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Strasbourg, 26 September 2014

CDDH-CORP(2014)R3

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**DRAFTING GROUP ON HUMAN RIGHTS AND BUSINESS
(CDDH-CORP)**

Meeting report

3rd meeting
24 September (9.30 a.m.) – 26 September 2014 (1 p.m.)
Council of Europe, Agora – Room G06

Item 1: Opening of the meeting and adoption of the agenda

1. The CDDH Drafting Group on Human Rights and Business (CDDH-CORP) held its third meeting in Strasbourg from 24 to 26 September 2014 with Mr René LEFEBER (Netherlands) in the Chair. The list of participants can be found in [Appendix I](#). The agenda as adopted appears in [Appendix II](#).
2. The Chair welcomed the participants, in particular those who had not attended the previous meetings, and recalled the tasks that the Group was entrusted to achieve in the framework of its terms of reference.

Item 2: Keynote speech: Mr Serge Bronkhorst, ACCESS Facility

3. Mr Serge Bronkhorst, managing director of ACCESS Facility, addressed in his keynote speech the aspect of non-judicial grievance mechanisms. Inspired by the UN Guiding Principles on Business and Human Rights, he explained that the non-governmental organisation ACCESS supports effective problem-solving to prevent and resolve conflicts between companies and communities and governments in a manner compatible with human rights. He discussed the main needs and challenges in this respect, in particular lack of both information on available remedy options and capacity to participate effectively in non-judicial and mediation processes. Mr Bronkhorst gave an overview of the existing non-judicial grievance mechanisms, stressed the need to inform parties on the added-value of consensus-based processes, and informed about the ACCESS' initiative to develop multi-stakeholder trainings on preventing and resolving conflicts between companies and communities. He also introduced his organisation's database of grievance mechanisms, a navigational tool for companies, communities and their representatives, as well as an "online library of case studies" and directory of company-community mediations. Mr Bronkhorst made several observations on the chapter in the draft recommendation of the CDDH-CORP with regard to non-judicial grievance mechanisms. The subsequent exchange of views with the CDDH-CORP focused in particular on how to increase the effectiveness of such mechanisms, the possible guidance on evaluation to assess their effectiveness, and the manner of how to include these aspects in the draft recommendation.

Item 3: Election of a Vice-Chair

4. Ms Maria Benedetta FRANCESCONI (Italy) was elected as Vice-Chair of the CDDH-CORP.

Item 4: Information on recent relevant national and international developments

5. The Secretariat informed the participants about the adoption of the declaration by the Committee of Ministers on the UN Guiding Principles on Business and Human Rights of 16 April 2014, as well as the discussions on the work of the Group at the 80th and 81st meeting of the CDDH in April and June respectively. It also informed the Group about the adoption of national action plans by Council of Europe member states since the last meeting of the Group, notably concerning Denmark and Spain. The representatives of Finland, Germany, Italy, Latvia, Switzerland and Ukraine provided information on the status of preparation of their respective national action plans. The Office of the United Nations High Commissioner for Human Rights presented the current status of its respective work in the field, in particular the two resolutions concerning business and human rights adopted by the Human Rights Council in June 2014, as well as the forthcoming UN Forum on Business and Human Rights in Geneva (1-3 December 2014).

Item 5: Elaboration of one or more non-binding instruments

6. After a general exchange of views and a subsequent discussion of further proposals on the text, the Group discussed the draft recommendation, prepared by the Secretariat in cooperation with the Chair, section by section and paragraph by paragraph, considering the relevant comments provided by delegations in writing prior to the meeting. The draft instrument as discussed and revised by the Group appears in Appendix III. It will form the basis for the continuance of the discussion at the next meeting.

7. In accordance with the practice of the Council of Europe, the Group decided that the Recommendation should contain only a few operative principles, while a full list of substantive provisions should appear in an appendix which would be an integral part of the Recommendation.

8. The Group considered that the Recommendation should be accompanied by an explanatory memorandum. It instructed the Secretariat to prepare a first draft and circulate it well in advance before the next CDDH-CORP meeting, preferably before the end of the year and in view of possible comments to be made by members and observers to the Secretariat (Matthias.Kloth@coe.int; Evangelia.Vratsida@coe.int) by 31 January 2015.

Item 6: Other business

9. The Group noted that the results of the third meeting will be discussed by the CDDH at its next meeting (18 - 21 November 2014), in particular the draft recommendation which appears in Appendix III. On the basis of the discussion, the CDDH will provide new instructions to the CDDH-CORP in view of its fourth meeting.

10. The CDDH-CORP will hold its fourth meeting in Strasbourg from 25 to 27 February 2015. It proposes to hold its fifth and final meeting from 23 to 25 September 2015.

11. The Group agreed to propose that the Chair of the CDDH-CORP represents the CDDH at the forthcoming UN Forum on Business and Human Rights.

