubmissionsCRC_BusinessSector.htm.

²⁹ <http://www.coe.int/t/dg3/children/>.

Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS. No. 201) requires states to encourage the private sector, in particular the information and communication technology sector, the tourism and travel industry and the banking and finance sectors, to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children and to implement internal norms through self-regulation or co-regulation. Moreover, the case-law of both the European Court of Human Rights and the European Committee of Social Rights as well as already existing resolutions and recommendations by the Parliamentary Assembly and the Committee of Ministers on the general protection of children's rights could serve as a very useful basis from which inspiration could be drawn.

Social rights

22. During its 75th meeting, the CDDH also identified social rights as a thematic subject which could deserve particular attention (see CDDH(2012)R75, para. 22).

23. The 1961 European Social Charter (ETS. No. 35) and the 1996 Revised European Social Charter (ETS. No. 163) contain several human rights provisions which have an impact on the relation between individuals and companies, for example:

- the right to safe and healthy conditions of work (Articles 2 and 3);
- the right to a fair remuneration sufficient for a decent standard of living (Article 4);
- the right to organise (Article 5);
- the right to bargain collectively (Article 6);
- the right of children and young persons to protection (Article 7);
- the right to social security (Article 12);
- the right to social and medical assistance (Article 13);
- the right of migrant workers who are nationals of a Party and their families to protection and assistance in the territory of any other Party (Article 19);
- the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20);
- the right of workers to be informed and to be consulted within the undertaking (Article 21);
- the right to take part in the determination and improvement of the working conditions and working environment in the undertaking (Article 22);
- the right to protection in cases of termination of employment (Article 24);
- the right to protection of workers' claims in the event of the insolvency of their employer (Article 25);
- the right to dignity at work (Article 26);
- the right of workers' representatives in undertakings to protection against acts prejudicial to them and should be afforded appropriate facilities to carry out their functions (Article 28);
- the right to be informed and consulted in collective redundancy procedures (Article 29).

24. Case-law by the European Committee of Social Rights (ECSR) which relates directly to obligations of business enterprises is rather sparse, since the provisions of the Charter, along with the provisions in the European Convention on Human Rights, are addressed to Council of Europe member States, and not to private companies. Moreover, the Charter applies only to the “*metropolitan territory of each Party*.”³⁰

25. In a collective complaint in the case of *Marangopoulos Foundation for Human Rights v. Greece*³¹, the European Committee of Social Rights found violations of the right to protection of health and the right to safe and healthy working conditions. The case concerned environmental pollution for workers and neighbouring homes of private persons through a private mining corporation (in which the State was the biggest shareholder). In *International Commission of Jurists v. Portugal* (no. 1/98), in which the former had claimed that Portugal was violating Article 7(1) of the European Social Charter by failing to properly supervise child labour, the European Committee of Social Rights found that the situation was not in conformity with the Charter. In this respect, account should also be taken of the ILO’s “Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy” adopted in 1977 and updated in 2006.³²

26. Whilst acknowledging that not all member states have ratified either or both the European Social Charter or the Revised European Social Charter, the CDDH considers it to be possible to focus on the issue of social rights and employment issues, for example by drafting guidelines on how to apply the relevant rights from the Charter in practice.

Substantive or procedural obligations for states under the European Convention on Human Rights

27. As far as the European Convention on Human Rights and the case-law of the European Court of Human Rights are concerned, the CDDH recalls the preliminary study of the Secretariat³³ as well as Article 4 of Resolution 1757 by the Parliamentary Assembly of 27 September 2010 which both stress that, while businesses enjoy certain rights under the Convention, they do not have obligations under this instrument. In this respect, the CDDH also notes cases before the European Court of Human Rights in which applicants have alleged violations of their human rights by national courts which had to balance these rights with certain rights of companies. Such cases may, for example, be employment-related³⁴ or involve the reporting about individuals in the media³⁵. In this

³⁰ Revised European Social Charter (CETS 163, 1996), Part VI, Article L.

