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STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

Draft Recommendation of the Committee of Ministers to member States on human rights and business and its draft explanatory memorandum

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84th meeting
7-11 December 2015

DRAFT RECOMMENDATION

(as adopted by the CDDH at its 84th meeting, 7-December 2015)

Recommendation of the Committee of Ministers to member States on human rights and business

The Committee of Ministers;

Considering that the aim of the Council of Europe is to achieve a greater unity among its member States, *inter alia*, by promoting common standards and developing actions in the field of human rights;

Believing in the economic and social progress as a means to promote the aims of the Council of Europe;

Recalling the member States' obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention on Human Rights and the Protocols thereto, including providing an effective remedy before a national authority for violation of those rights and freedoms, and their obligations arising, as far as they have ratified them, from the (revised) European Social Charter as well as from other European and international human rights instruments;

Reaffirming that all human rights and fundamental freedoms are universal, indivisible, interdependent and interrelated;

Recognising that business enterprises have a responsibility to respect human rights;

Considering the United Nations "Protect, Respect and Remedy" Framework, welcomed by the United Nations Human Rights Council on 18 June 2008, and the United Nations "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, and Remedy'" Framework, endorsed by the United Nations Human Rights Council on 16 June 2011 ("the UN Guiding Principles on Business and Human Rights");

Considering the United Nations Committee on the Rights of the Child's General comment No. 16 on State obligations regarding the impact of the business sector on children's rights addressed in 2013 to all States that have ratified the United Nations Convention on the Rights of the Child;

Recalling its Declaration on the UN Guiding Principles on Business and Human Rights of 16 April 2014 and, in particular, that their effective implementation, by both States and business enterprises, is essential to ensure respect for human rights in the business context;

Stressing, through this Recommendation, its commitment to contribute to the effective implementation of the UN Guiding Principles on Business and Human Rights at the European level;

Recommends that the governments of the member States:

1. review their national legislation and practice to ensure that they comply with the recommendations, principles and further guidance set out in the appendix, and evaluate the effectiveness of the measures taken at regular intervals;

2. ensure, by appropriate means and action, a wide dissemination of this Recommendation among competent authorities and stakeholders, with a view to raising awareness of the corporate responsibility to respect human rights and contribute to their realisation;

3. share examples of good practices related to the implementation of this Recommendation with a view to their inclusion in a shared information system, established and maintained by the Council of Europe, which is accessible to the public, including through reference to existing information systems;

4. share plans on the national implementation of the UN Guiding Principles on Business and Human Rights ("National Action Plans"), including revised National Action Plans as well as their best practices concerning the development and review of National Action Plans in a shared information system, established and maintained by the Council of Europe, which is accessible to the public, including through reference to existing information systems;

5. examine, within the Committee of Ministers, according to appropriate procedure, the implementation of this Recommendation no later than five years after its adoption, with the participation of relevant stakeholders.

Appendix to the Recommendation

I. Implementation of the UN Guiding Principles on Business and Human Rights

a. General Measures

1. Member States should effectively implement the UN Guiding Principles on Business and Human Rights as the current globally agreed baseline in the field of business and human rights, which rests on three pillars:

- States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms ("The State duty to protect human rights");
- The role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights ("The corporate responsibility to respect human rights");
- The need for rights and obligations to be matched to appropriate and effective remedies when breached ("Access to remedy").

2. They should implement the UN Guiding Principles on Business and Human Rights, as well as this Recommendation, in a non-discriminatory manner with due regard to gender-related risks.

3. In their implementation of the UN Guiding Principles on Business and Human Rights, member States should take into account the full spectrum of international human rights standards and ensure consistency and coherence at all levels of government. Member States which have not expressed their consent to be bound by a convention referred to in this Recommendation should consider doing so.

4. Member States should give due consideration to statements, general comments, recommendations and thematic commentaries relating to human rights provisions of the relevant international and regional conventions provided by the competent monitoring bodies.

5. In addition to their own implementation of the UN Guiding Principles on Business and Human Rights, member States should set out clearly the expectation that all business enterprises, which are domiciled or operate within their jurisdiction, to likewise implement these Principles throughout their operations.

6. Where necessary, member States should foster the translation and dissemination of the UN Guiding Principles, particularly in specific sectors or with regard to certain types of business enterprises where awareness is not yet sufficiently advanced, or in relation to which the risk of human rights abuses is high.

7. Member States should encourage third countries to implement the UN Guiding Principles on Business and Human Rights and other relevant international standards. They should

also consider developing partnerships with or offering other support to countries seeking to implement those standards.

8. Member States should offer advice and support to third countries wishing to strengthen, in line with the UN Guiding Principles on Business and Human Rights, their own judicial and non-judicial grievance mechanisms and to reduce barriers to remedies against business-related human rights abuses within their jurisdiction.

9. Member States should support the work of the United Nations, including the UN Working Group on Business and Human Rights, to promote the effective and comprehensive dissemination and implementation of the UN Guiding Principles on Business and Human Rights.

b. National Action Plans

10. If they have not yet done so, member States should develop and adopt plans on the national implementation of the UN Guiding Principles on Business and Human Rights ("National Action Plans") which address all three pillars of those Principles and this Recommendation. They should ensure their publication and wide distribution.

11. In the process of developing such National Action Plans, member States should refer to the available guidance, including that provided by the UN Working Group on Business and Human Rights as well as seek the expertise and involvement of all stakeholders, including business organisations and enterprises, National Human Rights Institutions, trade unions and non-governmental organisations.

12. With the participation of all stakeholders, member States should continuously monitor the implementation of their National Action Plans and, periodically evaluate and update them. Bearing in mind that a suitable model may vary from State to State, member States should share their best practices concerning the development and review of National Action Plans amongst each other, with third countries and relevant stakeholders.

II. The State duty to protect human rights

13. Member States should:

- Apply such measures as may be necessary to require business enterprises operating within their territorial jurisdiction to respect human rights;
- Apply such measures as may be necessary to require, as appropriate, business enterprises domiciled in their jurisdiction to respect human rights throughout their operations abroad;
- Encourage and support these business enterprises by other means to respect human rights throughout their operations.

14. Member states should ensure that everyone within their jurisdiction may easily have access to information about existing human rights in the context of corporate responsibility in a language which they can understand.

15. Within their jurisdiction, member States have a duty to protect individuals against human rights abuses by third parties, including business enterprises. This includes their positive and procedural obligations under the European Convention on Human Rights (ETS No. 5), as applied and interpreted by the European Court of Human Rights. Such obligations consist of requirements to prevent human rights violations where the competent authorities had known or ought to have known of a real risk of such violations, to undertake an independent and impartial, adequate, prompt and expeditious official investigation where such violations are alleged to have occurred, to undertake an effective prosecution, and to take all appropriate measures to establish accessible and effective mechanisms which require that the victims of such violations receive prompt and adequate reparation for the harm suffered.

16. The (revised) European Social Charter (ETS Nos. 35 and 163) and the Additional Protocol to the European Social Charter providing for a system of collective complaints (ETS No. 158) are other key instruments that afford protection against business-related human rights abuses, in particular with regard to the right of workers. Member States which have ratified these instruments accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which all the rights and principles set out in Part I of the (revised) European Social Charter may be effectively realised, and should consider increasing the number of accepted provisions.

17. In line with their international obligations, member States should ensure that their laws relating to employment are effectively implemented and require business enterprises not to discriminate against workers on any grounds, as reflected in Article 14 of the European Convention on Human Rights and interpreted by the European Court of Human Rights in its case law.

18. Member States should ensure that their legislation creates conditions that are conducive to the respect for human rights by business enterprises and do not create barriers to effective accountability and remedy for business-related human rights abuses. They should evaluate new relevant legislation with regard to any impact on human rights.

19. Member States should pay particular attention to the rights and needs of, as well as the challenges faced by, individuals, groups or populations that may be at heightened risk of becoming vulnerable or marginalised.

III. State action to enable corporate responsibility to respect human rights

20. Member States should apply such measures as may be necessary to encourage or, where appropriate, require that:

- business enterprises domiciled within their jurisdiction carry our human rights due diligence throughout their operations;
- business enterprises conducting substantial activities within their jurisdiction carry out human rights due diligence in respect of such activities;

including project-specific human rights impact assessments, as appropriate to the size of the business enterprise and the nature and context of the operation.

21. Member States should encourage and, where appropriate, require business enterprises referred to in paragraph 18 to display greater transparency in order to enable them better to "know and show" their corporate responsibility to respect human rights. Member States should also encourage and, where appropriate, require such business enterprises to provide regular, or as when needed, information on their efforts on corporate responsibility to respect human rights.

22. Member States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, that may be integrated into existing due diligence procedures, when member States:

- Own or control business enterprises;
- Grant substantial support and deliver services through agencies, such as export credit agencies and official investment insurance or guarantee agencies, to business enterprises;
- Grant export licenses to business enterprises;
- Conduct commercial transactions with business enterprises, including through the conclusion of public procurement contracts;
- Privatise the delivery of services that may impact upon the enjoyment of human rights.

Member States should evaluate the measures taken and respond to any deficiencies, as necessary. They should provide for adequate consequences if such respect for human rights is not honoured.

23. When concluding and during the term of trade and investment agreements, or other relevant conventions, member States should consider possible human rights impacts of such agreements and take appropriate steps, including through the incorporation of human rights clauses, to mitigate and address identified risks of adverse human rights impacts.

24. In order not to facilitate the administration of capital punishment or torture in third countries by providing goods which could be used to carry out such acts, member States should ensure that business enterprises domiciled within their jurisdiction do not trade in goods which have no practical use other than for the purpose of capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment.

25. Member States should, when business enterprises referred to in paragraph 18 are represented in a trade mission to member States and third countries, address and discuss possible adverse effects future operations might have on the human rights situation in those countries and require participating companies to respect the UN Guiding Principles or the OECD Guidelines for Multinational Enterprises.

26. Member States should advise, for example, through their competent ministries or diplomatic or consular missions, business enterprises which intend to operate or are operating in a third country on human rights issues, including challenges faced by individuals from groups or populations that may be at heightened risks of becoming vulnerable or marginalised, and with due regard to gender-related risks.

27. Member States should be in a position to inform business enterprises referred to in paragraph 18 on the potential human rights impacts of carrying out operations in conflict-affected areas, and in other sectors or areas that involve high risk of negative human rights impact and provide assistance to these business enterprises, in line with relevant international instruments, such as the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones or the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas. Member States should facilitate business enterprises' adherence to sector-specific standards, such as the Voluntary Principles on Security and Human Rights and the International Code of Conduct for Private Security Providers. Member States should consider performing a sector-risk analysis in order to identify the sectors that are most at risk of getting involved in negative impact on human rights.

28. Where appropriate, member States should promote, support and participate in training and workshops for business enterprises and their local trading partners, including on human rights due diligence in their business activities in third countries. This should be done in cooperation with business organisations and enterprises, National Human Rights Institutions, trade unions and non-governmental organisations.

29. Member States should offer training on business and human rights for governmental officials whose tasks are relevant to the issue of corporate responsibility, such as for example diplomatic and consular staff assigned to working in third countries with a sensitive human rights situation.

30. Member States should adopt effective enforcement measures with respect to human rights and business standards, and ensure that relevant regulatory bodies are engaged to this end.

IV. Access to remedy

a. Access to judicial mechanisms

31. Member States should ensure the effective implementation of their obligations under Articles 6 and 13 of the European Convention on Human Rights, and other international and European human rights instruments, to grant to everyone access to court in the determination of his civil rights, as well as to everyone whose rights have been violated under these instruments an effective remedy before a national authority, including where such violation arises from business activity.

i. Civil liability for business-related human rights abuses

32. Member States should apply such legislative or other measures as may be necessary to ensure that human rights abuses caused by business enterprises within their jurisdiction give rise to civil liability under their respective laws.

33. Member States which have not expressed their consent to be bound by the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the "Lugano Convention") should consider initiating the procedure for accession.

34. Member States should apply such legislative or other measures as may be necessary to ensure that their domestic courts have jurisdiction over civil claims related to business-related human rights abuses against business enterprises domiciled within their jurisdiction. The doctrine of *forum non conveniens* should not be applied in these cases.

35. Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims related to business-related human rights abuses against subsidiaries, wherever based, of business enterprises domiciled within their jurisdiction, if such claims are closely connected with civil claims against the latter enterprises.

36. Where business enterprises are not domiciled within their jurisdiction, member States should consider allowing their domestic courts to exercise jurisdiction over civil claims related to business- related human rights abuses against such a business enterprise, if manifestly no other effective forum guaranteeing a fair trial is available (*forum necessitatis*) and there is a sufficiently close connection to the member State concerned.

37. Where a member State owns or controls a business enterprise, or contracts with a business enterprise to provide public services, each member State should apply such legislative and other measures as may be necessary to ensure that civil claims in connection with human rights abuses by such enterprises may be brought before its domestic courts, and that it will refrain from invoking any domestic privileges or immunities if the claim is brought before a domestic court.

38. Member States should apply such legislative and other measures as may be necessary to ensure that civil claims related to business-related human rights abuses against business enterprises subject to their jurisdiction are not unduly restricted by the application of doctrines such as “the act of state” or “political question”.

39. Member States should consider adopting measures that allow entities such as foundations, associations, trade unions and other organisations to bring claims on behalf of alleged victims.

40. Member States should apply such legislative or other appropriate measures as may be necessary to ensure that their domestic courts refrain from applying a law that is incompatible with their international obligations, in particular those stemming from the applicable international human rights standards.

41. When alleged victims of business-related human rights abuses bring civil claims related to such abuses against business enterprises, member States should ensure that their legal systems sufficiently guarantee an equality of arms within the meaning of Article 6 of the European Convention on Human Rights. In particular, they should provide in their legal systems for legal aid schemes regarding claims concerning such abuses. Such legal aid should be obtainable in a manner that is practical and effective.

42. Member States should consider possible solutions for the collective determination of similar cases in respect of business-related human rights abuses.

