STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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

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

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Draft explanatory memorandum

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

The present explanatory memorandum was prepared by the Secretariat in co-operation with the Chair of the Drafting Group on Human Rights and Business (CDDH-CORP).

I. Introduction

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

The UN Guiding Principles

2. The United Nations Human Rights Council unanimously adopted on 16 June 2011 the Guiding Principles for the Implementation of the UN “Protect, Respect and Remedy” Framework (hereinafter: “the UN Guiding Principles”) which were elaborated by the UN Secretary General’s Special Representative on business and human rights, Mr John Ruggie. The UN Guiding Principles provide an authoritative global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity. They clarify the meaning of the corporate responsibility to respect human rights which calls on business to support and respect the protection of internationally proclaimed human rights. The principles rest on three pillars: firstly, the State duty to protect against human rights abuses by third parties, including businesses; secondly, the corporate responsibility to respect human rights; and thirdly, greater access by victims to effective remedy, both judicial and non-judicial. The UN Guiding Principles present for the first time globally agreed standards, which have been taken up by other intergovernmental organisations, governments and businesses, and which have also been well received by stakeholder groups, whether from the private sector or civil society. The UN Guiding Principles have achieved a worldwide consensus among all stakeholders on a series of key principles relating to the corporate responsibility to respect human rights. It is the purpose of this Recommendation to facilitate the implementation of these key principles in all 47 Council of Europe member States, and to give guidance of how to fill gaps at the European level.

Work in the Committee of Ministers

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

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

II. Comments

General considerations

Aim of the recommendation

5. The Recommendation seeks to give member States of the Council of Europe guidance on how to implement the UN Guiding Principles and to fill any gaps at the European level in the implementation process. It is intended as a “further step to effectively prevent and remedy business-related human rights abuses” (see the last paragraph of the Preamble of the Recommendation). While not all provisions of the UN Guiding Principles are explicitly mentioned in the Recommendation, but only those for which the Committee of Ministers had specific additions to fill gaps and put them in their regional context, it is understood that the implementation should comprise all provisions of the UN Guiding Principles, and all its three pillars are of equal importance. Even though it is not a legally binding instrument, and member States are only bound to the extent that they have ratified the instruments on which the principles are drawn, the Recommendation invites governments of member States to ensure that their national legislation and practice is being reviewed so as to comply with the recommendations set out in its appendix. Member States are also invited to share their good national practices related to the implementation of the Recommendation amongst each other.

Dissemination of the Recommendation and follow-up process

6. Member States are further encouraged to ensure, by appropriate means and action, a wide and effective dissemination of this instrument among competent authorities and stakeholders, such as companies, private sector networks, national human rights structures, non-governmental organisations and trade unions. For the purposes of such dissemination, member States are invited to translate the Recommendation and its appended principles into languages other than the official languages of the Council of Europe (English and French). Member States which have already adopted national action plans on business and human rights have also provided for such translations of other documents of central importance, such as the UN Guiding Principles (already available in English, French, Russian, German and Spanish) and the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (already made available in fourteen languages of Council of Europe member States).
7. Concerning the follow-up to the Recommendation, governments of member States are invited to examine its implementation within the Committee of Ministers three years after its adoption, with the participation of all relevant stakeholders. While in principle the follow-up process is open and may take different forms, as appropriate, previous recommendations where reassessed by sending questionnaires to member States on how and to which effects they had implemented those instruments. The replies were published on the Council of Europe website, together with a summary report elaborated by the Secretariat and subsequently adopted by the CDDH, with a view to it being transmitted to the Committee of Ministers. Should such a procedure be followed for the present Recommendation, it is understood that other stakeholders will have the possibility to make contributions throughout this process.