³¹ *Marangopoulos Foundation for Human Rights v. Greece*, no. 30/2005, decision of 6 December 2006.

³² http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm.

³³ CDDH(2012)012, pp. 10-11.

³⁴ See, for example, *Eweida and Chaplin v. the United Kingdom* (nos. 48420/10 and 59842/10), currently pending.

³⁵ See, for example, *Von Hannover v. Germany (No. 2)* (nos. 40660/08 and 60641/08), judgment of 7 February 2012; *Mosley v. the United Kingdom* (no. 48009/08), judgment of 10 May 2011; *Von Hannover v. Germany (No. 1)* (no. 59320/00), judgment of 24 June 2004. Similar cases have been brought by media

respect, both the preliminary study³⁶ as well as the factsheet “Companies: victims or culprits” elaborated by the Registry of the European Court of Human Rights in September 2012³⁷ give very recent summaries of the applicable case-law. Despite the fact that the Convention does not have direct horizontal effects vis-à-vis private companies, the CDDH finds that the substantive or procedural obligations by states under the Convention could be included in any new standard of the Council of Europe on human rights and business. In the context of environmental issues, a “Study of the Legal Framework on Human Rights and the Environment applicable for European Enterprises Operating Outside of the European Union” submitted by the University of Edinburgh has already suggested in 2010 to use the existing principles under the Convention as a basis for standards in the field of business and human rights:

*“While the ECHR is a comparatively advanced system of human rights protection against extraterritorial corporate abuse, it is still far from providing clear and unequivocal guidance for States in relation to their human rights obligations. Yet the procedural and substantive standards of protection developed in the jurisprudence of the ECtHR could serve as a basis for the European Union and its Member States to further clarify and develop normative standards on business and human rights.”*³⁸

28. In this respect, it should be noted that the preliminary study³⁹ has already elaborated in detail on the case-law of the European Court of Human Rights regarding the accountability of states for failure to protect citizens from the effects of actions by companies. In particular, this concerns judgments in which the European Court of Human Rights had found that states had failed to meet their positive obligations to protect individuals from the effects of certain actions by private companies, e.g. after environmental pollution caused not by the state, but by those companies (see the cases of *López Ostra v. Spain*⁴⁰, *Taşkin and Others v. Turkey*⁴¹, *Fadeyeva v. the Russian Federation*⁴² or *Tatar v. Romania*⁴³). Another issue which could be pursued further is the

companies where national courts decided in favour of the individuals which had been the subject of media reporting: *Axel Springer AG v. Germany* (no. 39954/08), judgment of 7 February 2012; *MGN Limited v. the United Kingdom* (no. 39401/04), judgment of 18 January 2011; *Verlagsgruppe News GmbH v. Austria (No. 2)* (no. 10520/02), judgment of 14 December 2006. See also the case of *Steel and Morris v. the United Kingdom* (no. 68416/01), judgment of 15 February 2005, concerning the refusal of legal aid in libel proceedings against a multinational company for criticism of its corporate social responsibility.

³⁶ CDDH(2012)012, p. 10 et seq.

³⁷ <http://www.echr.coe.int/ECHR/EN/Header/Press/Information+sheets/Factsheets/>.

³⁸ D. Augenstein, University of Edinburgh, “Study of the Legal Framework on Human Rights and the Environment applicable for European Enterprises Operating Outside of the European Union”, page 10.

³⁹ CDDH(2012)012, p. 11 et seq.

⁴⁰ *López Ostra v. Spain* (no. 16798/90), judgment of 9 December 1994.

⁴¹ *Taşkin and Others v. Turkey* (no. 46117/99), judgment of 10 December 2004.

⁴² *Fadeyeva v. the Russian Federation* (no. 55273/00), judgment of 9 June 2005.

⁴³ *Tatar v. Romania* (no. 67021/01), judgment of 27 January 2009.

accountability of states for actions by private companies where the latter exercise governmental functions. In certain judgments, the European Court of Human Rights has held states responsible where private company exercise functions which had been hitherto traditionally governmental.⁴⁴ In this respect, regard could also be given to Parliamentary Assembly Recommendation 1858 (2009) on private military and security firms and erosion of state monopoly on the use of force.