43. Member States should consider revising their civil procedures where the applicable rules impede the access to information in the possession of the defendant or a third party, if such information is relevant for victims of business-related human rights abuses to substantiate their claims, with due regard for confidentiality considerations.

ii. Criminal or equivalent liability for business-related human rights abuses

44. Member States should consider applying such legislative and other measures as may be necessary to ensure that business enterprises can be held liable under their criminal law or other equivalent law for the commission of:

- Crimes under international law;
- Offences established in accordance with treaties, such as the Criminal Law Convention on Corruption (ETS No. 173), the Convention on Cybercrime (ETS No. 185), the Convention on Action against Human Trafficking (CETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), the Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), the United Nations Convention against Transnational Organised Crime of 15 November 2000, and the United Nations Convention against Corruption of 31 October 2003, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;
- Other offences constituting serious human rights abuses involving business enterprises.

Such measures should also ensure that business enterprises can be held liable for their participation in the commission of such crimes.

45. Irrespective of whether business enterprises can be held liable under criminal or other equivalent law, member States should consider applying such legislative and other measures as may be necessary to ensure that representatives of business enterprises can be held criminally liable for the commission of crimes under international law, offences established in accordance with international agreements, and other offences that would constitute serious human rights abuses involving business enterprises.

46. Irrespective of whether or not they are directed against natural or legal persons, investigations are to satisfy the effectiveness criteria under the European Convention on Human Rights, *i.e.* they are to be adequate, thorough, impartial and independent, prompt, and contain an element of public scrutiny, including the effective participation of victims in the investigation. Member States have a duty to prosecute where the outcome of an investigation warrants this. Given that victims are entitled to request an effective official investigation, any decision not to start an investigation, or to stay an investigation or prosecution is to be sufficiently reasoned.

iii. Administrative remedies

47. Member States should apply such legislative and other measures as may be necessary to ensure that decisions of competent authorities such as those granting support, delivering

services or granting export licenses to business enterprises: (a) take into account human rights risks, for example, on the basis of a human rights impact assessment; (b) are disclosed, as appropriate; and (c) are subject to administrative or judicial review.

48. Member States should provide for appropriate measures to address credible allegations of human rights abuses in connection with the business activities that form the basis of the decisions referred to in paragraph 48.

b. Access to non-judicial mechanisms

49. Member States should assist in raising awareness of and in facilitating access to non-judicial grievance mechanisms, and contribute to knowledge sharing of the available non-judicial grievance mechanisms.

50. Member States should provide for State-based non-judicial grievance mechanisms that meet the effectiveness criteria listed in Principle 31 of the UN Guiding Principles on Business and Human Rights and facilitate the implementation of their outcomes. They should encourage that non-State based non-judicial grievance mechanisms also meet these effectiveness criteria.

51. Member States should evaluate the adequacy and availability of State-based non-judicial mechanisms, such as labour inspectorates, consumer protection authorities and environmental agencies, National Human Rights Institutions, ombudsperson institutions and national equality bodies, as well as the remedies they may provide for. This could include extending the mandate of existing State-based non-judicial bodies or creating new ones with the capacity to receive and adjudicate complaints of business-related human rights abuses and afford reparations to the victims.

52. Member States which have not yet done so should take steps to adhere to and/or implement the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (OECD Guidelines). They should support the effective implementation of the Tripartite declaration of principles concerning multinational enterprises and social policy of the International Labour Organisation.

53. Those member States which have implemented the OECD Guidelines should ensure the effectiveness of their National Contact Points (NCPs) established under those Guidelines, in particular by making available human and financial resources so that they can carry out their responsibilities; ensuring that the NCPs are visible, accessible, transparent, accountable and impartial; promoting dialogue-based approaches; considering whether to make public the recommendations of NCPs; and that such recommendations are taken into account by governmental authorities in their decisions on public procurement, export credits or investment guarantees.

54. Member States should encourage business enterprises referred to in paragraph 18 to establish their own grievance mechanisms in line with the effectiveness criteria in Principle 31 of the UN Guiding Principles. Where such mechanisms are being put in place, it should be ensured that they are not used to impede the alleged victim's access to the regular court system or State-based non-judicial mechanisms.

c. General measures

55. In order to improve the access to remedies for victims of business-related human rights abuses, member States should fulfil their obligations of judicial co-operation amongst each other or with third countries, including criminal investigations, mutual legal assistance, exchange of information and data, collection of evidence as well as the recognition and enforcement of judgments, in a manner consistent with the human rights of all parties involved in the proceedings. To that end, member States are encouraged to intensify their cooperation, amongst each other and with third countries and with non- State based non-judicial grievance mechanisms, beyond their existing obligations. Moreover, member States should undertake more efforts to support each other through technical cooperation and the exchange of experiences.

56. Member States should provide for sufficient resources and consider developing special guidance and training for judges, prosecutors, inspectors, arbitrators and mediators to deal with business-related human rights abuses, in particular those which have a transnational component.

57. Alleged victims of business-related human rights abuses within the territorial jurisdiction of member States should have general access to information about the content of the respective human rights as well as about existing judicial and non-judicial remedies in a language which they can understand.

V. Additional protection of workers

58. Member States should require that business enterprises respect the rights of workers when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction.

59. Member States should reinforce efforts to meet their obligations with regard to workers under the UN Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the (revised) European Social Charter, the fundamental conventions of the International Labour Organisation concerning in particular the freedom of association, the right to collective bargaining, the prohibition of discrimination, child and forced labour, as well as all other relevant international instruments, including those relating to the health and safety of workers and people working in the informal economy.

60. Member States should involve social partners in the elaboration and implementation of policies on matters which are particularly sensitive with regard to workers' rights.

VI. Additional protection of children

61. Member States should require that business enterprises respect the rights of children when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction.

62. When implementing the UN Convention on the Rights of the Child of 20 November 1989 and its Optional Protocols, they should give due consideration to General comment No. 16 on State obligations regarding the impact of the business sector on children's rights adopted by the UN Committee on the Rights of the Child. Member States should also reinforce efforts to meet their obligations with regard to children under the European Convention on Human Rights, the (revised) European Social Charter, the conventions of the International Labour Organisation concerning child labour, and other relevant international instruments, and give consideration to the Children's Rights and Business Principles developed by Global Compact, UNICEF and Save the Children.

63. Member States should involve all relevant stakeholders in the elaboration and implementation of policies on matters which are particularly sensitive with regard to children's rights, such as measures provided for by the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201).

64. Recognising that children often lack access to relevant information and face particular difficulties in exercising their right to be heard, member States should, in particular:

(a) encourage or, where appropriate, require that business enterprises specifically consider the rights of the child when carrying out human rights due diligence;
(b) implement measures to remove social, economic and juridical barriers so that children can have access to effective judicial and State-based non-judicial mechanisms without discrimination of any kind, in accordance with the Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice;
(c) specifically consider the rights of children in their National Action Plans.

VII. Additional protection of indigenous peoples

65. Member States should require that business enterprises respect the rights of indigenous peoples, as defined by international standards, when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction.

66. Member States should reinforce efforts to meet their commitments with regard to business and the rights of indigenous peoples under the United Nations Declaration on the Rights of Indigenous Peoples of 13 September 2007, the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989, and any other international instrument providing protection to the rights and culture of indigenous peoples.

67. Member States should apply such legislative and other measures as may be necessary to encourage or, where appropriate, require that business enterprises domiciled within their jurisdiction: (a) respect the rights and interests of indigenous peoples, and (b) consult and cooperate in good faith in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral, water or other resources. With regard to business enterprises conducting substantial activities within their jurisdiction, member States should apply such measures in respect of those activities.

68. Member States should pay special attention to the rights of indigenous peoples in their National Action Plans.

VIII. Protection of human rights defenders

69. Member States should ensure that the activities of human rights defenders within their jurisdiction who focus on business-related impacts on human rights are not obstructed, for example through political pressure, harassment, politically motivated or economic compulsion. In particular, the fundamental rights enjoyed by human rights defenders in accordance with Article 10 and Article 11 of the European Convention on Human Rights must be protected.

70. Member States should protect and also support, for example through their diplomatic and consular missions, the work of human rights defenders who focus on business-related impacts on human rights in third countries, in accordance with existing international and European standards.

Explanatory memorandum

of the Recommendation of the Committee of Ministers to member States on human rights and business

I. Introduction

1. Companies have, especially where they operate at the global level as multinational enterprises, become increasingly powerful, with some even exceeding the GDP of middle-sized States. While those companies generally bring benefits to society by generating tax revenues, creating jobs and improving technologies, the question of respect for human rights and accountability for violations by companies has been the subject of increasing debate at both international and national levels. Businesses see increasingly themselves as important players in respecting human rights.[1] For several decades now the term "corporate social responsibility" has been used in this context to indicate a normative standard, by which those companies take responsibility for their actions and encourage a positive impact through their activities on, *inter alia*, human rights. Since many multinational companies which operate at the global level have their headquarters in Council of Europe member States, the topic is of high relevance for this organisation.

The UN Guiding Principles

2. 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 (hereinafter: "the UN Guiding Principles") which were elaborated by the UN Secretary General's Special Representative on business and human rights, Mr John Ruggie. 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. Whilst they are not legally binding and do not create any new obligations under international law, they clarify the meaning of the corporate responsibility to respect human rights. The principles rest on three pillars: firstly, the State duty to protect against human rights abuses by third parties, including businesses; secondly, the corporate responsibility to respect human rights; and thirdly, greater access by victims to effective remedy, both judicial and non-judicial. The UN Guiding Principles present for the first time globally agreed standards, which have been taken up by other intergovernmental organisations, governments and businesses, and which have also been well received by stakeholder groups, whether from the private sector or civil society. The UN Guiding Principles have achieved a worldwide consensus among all stakeholders on a series of key principles relating to the corporate responsibility to respect human rights. It is the purpose of this Recommendation to facilitate the implementation of these key principles in all 47 Council of Europe member States, and to give guidance on how to fill gaps at the European level.

[1] See the survey by The Economist "The Road from Principles to Practice – today's challenges for business in respecting human rights", 2015, p. 4.

Work in the Committee of Ministers

3. At its 1160th meeting, on 13 January 2013, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to elaborate a declaration supporting the UN Guiding Principles and to submit it to the Committee of Ministers by 30 June 2014. This declaration, which was elaborated by the Drafting Group on Human Rights and Business (CDDH-CORP) which operated under the authority of the CDDH, was adopted by the Committee of Ministers on 16 April 2014. In the declaration, the Committee of Ministers, *inter alia*, recognised that business enterprises have a responsibility to respect human rights; welcomed the UN Guiding Principles and recognised them as the current globally agreed baseline; stressed that their effective implementation, both by States and business enterprises, is essential to ensure respect for human rights in the business context; and expressed its willingness to contribute to their effective implementation at the European level.

4. Moreover, the Committee of Ministers instructed in January 2013 the CDDH to elaborate – in co-operation with the private sector and civil society – a non-binding instrument, which addresses gaps in the implementation of the UN Guiding Principles at the European level, including with respect to access to justice for victims of human rights abuses related to business. The CDDH-CORP met six times in order to prepare the draft non-binding instrument, which it suggested to be a Recommendation by the Committee of Ministers to the Council of Europe member States. The CDDH-CORP further decided that an appendix to the Recommendation should set out already existing legal requirements and principles and give further guidance. The CDDH approved the proposed text of the present Recommendation at [*its 84th meeting (8-11 December 2015)*] and transmitted it to the Committee of Ministers, which adopted it on [… 2016], at the […th] meeting of the Ministers' Deputies.

II. Comments

General considerations

Aim of the recommendation

5. The Recommendation seeks to give member States of the Council of Europe guidance on how to implement the UN Guiding Principles and to fill any gaps at the European level in the implementation process. While not all provisions of the UN Guiding Principles are explicitly mentioned in the Recommendation, but only those for which the Committee of Ministers had specific additions to fill gaps and put them in their regional context, it is understood that the implementation should comprise all provisions of the UN Guiding Principles, and all three of its pillars are of equal importance. As the UN Guiding Principles, the present Recommendation applies to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure. Even though it is not a legally binding instrument, and member States are only bound to the extent that they have ratified the instruments on which the principles are

drawn, the paragraph 1 of the Recommendation itself invites governments of member States to ensure that their national legislation and practice is being reviewed so as to comply with the recommendations set out in its appendix. In paragraph 3 of the Recommendation itself Member States are also invited to share their good national practices related to the implementation of the Recommendation amongst each other.

Dissemination of the Recommendation and follow-up process

6. Member States are further encouraged to ensure, by appropriate means and action, a wide and effective dissemination of this instrument among competent authorities and stakeholders, such as companies, private sector networks, National Human Rights Institutions, non-governmental organisations and trade unions. For the purposes of such dissemination, member States are invited in paragraph 2 of the Recommendation itself where necessary to translate the Recommendation and its appended principles into languages other than the official languages of the Council of Europe (English and French). Member States which have already adopted National Action Plans on business and human rights (see paragraph 24 of this Explanatory Memorandum) have also provided for such translations of other documents of central importance, such as the UN Guiding Principles (already available in English, French, Russian, German, Spanish and Portuguese) and the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (already made available in fourteen languages of Council of Europe member States).

7. Concerning the follow-up to the Recommendation, governments of member States are invited to examine its implementation within the Committee of Ministers not later than five years after its adoption, with the participation of all relevant stakeholders. While in principle the follow-up process is open and may take different forms, as appropriate, previous recommendations were reassessed by sending questionnaires to member States on how and to what effect they had implemented those instruments. The replies were published on the Council of Europe website, together with a summary report elaborated by the Secretariat and subsequently adopted by the CDDH, with a view to its being transmitted to the Committee of Ministers. In any event, the examination of the implementation of the present Recommendation should take place with the participation of all relevant stakeholders, including business organisations and enterprises, National Human Rights Institutions, trade unions and non-governmental organisations, which should have the possibility to make contributions throughout this process. It is also understood that the sharing of best practices is to be encouraged throughout this follow-up process.