APPENDIX I
LIST OF PARTICIPANTS

MEMBER STATES/ETATS MEMBRES

ALBANIA / ALBANIE

Brunilda LILO, State Advocate, Ministry of Justice of the Republic of Albania
[Brunilda.Lilo@avokaturashtetit.gov.al](mailto: Brunilda.Lilo@avokaturashtetit.gov.al)

AUSTRIA / AUTRICHE

Eva FEHRINGER, Federal Ministry of Labour, Social Affairs and Consumer Protection,
European and International Social Policy and Labour Law, Stubenring 1, 1010 Wien
Tel: +43 17 1100 6098
eva.fehringer@bmask.gv.at

BELGIUM/ BELGIQUE

Ricardo PARRONDO RAMOS, Minister de la Justice Direction générale Législation, Liberté et
Droits Fondamentaux Service Droit pénal, 115 boulevard de Waterloo, 1000 Bruxelles
Tél.: +02 224 99 36 Fax : 02 224 99 08
ricardo.parrondoramos@just.fgov.be

FINLAND/FINLANDE

Mia Spolander, Legal Officer Unit for Human Rights Courts and Conventions, Legal Service,
Ministry for Foreign Affairs, Finland Tel. +358 295 351 176 , GSM +358 40 590 8137
mia.spolander@formin.fi

FRANCE

Hugo WAVRIN, Ministère des Affaires étrangères, Direction des affaires juridiques, Sous-
direction des droits de l'Homme, 57, boulevard des Invalides, 75700 Paris,
Tél: 01.53.69.36.28
Fax: 01.53.69.36.72
hugo.wavrin@diplomatie.gouv.fr

GERMANY / ALLEMAGNE

Gabriele SCHERER, Federal Ministry of Justice and Consumer Protection, Mohrenstraße 37,
10117 Berlin
Tel.: +49 30 2025 9476
Scherer-Ga@bmjv.bund.de

HUNGARY / HONGRIE

Tamás TÓTH, Co-Agent for the Hungarian Government before the European Court of Human
Rights, Department of Cooperation on International Crime and Human Rights, Ministry of
Public Administration and Justice, H-1054 Budapest, Kossuth tér 2-4 Tel: 00 36 1 795 63 92 ;
Fax: 00 36 1 795 05 29
antal.tamas.toth@kim.gov.hu

ITALY/ITALIE

Manlio DE SILVIO, Project Manager de la Fondation I-CSR
Manlio.desilvio@i-csr.it

Maria Benedetta FRANCESCONI, Ministère du développement Economique, Chef de Secrétariat du Point de contact national pour la mise en œuvre des Lignes directrices de l'OCDE en matière de conduite responsable des entreprises
Tel.: +39 0647052523
Benedetta.francesconi@mise.gov.it

LATVIA / LETTONIE

Natalja FREIMANE, Third Secretary Institutional Affairs Unit, Permanent Representation of the Republic of Latvia to the European Union
Tel.: +32 2 2383 109 (direct) Fax.: +32 2 2383 250 GSM: +32 473 531 651
natalija.freimane@mfa.gov.lv

NETHERLANDS / PAYS-BAS

Rene LEFEBER (Chair), Legal Counsel, Ministry of Foreign Affairs, International Law Division, Bezuidenhoutseweg 67, 2500 EB The Hague
Tel.: +31-70 348 5554
Rene.Lefeber@minbuza.nl

Gilles Goedhart , Senior Policy Officer Business and Human Rights, Ministry of Foreign Affairs of the Kingdom of The Netherlands, Department of Multilateral Institutions and Human Rights, Division of Human Rights and Political-Legal Affairs, Tel.: +31 70 348 48 69
gilles.goedhart@minbuza.nl

POLAND / POLOGNE

Piotr KOBIELSKI, Department of Proceedings before International Human Rights Protection Bodies, Ministry of Foreign Affairs of Poland, Al. J. Ch. Szucha 23, 00-580 Warszawa
piotr.kobielski@msz.gov.pl

SWITZERLAND/SUISSE

Rodrigo RODRIGUEZ, Attorney-at-Law, Scientific Adviser, Federal Department of Justice and Police (FDJP), Federal Office of Justice (FAJ), Private Law Division, Bundesrain 20, 3003 Bern
Tel.: + 41 (0)31 324 81 17 - Fax + 41 (0)31 322 42 25
rodrigo.rodriguez@bj.admin.ch

TURKEY / TURQUIE

Muhamet Murat ÜLKÜ , Counsellor (Rapporteur Judge), Permanente Representation of Turkey to the Council of Europe, 23, boulevard de l'Orangerie, F-67000 Strasbourg
Tel.: 03 88 36 50 94 – Fax: 03 88 24 03 73
turkdel@fr.oleane.com

