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

3rd meeting
24 September (9.30 a.m.) – 26 September 2014 (1 p.m.)
Council of Europe, Agora – Room G06
Recommendation of the Committee of Ministers to member States on human rights and business

[a] 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] 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;

[d] 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;

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

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

[g] Recognising that corporate liability for human rights abuses is not precluded by international law and may potentially extend to international crimes, such as genocide, war crimes and crimes against humanity;


[i] 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;

[j] 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 [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.]
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;

4. share 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;

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 business enterprises.

Appendix to the Recommendation

I. General principles

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:

   - The existing obligation of States to respect, protect and fulfil human rights and fundamental freedoms (“The State duty to protect human rights”);
   - The responsibility of business enterprises 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.

II. Measures to promote the State duty to respect human rights

3. 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

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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.]
prevent human rights violations where the competent authorities had or ought to have had knowledge of such violations, to undertake an effective official investigation where such violations 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.

4. 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 against human rights abuses by business enterprises. 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) are invited to 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.

5. In line with their international obligations, member States should ensure that their employment laws require business enterprises not to discriminate against employees on grounds of sex, race, colour, age, language, sexual orientation, religion, political or other opinion, national and social origin, association with a national minority, property, birth or other status.

6. Member States should ensure that their legislation, including civil law, criminal law and corporate law, does not create an obstacle to the respect for human rights by business enterprises. 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

7. Member States should formulate and implement measures and policies to encourage all business enterprises domiciled in their jurisdiction to respect human rights throughout their operations, within and beyond their territorial jurisdiction. They should also encourage, and where appropriate require, business enterprises to communicate their efforts in this respect.

8. Member States should apply such legislative and other measures as may be necessary to ensure that business enterprises domiciled in their jurisdiction carry out human rights due diligence. Such measures could be developed specifically for that purpose or integrated into corporate law or civil law.

9. Member States should encourage business enterprises 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 business enterprises to meet this responsibility by putting in place a respective policy commitment, a human rights due-diligence process 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 encourage business enterprises to include their corporate responsibility to respect human rights and contribute to their realisation in their annual reports.
10. Member States should protect against human rights abuses by business enterprises 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 by requiring human rights due diligence.

11. 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.

12. 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 information, communications and surveillance technology, which may be used by third countries against opponents or human rights defenders who may subsequently become victims of severe human rights abuses, falls within the ambit of their export control.

13. Member States should, when business enterprises domiciled within their territory and/or jurisdiction are represented in a trade mission to third countries, address and discuss possible adverse effects future operations might have on the human rights situation in those countries.

14. 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 indigenous peoples and communities, ethnic minorities, migrants, women, children or persons with disabilities.

15. Member States should alert business enterprises domiciled within their jurisdiction to the human rights impacts of carrying out operations in conflict areas, 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.

16. Where appropriate, member States should consider the possibility of training and workshops for business enterprises and their local trading partners, including the demonstration of due diligence in their business activities in third countries with regard to human rights impacts. 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.

17. 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.

3 [Note by the Secretariat, to be removed from the final version: the Chair and the Secretariat are considering adding a chapter with special measures on indigenous peoples and communities.]
IV. Measures to promote access to remedy

a. Access to judicial mechanisms

18. Member States should review, on a regular basis, the effective implementation of their obligation under Article 13 of the European Convention on Human Rights to grant to everyone whose rights has been violated under the Convention an effective remedy before a national authority, including where the violation has been triggered by the conduct of a business enterprise.

i. Civil liability for corporate human rights abuses

19. Member States should apply such legislative and 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 irrespective of where the abuse occurred.

20. Member States should consider allowing their domestic courts to exercise jurisdiction over civil claims related to corporate human rights abuses against foreign subsidiaries of business enterprises domiciled within their jurisdiction if such claims are connected with civil claims against the latter enterprises.

21. Member States should apply such legislative and other measures as may be necessary to ensure that civil claims related to corporate human rights abuses against business enterprises domiciled within their jurisdiction are admissible irrespective of where the abuse occurred.

22. If a business enterprise is not domiciled within their jurisdiction, member States should consider allowing their domestic courts to exercise jurisdiction over civil claims related to corporate human rights abuses against such a business enterprise if no other forum is available (forum necessitatis) or there is a sufficient connection to the member State concerned.

23. When alleged victims of corporate 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.

24. Member States should allow in their legislation foundations, associations, trade unions and other organisations to bring civil claims related to corporate human rights abuses against business enterprises on behalf of entire groups of alleged victims. They should also provide for the possibility to settle a large number of similar actions on a collective basis.

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

ii. Criminal liability of corporations for human rights abuses

Member States should apply such legislative and other measures as may be necessary to ensure that business enterprises 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 can be held liable under their criminal law for aiding and abetting international crimes.

Subject to their legal principles, member States should also consider ensuring that business enterprises 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, irrespective of whether or not they are parties to these Conventions.

Irrespective of whether or not they are directed against natural or legal persons, criminal investigations must satisfy the effectiveness criteria under the European Convention on Human Rights, i.e. they must 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. Decisions to stay the prosecution must be sufficiently reasoned. Victims are entitled to request an effective official criminal investigation.

b. Access to non-judicial mechanisms

In order to ensure the effectiveness of non-judicial grievance mechanisms, member States should provide for their own mechanisms to meet the effectiveness criteria listed in Principle 31 of the UN Guiding Principles on Business and Human Rights. They should encourage non-State based non-judicial grievance mechanisms to ensure that they also meet these criteria.

Member States which have not yet done so should consider adhering 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.

[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.]
32. Those member States which adhere to the OECD Guidelines should 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.

33. Member States should encourage business enterprises to establish their own grievance mechanisms. 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

34. In order to improve the access to remedies for victims of corporate 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 themselves and with non-State based non-judicial grievance mechanisms, beyond their existing obligations.

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

36. Victims of corporate human rights abuses within the jurisdiction of member States should have access to information about existing judicial and non-judicial remedies in a language which they can understand.

V. Special measures to protect children

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

38. In view of their obligations under the UN Convention on the Rights of the Child of 20 November 1989, 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.

39. Member States should encourage 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).

VI. The role of human rights defenders

40. Member States should encourage business enterprises to consult and seek the expertise of human rights defenders, in particular national human rights institutions, when identifying and assessing potential adverse human rights impacts of their activities or their business relationships.

41. 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.

42. Member States should 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.

VII. Further implementation of the UN Guiding Principles on Business and Human Rights

a. General measures

43. In their implementation of the UN Guiding Principles on Business and Human Rights, member States should ensure consistency and coherence at all levels of government.

44. In addition to their own implementation of the UN Guiding Principles on Business and Human Rights, member States should encourage all business enterprises, whether transnational or otherwise, which operate within their jurisdiction to likewise implement these Principles throughout their operations.

45. 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.

46. Member States should encourage third countries to support widespread implementation of the UN Guiding Principles on Business and Human Rights and other relevant international standards. They should also consider developing partnerships with countries seeking to implement those standards.

[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.]
47. Member States should provide advice and support to third countries wishing to develop, in line with the UN Guiding Principles on Business and Human Rights, their own judicial and non-judicial human rights protection mechanisms and to reduce barriers to remedies against corporate human rights abuses within their jurisdiction.

48. Member States should support the work of the United Nations, 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

49. 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.

50. In the process of developing such national action plans, member States should use the available guidance provided by the UN Working Group on Business and Human Rights as well as seek the expertise of all stakeholders, including business enterprises, national human rights institutions, trade unions and non-governmental organisations.

51. With the participation of all stakeholders, member States should continuously monitor the implementation of their national action plans and, if necessary, 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.