Definition of the term "domiciled within their jurisdiction"

8. The Recommendation makes in numerous paragraphs references to the domicile of business enterprises in the jurisdiction of Council of Europe member States. It was understood during the negotiations of the Recommendation that, whenever that instrument refers to the term "jurisdiction", that term shall have the same meaning as in Article 1 European Convention on Human Rights (ETS No. 005, hereinafter the "ECHR"), as applied and interpreted by

the European Court of Human Rights. Moreover, the term "domiciled" should be understood within the meaning of the EU Brussels I (No. 1215/2012) and Rome II (No. 864/2007) Regulations which define the term "domiciled" as being the business's "statutory seat", "central administration" or "principle place of business".

The three pillars of the UN Guiding Principles in the context of the Recommendation

9. As far as the first pillar of the UN Guiding Principles, the duty of States to protect human rights, is concerned, the Recommendation seeks to give guidance on how this duty relates to the European context. The European Convention on Human Rights as interpreted and applied by the European Court of Human Rights, and the (revised) European Social Charter (ETS No. 35 and 163) giving due consideration to the conclusions and decisions by the European Committee of Social Rights, are of particular relevance in this respect. Those measures are elaborated upon in Part II of the appendix to the Recommendation. Moreover, in the course of this explanatory memorandum, reference to other European and international instruments will also be made. The Recommendation also draws inspiration from Parliamentary Assembly Resolution 1757(2010) and Recommendation 1936(2010), both adopted on 6 October 2010, which were devoted to the issue of human rights and business.

10. The second pillar of the UN Guiding Principles concerns "the role of business enterprises as specialised organs of society performing specialised functions, required to comply with all applicable laws and to respect human rights" (General Principle (b) of the UN Guiding Principles). This pillar relates to a corporate responsibility to respect human rights, meaning that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved. In this context, it should be noted that Article 15b) of the Statute of the Council of Europe (ETS No. 001) provides for the possibility of recommendations by the Committee of Ministers to member States, but not to private entities. For that reason, the present Recommendation addresses the second pillar of the UN Guiding Principles by making recommendations about measures Council of Europe member States may take to promote the corporate responsibility to respect human rights. Those measures are elaborated upon in Part III of the appendix to the Recommendation.

11. As suggested by the Committee of Ministers in its instructions given at its 1160th meeting on 13 January 2013, particular emphasis has been given in the present Recommendation to access to justice. This is an area in which the Council of Europe has gathered considerable expertise over the last decades, whether through the case law of the European Court of Human Rights, the conclusions and decisions of the European Committee of Social Rights, the work of the European Commission for the Efficiency of Justice or other specialised bodies. In the appendix to the Recommendation, a specific and large part (Part IV) has been devoted to "Access to remedy", which also reflects the third pillar of the UN Guiding Principles.

12. The present Recommendation thus addresses all three pillars in a balanced way, while putting particular emphasis on the issue of access to remedy. The reason for this is that the

Council of Europe has particular expertise and numerous already-existing standards to draw from in this area. The Committee of Ministers considered therefore that the biggest added-value could be obtained by giving its member States guidance on the implementation on the UN Guiding Principles in this area, specifically tailored to the European context. The fact that such emphasis was made in the present Recommendation should, however, under no circumstances be understood as prioritising one of the three pillars of the UN Guiding Principles, which are all of equal value and importance.

I. Implementation of the UN Guiding Principles on Business and Human Rights

a. General Measures

Non-discrimination as a general principle

13. The Recommendation takes as a starting point the invitation in paragraph 1[2] to member States to effectively implement the UN Guiding Principles on Business and Human Rights. As the UN Guiding Principles, the Recommendation should be implemented in a non-discriminatory manner (paragraph 2 of the Recommendation), with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalised.The Recommendation thereby places particular emphasis on due regard for gender-related risks. As far as Council of Europe standards are concerned, this non-discrimination principle is derived from Article 14 ECHR (prohibition of discrimination with regard to the rights enshrined in the Convention) and Article 1 of Protocol No. 12 to the ECHR (establishing a general prohibition of discrimination). Those provisions prohibit discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The list of grounds for discrimination is not exhaustive, but rather illustrative. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case law concerning Article 14 ECHR. In particular, this case law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example, in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised"[3]. In the area of social and economic rights, Article E of the (revised) European Social Charter requires that the rights enshrined in the Charter shall be secured without any discrimination on the grounds contained in the provision, which mirror the reasons contained in Article 14 ECHR (with "health" added to the list). For those Council of Europe member States which are also members of the European Union, Article 21 of the Charter of Fundamental Rights contains a non-discrimination clause. The Recommendation specifies in its paragraph 17 that member States should, in line with their

[2] Henceforth, all references to the Recommendation are to the appendix to the Recommendation unless otherwise specified.

[3] *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (nos. 9214/80 *et al*.), judgment of 28 May 1985 (Plenary)

international obligations, ensure that their laws relating to employment are effectively implemented. In this context, the particular role of a well-functioning system of labour inspection should be highlighted. Moreover, it requires business enterprises not to discriminate against workers.

Relevant international and European human rights standards

14. Paragraph 3 of the Recommendation encourages member States to take into account the full spectrum of international human rights standards in the implementation process and to give due consideration to the work of their respective monitoring bodies. This means in particular both civil and political rights (as enshrined at Council of Europe level in the European Convention on Human Rights and at global level in the International Covenant on Civil and Political Rights) and social and economic rights (as enshrined at Council of Europe level in the (revised) European Social Charter and at global level in the International Covenant on Economic, Social and Cultural Rights). Moreover, specific human rights treaties may provide for human rights obligations of member States, as far as they have ratified those treaties, with regard to companies. Among the Council of Europe standards, such provisions may be contained in the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), the Convention on Human Rights and Biomedicine (ETS No. 164), the Convention on Cybercrime (ETS No. 185), the Convention against Trafficking in Human Beings (CETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201), and the Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210).

15. Of particular relevance are further the International Convention on the Elimination of All Forms of Racial Discrimination (1963), the Convention on the Elimination of All Forms of Discrimination against Women (1979), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990), the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children ("the Palermo Protocol"), supplementing the United Nations Convention against Transnational Organised Crime (2000), and the UN Convention on the Rights of Persons with Disabilities (2006).

16. Moreover, the International Labour Organisation has set eight "core conventions" which are relevant in the field of business and human rights, and which have been ratified by most Council of Europe member States: the Forced Labour Convention (no. 29, 1930) and its 2014 Protocol (as of November 2015, not yet in force), the latter stating in its Article 2(e) that each member State should support due diligence by the private sector to prevent and respond to risks of forced and compulsory labour; the Freedom of Association and Protection of the Right to Organize Convention (No. 87, 1948); the Right to Organize and Collective Bargaining Convention (No. 98, 1949); the Equal Remuneration Convention (no. 100, 1951); the Abolition of Forced Labour Convention (No. 105, 1957); the Discrimination (Employment and Occupation) Convention (No. 111, 1958); the Minimum Age Convention (No. 138, 1973); and the Worst Forms of Child Labour Convention (No. 182, 1999). Beyond the eight core conventions, the ILO has adopted a

wide range of further conventions which are of specific relevance, including the Occupational Safety and Health Convention (No. 155, 1981), the Promotional Framework for Occupational Safety and Health Convention (No. 187, 2006), the Prevention of Major Industrial Accidents Conventions (No. 174, 1993) and the Indigenous and Tribal Peoples Convention (No. 169, 1989).

17. More information, in particular on further relevant conventions, may be found in the document "Existing obligations of member States under Council of Europe treaties and other instruments in the context of human rights and business" (CDDH-CORP(2014)08) which was prepared by the Secretariat and is available on the website of the CDDH-CORP. In relation to the full spectrum of human rights paragraph 3 of the Recommendation states that member States which have not expressed their consent to be bound by a convention referred to in the Recommendation should consider doing so.

Consistency and coherence in the implementation of the UN Guiding Principles

18. Member States are invited by paragraph 3 of the Recommendation to ensure consistency and coherence at all levels of government when implementing the UN Guiding Principles on Business and Human Rights. Principle 8 of the UN Guiding Principles states that "States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support". To that effect, it is important that governments realise that they must be consistent and avoid sending conflicting messages. Some member States which have already adopted National Action Plans have addressed this issue in their plans, for example by coordinating an inter-ministerial working group with representatives from departments and agencies whose work concerns corporate social responsibility and human rights- related areas.

19. When implementing the Guiding Principles, including through the elaboration of National Action Plans, member States should engage and consult fully with all relevant stakeholders, including business and civil society. In particular, Member States are encouraged to involve relevant social partners when implementing sections of the Guiding Principles particularly affecting the rights of workers.

Expectation that business enterprises implement the UN Guiding Principles

20. Paragraph 5 of the Recommendation invites member States to set out clearly the expectation that all business enterprises which are domiciled or operate within their jurisdiction implement the UN Guiding Principles throughout their operations, as laid down in Principle 2 in the UN Guiding Principles. This is a "Foundational principle", which forms the basis of numerous provisions of both the Recommendation and the UN Guiding Principles. Moreover, governments' expectation to companies has been included in the already existing National Action Plans of Council of Europe member States.

Further measures to facilitate dissemination

21. The UN Guiding Principles on Business and Human Rights are available in the official languages of the United Nations (English, French, Russian, Spanish, Arabic and Chinese). Paragraph 6 of the Recommendation invites Member States to foster translation and dissemination of the Principles, in particular in sectors where awareness is not yet sufficiently advanced. A good example in this respect may be the European Commission's "Guide to human rights for small and medium-sized enterprises" of December 2012 which addresses small and medium-sized companies which may lack the awareness and the resources of multinational companies to undertake human rights due diligence. Moreover, specific sectors (such as textiles, extraction businesses, exports of surveillance technology) may create heightened human rights risks which vary according to their specific contexts. This may justify specific or targeted dissemination of the UN Guiding Principles by member States at the national level. At the same time, member States have to take into consideration that the scale and complexity of the means through which enterprises meet their responsibility to respect human rights may vary according to their size, operational context, ownership and structure and with the severity of the enterprise's adverse human rights impacts.

22. Paragraph 7 of the Recommendation invites member States to encourage third countries to implement the UN Guiding Principles and other relevant international standards, for example by developing partnerships or offering other support, in particular where third countries wish to strengthen their access to remedies. In this respect, some member States have already incorporated this aspect in their National Action Plans, and have formed collaborative partnerships with certain third States, expressed for example through joint statements by their heads of government.

23. Paragraph 9 of the Recommendation states that member States should support the work of the United Nations, including the Working Group on the issue of human rights and transnational corporations and other business enterprises (hereinafter the "UN Working Group on Business and Human Rights"), to promote the effective and comprehensive dissemination and implementation of the UN Guiding Principles on Business and Human Rights. The UN Working Group on Business and Human Rights was established by the UN Human Rights Council in June 2011. It consists of five independent experts, of balanced geographical representation, which are appointed for a period of three years (the mandate was extended in 2014 for another three years). Amongst the tasks of the UN Working Group are: to promote the effective and comprehensive dissemination and implementation of the UN Guiding Principles; to identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles and to assess and make recommendations thereon; to provide support for efforts to promote capacity-building and the use of the Guiding Principles, as well as, upon request, to provide advice and recommendations regarding the development of domestic legislation and policies relating to business and human rights; to continue to explore options and make recommendations at the national, regional and international levels for enhancing access to effective remedies available to those whose human rights are affected by corporate activities, including those in conflict areas; and to develop a

regular dialogue and discuss possible areas of cooperation with governments and all relevant actors.

b. National Action Plans

Development of National Action Plans

24. In its declaration of 16 April 2014, the Committee of Ministers called in paragraph 10d. on all member States to develop National Action Plans on the implementation of the UN Guiding Principles (hereinafter "National Action Plans"). Paragraph 10 of the present Recommendation reiterates this call. By the end of 2015, several member States of the Council of Europe had already adopted such plans, while others were in the process of developing them.

Available guidance

25. In the process of developing National Action Plans, paragraph 11 of the Recommendation invites member States to make use of the available guidance, including that provided by the UN Working Group on Business and Human Rights. In 2014, following an open consultation process, the Working Group issued its "Guidance on National Action Plans on Business and Human Rights", which was subsequently revised in November 2015. This guide is designed as a reference document for all stakeholders concerned, and is based on the notion that there is no "one size fits all"-approach to National Action Plans. Nevertheless, the Working Group has identified the following five-phase process for the development of national action plans: initiation; assessment and consultation; drafting of initial National Action Plans; implementation; and update. As to the overall substance and content, the Working Group proposes a certain structure with particular sections that may be suitable for a National Action Plan. It also identifies certain underlying principles in a government's response to adverse human rights impacts related to business: firstly, all commitments in the National Action Plan need to be directed towards preventing, mitigating and remedying current and potential adverse impacts; secondly, the UN Guiding Principles should be used to identify how to address adverse impacts; thirdly, governments should identify a "smart mix" of mandatory and voluntary, international and national measures; and fourthly, governments should take into account gender-related impacts, and make sure the measures defined in their National Action Plans allow for the effective prevention, mitigation and remediation of such impacts.

26. It should also be noted that the International Corporate Accountability Roundtable and the Danish Institute for Human Rights have launched a common project which resulted in 2014 in the guide on "National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks". That toolkit provides a checklist of twenty-five criteria by which National Action Plans can be assessed, covering both their content and the process undertaken by States in developing them. In particular, it suggests national baseline assessments to inform the content of National Action Plans. In the same year, the International Corporate Accountability Roundtable and the European Coalition for Corporate Justice published an assessment of the at the time already existing national action plans (all of them by Council of Europe member States) in terms of both

content and processes in light of the checklist contained in the above-mentioned toolkit. It also assessed best practices and suggested areas for improvement.