UKRAINE

Oleksiy ILNITSKYI, Cancellor of the Ministry for Foreign Affairs of Ukraine,

Tel +380-050-741-9362
o.ilnytskyi@mfa.gov.ua

UNITED KINGDOM / ROYAUME-UNI

Stephen LOWE, Head, Business and Human Rights, Freedom of Expression Team, Human Rights and Democracy Department at the Foreign and Commonwealth Office, London
Tel: +44 20 7008 3642 - Stephen.Lowe@fco.gov.uk

PARTICIPANTS

Keynote Speaker

Serge BRONKHORST, Managing Director of ACCESS Facility, Sophialaan 10, 2514 JR The Hague, The Netherlands, +31(0)70 3028 147
sbronkhorst@accessfacility.org

Japan / Japon

Takaaki SHINTAKU, Consul au Consulat Général du Japon à Strasbourg
Tel : 03 88 52 85 05
japan.coe@s6.mofa.go.jp

Emiko SAITO, Researcher/Advisor Consulate-General of Japan at Strasbourg
Tel: +33 3 88 52 85 16
emiko.saito@mofa.go.jp

Mexico/Mexique

Andres GONZALEZ REYNOSO, Mission Permanente du Mexique auprès du Conseil de l'Europe, 8, boulevard du Président Edwards - 67000 Strasbourg
Tél.: 03 88 24 26 81 – Fax: 03 88 24 10 87
repmexcoe@sre.gob.mx

Amnesty International

Gabriela QUIJANO, Business and Human Rights Legal Adviser Global Thematic Issues Amnesty International, International Secretariat, Tel: +44 (0)20 7413 5663
gabriela.quijano@amnesty.org

Conference of INGOs of the Council of Europe / Conférence des OING du Conseil de l'Europe

Jean-Bernard MARIE
Tel: +33 3 88 83 46 50
Jean-bernard.marie@misha.fr

European Trade Union Confederation (ETUC) / Confédération européenne des syndicats (CES)

Klaus LÖRCHER, Human Rights Adviser
K.Loercher@t-online.de

International Commission of Jurists (ICJ) / Commission internationale de Juristes (CIJ)

Carlos LOPEZ, Senior Legal Advisor, ICJ, Rue des Bains 33, P.O. Box 91, 1211 Geneva 8, Switzerland

carlos.lopez@icj.org

European Network of National Human Rights Institutions (ENNHRI) / Réseau européen des institutions nationales des droits de l'homme

Claire METHVEN O'BRIEN, LL.M., Ph.D., Special Adviser, Danish Institute for Human Rights, Special Adviser Human Rights & Business, Wilders Plads 8K- DK-1403 Copenhagen K

Te.: +45 3269 8888 ; Direct +45 3269 8650

cob@humanrights.dk

The European Coalition for Corporate Justice (ECCJ) / La Coalition Européenne pour la Responsabilité Sociale et Environnementale des Entreprises (ECCJ)

Sandra COSSART (SHERPA)

sandra.cossart@asso-sherpa.org

Organisation internationale des employeurs (OIE)/International Organization of Employers (IOE)

Matthias THORNS, Senior Adviser, Chemin de Joinville, 26, CH-1216 Cointrin/Geneva

Tel.: +41 (0) 22 929 00 21 ; Mob.: +41 (0) 79 400 60 83

thorns@ioe-emp.org

Office of the High Commissioner for Human Rights (OHCHR)

Ragnhild HANDAGARD, Business & Human Rights, Research and Right to Development Division, Office of the High Commissioner for Human Rights, Office address: Avenue Giuseppe Motta 48, Office 1-01, Geneva

Tel: +41 22 928 240 - Fax: +41 22 928 9010

rhandagard@ohchr.org

UNICEF

Maria-Pia BIANCHETTI, I Government Engagement Consultant – Corporate Social Responsibility Unit UNICEF, Private Fundraising and Partnerships Division United Nations Children's Fund 5-7 Avenue de la Paix, 1211 Geneva, Switzerland Tel: +41229095194
mbianchetti@unicef.org

European Social Charter / Charte sociale européenne

Florent DUPLOUY

florent.duplouy@coe.int

Children's Rights Division / Division des Droits des Enfants

Mikael POUTIERS

Mikael.POUTIERS@coe.int

SECRETARIAT

DG I – Human Rights and Rule of Law / Droits de l'Homme et État de droit

Council of Europe / Conseil de l'Europe, F-67075 Strasbourg Cedex

Alfonso DE SALAS, Secretary to the CDDH, Head of Division, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'Homme

Tel :+ 33 3 88 41 23 24

Alfonso.DESALAS@coe.int

Matthias KLOTH, Secretary to the CDDH-CORP, Administrator, Human Rights Law and Policy Division / Division du droit et politique des droits de l'homme

Tel: + 33 3 90 21 49 84

matthias.kloth@coe.int

Valérie PEARD, Principal Assistant, Human Rights Law and Policy Division / Division du droit et de la politique des droits de l'homme

Tel. : +33 3 88 41 31 58

valerie.peard@coe.int

Evangelia Vratsida, Assistant/Assistante

Human Rights Law and Policy Division / Division du droit et politique des droits de l'homme