IV. Possible gaps in access to effective remedies; extraterritorial issues

29. During its 75th meeting, the CDDH also identified possible gaps in access to effective remedies and extraterritorial issues to deserve particular attention in the feasibility study (see CDDH(2012)R75, para. 22). Because of their interdependence, both issues are being considered together in the following.

Possible gaps with regard to remedies to be addressed by the Council of Europe

30. It should be recalled that the third pillar of the UN Guiding Principles addresses the issue of greater access by victims to effective remedy, both judicial and non-judicial. Where human rights have been adversely affected, businesses should provide for or cooperate in “remediation”. In this respect, the Special Representative to the Secretary-General on business and human rights distinguishes three types of grievance mechanisms: judicial and non-judicial State-based mechanisms and company-level mechanisms.⁴⁵ The latter should be available both for employees and also as a method for outside stakeholders who interact with the company.⁴⁶ However, the UN Guiding Principles do not themselves provide for a mechanism to consider questions over the meaning of the Guiding Principles or to handle complaints.

31. Unlike - as further described in the preliminary study⁴⁷ - the legal situation in the United States, there are less prospects at the European level to successfully institute civil proceedings against a company for human rights abuses committed abroad, since no European state recognises such an extensive application in its domestic law as the Alien Tort Claims Act does under US law. Moreover, barriers for victims of corporate human rights abuses appear to be not only jurisdictional, but also resulting from costs and restricted access to legal aid, complex corporate structures, the lack of support for public interest litigation or mass tort claims, time limitations, and provisions on evidence.⁴⁸

⁴⁴ See the cases of *Costello-Roberts v. the United Kingdom* and *Powell and Rayner v. the United Kingdom*.

⁴⁵ Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, A/HRC/14/27 (2010), para. 89.

⁴⁶ Business and Human Rights: Further steps toward the operationalization of the “protect, respect and remedy” framework, A/HRC/14/27 (2010), para. 92.

⁴⁷ CDDH(2012)012, p. 8 et seq.

⁴⁸ See D. Augenstein, University of Edinburgh, “Study of the Legal Framework on Human Rights and the Environment applicable for European Enterprises Operating Outside of the European Union”, para. 167,

Nevertheless, for those states which are members of the EU, Article 2 of European Council's Regulation 44/2001 on Jurisdiction in Civil and Commercial Matters (the "Brussels regulation") provides that courts of EU member states are competent to adjudicate civil proceedings against companies based in the EU for acts which have taken place outside the EU, even where the victim is not domiciled in the EU and the damage also occurred elsewhere.⁴⁹

32. Any possible drafting, working or expert group on corporate social responsibility could prepare non-binding instruments on access to justice and adequate remedies, containing guiding principles on how to address existing obstacles to access to justice and to establish effective remedies for victims of corporate-related human rights abuses. The exercise of jurisdiction in cases with extraterritorial effects may be examined in this context while bearing in mind the complexity of this issue.

Extraterritoriality and the European Convention on Human Rights

33. Closely connected with the possibility to institute civil proceedings against private companies for human rights violations is the issue of extraterritoriality, which has already been discussed in detail in the preliminary study⁵⁰. It should be recalled that many of the cases and issues that have arisen in the context of the work of European companies involve alleged human rights violations committed outside of Europe. Normally, the alleged victims therefore reside outside of the territories of Council of Europe member States and, consequently, do not come within the jurisdiction of the High Contracting Parties within the meaning of Article 1 of the European Convention on Human Rights. The Court's case-law identifies the situations in which extraterritorial jurisdiction could apply, on the basis of effective control of territory or on other basis.⁵¹ However, this case-law applies in any event only to acts or omissions by state organs. The actions by a European company and its effects on persons outside of Europe may therefore not engage any responsibility of a High Contracting Party under the Convention if there is no jurisdictional link between those persons and that High Contracting Party.

referring to two studies on the Dutch and Polish legal systems: A.G. Castermans & J.A. van der Weide, *The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognised rights* (2009) and International Commission of Jurists, *Access to Justice: Human Rights involving Corporations*, Geneva 2010.