Best practices

27. In addition to the above initiatives, paragraph 12 of the Recommendation suggests that Council of Europe member States should share their best practices concerning the development and review of National Action Plans amongst each other, including the development and review of National Action Plans, with a view to their inclusion in a shared information system. Such a system could, for example, be maintained on the website of the CDDH-CORP, which is maintained by the Human Rights Policy and Cooperation Department of the Council of Europe's Directorate General of Human Rights and Rule of Law. Good practices should also be shared with third countries and relevant stakeholders. The latter should be involved at all stages of the process of National Action Plans, including their development and monitoring, as well as their periodic evaluation and updating. It is also suggested that National Action Plans should contain precise information about their follow-up process and identify which governmental authority bears responsibility for it. As regards the content of the National Action Plans, it is suggested that they address all three pillars of the UN Guiding Principles as well as both regulatory and practical action taken in the past and envisaged for the future by the respective governments. Finally, governments which want to inform themselves about recent developments in the area of National action plans might find the website of the "Business & Human Rights Resource Centre" useful[4].

II. The State duty to protect human rights

28. Paragraph 13 of the Recommendation suggests that member States apply such measures as may be necessary to require that business enterprises meet their responsibility to respect human rights. This concerns business enterprises that operate within a Council of Europe member State, irrespective of whether they are domiciled within or outside of Europe (first bullet point of paragraph 13 of the Recommendation). Moreover, where business enterprises domiciled in a Council of Europe member State operate outside of Europe, member States should apply such measures as may be necessary to require, as appropriate, such business enterprises to meet their responsibility to respect human rights throughout these operations abroad (second bullet point of paragraph 13 of the Recommendation). The third bullet point of this paragraph refers to other means to encourage and support business enterprises to respect human rights throughout their operations. Such means may, for example, be the adoption of incentive (rather than prescriptive or mandatory) measures.

Access to information

29. Paragraph 14 of the Recommendation invites member States to ensure that everyone "within their jurisdiction" may easily have access to information about existing human rights in the

[4] http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans

context of corporate responsibility. The reason behind this principle is that persons cannot claim their rights if they do not know about them. It provides that victims of corporate human rights violations have access to information on relevant court and administrative proceedings in a language which they can understand. The expression "in a language which they can understand" is thereby a formulation commonly used in Council of Europe treaties, which is understood not to require any possible language, but rather "the languages most widely used in the country" (see, for example, paragraph 229 of the Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse).

Obligations under the European Convention on Human Rights and other human rights treaties

30. Foundational Principle 1 of the UN Guiding Principles states that "States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication." The Recommendation transposes this principle in its paragraph 15 to the context of the ECHR, as such obligations to protect have been developed by the European Court of Human Rights as "positive obligations". They consist of requirements to establish specific criminal legislation as well as to prevent human rights violations for persons within their jurisdiction where the competent authorities had known or ought to have known of a real and immediate risk of such violations, including where such risks are inflicted by private persons or entities. Such requirements have been established by the Court for example with regard to Article 2 ECHR (the right to life)[5], Article 3 ECHR (prohibition of torture and inhuman and degrading treatment or punishment)[6], Article 4 ECHR (prohibition of slavery and forced labour)[7] or Article 5 ECHR (right to liberty and security)[8]. Especially in the context of Article 2 ECHR, the Court has considered several cases where dangerous activities by private entities have killed individuals, and concluded that this obligation must be construed as applying in the context of any activity, *whether public or not*, in which the right to life may be at stake, and *a fortiori* in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites.[9] It has also considered that, in the particular context of dangerous activities, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives.[10] Concerning the right to a private and family life (Article 8 ECHR), the Court has found on several occasions that States had failed to meet their positive obligations under that provision by protecting individuals from the effects of actions by private companies polluting the environment.[11]

[5] *Osman v. the United Kingdom* (no. 23452/94), judgment of 28 October 1998 (Grand Chamber), paras. 115-116.
[6] *Z and others v. the United Kingdom* (no. 29392/95), judgment of 10 May 2001 (Grand Chamber), para. 73.
[7] *Rantsev v. Cyprus and Russia* (no. 25965/04), judgment of 7 January 2010, paras. 286-287; *Siliadin v. France* (no. 73316/01), judgment of 25 July 2010).
[8] *Kurt v. Turkey* (no. 24276/94), judgment of 25 May 1998, para. 124.
[9] *Öneryıldız v. Turkey* (no. 48939/99), judgment of 30 November 2004; *Kolyadenko and Others v. Russia* (no. 17423/05 et al.), judgment of 28 February 2012.
[10] *Kolyadenko and Others v. Russia* (no. 17423/05 et al.), judgment of 28 February 2012, para. 158.
[11] *López Ostra v. Spain* (no. 16798/90), judgment of 9 December 1994; *Taşkin and Others v. Turkey* (no. 46117/99), judgment of 10 December 2004; *Fadeyeva v. Russia* (no. 55723/00), judgment of 9 June 2005; *Tatar v. Romania* (no. 67021/01),

31. Moreover, the European Court of Human Rights has established that the above-mentioned provisions in the ECHR contain "procedural obligations" which require States, once a violation has occurred, to undertake an independent and impartial, adequate, prompt and expeditious official investigation where such violations are credibly alleged to have occurred or the authorities have reasonable grounds to suspect that they have occurred.[12] Authorities are also required to take all appropriate measures to establish accessible and effective mechanisms which require that the victims of such violations receive prompt and adequate reparation for the harm suffered.[13] It should be noted that such duty to investigate is of an absolute character.

Obligations under the (revised) European Social Charter

32. Paragraph 16 of the Recommendation reiterates that the (revised) European Social Charter is another key legal instrument that affords protection against human rights abuses by companies, in particular with regard to the rights of workers. It complements the ECHR with regard to social and economic rights. The 1996 Revised European Social Charter (ETS No. 163), which has gradually replaced the 1961 European Social Charter (ETS No. 35) contains rights such as, for example, the right to work (Article 1); the right to just conditions of work (Article 2); the right to safe and healthy working conditions (Article 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 protection of health (Article 11); the right of children and young persons to social, legal and economic protection (Article 17); the right of migrant workers and their families to protection and assistance (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 to information and consultation (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); and the right of workers' representatives to protection in the undertaking and facilities accorded to them (Article 28). Whereas under Part I of the (revised) European Social Charter, State Parties accept as the aim of their policy the attainment of conditions in which all the rights and principles of the Charter may be effectively realized, under

judgment of 27 January 2009, para. 88; *Vilnes and Others v. Norway* (nos. 52806/09 *et al*.), judgment of 5 December 2013 (Grand Chamber).

[12] *McCann and others v. the United Kingdom* (no. 18984/91), judgment of 27 September 1995 (Grand Chamber), para. 161 (with regard to Article 2 ECHR); *Assenov and others v. Bulgaria* (no. 24760/94), judgment of 28 October 1998, para. 102 (with regard to Article 3 ECHR); *Rantsev v. Cyprus and Russia* (no. 25965/04), judgment of 7 January 2010, paras. 288 (with regard to Article 4 ECHR); *Orhan v. Turkey* (no. 25656/94), judgment of 18 June 2002, para. 369 (with regard to Article 5 ECHR); *M.C. v. Bulgaria* (no. 39272/98), judgment of 4 December 2003, para. 153 (with regard to Article 8 ECHR in the context of rape).

[13] See, in general, Articles 5 (5), 13 and 41 ECHR, as well as the Recommendation of the Committee of Ministers to member states on assistance to crime victims of 14 June 2006, the United Nations 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 Human Rights Law of 16 December 2005 and the United Nations Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity of 8 February 2005.

Part II they have to accept only a given number of the "hard core" provisions and an additional number of articles or numbered paragraphs which they may select. An overview of the rights and related case law of the European Committee of Social Rights may be found in the document "Existing obligations of member States under Council of Europe treaties and other instruments in the context of human rights and business" CDDH-CORP(2014)08. The European Social Charter and/or the revised version have been signed by the 47 member States of the Council of Europe and ratified by 43 of them. The Recommendation suggests that member States should consider increasing the number of accepted provisions and that those which have not yet ratified the 1996 Revised European Social Charter and the 1995 Additional Protocol providing for a system of collective complaints (ETS No. 158) should consider doing so. These are key objectives of the "Turin process", which aims at reinforcing the normative system of the Charter within the Council of Europe and in its relationship with the law of the European Union, and which calls on member States to improve the implementation of social and economic human rights in Europe, along the civil and political rights guaranteed by the ECHR[14].

Evaluation of national legislation

33. Paragraph 18 of the Recommendation suggests that member States should ensure that their legislation creates conditions that are conducive to the respect for human rights by business enterprises and do not create barriers to effective accountability and remedy for human rights abuses related to business. To that effect, some member States which have already adopted National Action Plans have made provision for their competent authorities to systematically evaluate, and identify and address gaps in, all new legislation in terms of human rights consequences. The findings of human rights monitoring mechanisms, whether through the United Nations, the International Labour Organisation or the Council of Europe, should be duly taken into account during such evaluations.

III. State action to enable the corporate responsibility to respect human rights

Responsibility of business enterprises to respect human rights

34. The second pillar of the UN Guiding Principles, "The corporate responsibility to respect human rights", addresses business enterprises. Under this pillar, the Foundational Principles establish that business enterprises should respect human rights (Principle 11), a responsibility which requires that they avoid causing or contributing to adverse human rights impacts throughout their activities, address impacts, and seek to prevent or mitigate adverse effects even where they have not contributed to those impacts (Principle 13). The responsibility applies to all enterprises, regardless of size, sector, operational context, ownership and structure, even though

[14] See, High-level Conference on the European Social Charter (Turin, 17-18 October 2014), including the General report by Vice-president of the Parliamentary Assembly Michele Nicoletti, p. 44 et seq.; High-level Conference on the Future of the Protection of Social Rights in Europe (Brussels, 12-13 February 2015), Brussels Document on the Future of the Protection of Social Rights in Europe, p. 1 et seq.; State of Democracy, Human Rights and the Rule of Law in Europe, Report by the Secretary-General of the Council of Europe, Doc. SG(2015)1 of 29 April 2015, p. 41 et seq.; for further information, http://www.coe.int/en/web/portal/high-level-conference-esc-2014.

the scale and complexity of the means by which enterprises meet this responsibility may vary according to these factors (Principle 14). It can be met by having in place certain policies and processes, including a respective policy commitment, a human rights diligence process, and processes to enable the remediation of any adverse human rights impacts (Principle 15).

Human rights due diligence

35. The UN Guiding Principles mention amongst the policies and processes business enterprises should have in place to meet their responsibility to respect a "human rights due diligence process" to identify, prevent, mitigate and account for how they address their impacts on human rights (Principle 15). The process should include assessing the actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed (Principle 17). While human rights due diligence will vary in complexity with the size, sector, operational context, ownership and structure of a business enterprise, it is understood to be an ongoing process (Principle 17 a. and b.) which draws on human rights expertise and involve meaningful consultations with potentially affected groups and other relevant stakeholders (Principle 18 a. and b.). The findings of the impact assessment should be integrated and be followed by appropriate action (Principle 19), and the effectiveness of their response should be addressed (Principle 20). Businesses should be prepared to communicate the results externally (Principle 21).

36. According to paragraph 20 of the Recommendation, member States should apply such measures as may be necessary to encourage or, where appropriate, require that business enterprises carry out human rights due diligence, including project-specific human rights impact assessments, as appropriate to the size of the business enterprise and the nature and context of the operation. It would seem appropriate to introduce requirements where States have international treaty obligations to ensure corporate liability for certain crimes, and a corresponding obligation to introduce at the domestic level "measures necessary to ensure that a legal person can be held liable where the lack of supervision or control … has made possible the commission of a criminal offence … for the benefit of that legal person by a natural person acting under its authority" (Article 22, para. 2 of the Convention against Trafficking in Human beings, Article 26, para. 2 of the Convention on the protection of Children against Sexual exploitation and Sexual Abuse). The introduction of a requirement may also be appropriate where the nature and the context of a business enterprise relate to sectors with particular human rights risks, instances in which the human rights impacts of business activities can be severe, where companies operate in conflict-affected or high risk areas or other contexts which pose significant risks to human rights. Where business enterprises are domiciled within the jurisdiction of a Council of Europe member State, paragraph 20 of the Recommendation should apply throughout their operations (first bullet point of paragraph 20). For business enterprises domiciled outside Europe which carry out substantial activities within a jurisdiction of Council of Europe member State, any requirement should only apply in respect of such activities (second bullet point of paragraph 20). The Recommendation neither seeks to define human rights due diligence, nor does it specify whether, in the event that member States take legislative measures to require human rights due diligence

under certain circumstances, such measures should be specifically developed or integrated into corporate or civil law. Several Council of Europe member States which have already adopted National Action Plans have reported about measures to facilitate access to information for businesses on human rights due diligence, as well as to give further guidance through risk checks, toolkits or special information on relevant export markets.

Reporting on the responsibility for human rights

37. Paragraph 21 of the Recommendation states that member States should encourage and, where appropriate, require business enterprises to display greater transparency in order to enable them better to "know and show" their corporate responsibility to respect human rights, and to provide information on their efforts on corporate responsibility to respect human rights. The Recommendation envisages that such information is provided regularly, whilst also allowing for additional information to be provided in response, for example, to specific events, requests for information or allegations of human rights abuses. Such information should include how concerns about human rights have been raised, as well as how they have been addressed, by or on behalf of affected stakeholders (see also the aspect of "meaningful consultation" in UN Guiding Principle 18 b.). To that effect, some Council of Europe member States have adopted reporting legislation which requires major companies to report on their responsibility to respect human rights, and have followed and analysed the effects of this legal obligation through annual surveys. Other member States which have already adopted National Action Plans have reported on non-legislative measures taken, such as giving an award for the best non-financial reporting of a business enterprise.

38. For those Council of Europe member States which are also in the EU (or the European Economic Area), EU Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups may be of particular interest. The Directive amends the Accounting Directive 2013/34/EU and requires companies concerned to disclose -in specific sections of- their management reports (or in separate reports), information on policies, risks and outcomes as regards a number of non- financial issues, amongst them human rights. The new rules will only apply to some large companies with more than 500 employees. The Directive, which entered into force on 6 December 2014 and for which member States have two years to transpose it into national legislation, is intended to leave significant flexibility for companies to disclose relevant information in the way that they consider most useful.