Tel : +33 3 90 21 5953

evangelia.vratsida@coe.int

Melodie SAHRAIE, Assistant Lawyer, Human Rights Intergovernmental Cooperation Division / Juriste assistante, Division de la coopération intergouvernementale en matière de droits de l'Homme

Melodie.SAHRAIE@coe.int

Andrea SIVO, Trainee, Human Rights Law and Policy Division / Stagiaire, Division du droit et politique des droits de l'homme

Andrea.Sivo@coe.int

INTERPRETERS / INTERPRÈTES

Michael HILL

Rémy JAIN

Nadine KIEFFER

APPENDIX II

AGENDA

- Item 1:** Opening of the meeting and adoption of the agenda
- Item 2:** Key-note speech: Mr Serge Bronkhorst, Managing Director, ACCESS Facility
- Item 3:** Election of a Vice-Chair
- Item 4:** Information on recent relevant national and international developments
- Item 5:** Elaboration of one or more non-binding instruments on human rights and business

Working documents:

Draft Recommendation of the Committee of Ministers to member States on human rights and business (CDDH-CORP(2014)10)

Relevant excerpts of the report of the 81th CDDH (CDDH-CORP(2014)11)

Relevant excerpts of the report of the 80th CDDH (CDDH-CORP(2014)09)

Comments from member States and Observers (CDDH-CORP(2014)12)

Meeting report of the 2nd meeting of the CDDH-CORP (CDDH-CORP(2014)R2)

Reference documents:

Corporate social responsibility in the field of human rights – Proposals and suggestions of issues for further consideration (updated version, June 2014 (CDDH-CORP(2014)007add.))

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)

- Item 6:** Other business
- Dates of the next meeting

APPENDIX III

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

[a]¹ The Committee of Ministers, under the terms of Article 15.b of the Statute of the Council of Europe;

[b] 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;

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

[d] Reaffirming its commitment to the protection of all human rights stated in the European Convention on Human Rights and the European Social Charter, including the revised European Social Charter;

[e] Recalling the member States' obligation to secure to everyone within their jurisdiction the rights and freedoms defined in the European Convention on Human Rights, 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;

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

[g] Recognising that business enterprises have a responsibility to respect human rights [and to [effectively] contribute to their realisation];

[h] [Recognising that corporate liability for human rights abuses is not precluded by international law [and may potentially extend to] / [, including] international crimes, such as genocide, war crimes and crimes against humanity] // [Recognising that international law does not preclude that business enterprises be held liable for international crimes such as genocide, war crimes and crimes against humanity] // [Recognising that business enterprises may be held liable for human rights abuses, potentially extending to crimes under international law such as genocide, war crimes, crimes against humanity, torture and inhuman or degrading treatment, enforced disappearances, unlawful killing, and forced labour and slavery]];

[i] 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'"

¹ Note by the Secretariat, to be removed from the final version: preambular paragraphs are provisionally numbered only for reasons of convenience during the negotiation process and will be deleted in the final document.

Framework, endorsed by the United Nations Human Rights Council on 16 June 2011 (“the UN Guiding Principles on Business and Human Rights”);

[[j] 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;]

[k] 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;

[l] Reaffirming its willingness to contribute to the implementation and development of the UN Guiding Principles on Business and Human Rights at the European level by making a further step to effectively prevent and remedy business-related human rights abuses;

Recommends that the governments of the member States:

1. review their national legislation and practice to ensure that they comply with the legal requirements, 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 the implementation of this Recommendation three years after its adoption, with the participation of all relevant stakeholders, including the business organisations and enterprises, national human rights institutions, trade unions and non-governmental organisations.

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.

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.

4. 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.

5. 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.

6. Member States should [encourage] / [require] 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.

7. 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.

8. Member States should support the work of the United Nations, including in particular 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

9. 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.

10. 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.

11. 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. Measures to promote the State duty to protect human rights

12. 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.

13. Within their jurisdiction², member States have a duty [in certain circumstances] 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 prosecute where the outcome of an investigation warrants this, 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.

14. The (revised) European Social Charter (ETS Nos. 35 and 163)[, as applied and interpreted by the European Committee of Social Rights], is another key legal instrument that affords protection

² Note by the Secretariat, to be removed from the final version: the explanatory memorandum which will accompany the Recommendation will clarify that the term “jurisdiction” is being understood to have the same meaning as in Article 1 of the European Convention on Human Rights, as applied and interpreted by the European Court of Human Rights.

against [corporate] / [business-related]³ human rights abuses. Member States which have not yet ratified the (revised) European Social Charter and the Additional Protocol to the European Social Charter providing for a system of collective complaints (ETS No. 158) should consider doing so. Those which have ratified these instruments should consider increasing the number of accepted provisions. [Member States should endeavour to respect the (revised) European Social Charter, in particular with regard to the rights of workers, even where they are not yet bound by particular provisions.]