Definition of the term “domiciled within their jurisdiction”

8. The Recommendation makes in numerous paragraphs references to the domicile of business enterprises in the jurisdiction of Council of Europe member States. It was understood during the negotiations of the Recommendation that, whenever that instrument refers to the term “jurisdiction”, that term shall have the same meaning as in Article 1 European Convention on Human Rights, as applied and interpreted by the European Court of Human Rights. Moreover, the term “domiciled” should be understood within the meaning of the EU Brussels I and Rome II Regulations which define the term “domiciled” as being the business’s “statutory seat”, “central administration” or “principle place of business”.

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

9. As far as the first pillar of the UN Guiding Principles, the duty of States to protect human rights, is concerned, the Recommendation seeks to give guidance on how this duty relates to the European context. The European Convention on Human Rights (CETS No. 005, hereinafter the “ECHR”), as applied and interpreted by the European Court of Human Rights, and the (revised) European Social Charter (CETS No. 163), as applied and interpreted in the conclusions and decisions by the European Committee of Social Rights, are of particular relevance in this respect. Those measures are elaborated upon in Part II of the appendix to the Recommendation. Moreover, in the course of this explanatory memorandum, reference to other European and international instruments will also be made. The Recommendation also draws inspiration from Parliamentary Assembly Resolution 1757(2010) and Recommendation 1936(2010), both adopted on 6 October 2010, which were devoted to the issue of human rights and business.

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

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

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

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

a. General Measures

Non-discrimination as a general principle

13. The Recommendation takes as a starting point the invitation to member States to effectively implement the UN Guiding Principles on Business and Human Rights. Both the Recommendation and the UN Guiding Principles should be implemented in a non-discriminatory manner, which is also reflected as a general principle of the UN Guiding Principles themselves. As far as the Council of Europe standards are concerned, such non-discrimination principle is derived from Article 14 ECHR (prohibition of discrimination with regard to the rights enshrined in the Convention) and Article 1 of Protocol No. 12 to the ECHR (establishing a general prohibition of discrimination). Those provisions prohibit discrimination on any ground, such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The list of grounds for discrimination is not exhaustive, but rather illustrative. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 ECHR. In particular, this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example, in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, “a difference of treatment is discriminatory if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’”. In the area of social and economic rights, Article E of the (revised) European Social Charter requires that the rights enshrined in the Charter shall be secured without any discrimination on the grounds contained in the provision, which mirror the reasons contained in Article 14 ECHR (with “health” added to the list). For those Council of Europe member States which are also members of the European Union, Article 21 of the Charter of Fundamental Rights contains a non-discrimination clause. In order to ensure such non-discrimination, the Recommendation specifies in its paragraph 15 that member States should, in line with their international obligations, ensure that their laws relating to employment are effectively implemented and require business enterprises not to discriminate against employees.

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1 *Abdulaziz, Cabales and Balkandali v. the United Kingdom* (nos. 9214/80 et al.), judgment of 28 May 1985 (Plenary), para. 72.
Relevant international and European human rights treaties

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


16. Moreover, the International Labour Organisation has set eight “core conventions” which are relevant in the field of business and human rights, and which have been ratified by most Council of Europe member States: the Forced Labour Convention (no. 29, 1930) and its 2014 Protocol, the latter stating in its Article 2e) that each member State should support due diligence by the private sector to prevent and respond to risks of forced and compulsory labour; the Freedom of Association and Protection of the Right to Organize Convention (No. 87, 1948); the Right to Organize and Collective Bargaining Convention (No. 98, 1949); the Equal Remuneration Convention (no. 100, 1951); the Abolition of Forced Labour Convention (No. 105, 1957); the Discrimination (Employment and Occupation) Convention (No. 111, 1958); the Minimum Age Convention (No. 138, 1973); and the Worst Forms of Child Labour Convention (No. 182, 1999).

17. The specific human rights obligations under these treaties are elaborated upon, where applicable, throughout this explanatory memorandum. Moreover, more information may be found in the document “Existing obligations of member States under Council of Europe treaties and other instruments in the context of human rights and business” (CDDH-CORP(2014)08) which was prepared by the Secretariat and is available on the website of the CDDH-CORP.