The State-Business Nexus

39. The UN Guiding Principles reiterate that States are the primary duty-bearers under international human rights law. Therefore, where there is a particular nexus between a State and a business enterprise, there are more means for the State to ensure that the responsibility to respect human rights is met by that business enterprise. This in turn may justify additional steps to protect against human rights abuses by business enterprises that have such nexus with a State, as

recognised by UN Guiding Principles 4 to 6.[15] Examples are business enterprises which are owned or controlled by the State; receive substantial support and services from State agencies (such as export agencies and official investment insurance or guarantee agencies, Principle 4); or obtain export licences, have been privatised and deliver services that may impact on human rights (Principle 5). Another example is the conduct of commercial transactions by States with business enterprises (Principle 6). In the light of UN Guiding Principles 4 to 6, Paragraph 22 of the Recommendation suggests that member States apply additional measures to require such business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence. This paragraph also mirrors proposals made by Parliamentary Assembly Resolution 1757(2010) on human rights and business. It also suggests that member States should evaluate the measures taken where there exists a particular nexus with a business enterprise, and respond to any deficiencies. This may include the provision of consequences if the respect for human rights is not honoured, such as, for example, the termination of public procurement contracts as a measure of last resort.

40. Several Council of Europe member States which have already adopted National Action Plans have addressed the State-Business nexus, for example by including a particular sustainable procurement policy, which requires a risk analysis to show that the government authorities respect human rights in accordance with the UN Guiding Principles when contracting with business enterprises. Other measures included in National Action Plans are the introduction of a statutory requirement for such business enterprises to: report on this responsibility in the management's review in their annual reports; join the UN Global Compact principles and the Principles for Responsible Investment; take possible human rights impacts into account in export licences systems; have due regard for equality-related issues in State's procurement activity; publish a set of common guidelines for responsible procurement in the public sector, in collaboration with municipalities and other relevant parties, including a requirement for export credit agencies, as included in the OECD 2012 Common Approaches; take into account "relevant adverse project-related human rights impacts" as well as to "consider any statements or reports made publicly available by their National Contact Points (NCPs) at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises"; adhere to the "International Code of Conduct for Private Security Service Providers"; and develop guidance to address the risks posed by certain exports of technology that is not yet subject to export control but which might have impacts on human rights.

Trade agreements and missions

41. Paragraph 23 of the Recommendation suggests that member States should consider human rights impacts of trade and investment agreements before concluding them. In the assessment of such possible impacts, member States enjoy a wide margin of appreciation. They should take appropriate steps to mitigate and address the risks identified, which may involve the incorporation of human rights clauses in their trade and investment agreements. In this respect,

[15] See also Parliamentary Assembly Resolution 1757(2010) and Recommendation 1936(2010), both adopted on 6 October 2010, on human rights and business.

it should be noted that the European Union as well as the EFTA States have included in their recent free trade agreements references to the promotion of corporate social responsibility. With regard to trade missions, paragraph 25 of the Recommendation provides that member States should address and discuss possible adverse effects of future operations, and require participating companies to respect the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. Some Council of Europe member States which have already adopted National Action Plans have explicitly stated that they regard the UN Guiding Principles as an integral part of their foreign and human rights policy, and indicated that they expect companies represented in trade missions to look into possible adverse human rights effects and pursue policies to mitigate them.

Trade in in equipment that has no other use than for the purpose of capital punishment or torture

42. The Council of Europe and its member States are opposed to the death penalty in all places and in all circumstances. Moreover, torture or inhuman or degrading treatment or punishment have been outlawed on a global scale by international law, in particular through Article 7 of the International Covenant on Civil and Political Rights (prohibition of torture) and the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. To complement the obligations that Council of Europe member States have under Article 3 ECHR (prohibition of torture) as well as Protocols Nos. 6 and 13 ECHR (abolition of the death penalty in times of peace and in all circumstances, respectively), member States should ensure that businesses domiciled within their jurisdiction do not trade in equipment which has no practical use other than for the purpose of capital punishment, torture, or other inhuman or degrading treatment or punishment (paragraph 24 of the Recommendation). Such equipment may concern gallows, electric chairs, or automatic drug injection systems as well as drugs that are imported by countries exercising capital punishment where the sole purpose is lethal injections.

43. For those Council of Europe member States which are also within the European Union, Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment ([2005] OJ L200/1, Annex II) introduced export controls on goods that are used in this respect. After several European companies had taken steps to cease trade in chemicals that can be used in lethal injections, the Regulation was amended in 2011 to also including a prohibition on exporting such materials that are used in lethal injections.[16]

Advice on third countries with sensitive human rights records

44. Some member States which have put in place their own National Action Plans have recognised the important role of embassies and consulates to inform their domestic companies abroad about the UN Guiding Principles, as suggested by paragraph 26 of the Recommendation. This may be particularly the case where a third country undergoes significant changes, which

[16] See B. Malkani, *The Obligation to Refrain from Assisting the Use of the Death Penalty*, International and Comparative Law Quarterly 2013, pp. 551-552.

may have as a consequence the opening of its economy to foreign investment, be it through the lifting of economic sanctions and embargoes or due to general economic reforms. Such information may concern, for example, negative impacts on workers, indigenous peoples and communities, ethnic or linguistic minorities, migrants, women, children, persons belonging to gender or sexual minorities, or persons with disabilities. It may also be particularly important to provide this information to small and medium-sized enterprises, which may be less aware of the Guiding Principles and their contents, and face particular challenges to access such information.

45. Moreover, member States have reported in their National Action Plans about past activities, such as the organisation of roundtables in third countries on corporate social responsibility, which were attended by companies, government agencies and parlamentarians from that third country. Embassies and consulates may bring their own national companies together with local entrepreneurs and civil society organisation to discuss any issues that arise with regard to corporate social responsibility. Other member States with National Action Plans stressed the importance of their embassies and consulates to lobby third countries to support widespread international implementation of the UN Guiding Principles and related standards, such as the OECD Guidelines for Multilateral Enterprises. Some member States hold, through their embassies or consulates, annual workshops in responsible supply chain management, especially focusing on small and medium-sized companies and their local business partners. Embassies and consulates may also conduct corporate social responsibility reviews of local trading partners.

Business operations in conflict affected areas

46. Member States may address particular problematic areas of business activities, or specific sectors where there exist particularly high human rights risks. Paragraph 27 of the Recommendation stresses the important role member States have in this regard to inform relevant companies. Concerning conflict-affected areas, the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones aims to help companies that invest in countries where governments are unwilling or unable to assume their human rights responsibilities. That instrument is being complemented by the OECD Due Diligence Guidance for responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which provides detailed recommendations to help companies respect human rights, avoid contributing to conflict through their mineral purchasing decisions and practices, and assists them to meet their due-diligence reporting requirements. Within the European Union, the so-called “blood diamond” regulation sets out the criteria to which anyone wishing to import or export rough diamonds must adhere, a separate regulation governs exports controls of so-called "dual use" products.[17] In this respect, it is useful to recall that the Commentary to Principle 12 of the UN Guiding Principles states that enterprises should respect standards of international humanitarian law in situations of armed conflict.

[17] Council Regulation (EC) No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds; and Council Regulation (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items.

Specific sector-guidance

47. As far as sector-specific guidance on the UN Guiding Principles is concerned, the European Commission has developed guidance material for enterprises on meeting the corporate responsibility to protect, in particular for three industry sectors (information and communications technology; oil and gas; and employment and recruitment agencies), as well as a guide for small and medium-sized enterprises. Member States may elaborate in their National Action Plans particular action envisaged in those areas and sectors where there exist particular risks for human rights.

Training on business and human rights for governmental officials

48. Paragraph 29 of the Recommendation encourages member States to offer training on business and human rights for governmental officials whose work might be particularly relevant, such as diplomatic and consular staff assigned to working in third countries with a sensitive human rights situation. Some Council of Europe member States which have already put in place National Action Plans reported that they have put together specific information for diplomatic and consular staff on business and human rights, in which they also identify country-specific risks. Moreover, special training for diplomatic and consular staff assigned to certain countries, or the development of an e-learning courses or toolkits for civil servants operating at the international level and implementing organisations have been mentioned as possible good practices.

49. When offering such training, member States may want to make use of the European Programme for Human Rights Education for Legal Professionals (HELP), the objective of which is to enhance the capacity of judges, lawyers and prosecutors in all 47 member States to apply the European Convention on Human Rights in their daily work, which has elaborated a training course on human rights and business. The training course focuses on the three pillars of the UN Guiding Principles and relevant case law of the European Court of Human Rights. The course will be tested in the United Kingdom, Italy and the Russian Federation; other member States have already expressed an interest in launching the course for legal professionals in 2015-16.

IV. Access to remedy

50. Part IV of the Recommendation is intended to facilitate the implementation of the third pillar (Access to Remedy) of the UN Guiding Principles. Foundational Principle 25 of the UN Guiding Principle states that “as part of their duty to protect against human rights abuses related to business, 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”. As the UN Guiding Principles, this Recommendation distinguishes between judicial remedies (Sub-chapter a., which further differentiates between civil and criminal or equivalent liability) and non-judicial remedies (Sub-

chapter b., which contains provisions addressed to both State-based and non-State grievance mechanisms).

a. Access to judicial mechanisms

Articles 6 and 13 ECHR

51. Access to judicial remedies has a twofold dimension under the European Convention on Human Rights. While Article 6, paragraph 1 ECHR grants to everyone access to a court "in the determination of his civil rights and obligations"[18], Article 13 ECHR guarantees everyone whose Convention rights and freedoms are violated an effective remedy before a national authority. Access to court guarantees can also be found in other human rights standards, notably in Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 47 of the Charter of Fundamental Rights of the European Union. Paragraph 31 of the Recommendation reminds member States of their legal obligations to ensure the effective implementation of these rights, including with regard to alleged violations arising from business activities.

52. While Article 6 ECHR grants a number of judicial guarantees to ensure that an accused person is being given a fair criminal trial, the right of access to court under that provision does not apply to proceedings aimed at instituting criminal proceedings against third persons, including business enterprises.[19] Consequently, the "criminal aspect" of Article 6 ECHR only concerns charges *against* a person.

53. With regard to Article 13 ECHR, it should be noted that the wording of Article 13 of the Convention ("notwithstanding that the violation has been committed by persons acting in an official capacity") has remained without any significance in the case law of the Court and cannot be used as an argument in favour of a third-party effect, e.g. in relation to private companies.[20] Since this provision gives the right to an effective remedy, Article 13 ECHR may only be violated by a State, not by a private entity.

i. Civil liability for human rights abuses related to business

54. Paragraph 32 of the Recommendation suggests that member States should apply such legislative or other measures as may be necessary to ensure that human rights abuses caused by business enterprises within their jurisdiction give rise to civil liability under their respective laws. When such abuse occurs, member States should provide for civil liability of business enterprises and the corresponding legal remedies which alleged victims can pursue. Where

[18] See the leading case of *Golder v. the United Kingdom* (no. 4451/70), judgment of 21 February 1975.
[19] See *Rékási v. Hungary* (no. 31506/96), Commission decision of 25 November 1996, D/R 87 A, p. 171. The right of access to court under Article 6 ECHR may however apply in respect of a third party in criminal proceedings where the outcome of those proceedings are decisive for the third party's civil claims, for example concerning compensation claims by a victim of a criminal offence (see *Tomasi v. France*, no. 12850/87, judgment of 27 August 1992, Series A 241-A, para. 121).
[20] See C. Grabenwarter, *European Convention on Human Rights – Commentary*, München/Oxford/Baden-Baden 2014, pp. 338-339.

considered necessary, member States should also examine the possibility of creating civil causes of action against business enterprises that cause human rights abuses as a consequence of a failure to carry out adequate due diligence processes to prevent or mitigate risks to human rights. It is understood that the term "within their jurisdiction" refers to the domicile of the business enterprises in question. It is further understood that the term "caused" is to be interpreted in line with relevant domestic law and the term may include participation in a human rights abuse to the extent that a particular form of participation is recognised under the domestic law of a member State.

55. Paragraph 34 of the Recommendation suggests that member States should apply such legislative or other measures as may be necessary to ensure that their domestic courts have jurisdiction over civil claims related to human rights abuses related to business against business enterprises domiciled within their jurisdiction. This aspect is of particular importance since the alleged victims of such violations often face obstacles in the courts of the third States where the alleged human rights abuses occurred, with the result that the domestic courts of the State where the defendant business enterprise is domiciled may provide the only possibility to remedy the abuses. Paragraphs 33 to 43 of the Recommendation make specific proposals how to remove typical obstacles victims of human rights violations related to business may face in the domestic courts of Council of Europe member States if such claims are brought against business enterprises for alleged violations which occurred outside of Europe.

56. Jurisdictional issues are inevitable where multinational companies operate at a global level. Within Europe, the so-called "Brussels Regime" serves as a set of rules regulating which courts have jurisdiction in legal disputes of a civil or commercial nature between natural and/or legal persons resident or located in different member States. The regime has detailed rules assigning jurisdiction for the dispute to be heard and governs the recognition and enforcement of foreign judgments. The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the "Lugano Convention") brings these rules on jurisdiction beyond the 28 member States and involves also the member States of the European Free Trade Area (EFTA), thus easing the recognition and enforcement of judgments between these jurisdictions. The Lugano Convention is open to States which are not members of the European Union and is not limited to merely those which are part of EFTA. Therefore, paragraph 33 of the Recommendation invites Council of Europe member States which have not yet initiated the procedure for accession to be bound by the Lugano Convention to do so. The procedure for accession is laid down in Articles 70–3 of the Convention. States which are not members of the European Free Trade Association or the European Union will only be invited to accede if unanimous agreement of the Contracting Parties has been obtained (Article 72, paragraph 3 of the Convention).