⁴⁹ See generally J. Wouters and C. Ryngaert, *Litigation for overseas corporate human rights abuses in the European Union: the challenge of jurisdiction*, *The George Washington International Law Review* Vol. 40 (2009), p. 939.

⁵⁰ CDDH(2012)012, p. 12 et seq.

⁵¹ See, for example, the cases of *Al-Skeini and others v. the United Kingdom* (no. 55721/07), judgment of 7 July 2011; *Medvedyev and others v. France* (no. 3394/03), judgment of 29 March 2010; *Al Saadoon and Mufdhi v. the United Kingdom* (no. 61498/08), judgment of 30 June 2009; *Bankovic and others v. Belgium and 16 other Contracting States* (no. 52207/99), decision of 12 December 2001.

Extraterritoriality and other Council of Europe treaties and instruments

34. It should however be noted that, unlike the European Convention on Human Rights, to address the conduct of natural or legal persons outside a state's jurisdiction is not totally novel in the contexts of other Council of Europe treaties. Some Council of Europe treaties require parties to extend jurisdiction to certain activities of natural or legal persons outside their territory, for example: Article 44 of the Convention on Preventing and Combating Violence Against Women and Domestic Violence (CETS No. 210) with regard to criminal offences such as rape, forced marriage, female genital mutilation or forced abortion; Article 17 of the Criminal Law Convention on Corruption (ETS No. 173) with regard to corruption-related offences committed in third states by their own natural and legal persons or Article 29 of the Additional Protocol to the Convention on Human Rights and Biomedicine concerning Biomedical Research (CETS No. 195). Further work by the Council of Europe on human rights and business could therefore explore the challenges relating to the extraterritorial conduct of transnational companies.

Civil and criminal responsibility of companies under national laws of Council of Europe member states

35. As already discussed in detail in the preliminary study⁵², more harmonised legislation of Council of Europe member states concerning the principle of corporate civil and criminal liability could enhance the remedies for victims of human rights violations committed by private companies. The CDDH considers that any working group on the issue should also take into account the proposals made by the “Study of the Legal Framework on Human Rights and the Environment applicable for European Enterprises Operating Outside the European Union” submitted in 2010 by the University of Edinburgh to consider the strengthening of civil and criminal liability of corporations operating outside Europe. Amongst others are the questions of liability of parent corporations for acts or omissions of subsidiaries, subcontractors and suppliers, the relationship between the liability of companies and the direct responsibility of individuals operating therein and the conditions under which jurisdiction over extra-territorial human rights abuses should be exercised.⁵³ With regard to criminal liability of companies, it should also be recalled that several Council of Europe conventions have already addressed the issue of corporate liability by requiring Contracting Parties to enact legislation to hold companies liable for criminal offences established under those treaties.⁵⁴

⁵² CDDH(2012)012, p. 8 et seq.

⁵³ D. Augenstein, University of Edinburgh, “Study of the Legal Framework on Human Rights and the Environment applicable for European Enterprises Operating Outside of the European Union”, paras. 188 et seq.

⁵⁴ See for example Article 12 of the Convention on Cybercrime (ETS No. 185) or Article 18 of the Criminal Law Convention on Corruption (ETS No. 173).

Strengthening the OECD Guidelines for Multinational Enterprises

36. A further strengthening of remedies for victims could be the adherence by all Council of Europe member states to the OECD Guidelines for Multinational Enterprises⁵⁵. As already elaborated in more detail in the preliminary study, those Guidelines have been updated in May 2011 with a specific focus on human rights issues. They address the operation of multinational enterprises most notably through National Contact Points (NCPs), which are government offices charged with offering a mediation forum concerning human rights violations by private companies, and any individual or NGO may file a complaint. Even though the recommendations by the NCPs are not binding and the latter are not obliged to make a decision of whether or not the Guidelines have been violated, the establishment of NCPs might be an interesting avenue to pursue for all Council of Europe member states. To-date, 27 Council of Europe member states have decided to adhere to the Guidelines which are also open to non-OECD member states. The CDDH considers that any Council of Europe work on human rights and business should include encouraging its member states to adhere to these Guidelines, for example in a declaration by the Committee of Ministers as considered below (para. 38).