Consistency and coherence in the implementation of the UN Guiding Principles

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

**Expectation that business enterprises implement the UN Guiding Principles**

19. The Recommendation invites member States to set out clearly the expectation that all business enterprises which are domiciled in their territory or operate within their jurisdiction implement the UN Guiding Principles throughout their operations, as laid down in Principle 2 in the UN Guiding Principles. This is a “Foundational principle”, which forms the basis of numerous provisions of both the Recommendation and the UN Guiding Principles. Moreover, governments’ expectation to companies has been given a prominent place in the already existing national action plans of Council of Europe member States.

**Further measures to facilitate dissemination**

20. The UN Guiding Principles on Business and Human Rights are available in the official languages of the United Nations (English, French, Russian, Spanish, Arabic and Chinese). The Recommendation invites Member States to foster translation and dissemination of the Principles, in particular in sectors where awareness is not yet sufficiently advanced. As a good example may serve in this respect the European Commission’s “Guide to human rights for small and medium-sized enterprises” of December 2012 which addresses small and medium-sized companies which may lack the awareness and the resources of multinational companies to undertake human rights due diligence. Moreover, specific sectors (such as textiles, extraction businesses, exports of surveillance technology) may create heightened human rights risks which vary according to their specific contexts. This may justify specific or targeted dissemination of the UN Guiding Principles by member States at the national level.

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

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

b. National action plans

Development of national action plans

23. In its declaration of 16 April 2014, the Committee of Ministers called in paragraph 10d. on all member States to develop national action plans on the implementation of the UN Guiding Principles (hereinafter “National action plans”). The present Recommendation reiterates this call. For those member States that are also in the European Union, the development of national action plans also forms part of the EU’s Corporate Social Responsibility peer review process with EU member States. By mid-2015, several member States of the Council of Europe had already adopted such plans, while others were in the process of developing them.

Available guidance

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

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

Best practices

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

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

Access to information

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

Obligations under the European Convention on Human Rights

28. Foundational Principle 1 of the UN Guiding Principles states that “States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” The Recommendation transposes this principle in its paragraph 13 to the context of the ECHR, as such obligations to protect have been developed by the European Court of Human Rights as “positive obligations”. They consist of requirements to establish specific criminal legislation as well as to prevent human rights violations for persons within their jurisdiction where the competent authorities had known or ought to have known of a real and immediate risk of such violations, including where such risks are inflicted by private persons or entities. Such requirements have been established by the Court for example with regard to Article 2 ECHR (the right to life)3, Article 3 ECHR (prohibition of torture and inhuman and degrading treatment or punishment)4, Article 4 ECHR (prohibition of slavery and forced labour)5 or Article 5 ECHR (right to liberty and security)6. Especially

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4 Osman v. the United Kingdom (no. 23452/94), judgment of 28 October 1998 (Grand Chamber), paras. 115-116.  
5 Z and others v. the United Kingdom (no. 29392/95), judgment of 10 May 2001 (Grand Chamber), para. 73.  
6 Rantsev v. Cyprus and Russia (no. 25965/04), judgment of 7 January 2010, paras. 286-287.
in the context of Article 2 ECHR, the Court has considered several cases where dangerous activities by private entities have killed individuals, and concluded that this obligation must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake, and a fortiori in the case of industrial activities, which by their very nature are dangerous, such as the operation of waste-collection sites. It also considered that, in the particular context of dangerous activities, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives.

Concerning the right to a private and family life (Article 8 ECHR), the Court has found on several occasions that States had failed to meet their positive obligations under that provision by protecting individuals from the effects of actions by private companies polluting the environment.