Forum non conveniens

57. The second sentence of paragraph 34 of the Recommendation suggests that member States do not apply the doctrine of *forum non conveniens* in cases of human rights-related civil

proceedings against business enterprises domiciled within their jurisdiction. The legal doctrine of *forum non conveniens* allows courts to refuse to assume jurisdiction, despite all necessary requirements being fulfilled, over matters where there is a more appropriate forum available to the parties, even where that forum is located in another jurisdiction. The paragraph in the Recommendation is coherent with the judgment *Owusu v. N.B. Jackson* by the Court of Justice of the European Union, in which the latter decided in 2005 that the above-mentioned Brussels Regime precludes a national court of a member State of the European Union from declining its jurisdiction by applying the doctrine of *forum non conveniens.*[21]

Companies and their subsidiaries

58. The principle of legal personhood and the doctrine of limited liability, which was created in commercial law to encourage investment without fear of liability and thus to encourage economic growth, have as a consequence that the legal personality of one business is distinct from the legal personality of another.[22] These doctrines also extend to parent companies and their subsidiaries, thereby aggravating for alleged victims of human rights violations involving business enterprises to establish civil liability of the parent company (unless the exception of "piercing the corporate veil" is applied by the domestic courts). From a procedural point of view, a barrier to justice may arise where the subsidiary operates in a third country, and thus in a different jurisdiction. Therefore, paragraph 35 of the Recommendation suggests that member States consider allowing their domestic courts to exercise jurisdiction in such cases against both the parent company if based in its jurisdiction, as well as the subsidiary, even if based in another jurisdiction. However, the claims against the parent company and the subsidiary should be closely connected in such instances. For example, a Dutch District Court has asserted jurisdiction over both Royal Dutch Shell Plc, registered in the United Kingdom and headquartered in the Netherlands, and Shell Petroleum Development Company of Nigeria Ltd., domiciled in Nigeria, in a case brought by Nigerian citizens in connection with oil pollution damage caused by a leaking pipeline in Nigeria (Decision of 30 December 2009 in case No. 30891 / HA ZA 09-579). The District Court considered that the claims against the two business enterprises were interconnected, because they related to the same facts and the defendants were held liable for the same damage.

Forum necessitatis

59. The doctrine of *forum necessitatis*, also referred to as the "forum of necessity", allows a court to assert jurisdiction over a case when there is no other available forum. This may be in the instance that no forum is available due to a war or natural disaster in a third country. The doctrine may also serve as a safeguard to avoid a denial of justice, for example in cases where victims of alleged human rights abuses involving business enterprises which occurred outside of Europe cannot reasonably be expected to receive a fair trial in the domestic courts of the country where such abuses allegedly occurred. Paragraph 36 of the Recommendation invites member States to

[21] *Andrew Owusu v. N.B. Jackson*, judgment of 1 March 2005, C-281/02.

[22] Skinner/McCorquodale/De Schutter, *The Third Pillar – Access to Judicial Remedies for Human Rights Violations by Transnational Business*, p. 57.

consider allowing their domestic courts to exercise jurisdiction by applying this doctrine in cases concerning alleged human rights abuses involving business enterprises that occurred outside their jurisdiction. The paragraph puts this under the conditions that the proceedings in the courts of the third country where the alleged violations occurred can be expected to manifestly contravene fair trial guarantees, and that there is a sufficiently close connection to the member State that would exercise such jurisdiction. Several member States have adopted laws or adjusted their existing ones in this respect.[23]

60. Paragraph 37 recommends that, where member States provide for the possibility of civil claims in connection with human rights abuses allegedly committed by State-owned enterprises or companies with which they contract (e.g. in the area of private military and security services, prisons, detention centers or escort services for deportation of immigrants), they refrain from invoking any domestic privileges or immunities in their own courts. It is understood that this paragraph does not address immunities as recognised under public international law which would apply in court procedures in third States.

Non-justiciability doctrines

61. Certain doctrines which domestic courts in Council of Europe member States may apply can have a negative impact on the access to justice of victims of human rights abuses involving business enterprises. Such doctrines may either have the effect of not attributing civil liability to a defendant, or to prevent such liability from being determined by the domestic courts. An example of such doctrines is immunities attributed to foreign State-owned enterprises or companies in which States are significant shareholders. While these do not attract immunity for commercial transactions (Article 10, paragraph 1 of the United Nations Convention on Jurisdictional Immunities and Their Property, as well as Article 7, paragraph, 1 of the European Convention on State Immunity (ETS. No. 74), a domestic court may nevertheless accord immunity to a foreign State-owned company where the latter's acts contribute to human rights abuses which cannot be categorised as "commercial acts". This could amount to a violation of the right of access to court under Article 6, paragraph 1 ECHR. Since international law does not yet recognise exceptions to State immunity for serious human rights violations, as confirmed by both the European Court of Human Rights and the International Court of Justice[24], alleged human rights violations by a foreign State-owned enterprise may attract immunity, provided that the company would be regarded as a State entity within the meaning of Article 2 (1) (b) (iii) of the United Nations Convention on Jurisdictional Immunities and Their Property, and the acts are not of a mere commercial nature. Another example for a non-justiciability doctrine would be the "Act of state"-doctrine, according to which domestic courts are bound to respect the independence of every other sovereign State, with the consequence that they will not sit in judgment of another

[23] For more information, see Skinner/McCorquodale/De Schutter, *The Third Pillar – Access to Judicial Remedies for Human Rights Violations by Transnational Business*, p. 31.

[24] European Court of Human Rights, *Al-Adsani v. the United Kingdom* [Grand Chamber], no. 31253/96, judgment of 21 November 2001; International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, p. 99.

government's acts done within its own territory.[25] A third example may be the "Political question"-doctrine, according to which legal questions are deemed to be justiciable, while political questions are non-justiciable. Paragraph 38 of the Recommendation suggests that the application of such doctrines should not unduly restrict civil claims related to human rights abuses involving business enterprises.

Legal standing for third parties and collective determination of similar cases

62. Paragraph 39 of the Recommendation suggests that member States consider adopting measures to allow third parties, such as foundations, associations, trade unions or other organisations, to bring claims on behalf of alleged victims, whereas paragraph 42 of the Recommendation suggests that member States consider possible solutions for the collective determination of similar cases in respect of human rights abuses involving business enterprises. Although not all Council of Europe member States provide for class action mechanisms (*i.e.* where a large group of claimants may be represented by a lawyer in one proceeding), there may be other ways for the collective determination of numerous identical claims which those member States could consider. Such collective solutions could benefit alleged victims by significantly reducing their personal involvement and legal costs in such proceedings, while at the same time augmenting their access to a remedy. One such possibility may be to allow certain organisations to bring claims on behalf of an unlimited number of alleged victims, as addressed in paragraph 39 of the Recommendation. Other options could include the possibility to create "opt in"-systems for decisions that would be valid for a large number of claims, to join cases with similar facts and legal questions, or to transfer a claim for a third party to litigate before a court. It is understood that the term "collective determination of similar cases" also includes the adjudication of joint cases, and that the term "on behalf of victims" implies that such claims cannot be brought against the will of and without a particular link to such victims.

Applying domestic law in accordance with international human rights treaties

63. Paragraph 40 of the Recommendation reminds member States that they should apply such legislative and other appropriate measures to ensure compliance with the Convention and the judgments of the Court, as well as other international and European human rights instruments, such as the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, relevant ILO Conventions, the (revised) European Social Charter, as well as the Charter of Fundamental Rights of the European Union, as far as they are bound by these treaties. This may be particularly relevant when choice of law rules result in foreign laws being applied that are inconsistent with such human rights standards. Exceptions of public policy are useful tools to help alleviate this problem. For example, in the United Kingdom, despite

[25] For a judgment by the European Court of Human Rights concerning Article 6 ECHR and the "Act of state"-doctrine, see the case of *Markovic and Others v. Italy* [Grand Chamber] (no. 1398/03), judgment of 14 December 2006.

the "public policy"-exception generally being construed narrowly, there is judicial support for the idea that foreign laws that violate human rights ought not to be recognised.[26]

Determination of applicable law where the harm occurred in a third State

64. Faced with a claim for harm that has occurred in another jurisdiction, domestic courts have to determine which law should apply to the case. Within the European Union, the Rome II Regulation in principle designates the law of the State in which the harm occurred (*lex loci damni*) as the applicable law. The Regulation however provides for certain exceptions to this general rule.

Equality of arms and legal aid

65. Civil claims by alleged victims of human rights abuses involving business enterprises may regularly lead to the situation that the defendant's financial resources by far outweigh the plaintiff's, especially where the defendant company is a multinational enterprise. At the same time, litigation on such abuses may be very costly, which may lead to a barrier to access to justice and may inevitably raise fair-trial issues under Article 6 ECHR. The Court has stated that it is not incumbent on the State to seek through the use of public funds to ensure total "equality of arms" between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.[27] However, while the right of access to court under Article 6 ECHR is not unlimited and may be subject to restrictions which serve a legitimate aim and are not disproportionate, the granting of legal aid may in certain cases be necessary to ensure an "equality of arms" between the parties. Therefore, the Court considers it acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings.[28] In light of these requirements, paragraph 41 of the Recommendation reminds member States of their obligations under Article 6 ECHR to avoid claims related to alleged human rights abuses involving business enterprises in which the denial of legal aid deprive the alleged victims of the opportunity to present their case effectively before the domestic courts, thereby contributing to an unacceptable inequality of arms under that provision.

Access to information

66. Paragraph 43 of the Recommendation suggests that member States should consider revising their civil procedure where the applicable rules impede the access to information in the possession of the defendant or a third party, if such information is relevant for alleged victims of human rights abuses involving business enterprises. While it must be considered that "barriers to

[26] See, for example, *Oppenheimer v Cattermole* [1976] AC 249 pp. 277-8 (Lord Cross) regarding a law of the Nazi regime, and *Kuwait Airways Corporation v Iraqi Airlines Co* [2002] 1 All ER 843 regarding an Iraqi decree contrary to international law. See also the UK Foreign Limitation Periods Act 1984, which allows courts to disregard a foreign limitation if its application would "conflict with public policy to the extent that its application would cause undue hardship" to a party or potential party.

[27] *Steel and Morris v. the United Kingdom* (no. 68416/01), judgment of 15 May 2005, para. 62.

[28] *Ibid*.

access to justice" may not be equated with "barriers to winning a legal case" by removing evidentiary burden the plaintiff must provide, member States have recognised in their legal systems that there may be situations where a plaintiff cannot legitimately be expected to provide certain evidence if the latter rests entirely in the sphere of the defendant. One example is product liability where the burden of proof may, in some elements, shift towards the defendant producing company under certain conditions. While it is for each member State to define the conditions under which domestic courts are to assess the evidence with which they are presented, they should reflect upon their evidentiary rules, while taking into account that the confidentiality of the information requested also must be considered in balancing the competing interests.

ii. Criminal or equivalent liability for business-related human rights abuses

Corporate criminal liability

67. In the member States of the Council of Europe, corporate criminal responsibility is not applied uniformly. Penalties for legal entities may take various forms, from criminal sanctions to punitive measures under administrative or civil law.[29] The Recommendation follows the approach taken in various Council of Europe treaties which provide for corporate liability with regard to the criminalisation of certain acts. For example, Article 22 of the Convention against Trafficking in Human Beings provides that States "shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention". Paragraph 250 of the Explanatory Report to that Convention clarifies that:

"Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 23, paragraph 2, are met, namely that the sanction on measure be 'effective, proportionate and dissuasive' and include monetary sanctions."

68. In the same manner, paragraph 44 of the Recommendation does not suggest to member States a particular legislative measure to ensure liability for business enterprises for the crimes enlisted in that paragraph. Such discretion does not, however, touch upon their general obligations under international law to provide for *individual* criminal responsibility for certain international crimes. In this respect, member States should also consider revising their criminal and other laws as well as their enforcement practices to ensure that business enterprises can be held liable under their criminal or other equivalent law for the commission of serious human rights offences.

69. Paragraph 44 of the Recommendation lists three groups of offences for which member States should consider establishing corporate liability: crimes under international law, treaty-based crimes, as well as other serious human rights offences involving business enterprises.

[29] For an overview over the various legal situations, see FIDH, *Corporate Accountability for Human Rights Abuses – A Guide for Victims and NGOs on Recourse Mechanisms*, March 2012, pp. 276 et seq.

Crimes under international law

70. The term "crimes under international law" is meant to refer to genocide, crimes against humanity and war crimes, for which the International Criminal Court has jurisdiction under Articles 6-8 of the Rome Statue. It is further understood that paragraph 44 of the Recommendation also refers to liability for any form of participation, such as aiding and abetting, conspiracy or incitement.

Treaty-based crimes

71. It should be noted that the list of treaty-based obligations in paragraph 44 of the Recommendation to criminalise certain acts is not exhaustive, but relates to those crimes which may be of particular relevance in the area of certain business activities. That paragraph also encourages member States which have not yet ratified the treaties figured in this indicative list to do so. Where States are not yet bound by those treaties, their obligations under the European Convention on Human Rights may nevertheless oblige them to criminalise certain acts with regard to individual criminal responsibility. Within the ambit of Article 4 ECHR, this is for example the case for human trafficking[30] or domestic servitude and exploitation.[31] It is understood that references in paragraph 44 also include the additional and optional protocols to the treaties listed. The following gives a short overview of the treaty-based crimes mentioned in paragraph 44:

- The **Convention on Cybercrime**, which entered into force in 2001, is the only binding international instrument in the area of cybercrime. It serves as a guideline for any country developing comprehensive national legislation against cybercrime and as a framework for international cooperation between state parties to the treaty. The Convention is supplemented by a Protocol on Xenophobia and Racism committed through computer systems. It obliges States to adopt legislative or other measures in areas such as illegal access and interception, data interference, computer-related forgery and fraud, child pornography or copyright infringements. According to Article 12 ("Corporate liability"), States shall adopt such legislative and other measures as may be necessary to ensure that legal persons can be held liable for a criminal offence established in accordance with the Convention.

- The **Convention against Trafficking in Human Beings** entered into force in 2008 and seeks the protection of victims of trafficking and the safeguard of their rights. It also aims at preventing trafficking as well as prosecuting traffickers. The Convention applies to all forms of trafficking; whether national or transnational, whether or not related to organised crime and whoever the victim, women, men or children and whatever the form of exploitation, sexual exploitation, forced labour or services. The Convention obliges states to criminalise human trafficking, the use of services of a victim, or certain acts relating to travel or identity documents. Article 22 of the Convention requires States to regulate corporate liability.

