15 September 2014

PRELIMINARY IOE COMMENTS ON THE DRAFT RECOMMENDATIONS OF THE COUNCIL OF EUROPE COMMITTEE OF MINISTERS TO MEMBER STATES ON HUMAN RIGHTS AND BUSINESS (CDDH-CORP (2014)10)

Business and human rights is a matter of high priority for the International Organisation of Employers (IOE) and its more than 150 member federations around the world. The organisation has been active for many years in this area and was highly engaged in the drafting of the UN Guiding Principles on Business and Human Rights.

The IOE endorses the UN “protect-respect-remedy” framework and continues to give its full support to the UN Guiding Principles on Business and Human Rights. IOE member federations are highly committed to working with their national governments, as well as with all other stakeholders, to advance the dissemination and implementation of the UN Guiding Principles.

The IOE welcomes the draft recommendations of the Committee of Ministers to member States on human rights and business (CDDH-CORP (2014)10) and would like to make the following preliminary comments:

I. General Remarks

1. It is the primary duty of States to protect the human rights of their citizens. Governments must ensure the enforcement of legislation at national level, improve governance systems and the rule of law and assess their civil and criminal justice systems, identify gaps and improve their systems by addressing these gaps, with the help in some cases of relevant international bodies. The focus of the draft recommendations must therefore more specifically address this key duty of States.

2. There is no “one-size-fits-all” approach when it comes to the implementation of the UN Guiding Principles. In some instances, legal measures may be required and, in others, none may be needed, but States can focus on political initiatives and support measures. The flexibility of governments to use the best suitable policy instruments to address the specific situation in their countries should not be restricted through provisions made by the Council of Europe. It should be made clear in the recommendations that the guidance provided is to inspire governments and stakeholders, but is not a check-list of “need-to-be implemented” actions. At the same time CoE member States should be encouraged to develop integrated, coherent and properly considered responses to all three pillars.

3. The recommendations of the Council of Europe must focus on the implementation of the UN Guiding Principles and should not move beyond that, so that businesses and other stakeholders have clarity and stability with regard to their role and the responsibilities that are expected of them.
4. The recommendations should encourage CoE member States to take a “think small first” approach. Small and medium-sized enterprises (SMEs) are the essential backbone of all economies around the world and, moreover, many are active on a global scale. SMEs have different challenges and resources, but also possibilities when it comes to the implementation of the UN Guiding Principles. States must take into account the challenges, limitations and needs of SMEs when developing policies on business and human rights.

II. Specific Comments

Measures to promote the State duty to respect human rights

1. The draft recommendations address only very briefly at the end the development of National Action Plans (NAP) and refer mainly to the guidance which is currently developed by the UN Working Group on Business and Human Rights. Although the IOE supports stressing the importance of the work of the UN Working Group, it is nevertheless necessary to elaborate more on the issue of NAPs.

2. The involvement of business in the development of state policy on business and human rights is key. NAPs, as well as all other policies related to business and human rights, must be developed in close coordination with business as the main target group. The feedback of individual companies is important in gaining direct insight from practitioners. However, only representative business organisations have the mandate to speak on behalf of the business community as a whole and are able to give a comprehensive overview of the national state of play. Moreover SMEs are given a voice in the process through these representative organisations.

3. All provisions of States' business and human rights policies should undergo a specific impact assessment, including an examination of potential legal contradictions/dilemmas and a cost-benefit assessment to avoid unintended consequences and bureaucracy. Central questions are: what will the impact be on the ground? How large will this impact be? What is the effect on businesses? What are the costs involved?

4. States should avoid a “one-size-fits-all” approach in their business and human rights policies. Companies’ contributions to the respect of human rights are made in many different ways. States should not restrict or discourage this diversity. There is no single solution for strengthening the corporate responsibility to respect human rights.

5. CoE member States should consider how to support the promotion of the UN Guiding Principles at international level. Governments might, for instance, commit to fund the activities of the UN Working Group on Business and Human Rights. Governments may also wish to consider committing to technical cooperation and development aid. Governments should additionally share their experiences and practice concerning the implementation of the UN Guiding Principles. The response rate of the last government survey conducted by the UN Working Group on the implementation of the UN Guiding Principles was disappointingly low. Governments, finally, should put pressure on sensitive countries to make sure they improve the human rights situation on the ground.
6. CoE member States should create clear responsibilities with regard to CSR and human rights in the national administration. It should be clear for business and all other stakeholders which department within the government has the leadership role on these issues.