29. Moreover, the European Court of Human Rights has established that the above-mentioned provisions in the ECHR contain “procedural obligations” which require States that, once a violation has occurred, to undertake an independent and impartial, adequate, prompt and expeditious official investigation where such violations are credibly alleged to have occurred or the authorities have reasonable grounds to suspect that they have occurred. While this is an obligation of means (i.e. not necessarily having to lead to a particular result), authorities are obliged to prosecute where the outcome of an investigation warrants this. They are also required to take all appropriate measures to establish accessible and effective mechanisms which require that the victims of such violations receive prompt and adequate reparation for the harm suffered. It should be noted that such duty to investigate is of an absolute character.

Obligations under the (revised) European Social Charter

30. The Recommendation reiterates that the (revised) European Social Charter is another key legal instrument that affords protection against human rights abuses by companies. The Charter complements the ECHR with regard to social and economic rights. The European Committee of Social Rights is the monitoring body of the provisions of the Charter and supervises the State parties’ conformity in law and in practice. The 1961 European Social Charter and the 1996 Revised European Social Charter (which has gradually replaced the original treaty of 1961) contain numerous human rights provisions which have an impact on the relation between individuals and companies. Among those rights are, for example, the right to just conditions of work (Article 2); the right to safe and healthy conditions of work (Article 3); the right to a fair remuneration sufficient for a decent standard of living (Article 4); the right to freedom of association (Article 5); the right to bargain collectively (Article 6); the right of children and young persons to protection (Article 7); the right to

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7. *Rantsev v. Cyprus and Russia* (no. 25965/04), judgment of 28 October 1998, para. 102 (with regard to Article 3 ECHR);
8. *Orhan v. Turkey* (no. 25656/94), judgment of 18 June 2002, para. 369 (with regard to Article 5 ECHR);
10. *McCann and others v. the United Kingdom* (no. 18984/91), judgment of 27 September 1995 (Grand Chamber), para. 161 (with regard to Article 2 ECHR); *Assenov and others v. Bulgaria* (no. 24760/94), judgment of 28 October 1998, para. 228 (with regard to Article 4 ECHR);

10
protection of health (Article 11); the right of children and young persons to social, legal and economic protection (Article 17); the right of migrant workers who are nationals of a Party and their families to protection and assistance in the territory of any other Party (Article 19); the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex (Article 20); the right of workers to be informed and to be consulted within the undertaking (Article 21); the right to take part in the determination and improvement of the working conditions and working environment in the undertaking (Article 22); the right to protection in cases of termination of employment (Article 24); the right to protection of workers’ claims in the event of the insolvency of their employer (Article 25); the right to dignity at work (Article 26); and the right of workers’ representatives in the undertaking (Article 28). Not all rights in the Charter are automatically binding on state parties which have to accept at least six of the nine articles of the “hard core” provisions of the Charter and may select an additional number of articles or numbered paragraphs to be bound by. The Charter, in its original version of 1961 or in its revised version of 1996, has been signed by the 47 member States of the Council of Europe and ratified by 43 of them. The Recommendation suggests that 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 should consider doing so, and that those which have ratified these instruments should consider increasing the number of accepted provisions.

Evaluation of national legislation

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

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

Requirement of business enterprises to respect human rights

32. Under the second pillar of the UN Guiding Principles, “The corporate responsibility to respect human rights”, the Foundational Principles establish that business enterprises should respect human rights (Principle 11), a responsibility which requires that they avoid causing or contributing to adverse human rights impacts throughout their activities, address impacts, and seek to prevent or mitigate adverse effects even where they have not contributed to those impacts (Principle 13). The responsibility applies to all enterprises, regardless of size, sector, operational context, ownership and structure, even though the scale and complexity of the means by which enterprises meet this responsibility may vary according to these factors (Principle 14). It can be met by having in place certain policies and processes, including a respective policy commitment, a human rights diligence process, and processes to enable the remediation of any adverse human rights impacts (Principle 15).