[30] *Rantsev v. Cyprus and Russia* (no. 25965/04), judgment of 7 January 2010.
[31] *Siliadin v. France* (no. 73316/01), judgment of 26 July 2005; *C.N. v. the United Kingdom* (no. 4239/08), judgment of 13

- The **Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse** entered into force in 2010 and is the first instrument to establish the various forms of sexual abuse of children as criminal offences. The Convention ensures that certain types of conduct are classified as criminal offences, such as engaging in sexual activities with a child below the legal age and child prostitution and pornography. Article 9 (2) of the Convention states that: "*Each Party shall encourage the private sector, in particular the information and communication technology sector, the tourism and travel industry and the banking and finance sectors, as well as civil society, 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*."[32] Article 26 of the Convention requires states to regulate corporate liability.

- The **Criminal Law Convention on Corruption***,* which entered into force in 2002, aims at the co-ordinated criminalisation of a large number of corrupt practices. It covers various forms of corrupt behaviour, including active and passive bribery in the private sector. States are required to provide for effective and dissuasive sanctions and measures, including deprivation of liberty that can lead to extradition. Article 17 requires jurisdiction of States for corruption-related offences committed in third states (*i.e.* outside their jurisdiction) by their own natural and legal persons. Article 18 provides for corporate liability of private legal entities. In addition to the criminal law aspects of this Convention, the Civil Law Convention on Corruption (which entered into force in 2003) provides for effective remedies for persons who have suffered damage as a result of acts of corruption.

- The **United Nations Convention against Corruption** entered into force in 2005, and provides for preventive measures also addressed to the private sector as well as criminalisation of a wide range of acts, including private-sector corruption. Article 26 of the Convention deals with liability of legal persons.

- The **United Nations Convention on the Rights of the Child**, which entered into force in 1990, recognises in Article 32 the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. State Parties shall in particular provide for a minimum age for admission to employment; provide for appropriate regulation of the hours and conditions of employment; and provide for appropriate penalties or other sanctions to ensure the effective enforcement of that article. Article 19 requires States Parties to take all appropriate measures to protect children from all forms of violence, abuse and exploitation, while Article 34 deals with sexual abuse and exploitation, and Article 35 covers trafficking in children. Article 38 focuses on States Parties which undertake to respect and

[32] The Explanatory Report to the Convention elaborates that: "The travel and tourism industry is included specifically to target the so-called 'child sex tourism' phenomenon. In some member States, for example, airline companies and airports provide passengers with audio-visual preventive messages presenting the risks of prosecution to which perpetrators of sexual offences committed abroad are exposed. … The inclusion of the finance and banking sectors is very important because of the possibility for financial institutions, in cooperation with law enforcement, to disrupt the functioning of financial mechanisms supporting pay for view child abuse websites and to contribute to dismantling them." (Explanatory Report to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, paras. 70-71

to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. The Convention is complemented by the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography which details offences relating to child trafficking and sexual exploitation. Article 3 requires States Parties to establish the liability of legal persons for these offences where appropriate, while Article 4 calls on States Parties to extend extraterritorial jurisdiction for these offences and Article 8 envisions compensation for child victims. The Convention is further complemented by the Optional Protocol on the Involvement of Children in Armed Conflict.

- The **United Nations Convention against Transnational Organised Crime**, which entered into force in 2003, is the main international instrument in the fight against transnational organised crime. It obliges States to criminalise certain acts, such as participation in an organised criminal group, the laundering of proceeds of crime, money laundering, and corruption. Article 10 addresses the liability of legal persons. The Convention is further supplemented by three Protocols, which target specific areas and manifestations of organised crime: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

Other serious business-related human rights offences

72. The term "other offences constituting serious human rights abuses involving business enterprises" refers to violations which are neither crimes under international law (as defined by paragraph 70) nor treaty-based crimes. Examples may be certain forced evictions or murder, if committed not as part of a widespread or systematic attack directed against any civilian population (and thus not fulfilling the definition of a crime against humanity within the meaning of Article 7 of the Statute of the International Criminal Court).

Corporate and individual liability

73. Paragraph 45 of the Recommendation clarifies that corporate liability does not exclude individual liability of the natural person who may be perpetrator, instigator or abettor to the crime committed. In a particular case, there may be liability at several levels simultaneously – for example, liability of one of the legal entity's organs, liability of the legal entity as a whole and individual liability of a corporate representative in connection with one or the other. It should be noted that liability of a legal person should also ensure responsibility for a lack of supervision and control that has enabled the commission of the crime by a person under the legal person's authority.[33]

[33] See, for example, Article 5 ("Liability of legal persons") of Directive 2011/36/EU of the European Parliament and of the Council on preventing and combatting trafficking in human beings and protecting its victims, 5 April 2011

Effective investigations in accordance with the European Convention on Human Rights

74. Paragraph 46 of the Recommendation recalls that effective criminal investigations must satisfy certain criteria which the European Court of Human Rights has established in its case law. They apply irrespective of whether the defendant is a legal person, or a natural person representing the former. Such criteria are: "Adequacy", "Thoroughness", "Impartiality", "Independence", "Promptness", and "Public scrutiny". In the context of Article 2 ECHR (right to life), the Court has interpreted these criteria as follows.

- *Adequacy*

"In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify the perpetrator or perpetrators will risk falling foul of this standard (cf. Tahsin Acar v. Turkey [GC], No. 26307/95, § 223, ECHR 2004-III)."[34]

- *Thoroughness*

"The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g. *Tanrıkulu v. Turkey* [GC], No. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard."[35]

- *Independence and impartiality*

"For an investigation into alleged unlawful killing by State agents to be effective, the persons responsible for and carrying out the investigation must be independent and impartial, in law and in practice (see *Güleç v. Turkey*, judgment of 27 July 1998, *Reports* 1998-IV, p. 1733, §§ 81-82; *Oğur v. Turkey* [GC], No. 21594/93, §§ 91-92, ECHR 1999-III; and *Ergi v. Turkey*, judgment of 28 July 1998, *Reports* 1998-IV, pp. 1778-79, §§ 83-84)."[36]

[34] *Ramsahai and Others v. the Netherlands* (no. 24746/94), judgment of 15 May 2007 [Grand Chamber], paragraph 324.
[35] *Hugh Jordan v. the United Kingdom* (no. 24746/94), judgment of 4 May 2001, paragraph 107.
[36] *Nachova and Others v. Bulgaria* (nos. 43577/98 and 43579/98), judgment of 6 July 2005 [Grand Chamber], paragraph 112.

- *Promptness*

"The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Ögur v. Turkey* [GC], No. 21954/93, § 88, ECHR 1999-III). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard. … It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts."[37]

- *Public scrutiny*

"The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Güleç*, cited above, p. 1733, § 82, where the father of the victim was not informed of the decision not to prosecute; *Oğur*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; and Gül, cited above, § 93)."[38]

Statutory limitations for international crimes

75. Two international treaties have sought to codify the law with regard to most serious crimes under international law – such as genocide, war crimes or crimes against humanity – and statutory limitations. The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity entered into force in 1970 and has, as to date (May 2015), fifty-five States Parties. The European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which entered into force in 2003, has as to date (May 2015) only been ratified by seven Council of Europe member States. Regardless of the rather reluctant acceptance of these treaties by States, Article 29 of the Statute of the International Criminal Court provides that the above-mentioned crimes shall not be subject to any statutory limitations. Moreover, according to Principle 6 of the United Nations General Assembly's "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" of December 2005[39], statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

76. However, there may be other international crimes than the ones provided for by the Statute of the International Criminal Court which member States are obliged to criminalise in their national laws. This concerns the crimes referred to in paragraph 44, second bullet-point of the

[37] *Kukayev v. Russia* (no. 29361/02), judgment of 15 November 2007, paragraph 95.
[38] *McKerr v. the United Kingdom* (no. 28883/95), judgment of 4 May 2001, paragraph 115.
[39] Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

Recommendation, such as the crimes provided for by the United Nations Convention against Transnational Organised Crime or the Council of Europe Convention against Trafficking in Human Beings. International law does not necessarily prevent those treaty-based crimes to be subject to statutory limitations. However, Principle 7 of the United Nations General Assembly's "Basic Principles and Guidelines on the Right to a Remedy" states that domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.

iii. Administrative remedies

77. Administrative decisions provided for by States, such as those granting support, delivering services or granting export licences to business enterprises, may potentially have a negative impact on human rights. Thus, paragraph 47 of the Recommendation sets out standards for the relevant decisions of competent authorities, through encouraging member States to apply such legislative measures and other measures as may be necessary to ensure that these standards are met. Part (a) refers to the taking into account of human rights risks in these decisions, for example on the basis of a human rights impact assessment. Part (b) recommends that the decisions of these authorities are disclosed as appropriate. In this regard, member States should refer to the OECD 2012 Common Approaches, in which member States are urged in paragraph 4(v) to "foster transparency, predictability and responsibility in decision-making, by encouraging disclosure of relevant environmental and social impact information, with due regard to any legal stipulations, business confidentiality and other competitive concerns." Section VII of the Common Approaches then sets out detailed recommendations regarding exchange and disclosure of information. Finally, part (c) of paragraph 48 of the Recommendation suggests that these decisions are subject to administrative or judicial review. In the same spirit, paragraph 48 of the Recommendation encourages member States to provide for appropriate measures to address credible allegations of human rights abuses in connection with the business activities that form the basis of these decisions.

b. Access to non-judicial mechanisms

Awareness-raising for non-judicial mechanisms

78. In addition to the judicial remedies available, non-judicial grievance mechanisms serve as an additional alternative remedy for alleged corporate human rights abuses. Such remedies may be State-based or non-State based (for example, those administered by a company, industry association or multi-stakeholder group). Non-judicial remedies include ombudspersons, National Human Rights Institutions, arbitration, mediation and complaints-handling mechanisms, national contact points established in accordance with the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development, labour inspectorates, labour tribunals (where they exercise a mere conciliatory, as opposed to a judicial, function), consumer agencies or national equality bodies. Paragraph 49 of the Recommendation encourages member States to raise awareness and knowledge-sharing of the available non-judicial grievance mechanisms.

Effectiveness criteria

79. Principle 31 of the UN Guiding Principles establishes certain criteria for the effectiveness of non-judicial mechanisms, irrespective of whether or not the mechanisms are State-based. These criteria are: legitimacy, accessibility, predictability, equitability, transparency, and rights-compatibility.[40] The Commentary to Principle 31 should also be noted in this respect, stating that where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism, since a business cannot be both the subject of complaints and unilaterally determine their outcome.[41] Paragraph 50 of the Recommendation recalls that member States' own non-judicial mechanisms should meet these criteria, and that they should encourage non-State based non-judicial mechanisms to ensure that they also meet them. Paragraph 54 of the Recommendation further encourages businesses to establish such mechanisms, as a complement to regular access of alleged victims to the domestic court system or State-based non- judicial mechanisms. Paragraph 51 of the Recommendation invites member States to assess and evaluate their State-based non-judicial grievance mechanisms on a regular basis, and where necessary, extend their mandate or create appropriate mechanisms where those are not yet already in place.

The Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development

80. Paragraph 52 of the Recommendation provides that member States which have not yet done so to take steps to adhere to and/or implement the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (hereinafter: the OECD Guidelines). Adopted in 1976 as a response to increasing activity of companies from OECD member States in developing countries, the OECD Guidelines constitute a set of voluntary recommendations to multinational enterprises in all the major areas of business ethics. They have been updated five times, the last time in 2011 with a specific chapter on human rights issues which draws upon the UN Guiding Principles. Moreover, the OECD Guidelines Proactive Agenda seeks to elucidate the guidelines for specific sectors, such as the financial sector, the extractive sector, the agricultural sector and the textile sector. As to date, twenty-seven member States of the Council of Europe have given declarations that they adhere to the Guidelines, which are also open for adherence by non- OECD member States.

81. The OECD Guidelines address the operation of multinational enterprises in or from the territories of the governments which adhere to them, most notably through the operation of National Contact Points (NCPs). These are mechanisms charged with promoting the Guidelines and handling enquiries in the national context, but also liaising with NCPs from other countries in cases with extraterritorial contexts. Moreover, the NCPs assist enterprises and their stakeholders to take appropriate measures on human rights-related issues and provide a mediation and conciliation platform. Any individual, non-governmental organisation or trade union may file a complaint.

[40] For more information about the meaning of these criteria, see Principle 31 of the UN Guiding Principles and its commentary.

[41] See letter (h) of the commentary to Principle 31 of the UN Guiding Principles.

Depending on whether mediation between the parties is successful, the NCP will either issue a report or make a recommendation to the parties involved, although there is no obligation to make a decision as to whether or not the Guidelines have been violated. At the conclusion of the procedures and after consultation with the parties involved, the NCPs make the results of the procedure publicly available, taking into account the need to protect sensitive business and other stakeholder information. An annual report by the adhering governments provides an account of the actions taken following NCP mediation.

82. Paragraph 53 of the Recommendation makes a number of suggestions on how to improve the effectiveness of NCPs, in particular with regard to human and financial resources, transparency and visibility, and publication of their outcome documents. Moreover, the taking into account of the NCP findings by government agencies is being recommended. In this respect, it should be noted that the "OECD 2012 Common Approaches" include a requirement for export credit agencies to take into account relevant adverse project-related human rights impacts and to "consider any statements or reports made publicly available by their National Contact Points (NCPs) at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises". Some Council of Europe member States have included in their National Action Plans a requirement that their export credit agencies consider any negative final NCP statements a company has received in respect of its human rights record when considering a project for export credit.

c. General measures

Judicial cooperation

83. Paragraph 55 of the Recommendation provides that, in order to strengthen remedies for victims of human rights abuses involving business enterprises, member States should fulfill their obligations of judicial cooperation, and intensify such cooperation beyond their existing obligations. It should be noted that such obligations for judicial cooperation may derive from particular treaties (such as the European Convention on Extradition or the European Convention on Mutual Assistance), but also from their human rights obligations. In its case law under Article 4 ECHR (prohibition of slavery and forced labour), the European Court of Human Rights has for example stated that States have, in addition to their obligations to conduct a domestic investigation into a case of cross-border human trafficking, also an obligation to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.[42] Paragraph 56 of the Recommendation also addresses cooperation with non-judicial grievance mechanisms. For both types of cooperation, it should be recalled that speediness in the cooperation is of high importance.