V. Measures to raise awareness

37. Even though the dissemination of the UN Guiding Principles is of particular importance, there nevertheless currently appears to be a lack of awareness amongst stakeholders. As the UN Working Group observed in August 2012 regarding the “dissemination gap” of the Guiding Principles:

*“... [T]here is an overwhelming lack of awareness of the Guiding Principles among stakeholders globally, particularly businesses, especially small and medium-sized enterprises. The Working Group is aware of the urgent need to build awareness, provide support and increase the capacity of this sector to implement the Guiding Principles... [t]he Working Group acknowledges that there are numerous initiatives aimed at disseminating the Guiding Principles. Despite these initiatives, however, there have been insufficient efforts to disseminate the Guiding Principles across all regions and all stakeholder groups.”*⁵⁶

A declaration by the Committee of Ministers?

38. One of the ideas expressed by delegations during the discussion at the 75th meeting of the CDDH to increase awareness was a possible declaration by the Committee of Ministers. Such a declaration however would not have to be necessarily an isolated

⁵⁵ <http://www.oecd.org/daf/internationalinvestment/guidelinesformultinationalenterprises/>.

⁵⁶ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises”, United Nations Human Rights Council, 10 August 2012, A/67/285, paras. 35 and 38.

instrument, since it could easily complement or be combined with a recommendation or guidelines that address particular issues contained in the declaration.

39. In this respect, it should be noted that the General Assembly of the Organisation of American States has adopted on 4 June 2012 a resolution on the “Promotion of Corporate Social Responsibility in the Hemisphere”.⁵⁷ In that resolution, the Assembly recognises that, while companies share responsibilities for promoting and respecting the observance of human rights, governments have the ultimate responsibility for upholding the rule of law and implementing human rights obligations. Moreover, the resolution further recognises that support for human rights, respect for the principles of labour and environmental standards, and the fight against corruption, as outlined in the United Nations Global Compact, are principles that, *inter alia*, businesses and governments should promote jointly. Any possible declaration of the Council of Europe could take into account and draw some inspiration from this document.

Conferences, seminars, workshops, colloquia or roundtables on corporate social responsibility

40. The CDDH is aware that the organisation of conferences, seminars, workshops, colloquia or roundtables on corporate social responsibility is a useful tool for the awareness-raising of the topic. In this respect, it refers to recent conferences organised by or in Council of Europe member states, such as the already mentioned European Union conference on the implementation of the Guiding Principles hosted by the Government of Denmark on 7-8 May 2012⁵⁸, a conference on “Ireland and the United Nations Framework for Business and Human Rights” (24 March 2012) organised by the National University of Ireland (Galway)⁵⁹, a conference on “Business and human rights: implementing the Guiding Principles one year on” organised by the United Kingdom Foreign and Commonwealth Office (27-29 June 2012)⁶⁰, and a conference on corporate social responsibility organised by the Ministry of Foreign Affairs of Norway on 13-14 November 2012⁶¹. The CDDH is however also aware of the limited resources in this respect in the absence of any voluntary contributions from member states with a particular interest in the topic.

⁵⁷ General Assembly of the Organisation of American States, “Promotion of Corporate Social Responsibility in the Hemisphere”, resolution of 4 June 2012 (AG/RES. 2753 (XLII-O/12)); http://www.oas.org/dil/AG-RES_2483-2009_eng.doc.

⁵⁸ <http://www.ihrb.org/news/2012/conference-business-and-human-rights-principles-to-practice.html>.