33. Paragraph 17 of the Recommendation suggests that member States apply such measures as may be necessary to require that business enterprises meet their responsibility to respect human rights. This concerns business enterprises that operate within a Council of Europe member State, irrespective of whether they are domiciled within or outside of Europe (first bullet point of paragraph 17 of the Recommendation). Moreover, where business enterprises domiciled in a
Council of Europe member State operate outside of Europe, member States should apply necessary measures to require such business enterprises to meet their responsibility to respect human rights (second bullet point of paragraph 17 of the Recommendation). The third bullet point of this paragraph refers to other means to encourage and support business enterprises to respect human rights throughout their operations. Such means may, for example, be the adoption of incentive (rather then prescriptive or mandatory) measures.

*Human rights due diligence*

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

35. According to paragraph 18 of the Recommendation, member States should apply such measures as may be necessary to encourage or, where appropriate, require that business enterprises carry out human rights due diligence. It would seem appropriate to introduce requirements where States have international treaty obligations to ensure corporate liability for certain crimes, and a corresponding obligation to introduce at the domestic level “measures necessary to ensure that a legal person can be held liable where the lack of supervision or control ... has made possible the commission of a criminal offence ... for the benefit of that legal person by a natural person acting under its authority” (Article 22, para. 2 of the Convention against Trafficking in Human beings, Article 26, para. 2 of the Convention on the protection of Children against Sexual exploitation and Sexual Abuse). The introduction of a requirement may also be appropriate where the nature and the context of a business enterprise relate to sectors with particular human rights risks. Where business enterprises are domiciled within the jurisdiction of a Council of Europe member State, paragraph 18 of the Recommendation should apply throughout their operations (first bullet point of paragraph 18). For business enterprises domiciled outside of Europe which carry out substantial activities within a jurisdiction of Council of Europe member State, any requirement should only apply in respect of such activities (second bullet point of paragraph 18). The Recommendation does neither seek to define human rights due diligence, nor does it specify whether, in the event that member States take legislative measures to require human rights due diligence under certain circumstances, such measures should be specifically developed or integrated into corporate or civil law. Several Council of Europe member States which have already adopted national action plans have reported about measures to facilitate access to information for businesses on human rights due diligence, as well as to give further guidance through risk checks, toolkits or special information on relevant export markets.

*Reporting on the responsibility for human rights*

36. Paragraph 19 of the Recommendation states that member States should encourage business enterprises to provide information on their efforts on corporate responsibility to respect human rights, for example in their annual reports. Such information should include how concerns about
human rights have been raised by or on behalf of affected stakeholders (see also the aspect of “meaningful consultation” in UN Guiding Principle 18 b.). To that effect, some Council of Europe member States have adopted reporting legislation which requires major companies to report on their responsibility to respect human rights, and have followed and analysed the effects of this legal obligation through annual surveys. Other member States which have already adopted national action plans have reported on non-legislative measures taken, such as giving an award for the best non-financial reporting of a business enterprise.

37. For those Council of Europe member States which are also in the EU (or the European Economic Area), EU Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings and groups may be of particular interest. The Directive amends the Accounting Directive 2013/34/EU and requires companies concerned to disclose in their management report, information on policies, risks and outcomes as regards a number of non-financial issues, amongst them human rights. The new rules will only apply to some large companies with more than 500 employees. It is estimated that it concerns approximately 6,000 large companies and groups across the EU. The Directive, which entered into force on 6 December 2014 and for which member States have two years to transpose it into national legislation, is intended to leave significant flexibility for companies to disclose relevant information in the way that they consider most useful.

The State-Business Nexus

38. The UN Guiding Principles reiterate that States are the primary duty-bearers under international human rights law. Therefore, where there is a particular nexus between a State and a business enterprise, there are more means for the State to ensure that the responsibility to respect human rights is met by that business enterprise. This in return may justify additional steps to protect against human rights abuses by business enterprises that have such nexus with a State, as recognised by UN Guiding Principles 4 to 6. Examples are business enterprises which are owned or controlled by the State; receive substantial support and services from State agencies (such as export agencies and official investment insurance or guarantee agencies, Principles 4); obtain export licences, have been privatised and deliver services that may impact on human rights (Principle 5); or conduct commercial transactions with the State (Principle 6). In the light of UN Guiding Principles 4 to 6, Paragraph 21 of the Recommendation suggests that member States apply additional measures to require such business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence. This paragraph also mirrors proposals made by Parliamentary Assembly Resolution 1757(2010) on human rights and business. Paragraph 22 of the Recommendation suggests that member States should evaluate the measures taken where there exists a particular nexus with a business enterprise, and respond to any deficiencies. This may include the provision of consequences if the respect for human rights is not honoured, such as, for example, the termination of public procurement contracts as a measure of last resort.