[42] *Rantsev v. Cyprus and Russia* (no. 25965/04), judgment of 7 January 2010, para. 289.

Training of professionals

84. Paragraph 56 of the Recommendation invites member States to provide for sufficient resources and to consider developing special guidance and training for judges, prosecutors, inspectors, arbitrators and mediators to deal with human rights abuses involving business enterprises. In this respect, some national good practices cited in National Action Plans of Council of Europe member States could give member States some inspiration, such as the development of e-learning courses or toolkits on the UN Guiding Principles, or more generally on business and human rights. Moreover, the Council of Europe HELP Programme on business and human rights may provide some useful guidance and training in this respect.

Information for alleged victims about rights and remedies

85. Paragraph 57 of the Recommendation states that alleged victims of human rights abuses involving business enterprises within their jurisdiction should have general access to information about the content of the respective human rights as well as remedies. The expression "in a language which they can understand" is thereby a formulation commonly used in Council of Europe treaties, which is understood not to require any possible language, but rather "the languages most widely used in the country" (see, for example, paragraph 229 of the Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse).

V. Additional protection of workers

86. It lies in the very nature of work relationships that workers are significantly affected by the activities of businesses. Paragraph 58 of the Recommendation thus invites member States to require that business enterprises respect the rights of workers when operating within their territorial jurisdiction and, as, appropriate, throughout their operations abroad when domiciled in their jurisdiction. Paragraph 59 of the Recommendation references relevant European and international standards in this field. The term "other relevant international instruments" thereby is also meant to include conventions of the International Labour Organisation which are not categorized as "fundamental". Articles 6-8 of the International Covenant on Economic, Social and Cultural Rights offer various protections for workers, such as the right to enjoyment of just and favourable conditions of work (Article 7), and the right to form and join trade unions (Article 8(1)(a)). The European Convention of Human Rights similarly includes the "right to form and to join trade unions" under Article 11. In its case law, the ECHR has also elaborated a set of work-related rights based on various articles of the Convention, most often – but not restricted to - concerning situations when the State is acting as an employer. Amongst the well-established jurisprudence, examples include a violation of Article 8 (right of respect for private and family life) when an applicant's calls on her office telephone were intercepted[43], or a violation of Article 2 (right to life) regarding workers' prolonged exposure to asbestos[44]. The (revised) European Social Charter

[43] *Halford v. United Kingdom* (no. 20605/92), judgment of 25 June 1997.
[44] *Brincat and Others v. Malta* (no. 60908/11), judgment of 24 July 2014.

contains extensive provisions for the protection of workers, including in particular the right to work (Article 1), the right to just conditions of work (Article 2), the right to safe and healthy working conditions (Article 3), the right to a fair remuneration (Article 4), the right to organise (Article 5), the right to bargain collectively (Article 6), the right to protection in cases of termination of employment (Article 24) and the right to dignity at work (Article 26) as well as the other articles mentioned in para. 32 above. An overview of the relevant case law on the rights of workers may be found in the document "Existing obligations of member States under Council of Europe treaties and other instruments in the context of human rights and business" (CDDH-CORP(2014)08) which was prepared by the Secretariat and is available on the website of the CDDH-CORP. In this respect, member States should also take into account the general comments and interpretative statements by the competent international monitoring bodies, notably the European Committee of Social Rights (ECSR) and the Committee on Economic, Social and Cultural Rights (CESCR).

87. The Recommendation also makes reference to persons working in the informal economy, and their need for protection. This is specifically highlighted by the ILO Recommendation "Transition from the Informal to the Formal Economy" 2015 (No. 204). This Recommendation provides guidance to States, inter alia, to "facilitate the transition of workers and economic units from the informal to the formal economy, while respecting workers' fundamental rights and ensuring opportunities for income security, livelihoods and entrepreneurship;" (para. 1(a)) and defines the term "informal economy" by referring "to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements;" (para. 2(a)).

88. Finally, paragraph 60 recommends that relevant social partners are involved in the elaboration and implementation of policies on matters which are particularly sensitive with regard to workers' rights, which goes beyond participation in the elaboration of National Action Plans. The principle of tripartite consultation is enshrined in ILO Convention Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) as well as specific consultation requirements in many other ILO Conventions and Recommendations.

VI. Additional protection of children

International standards

89. The Recommendation contains a chapter on the protection of children given their particular vulnerability, not least through the phenomenon of child labour. The Recommendation makes explicit reference to "General Comment No. 16 on State obligations regarding the impact of the business sector on children's rights". General Comment No. 16 was adopted by the Committee on the Rights of the Child on 7 February 2013, and sets out the nature and scope of State obligations related to business and human rights as well as State obligations in specific contexts (such as the informal economy and emergencies and conflict situations). The General Comment also provides a framework for implementation of its recommendations.

90. Paragraph 61 of the Recommendation invites member States to require that business enterprises respect the rights of children when operating within their territorial jurisdiction and, as appropriate, throughout their operations abroad when domiciled in their jurisdiction. Relevant in this regard is the obligation under Article 26 of the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse to ensure that liability for offences established under that Convention also extends to legal persons. Paragraph 62 of the Recommendation makes reference to European and international standards relevant for member States in meeting their obligations to protect children. The ECHR and the (revised) European Social Charter are also mentioned as containing relevant provisions. The European Court of Human Rights has consistently held that States are under a positive or affirmative duty to protect the rights of children in certain circumstances. Some of these scenarios may be particularly relevant in the context of businesses. For example, the Court has found a violation of Article 4 of the ECHR (prohibition of slavery, servitude, forced or compulsory labour) when a minor worked without pay for 15 hours every day for several years.45 Article 7 of the revised European Social Charter sets out "the right of children and young persons to protection", with several specific requirements regarding working conditions, and Article 17 covers the right of children and young persons to social legal and economic protection. An overview of the relevant case law on the rights of children, including decisions of the European Committee of Social Rights, may be found in the document "Existing obligations of member States under Council of Europe treaties and other instruments in the context of human rights and business" (CDDH-CORP(2014)08) which was prepared by the Secretariat and is available on the website of the CDDH-CORP. Other relevant European instruments include notably the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse. On the international level, member States should consider directing their attention to the ILO Minimum Age Convention 1973 and the Worst Forms of Child Labour Convention 1999, as well as other ILO instruments concerning the protection of children and young persons. The UN Convention on the Rights of the Child has also been extended through two optional protocols on the involvement of children in armed conflict and on the sale of children, prostitution and child pornography. Many international human rights treaties also contain specific references to children, such as Article 10(4) of the International Covenant on Economic, Social and Cultural Rights.

Elaboration and implementation of policies concerning children

91. Paragraph 63 of the Recommendation urges member States to involve all relevant stakeholders in the elaboration and implementation of policies on matters which are particularly sensitive with regard to children's rights. The Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse provides for various measures, such as preventive measures (for example training and awareness-raising), protective measures and assistance to victims (such as helplines), and intervention programmes. It also gives detailed guidance on substantive criminal

[45] *Siliadin v. France* (no. 73316/01), judgment of 26 July 2005.

laws and associated investigations. Article 9 of the Convention also encourages the direct participation of children themselves in the development and implementation of State policies.

92. Paragraph 64 of the Recommendation outlines various methods to improve children's access to relevant information and their right to be heard. Sub-paragraph (a) urges member States to encourage or, where appropriate, require business enterprises to specifically consider the rights of the child when carrying out human rights due diligence. This should be read in conjunction with paragraphs 18-21 of the Recommendation concerning due diligence more generally. Sub-paragraph (b) builds on the Council of Europe Guidelines on Child Friendly Justice (adopted by the Committee of Ministers on 17 November 2010) by inviting States to implement measures to remove social, economic and juridical barriers to improve children's access to judicial and State-based non-judicial mechanisms. The Guidelines give a comprehensive overview of measures that can be taken in this regard. In particular, paragraph 34 of the Guidelines ("Access to court and to the judicial process") states that: "As bearers of rights, children should have recourse to remedies to effectively exercise their rights or act upon violations of their rights. The domestic law should facilitate where appropriate the possibility of access to court for children who have sufficient understanding of their rights as well as of the use of remedies to protect these rights, based on adequately given legal advice." Finally, sub-paragraph (c) invites States to specifically consider the rights of children in their National Action Plans, and some member States have already done so, including the translation and distribution of General Comment No. 16.

VII. Additional protection of indigenous peoples

93. Part VII of the Recommendation concerns the protection of indigenous peoples. This issue has received particular attention by the UN Working Group on Business and Human Rights when implementing the UN Guiding Principles[46], as indigenous peoples face a heightened risk of social and economic marginalisation and are often excluded from consultations on business activities that influence their lives. Paragraph 65 of the Recommendation encourages member States to require business enterprises to respect the rights of indigenous peoples, and member States should also be encouraged to take into consideration the special relationship between indigenous peoples and their lands in this regard Paragraph 66 of the Recommendation lists some of the international instruments which elaborate these standards and the rights of indigenous peoples.[47] The issue of business-related impacts on the rights of indigenous peoples has also been addressed by a number of UN mechanisms, including the Special Rapporteur on the rights of indigenous peoples[48], as well as through General Comments of treaty bodies[49] and the Expert Mechanism on

[46] See the Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises of 6 August 2013 (A/68/279). That report explores the challenges faced in addressing adverse impacts of business-related activities on the rights of indigenous peoples through the lens of the United Nations Guiding Principles.

[47] Paragraph 65 of the Recommendation makes a reference to "land" which should not been restricted to formal ownership, but rather in the sense of Article 32, paragraph 2 of the UN Declaration on the Rights of Indigenous People of 13 September 2007 ("affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources").

[48] A/HRC/24/41; A/HRC/FBHR/2012/CRP.1

Indigenous Peoples.[50] Paragraph 68 concerns the business responsibility to respect the rights and interests of indigenous peoples, and to consult and cooperate in good faith in order to obtain their free and informed consent prior to certain projects. This requirement is also recognised in paragraph 20 of the Outcome Document of the World Conference on Indigenous Peoples, adopted by the General Assembly in 2014. However, it is understood that such a requirement does not preempt a member State, subject to its domestic law, to authorise a proposed project.

National Action Plans

94. Paragraph 68 of the Recommendation states that member States should pay special attention to the rights of indigenous peoples in their National Action Plans. To that effect, some member States have already included special provisions regarding indigenous peoples in their respective plans. For example, the Finnish National Action Plan states that it will "continue the dialogue related to the human rights impacts of business activities with the UN bodies for indigenous peoples".

VIII. Protection of human rights defenders

Human rights defenders in Council of Europe member States

95. Paragraph 69 of the Recommendation relates to possible challenges for human rights defenders, in particular with regard to freedom of expression (Article 10 ECHR) and the freedom of assembly and association (Article 11 ECHR), which may also arise in the business-related context. The Council of Europe has sought to protect and improve the situation of human rights defenders in general through a wide variety of measures. In 2012, the Parliamentary Assembly adopted a resolution on "The situation of human rights defenders in Council of Europe member states" in which it paid "tribute to human rights defenders, whose dedicated work is highly appreciated". While it welcomed the fact that, in most European states, human rights defenders are able to work unimpeded and enjoy the protection of the law, the Assembly strongly condemned all attacks on human rights defenders that have nevertheless occurred, irrespective of whether they were carried out "by public officials or others", the latter referring to non-state actors including businesses.[51] In this context, the Committee of Ministers' declaration

[49] See, for example, the UN Committee on Economic, Social and Cultural Rights (CESCR): General Comment No. 7 (1997): "The right to adequate housing: forced evictions" (E/1998/22, annex IV), para. 10; General Comment No. 15 (2002) "The right to water" (E/C.12/2002/11), paras. 7 and 16; as well as the UN Committee on the Rights of the Child (CRC): General Comment No. 11 (2009): "Indigenous children and their rights under the Convention" (CRC/C/GC/11 (2009)), para. 16; General Comment No. 16 (2013): "State obligations regarding the impact of the business sector and children's rights" and the UN Committee on the Elimination of Racial Discrimination (CERD): General Recommendation No. 23 (1997): "Indigenous Peoples"

[50] A/HRC/EMRIP/2012/CRP.1; A/HRC/21/55.

[51] The Assembly also called on member states to put an end to any administrative, fiscal and judicial harassment of human rights defenders, as well as to the impunity of perpetrators of violations against them. In this respect, Council of Europe organs have also on numerous occasions underlined the need for close cooperation with other international organisations and institutions, notably the UN Special Rapporteur on Human Rights Defenders.

on the protection of freedom of expression with regard to the internet[52], in which it made particular reference to human rights defenders, is of particular relevance. In that declaration, the Committee deplored denial-of-service attacks against websites of human rights defenders by privately owned internet platforms. Usually the companies concerned would invoke as justification mere compliance with their terms of service. The Committee of Ministers underlined the necessity to reinforce policies that uphold freedom of expression for human rights defenders against such attacks.[53]

Human rights defenders in third countries

96. Paragraph 70 of the Recommendation provides that member States should protect and also support, for example through their diplomatic and consular missions, the work of human rights defenders who focus on business-related impacts on human rights in third countries. Some member States have already taken up this aspect in their National Action Plans.

Relevant international and European standards

97. Irrespective of whether they are based in their jurisdiction or abroad, member States may wish to take into account, when protecting human rights defenders, the relevant international and European standards. These are, in particular, the "United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" of 9 December 1998, the "Declaration of the Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities" of 6 February 2008, as well as the "European Union Guidelines on Human Rights Defenders" of 6 December 2008.

[52] Declaration of the Committee of Ministers on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, adopted on 7 December 2011.

[53] Another example would be situations in which human rights defenders are targeted by private media which are nevertheless *de facto* government controlled.