⁵⁹ <http://www.conference.ie/Conferences/index.asp?Conference=153>.

⁶⁰ http://staging.solidstategroup.com/global_business_initiative/wp-content/uploads/2012/08/Wilton-Park-2012.pdf.

⁶¹ <http://tsforum.event123.no/UD/CSR2012/home.cfm>.

41. The UN Working Group recently noted that “there is as yet little dialogue between regions, and encourages increased cross-regional exchange and dialogue”⁶². While sharing this concern in principle, the CDDH considers that the hosting of a conference, seminar or roundtable on cross-regional exchange of views and effects of transnational business operations and human rights would require additional resources to be found.

Awareness-raising initiatives involving the private sector

42. During its 75th meeting, the CDDH also requested the Secretariat to consider any awareness-raising initiatives involving the private sector (see CDDH(2012)R75, para. 22).

43. In this respect, it should be noted that the Council of Europe has in the past already engaged with the private sector in other contexts. For example, the Council of Europe has initiated the Global Project on Cybercrime in order to promote broad implementation of the Convention on Cybercrime (ETS No. 185) and its Protocol on Xenophobia and Racism (ETS No. 189) and to deliver specific results in terms of legislation, criminal justice capacities and international cooperation. That project is funded, *inter alia*, by voluntary contributions from several businesses such as Microsoft and VISA Europe. Moreover, the Council of Europe provides (in cooperation with European Union institutions and other organisations) secretariat services to the European Dialogue on Internet Governance (EuroDIG) which constitutes an annual platform for multistakeholders, including businesses, to meet in an open and inclusive environment to discuss the challenges and opportunities facing the future of the internet.

44. The CDDH considers that similar projects or platforms are feasible in the field of human rights and business, also in the light of the suggestion by the Parliamentary Assembly to develop partnerships with the business community to promote its standards.⁶³

Identification and recognition of good business practices

45. Collaboration with private businesses and civil society could also be a very fruitful possibility in order to identify and recognise good business practices. Many companies themselves have already established their own codes of conduct in which they oblige themselves (or their suppliers or business partners) to observe human rights and ethical standards. A Council of Europe expert group which would gather representatives from the private sector and civil society could elaborate a guide of good practices about how companies have implemented the UN Guiding Principles in order to give some

⁶² Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises”, United Nations Human Rights Council, 10 August 2012, A/67/285, para. 33.

⁶³ Resolution 1757 (2010), para. 7.4.1; http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm#P38_1800.

orientation to other enterprises which have not yet done so. In this respect, it should also be noted that the Drafting Group on the Human Rights of Older Persons has recently proposed to provide guidance on good practices in another context (see CDDH-AGE(2012)R2, para. 17). This idea is also in line with a proposal by the Parliamentary Assembly which suggested devising “a toolkit on mainstreaming best practices in the field of human rights protection into every aspect of a business and on how to conduct human rights impact assessments, in co-operation with business organisations and human rights groups”.⁶⁴

Cooperation with national human rights institutions and other specialised bodies

46. As suggested by the Parliamentary Assembly, the CDDH considers it feasible to establish co-operation with national human rights institutions and other specialised bodies in disseminating relevant information to companies and assessing progress and possible problems.⁶⁵ In this context, cooperation with specialised institutions, such as the Human Rights and Business Department of the Danish Institute for Human Rights⁶⁶ and the Institute for Business and Human Rights⁶⁷, could be particularly fruitful.

VI. Other measures

47. When considering what other measures and ideas the CDDH could envisage in the field of human rights and business, the existing relevant texts by the Parliamentary Assembly should be taken into account.