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

Trade agreements and missions

40. Paragraph 23 of the Recommendation suggests that member States should consider human rights impacts of trade and investment agreements before concluding them. They should take appropriate steps to mitigate and address the risks identified, which may involve the incorporation of human rights clauses in their trade and investment treaties. In this respect, it should be noted that the European Union has included in its recent free trade agreements references to the promotion of corporate social responsibility. With regard to trade missions, paragraph 25 of the Recommendation provides that member States should address and discuss possible adverse effects of future operations, and require participating companies to respect the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises. Some Council of Europe member States which have already adopted national action plans have explicitly stated that they regard the UN Guiding Principles as an integral part of their foreign and human rights policy, and indicated that they expect companies represented in trade missions to look into possible adverse human rights effects and pursue policies to mitigate them.

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

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

42. For those Council of Europe member States which are also within the European Union, Council Regulation (EC) 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment ([2005] OJ L200/1, Annex II) introduced export controls on goods that are used in this respect. After several European companies had taken steps to cease trade in chemicals that can be used in lethal injections, the Regulation was amended in 2011 to also including a prohibition on exporting such materials that are used in lethal injections.13

Advise on third countries with sensitive human rights records

43. Some member States which have put in place their own national action plans have recognised the important role of embassies and consulates to inform their domestic companies abroad about the UN Guiding Principles, as suggested by paragraph 26 of the Recommendation. This may be particularly the case where a third country undergoes significant changes, which may have as a consequence the opening of its economy to foreign investment, be it through the lifting of economic sanctions and embargoes or due to general economic reforms. Such information may concern, for example, negative impacts on workers, indigenous peoples and communities, ethnic or linguistic minorities, migrants, women, children, persons belonging to gender or sexual minorities, or persons with disabilities.

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

Business operations in conflict areas

45. Member States may address particular problematic areas of business activities, or specific sectors where there exist particularly high human rights risks. Paragraph 27 of the Recommendation stresses the important role member States have in this regard to inform relevant companies. Concerning conflict areas, the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones aims to help companies that invest in countries where governments are unwilling or unable to assume their human rights responsibilities. That instrument is being complemented by the OECD Due Diligence Guidance for responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which provides detailed recommendations to help companies respect human rights, avoid contributing to conflict through their mineral purchasing decisions and practices, and assists them to meet their due-diligence reporting requirements. Within the European Union, the so-called “blood diamond” regulation sets out the criteria to which anyone wishing to import or export rough diamonds must adhere.14

Specific sector-guidance

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

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

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

IV. Measures to promote access to remedy

49. Chapter 4 of the Recommendation is intended to facilitate the implementation of the third pillar (Access to Remedy) of the UN Guiding Principles. The Foundational Principle 25 of the UN Guiding Principle states that “as part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy”. As the UN Guiding Principles, this Recommendation distinguishes between judicial remedies (Sub-chapter a., which further differentiates between civil and criminal liability) and non-judicial remedies (Sub-chapter b., which contains provisions addressed to both State-based and non-State grievance mechanisms).

a. Access to judicial mechanisms

*Articles 6 and 13 ECHR*

50. Access to judicial remedies has a twofold dimension under the European Convention on Human Rights. While Article 6, paragraph 1 ECHR grants to everyone access to court “in the determination of his civil rights and obligations”\(^\text{15}\), Article 13 ECHR guarantees everyone whose Convention rights and freedoms are violated an effective remedy before a national authority. Access to court-guarantees can also be found in other human rights standards, notably in Article 10 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights and Article 47 of the Charter of Fundamental Rights of the European Union. Paragraph 30 of the Recommendation reminds member States of their legal obligations to review the effective implementation of these rights, including with regard to alleged violations arising from business activities.