15. 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 employees on any grounds, such as sex, sexual orientation and gender identity, race, colour, age, language, religion, political or other opinion, national and social origin, association with a national minority, trade union membership or activity, disability, property, birth or other status.

16. 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.

[III. Measures to promote the corporate responsibility to respect human rights]

17. [Member States should:

- Apply such measures as may be necessary to require all business enterprises operating within their territorial jurisdiction to respect human rights;
- Apply such measures as may be necessary to require, as appropriate, all 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.]

[They should also encourage, and where appropriate require, business enterprises to communicate their efforts in this respect.]

[18. Member States should apply such [legislative [and/or] other] measures as may be necessary to [ensure] / [vigorously promote] / [require] that business enterprises domiciled [or carrying out substantial business activities] in their jurisdiction carry out human rights due diligence [throughout their operations]. Such measures could be developed specifically for that purpose or integrated into corporate law or civil law.]

19. Member States should [encourage] / [require] business enterprises domiciled [or carrying out substantial business activities] within their jurisdiction to display greater transparency in order to enable them better to “know and show” their corporate responsibility to respect human rights and contribute to their realisation. They should further [encourage] / [require] such business enterprises

³ Note by the Secretariat, to be removed from the final version: Two alternatives are reflected in this paragraph; the CDDH-CORP will come back to this issue at its next meeting. In the following, only the term ‘business-related human rights abuses’ is being used for reasons of brevity, it being understood that, whichever of the two alternatives is being chosen, it will apply consistently throughout the whole text. Note that this issue arises only in the English version.

to meet this responsibility by putting in place a respective policy commitment, a human rights due-diligence process [throughout their operations] to identify, prevent, mitigate, and account for how they address their impacts on human rights, as well as processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute. Member States should also [encourage] / [require] such business enterprises to include [information on] their [efforts on] corporate responsibility to respect human rights and contribute to their realisation in their annual reports[, especially how they address concerns that have been raised by or on behalf of affected stakeholders].

[20. Member States Should examine the possibility of creating civil, criminal and/or administrative law causes of action against business enterprises domiciled [or carrying out substantial business activities] within their jurisdiction that cause or contribute to human rights abuses within or beyond their territorial jurisdiction as a consequence of failures to carry out adequate due diligence processes to prevent or mitigate risks to human rights.]

[21. Member States should adopt effective enforcement mechanisms, including the establishment of regulatory bodies with a mandate to monitor and enforce business and human rights standards, including human rights due diligence practices [throughout their operations].]

[22. Member States should [strive to/take additional steps to]protect against business-related human rights abuses that are owned or controlled by them, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including [where appropriate] by requiring human rights due diligence [throughout their operations].]

[23. Member States should exercise adequate oversight in order to meet their international human rights obligations when they contract with business enterprises to provide services that may impact on the enjoyment of human rights. In the area of public procurement, they should require respect for human rights by business enterprises with which they conduct commercial transactions and provide clauses for consequences in their procurement contracts, including their termination, if such respect for human rights is not honoured.]

[24. Before granting export licences to business enterprises, member States should fully take account of possible human rights impacts. [They should ensure that the export of [weapons and] information, communications and surveillance technology, which may be used by third [countries] / [parties] against opponents or human rights defenders who may subsequently become victims of severe human rights abuses, falls within the ambit of their export control [or is subject to human rights due diligence [throughout their operations]].]

[25. Member States should also strive to ensure full respect for the UN Guiding Principles on Business and Human Rights in the context of their development assistance.]

[26. [Before concluding and during the term of trade and investment agreements, member States should consider possible human rights impacts of such agreements.] / [In the course of negotiations of trade agreements as well as their implementation, member States should ensure that human

rights in general and fundamental social rights in particular are fully respected, protected and realised.]]

[27. 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 [or carrying out substantial business activities] within their jurisdiction do not trade in goods which could be used for capital punishment, torture, or other cruel, inhuman or degrading treatment or punishment.]

28. Member States should, when business enterprises domiciled[or carrying out substantial business-activities] within their jurisdiction 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 adhere to the UN Guiding Principles or the OECD Guidelines for Multinational Enterprises].

29. Member States should advise, for example, through their competent ministries or diplomatic or consular missions, business enterprises which intend to operate in a third country on sensitive human rights issues, including negative impacts on [workers,]indigenous peoples and communities, ethnic minorities, migrants, women, children, [persons belonging to gender or sexual minorities,]or persons with disabilities.

30. Member States should [alert] / [be in a position to inform] business enterprises domiciled[or carrying out substantial business activities] within their jurisdiction [to] / [on] the human rights impacts of carrying out operations in conflict 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 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.]

[31. Where appropriate, member States should [consider[, in cooperation with business enterprises and civil society,] the possibility of] / [promote, support and participate in] training and workshops for business enterprises and their local trading partners[as well as impacted communities], including the demonstration of human rights due diligence [throughout their operations] in their business activities in third countries. They should consider the assessment of corporate responsibility of local trading partners in the supply chain of business enterprises in third countries[, for example through their diplomatic and consular missions. They should also give guidance to business enterprises as to how they can use their influence and leverage on such local trading partners to respect human rights in third countries].]