48. The report on “Human rights and business” by the Parliamentary Assembly, elaborated by the Committee on Legal Affairs and Human Rights (Rapporteur: Mr. Holger Haibach) and adopted on 27 September 2010, together with Resolution 1757 (2010) and Recommendation 1936 (2010) lists several proposals by the Parliamentary Assembly which the CDDH might wish to consider. Amongst those which had not previously been mentioned in this study, the Parliamentary Assembly recommended that Council of Europe member states should invest ethically, refuse to work with corporations associated with abuses and insist that firms fully respect human rights standards when they carry out government contracts – especially if the work involves classic state functions which have been “privatised”, such as law enforcement or military activities. More generally, it recommended that member states should introduce laws to protect individuals from corporate abuses of human rights enshrined in the European Convention on Human Rights. The Parliamentary Assembly also suggested strengthening

⁶⁴ Resolution 1757 (2010), para. 7.4.1; http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm#P38_1800.

⁶⁵ Resolution 1757 (2010), para. 7.4.2; http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm#P38_1800.

⁶⁶ <http://www.humanrights.dk/about+dihr/organisation/human+rights+and+business>.

⁶⁷ <http://www.ihrb.org/>.

the supervisory mechanism of the revised European Social Charter and to accelerate the modernisation of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. Moreover, it proposed a system for assessing the social responsibility of businesses, leading to a Council of Europe “label” for the best.

49. The report also suggests, on the basis of the UN framework “Protect, Respect and Remedy”, that the Council of Europe could also consider the following points:

- Connect public procurement with good human rights records of companies;
- Make investments by public pension or other insurance schemes dependent on corporate social responsibility;
- Connect export credit guarantees with good human rights records of companies;
- More detailed guidelines to accomplish a treaty or recommendation;
- Measures for training and awareness-raising.

50. The CDDH notes that some proposals, such as the modernisation of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, are meanwhile well underway. Others, such as the establishment of a “Council of Europe label” for good practices, could certainly be seen as an innovative way of action. However, they might require efforts and expenditure beyond the available resources and expertise, and the existence of standards such as ISO 26000⁶⁸ should be borne in mind before considering further action. A possible standard-setting instrument could however encompass certain of the recommendations by the Parliamentary Assembly, such as recommending to states the connection of public procurement or export credit guarantees with the human rights records of private companies.

VII. Conclusions

51. The UN Guiding Principles were unanimously adopted by the UN Human Rights Council in June 2011. Bearing in mind that Principle 10 recommends to states to encourage international institutions of which they are members to adopt policies to promote human rights, and considering the resolution and recommendation by the Parliamentary Assembly on “Human rights and business” of 27 September 2010 and its reply by the Committee of Ministers of 6 July 2011, the Council of Europe could develop a strategy for human rights and business which could comprise some or all of the following measures:

- the adoption of awareness-raising measures for the UN Guiding Principles amongst stakeholders in all 47 Council of Europe member states, such as a

⁶⁸ The International Standard providing guidelines for social responsibility (SR) named ISO 26000 or simply ISO SR (see <http://www.iso.org/iso/home/standards/iso26000.htm>) was released on 1 November 2010. This standard offers guidance on socially responsible behavior and possible actions; it does not contain requirements and, therefore, in contrast to ISO management system standards, is not certifiable.

declaration by the Committee of Ministers on corporate social responsibility and human rights, initiatives involving the private sector, identification and recognition of good business practices as well as – if resources permit – the organisation of conferences, seminars or similar events;

- the combination of a possible declaration by the Committee of Ministers (as mentioned above) with a recommendation or guidelines on human rights and business, in order to contribute to filling the “implementation gap” of the UN Guiding Principles at the regional level, particularly concerning access to justice for victims of corporate human rights abuses;
- the consideration of corporate social responsibility within specific aspects of Council of Europe action, in particular children’s rights, internet governance or social rights;
- the adoption of a guide of good practices in the field of corporate social responsibility and human rights, in co-operation with the private sector and civil society.

In addition, the Council of Europe could strengthen its co-operation with the European Union (on the basis of the Memorandum of Understanding between the two organisations) and other international organisations as well as with national human rights institutions and other bodies specialised in the field of corporate social responsibility and human rights.

52. With the submission of the present study, the CDDH considers having fulfilled this part of its terms of reference. It stands ready to carry out any additional tasks the Committee of Ministers may decide to entrust it in the light of the conclusions of the present study.