\(^{15}\) See the leading case of *Golder v. the United Kingdom* (no. 4451/70), judgment of 21 February 1975.
51. While Article 6 ECHR grants a number of judicial guarantees to ensure that an accused person is being given a fair criminal trial, the right of access to court under that provision does not apply to proceedings aimed at instituting criminal proceedings against third persons, including business enterprises. Consequently, the “criminal aspect” of Article 6 ECHR only concerns charges against a person.

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

53. Where any barriers to remedy in their legal systems have been identified and considered unnecessary, member States should remove those barriers, irrespective of whether abuses occurred within or outside of their own territory (Paragraph 31 of the Recommendation).

i. Civil liability for business-related human rights abuses

Civil liability for business-related human rights abuses

54. Paragraph 32 of the Recommendation suggests that member States should apply such legislative or other measures as may be necessary to ensure that human rights abuses caused by business enterprises give rise to civil liability under their respective laws. Where such abuse occur within their jurisdiction, member State should provide for civil liability of business enterprises and the corresponding legal remedies which alleged victims can pursue. Where considered necessary, member States should also examine the possibility of creating civil causes of action against business enterprises that cause human rights abuses beyond their territorial jurisdiction as a consequence of failure to carry out adequate due diligence processes to prevent or mitigate risks to human rights. It is understood that the term “caused” also includes instances where business enterprises have contributed to a human rights violation committed by a third person.

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

56. Jurisdictional issues are inevitable where multinational companies operate at a global level. Within Europe, the so-called “Brussels Regime” serves as a set of rules regulating which courts have

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16 See Rékási v. Hungary (no. 31506/96), Commission decision of 25 November 1996, D/R 87 A, p. 171. The right of access to court under Article 6 ECHR may however apply in respect of a third party in criminal proceedings where the outcome of those proceedings are decisive for the third party’s civil claims, for example concerning compensation claims by a victim of a criminal offence (see Tomasi v. France, no. 12850/87, judgment of 27 August 1992, Series A 241-A, para. 121).

jurisdiction in legal disputes of a civil or commercial nature between natural and/or legal persons resident or located in different member States. The regime has detailed rules assigning jurisdiction for the dispute to be heard and governs the recognition and enforcement of foreign judgments. The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (the “Lugano Convention”) bring these rules on jurisdiction beyond the 28 member States and involves also the member States of the European Free Trade Area (EFTA), thus easing the recognition and enforcement of judgments between these jurisdictions. The Lugano Convention is open to States which are not members of the European Union and not limited to merely those which are part of EFTA. Therefore, paragraph 33 of the Recommendation invites Council of Europe member States which have not yet expressed their consent to be bound by the Lugano Convention to do so.

**Forum non conveniens**

57. The second sentence of paragraph 34 of the Recommendation suggests that member States do not apply the doctrine of forum non conveniens in cases of human rights-related civil proceedings against business enterprises domiciled within their jurisdiction. The legal doctrine of forum non conveniens allows courts to refuse to assume jurisdiction, despite all necessary requirements being fulfilled, over matters where there is a more appropriate forum available to the parties, even where that forum is located in another jurisdiction. The paragraph in the Recommendation is coherent with the judgment Owusu v. N.B. Jackson by the Court of Justice of the European Union, in which the latter decided in 2005 that the above-mentioned Brussels Regime precludes a national court of a member State of the European Union from declining its jurisdiction by applying the doctrine of forum non conveniens.  