7. A key challenge in many countries with regard to the State's “duty to protect” is not the absence of legislation, but insufficient enforcement of existing legislation. This key challenge should be addressed more clearly in the recommendations. CoE member States should identify enforcement gaps and the reason for these gaps (such as insufficient labour inspection, corrupt police forces, etc.) and take action to address and remedy these situations.

8. In many cases, State actors are directly involved, or are even the cause of, human rights challenges which business faces, such as secret services which demand information on telecommunications data, violating the privacy of ICT companies’ customers. CoE member States must identify the areas where they themselves are involved in human rights violations and remedy them.

9. With regard to paragraph II.4: The European Committee of Social Rights has no mandate to interpret the provisions in the European Social Charter. Please therefore delete this reference.

Measures to promote the corporate responsibility to respect human rights

1. According to the third UN Guiding Principle, States should “provide effective guidance to business enterprises on how to respect human rights throughout their operations”. Thus, CoE member States should be encouraged to:

   a. Consider providing companies with guidance to national law and human rights obligations. This is especially relevant in countries with a high informal or grey sector where enforcement of the law is weak, as well as in countries where laws have been developed through legislative procedures.

   b. Consider supporting companies with information. Companies are required to analyse the impacts of their business activity with regard to human rights through a due diligence process. Companies often find it difficult to meet the first requirement, which is collecting accurate and relevant information on the target regions of their investments. Governments - possibly in conjunction with international organisations - should consider setting up a helpdesk to provide companies with information on country-specific risks. Moreover, embassies should be instructed to work closely with companies – especially if companies are considering doing business in so-called weak governance zones.

2. UN Guiding Principle 3.b speaks of an enabling environment for business to respect human rights. However, the guidance given in the draft recommendations focuses on requirements for companies; thereby overturning the spirit of UN Guiding Principle 3.b. The suggestion in paragraph III.8 that States may require due diligence through legislative measures is not covered by the UN Guiding Principles. It should be
realised that the vast majority of businesses in all countries are SMEs, which would be overburdened with such additional demands.

3. Public procurement (paragraph 11) and export licences (paragraph 12) are complex issues, as a consultation of the UN Working Group on NAPs in May this year again showed. In drafting the recommendations the Council of Europe, as well as member States at national level, must be careful to avoid unintended consequences. States must ensure that proposed measures do not prevent companies, especially SMEs, from participating in calls for tender and do not lead to unnecessary red tape which creates additional difficulties in the granting of export licenses. Moreover, the private sector has decades-long experience with responsible procurement. Governments should learn from and exchange experiences with the private sector in this regard.

**Measures to promote access to remedy**

1. The recommendations are not balanced as they are exclusively focussed on extraterritorial jurisdiction instead of supporting CoE member States to improve access to remedy at local level. The shortcomings of extraterritorial jurisdiction are thereby ignored, including the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years; the challenges presented to foreign 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.

2. Moreover, access to remedy must not be confused with corporate accountability. Although the goals are related, they are not the same. Measures that hold companies accountable do not necessarily improve victims’ access to effective remedy. Criminal proceedings themselves, for instance, do not always result in remedying the infringement suffered. This does not mean that criminal proceedings should not be pursued in cases of criminal conduct, but more clarity is needed around the distinction between corporate accountability versus access to remedy.

3. The recommendations should focus in the first place on how to strengthen access to remedy at local level. 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 following important elements which governments should consider with respect to improving access to State-based judicial remedies:

   - **Disseminate**, through public and private mechanisms, information about all available remedies for gross violations.

   - **Take measures to minimise inconvenience** to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation.
• Provide proper assistance to victims seeking access to justice.

• Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of human rights.

• Provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.

• Endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.

• Provide effective mechanisms for the enforcement of reparation judgements under domestic laws.

• Provide victims of human rights violations with full and effective reparation which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

• Develop means of informing the general public and, in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law, of the rights and remedies addressed by these basic principles and guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.

CoE member States should use these elements of guidance in their efforts to strengthen access to State-based judicial remedies.

4. Moreover, CoE member States should undertake more efforts to support each other through technical cooperation and the exchange of experiences. The system of twinning partnerships has been very successful in the past; for instance in the case of EU enlargement, and should be considered further in this regard. Donor countries should also consider listing the functioning of the legal systems as a key criterion for providing financial aid to developing countries. A human rights approach to foreign aid could be a major ingredient to improving national legal systems.

The IOE appreciates the opportunity to provide input to the work of the Council of Europe on business and human rights and looks forward to cooperating closely with the Council of Europe’s drafting group on this matter. It encourages the member States of the Council of Europe to additionally consult closely with the business community at national level with regard to further work on this issue.

*****