32. 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.

IV. Measures to promote access to remedy

a. Access to judicial mechanisms

33. Member States should review, on a regular basis, the effective implementation of their obligation under Article 13 of the European Convention on Human Rights [and other international and European human rights instruments]to grant to everyone whose rights [under the Convention] have been violated under [the Convention] / [these instruments] an effective remedy before a national authority, including where the violation has been triggered by[, caused by or contributed to] the conduct of a business enterprise.

i. Civil liability for business-related human rights abuses

[34. Member States should identify and remove barriers to remedy in cases of business-related human rights abuses, irrespective of where the abuse occurred.]

35. Member States should apply such legislative and other measures as may be necessary to ensure that their domestic courts have jurisdiction[and exercise it effectively] over civil [and administrative⁴]claims related to [business-related] human rights abuses against business enterprises domiciled [or carrying out substantial business activities]within their jurisdiction irrespective of where the abuse occurred.

[36. Member States should apply such legislative and other measures as may be necessary to ensure that human rights abuses [caused or contributed to/aided and abetted]by business enterprises give rise to civil liability under their respective laws.]

37. Member States should [consider allowing] / [allow] their domestic courts to exercise jurisdiction over civil claims related to business-related human rights abuses against [foreign] / [overseas-based] subsidiaries of business enterprises domiciled [or carrying out substantial business activities]within their jurisdiction if such claims are [closely]connected with civil claims against the latter enterprises.

[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 domiciled [or carrying out substantial business activities]within their jurisdiction are admissible irrespective of where the abuse occurred.]

39. If a business enterprise is not domiciled within their jurisdiction, member States should [consider] allow[ing] 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*) [[or] / [and] there is a sufficient connection to the member State concerned].

⁴ Note by the Secretariat: There is understanding in the Group about the necessity to discuss at the next meeting access to remedies under administrative law on the basis of a proposal developed by the Chair and the Secretariat.

40. 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 [where appropriate]provide in their legal systems for legal aid schemes regarding claims concerning such abuses. Such legal aid should be [obtainable] / [available] in a manner that is practical and effective[to ensure a fair hearing and trial in accordance with international standards] [and at least in the same manner as legal aid is available for plaintiffs in the forum country]. [Legal aid systems should extend to such abuses if the requisite conditions are met.] [Member States shall take such steps as may be necessary to ensure that victims of human rights abuses have access to suitably qualified legal counsel, and that access to legal counsel and judicial proceedings is not obstructed or denied to them because of financial disadvantage. In particular, member States should review their present legislative and other measures relating to financing of legal claims in light of Article 6 of the European Convention on Human Rights and to take the steps necessary to ensure that the standards laid down in that Article are met.]

41. [Member States should allow in their legislation foundations, associations, trade unions and other organisations to bring civil claims related to business-related human rights abuses against business enterprises on behalf of entire groups of alleged victims[and eventually be admitted as third parties] [as long as the victims are free to join the group (opt-in)]. They should also provide for the possibility to settle a large number of similar actions on a collective basis.] // [Member states should consider possible solutions for the settlement of large number of similar cases.] // [Member states should provide in their legislation collective redress systems for alleged victims of business-related human rights abuses. Such systems may include group actions where the action can be brought jointly by those who claim to have suffered harm, representative actions by foundations, associations, trade unions and other organisation on behalf of groups of alleged victims, as well as rules on the availability of funding for collective redress litigation.] // [Member States should apply such legislative and other measures as may be necessary to allow for “class”, “group” or other forms of collective action in cases of business-related human rights abuses, irrespective of where the abuse occurred.]

42. [Notwithstanding international rules in taking evidence abroad,]Member States should [consider revising] / [review] their civil procedures where the applicable rules [unfairly] / [disproportionately and unnecessarily or otherwise unfairly] impede the access to information in the possession of the defendant or a third party, if such information is [essential] / [considered by the court to be relevant] for victims of business-related human rights abuses to substantiate their claims, with due regard for confidentiality considerations.

