International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores

26 January 2015

Further IOE Comments on the Council of Europe Draft Instrument on Business and Human Rights (appendix III / CDDH-CORP(2014)R3)

General Remarks

These further comments build on the IOE's preliminary position, prepared for the 24-26 September 2014 meeting, on the Council of Europe's draft instrument on business and human rights. With these further comments, the IOE wishes to stress and reaffirm in this ongoing process the following points:

- The recommendations of the Council of Europe (CoE) must focus on the implementation of the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) so that businesses and other stakeholders have clarity with regard to their role and responsibilities. To go beyond the UN Guiding Principles carries the risk of breaking the consensus established among the stakeholders by John Ruggie after an extremely lengthy process.

- As they stand, the recommendations are not balanced because they focus primarily on access to remedy, the third pillar of the UN Guiding Principles. This is most unfortunate as there is general agreement that all three pillars ought to be supported with the same level of attention. The disproportionate focus on the third pillar jeopardises the intentions of the Council of Europe, which is to promote responsible business conduct with regard to human rights. Moreover, it is widely recognised that prevention is key to avoiding situations in which access to remedy becomes necessary. By focusing chiefly on access to remedy, the Council of Europe is sending the wrong message that it is more important to have access to remedy after the fact than to prevent the incident from happening in the first place.

- Moreover, the section on access to remedy is almost exclusively focused on extraterritorial jurisdiction rather than on supporting CoE member States to improve access to remedy at local level. The **shortcomings of extraterritorial jurisdiction** are ignored, including:

    - the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years;
    - the challenges presented to courts when they must rule according to foreign legal principles;
    - the difficulties in obtaining evidence and testimony abroad; and most importantly;
    - the problem that extraterritorial jurisdiction is mainly open for allegations against multinationals and not purely domestic companies, which leaves victims of domestic companies without access to remedy.

- Furthermore, extraterritorial jurisdiction could also exacerbate a conflict of laws and entrain contradictions between civil and common law jurisdictions. CoE member

States do not have to re-invent the wheel when improving access to remedy. The UN 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 identify some of the key elements which governments should consider with respect to improving access to State-based judicial remedies. It is very unfortunate that the paper did not take into account this important UN document.

Specific Comments

With regard to **Paragraph [g]**: UN GP 11 states that "*Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved*." The UN Guiding Principles do not speak about "effectively contributing to their realisation". This wording should therefore be deleted from paragraph [g].

With regard to **Paragraph 4**: The paragraph should clarify that member States set out clear expectations for all businesses, including State-owned businesses to implement the UN Guiding Principles.

With regard to **Paragraph 14**: The European Committee of Social Rights has no mandate to *interpret* the provisions in the European Social Charter. This reference needs to be deleted. Moreover, it is not appropriate to single out workers' rights. The paragraph should also clarify that the duty to protect also includes the rights of legal persons, which includes those of companies.

With regard to **Paragraph 17**: The second and third bullet points should be merged and amended as follows: "*Expect and encourage businesses to respect human rights throughout their operations and support them in this regard*."

With regard to **Paragraph 18**: UN GP 4 clearly states the circumstances under which States might, "where appropriate", require human rights due diligence. It is in cases where enterprises are owned or controlled by the State, or where enterprises receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies. The proposed wording in paragraph 18 on legislation "requiring" human rights due diligence goes far beyond the UN GPs. It is not even limited to high-risk operations. The wording should be altered to promote "encouragement".

With regard to **Paragraph 19**: This paragraph is repetitive with regard to due diligence requirements. Concerning the proposal to require a human rights policy commitment from business, it should be stressed once again that the UN Guiding Principles do not suggest such measures. Furthermore, of which types of businesses do we speak? Of all micro-companies, which are the backbone of most economies? The suggested reporting requirements in this paragraph do not reflect the UN GPs. UN GP 3(d) states, that States should "*encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts*". The commentary to UN GP 3 specifies that it might be appropriate to require reporting in circumstances "*where the nature of business operations or operating contexts pose a significant risk to human rights.*" Thus, any call for reporting requirements in this paragraph must be aligned to the wording in UN GP 3(d).

With regard to **Paragraph 20**: This paragraph is repetitive with regard to chapter IV, "Measures to promote access to remedy" and should be deleted.

With regard to **Paragraph 21**: It is not clear how member States should establish "*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*." Law enforcement is the role, duty and prerogative of the State in which an incident may have happened. Does this mean that a company's home State may need to undertake investigations in a possible case of discrimination at the other end of the world? How would these investigations be linked to the proceedings of the host State? This paragraph creates confusion and should be deleted.

With regard to **Paragraph 25**: It is not clear what is meant by this paragraph. Clarifications are necessary.

With regard to **Paragraph 31**: It is hard to imagine how member States might engage in "*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*." Diplomatic missions have neither the resources, nor the knowledge and expertise, to become the supply chain auditing unit of buyers in their home countries.

With regard to **Paragraph 35**: The proposal that member States should have "*jurisdiction over civil and administrative claims related to human rights abuses by businesses domiciled or carrying out substantial business activities within their jurisdiction irrespective of where the abuse occurred*" triggers challenges with regard to the identification of the responsible jurisdiction. Many MNEs are active in all major countries around the world. Does it mean that all these countries would be the responsible jurisdiction with regard to incidents in a third country? Which law would apply?

With regard to **Paragraph 41**: The majority of European countries do not have any provisions for class action / collective redress procedures. This has not been identified as creating obstacles to access to remedy in Europe. The call for class action is not sufficiently justified.

With regard to **Paragraph 51**: What does the "*further development*" of the Tripartite ILO MNE Declaration mean? Development in which direction? Besides, it is the ILO International Labour Conference which discusses and decides on the necessity to revise ILO instruments. This reference should be deleted.

With regard to **Paragraph 52**: NCP procedures are mediation processes. They are not judicial procedures. For this reason NCP recommendations should not play any role in public procurement procedures.

With regard to **Paragraph 58**: The paragraph speaks generally about ILO Conventions but it should focus on the 1998 Declaration on Fundamental Principles and Rights at Work as the UN Guiding Principles do.

With regard to **Paragraph 66 and 67**: Both paragraphs ignore the key provisions of ILO Convention 169 on indigenous people. According to the Convention, governments are required to undertake the consultation process. Such consultations do not imply a right to

veto, nor does the result of the consultation necessarily mean reaching an agreement or prior consent, however desirable that may be. According to article 6 of Convention 169, such consultation "*shall be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures*". This means that consultation mechanisms are not merely a formal requirement, but are intended to enable indigenous peoples to participate effectively in their own development. In practice however, governments struggle to implement proper consultation processes. There is insufficient understanding of when, how, who and on what basis to consult. Thus, the Council of Europe's Human Rights standard should encourage Member States to ratify and implement correctly ILO Convention 169 as well as support capacity building.

With regard to **Paragraph 69**: To consult and seek the expertise of human rights defenders may be useful and necessary for a company in certain circumstances and national contexts. However, for the majority of companies and situations within Council of Europe member States, it is unnecessary.

******