43. Member States should ensure that they do not [disproportionately]interfere with the right of access to court under Article 6, paragraph 1 of the European Convention on Human Rights of victims of business-related human rights abuses.

ii. **Criminal liability of corporations for human rights abuses**

[44. [Member States should [consider introducing legislation under which business enterprises are held liable] / [apply such legislative and other measures as may be necessary to ensure that business enterprises [domiciled [or carrying out substantive business] within their jurisdiction] can be

held liable under their [criminal] law] for international crimes, such as genocide, war crimes and crimes against humanity, irrespective of where such acts are committed.] [Such measures should also ensure that business enterprises [domiciled [or carrying out substantive business] within their jurisdiction can be held liable under their criminal law for aiding and abetting international crimes].] // [Member States should adopt and/or apply 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, including genocide; war crimes; crimes against humanity; torture and inhuman or degrading treatment; enforced disappearances; unlawful killings; forced labour and slavery, irrespective of where such acts are committed. Such measures should also ensure that business enterprises can be held liable under their criminal law for their participation or contribution to the commission of those crimes. Member states should examine their criminal legislation and justice systems as well as enforcement practices and policies to identify legal and practical obstacles to ensuring corporate accountability for crimes that are or contribute to human rights abuse. Member States should address these prosecution gaps, in particular by ensuring new laws are adopted, existing criminal laws are enforced effectively, and/or thresholds or other obstacles in existing laws are revised so that their application is not rendered impossible in practice. They should furthermore ensure these laws apply to legal entities and, where this is not possible at present, extend their reach to apply to crimes committed abroad.]

45. Subject to their legal principles, member States should also consider ensuring that business enterprises [domiciled or carrying out substantive business activities within their jurisdiction] can be held liable under their [criminal] law for offences established in accordance with the Criminal Law Convention on Corruption (ETS No. 173), the Convention on Cybercrime (ETS No. 185), the Convention on Action against Human Trafficking (ETS No. 197), the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201), the Convention on Preventing and Combating Violence against Women and Domestic Violence (ETS 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][, irrespective of whether or not they are parties to these Conventions].⁵ [Member states which have not yet ratified these conventions are invited to do so.]

46. Irrespective of whether or not they are directed against natural or legal persons, [criminal] investigations [must] / [should] satisfy the effectiveness criteria under the European Convention on Human Rights, *i.e.* they [must] / [should] 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[and where the interest of justice so demand]. [Decisions to stay the prosecution must be sufficiently reasoned. Victims are entitled to request an effective official criminal investigation.] / [Victims should be entitled to request an effective official investigation. Any decision to stay an investigation or prosecution should be sufficiently reasoned.]

[47. Member states should ensure statutes of limitations shall not apply to crimes under international law committed or contributed to by business enterprises.]

⁵ Note by the Secretariat, to be removed from the final version: the explanatory memorandum will clarify that the provision is naturally meant to also include the additional protocols to those treaties.

b. Access to non-judicial mechanisms

[48. 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.]

49. In order to ensure the effectiveness of non-judicial grievance mechanisms, member States should provide for their own mechanisms to meet [minimum standards of independence, procedural fairness and enforceability of their decisions, as well as] the effectiveness criteria listed in Principle 31 of the UN Guiding Principles on Business and Human Rights. They should [encourage] / [require] non-State based non-judicial grievance mechanisms to ensure that they also meet these criteria.

[50. Member States should assess existing State-based non judicial mechanisms responsible for monitoring, enforcing and adjudicating aspects of business conduct such as labor inspectorates and tribunals, consumer protection authorities and environmental agencies, among others and draw lessons from their strengths and weaknesses in order to put in place robust and effective State-based non-judicial mechanisms in the area of business and human rights. 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.]

51. Member States which have not yet done so should [consider adhering] / [take steps to adhere] to the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (OECD Guidelines) with the aim of contributing to the resolution of issues related to the implementation of the OECD Guidelines, the UN Guiding Principles on Business and Human Rights and this Recommendation. [They should support the effective implementation and further development of the Tripartite declaration of principles concerning multinational enterprises and social policy (MNE declaration – 4th edition) of the International Labour Organisation.]

52. Those member States which adhere to the OECD Guidelines should[ensure, and where necessary,] consider enhancing 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; allowing the NCPs to carry out investigations on their own motion; and requiring that the recommendations of NCPs are made public and taken into account by governmental authorities in their decisions on public procurement or export credits].

[53. Member States should [encourage] / [require] business enterprises domiciled[or carrying out substantial business activities] within their jurisdiction 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

54. 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. Donor countries should also consider listing the functioning of the legal systems as a key criterion for providing financial aid to developing countries.] [Member states should take steps to ensure that effective and appropriate legal and institutional arrangements have been made to facilitate and enhance international cooperation in respect of cases of business involvement in human rights abuses, including in relation to the prevention, detection, investigation and prosecution of such offenses, and the enforcement of criminal sanctions or civil remedies awarded in respect of such abuses.]

55. 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.

56. [Alleged]Victims of business-related human rights abuses within the[territorial] jurisdiction of member States should have [as far as possible]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. Special measures to protect workers

57. Because of their particular vulnerability in the globalised economy, member States should ensure that the human rights of workers are especially protected throughout the operations of business enterprises.

58. In view of their obligations under the UN Covenant on Economic, Social and Cultural Rights of 19 December 1966, they should thereby take into account of the respective General comments. Member States should also reinforce efforts to meet their obligations with regard to workers under the European Convention on Human Rights, the (revised) European Social Charter, the conventions of the International Labour Organisation concerning in particular the freedom of association, the prohibition discrimination, child and forced labour as well as all other relevant international instruments including especially the health and safety of workers.

59. Member States should [encourage] / [require] relevant stakeholders such as national human rights institutions and trade unions to participate in the elaboration and implementation of policies on matters which are particularly sensitive with regard to workers' rights.]

VI. Special measures to protect children

60. Because of their particular vulnerability, member States [should ensure] that the human rights of children are especially protected throughout the operations of business enterprises.

61. In view of their obligations under the UN Convention on the Rights of the Child of 20 November 1989[and its Optional Protocols], they should thereby take into account 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 the abolition of child labour, and other relevant international instruments.

62. Member States should [encourage] / [require] business enterprises to participate in the elaboration and implementation of policies on matters which are particularly sensitive with regard to children's rights, such as for example those measures provided for by the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201).

[63. Member states should implement measures to remove social, economic and juridical barriers so that children can have access to effective judicial mechanisms without discrimination of any kind. Children and their representatives should be provided with information about remedies, both of judicial and non judicial nature, they should be allowed to initiate proceedings in their own right and have access to legal aid and the support of lawyers and legal aid providers in bringing cases against business enterprises to ensure equality of arms.]

VII. Special measure to protect indigenous peoples and communities

64. [Because of their particular vulnerability,] / [With reference to the special rights of indigenous peoples and communities as defined in international standards,]member States [should ensure] that the human rights of indigenous peoples and communities are [especially]protected throughout the operations of business enterprises. [Because of the particular vulnerability of indigenous peoples and communities, member States should formulate and implement legislative and other measures to [encourage] / [require] all business enterprises domiciled[or carrying out substantial business activities] within their jurisdiction to especially protect the rights of indigenous peoples and communities throughout their operations.]

65. Member states should reinforce efforts to meet their commitments with regard to business and the human rights of indigenous peoples and communities under the United Nations Declaration on the Rights of Indigenous Peoples of 13 September 2007, the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries of 27 June 1989, [the UN Convention on Racial Discrimination]and any other provision of international treaties [specifically aimed at] / [referring to] the preservation of the rights and culture of indigenous peoples and communities. [Member states which have not yet ratified these conventions are invited to do so.]

[66. Member states should apply such legislative and other measures as may be necessary to ensure that the free, prior, and informed consent of indigenous peoples and communities [within their jurisdiction]is obtained for operations of business enterprises, which take place on territories

traditionally owned or otherwise occupied or used by those peoples and communities or which otherwise negatively affect their living conditions.]

[67. Member States should apply such legislative and other measures as may be necessary to ensure that business enterprises domiciled [or carrying out substantial business-activities] in their jurisdiction (a) respect the rights and interests of indigenous peoples and communities, and (b) establish mutually agreed terms with indigenous peoples and communities [when] / [prior to] accessing [land and/or]natural resources on territories traditionally owned or otherwise occupied or used by those peoples and communities or traditional knowledge associated with those resources that is held by those peoples and communities.]

68. Member states should pay special attention to the human rights of indigenous peoples and communities in their national action plans[on human rights and business].

VIII. The role of human rights defenders[and civil society]

69. Member States should [themselves and should][encourage] / [require] business enterprises to consult and seek the expertise of human rights defenders[and civil society], in particular national human rights institutions, when identifying and assessing potential adverse human rights impacts of their activities or their business relationships.

70. Member States should ensure that the legitimate and peaceful activities of human rights defenders within their jurisdiction who focus on business-related impacts on human rights are not obstructed, whether through political pressure, harassment, politically motivated economic compulsion or otherwise. 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 respected.

71. Member States should [protect and]also support, for example through[the establishment of rapid response mechanisms and the issuance of specific guidance for] 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.⁶

[IX. Consultation

72. Member States should make clear to business enterprises that human rights due diligence processes must include, where appropriate, project-specific human rights impact assessments and effective and meaningful consultation with individuals and communities likely to be affected by these projects. This is particularly relevant to, though not exclusive of, industrial and infrastructure projects and projects requiring the use of large extensions of land or the exploitation of natural resources.

73. Human rights impact assessments should be carried out prior to the initiation of a project

⁶ Note by the Secretariat, to be removed from the final version: Such standards, which would be further elaborated on in an explanatory memorandum, are notably: “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; “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; and the “European Union Guidelines on Human Rights Defenders” of 6 December 2008.

and regularly throughout the project's entire life cycle. Affected individuals and communities should be involved at every stage of the impact assessment process and should be consulted regarding potential impacts, prevention, mitigation and remedial measures. They should have access to full, clear, timely and objective information on all relevant aspects of the planned activities. In carrying out impact assessments, business enterprises should be required to give special consideration to potential impacts on the human rights of women and of certain groups, such as children, migrant workers, Indigenous peoples, minorities and women within those groups, who, due to their specific circumstances, might require special measures to ensure respect for the relevant international human rights standards applicable to them.]