**Companies and their subsidiaries**

58. The principle of legal personhood and the doctrine of limited liability, which was created in commercial law to encourage investment without fear of liability and thus to encourage economic growth, have as a consequence that the legal personality of one business is distinct from the legal personality of another. These doctrines also extend to parent companies and their subsidiaries, thereby aggravating for alleged victims of business-related human rights violations to establish civil liability of the parent company (unless the exception “piercing the corporate veil” is applied by the domestic courts). From a procedural point of view, a barrier to justice may arise where the subsidiary operates in a third country, and thus in a different jurisdiction. Therefore, paragraph 35 of the Recommendation suggests that member States consider allowing their domestic courts to exercise jurisdiction in such case against both the parent company if based in its jurisdiction, as well as the subsidiary, even if based in another jurisdiction. However, the claims against the parent company and the subsidiary should be closely connected in such instances. For example, a Dutch District Court has asserted jurisdiction over both Royal Dutch Shell Plc, registered in the United Kingdom and headquartered in the Netherlands, and Shell Petroleum Development Company of Nigeria Ltd., domiciled in Nigeria, in a case brought by Nigerian citizens in connection with oil pollution damage caused by a leaking pipeline in Nigeria (Decision of 30 December 2009 in case No. 330891 / HA ZA 09-579). The District Court considered that the claims against the two business enterprises were interconnected, because they related to the same facts and the defendants were held liable for the same damage.

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The doctrine of *forum necessitatis*, also referred to as the “forum of necessity”, allows a court to assert jurisdiction over a case when there is no other available forum. This may be in the instance that no forum is available due to a war or natural desaster in a third country. The doctrine may also serve as a safeguard to avoid a denial of justice, for example in cases where victims of alleged business-related human rights abuses which occurred outside of Europe cannot reasonably be expected to receive a fair trial in the domestic courts of the country where such abuses allegedly occurred. Paragraph 36 of the Recommendation invites member States to consider allowing their domestic courts to exercise jurisdiction by applying this doctrine in cases concerning alleged business-related human rights abuses that occurred outside their jurisdiction. The paragraph puts this under the conditions that the proceedings in the courts of the third country where the alleged violations occurred can be expected to manifestly contravene fair trial guarantees, and that there is a sufficient connection to the member State that would exercise such jurisdiction. Several member States have adopted laws or adjusted their existing ones in this respect.

**Non-justiciability doctrines**

Certain doctrines which domestic courts in Council of Europe member States may apply can have a negative impact on the access to justice of victims of business-related human rights abuses. Such doctrines may either have the effect of not attributing civil liability to a defendant, or to prevent such liability from being determined by the domestic courts. An example of such doctrines are immunities attributed to foreign State-owned enterprises or companies in which States are significant shareholders. While these do not attract immunity for commercial transactions (Article 10, paragraph 1 of the United Nations Convention on Jurisdictional Immunities and Their Property, as well as Article 7, para. 1 of the European Convention on State Immunity (CETS. No. 74), a domestic court may nevertheless accord immunity to a foreign State-owned company where the latter’s acts contribute to human rights abuses which cannot be categorised as “commercial acts”. This could amount to a violation of the right of access to court under Article 6, paragraph 1 ECHR. Since international law does not yet attract exceptions to State immunity for serious human rights violations, as confirmed by both the European Court of Human Rights and the International Court of Justice, alleged human rights violations by a foreign State-owned enterprise may attract immunity, provided that the company would be regarded as a State entity within the meaning of Article 2 (1) (b) (iii) of the United Nations Convention on Jurisdictional Immunities and Their Property, and the acts are not of a mere commercial nature. Another example for a non-justiciability doctrine would be the “Act of state”-doctrine, according to which domestic courts are bound to respect the independence of every other sovereign State, with the consequence that they will not sit in judgment of another government’s acts done within its own territory. A third example may be the “Political question”-doctrine, according to which legal questions are deemed to be justiciable, while political questions are non-justiciable. Paragraph 37 of the Recommendation suggests that the application of such doctrines should not unduly restrict civil claims related to business-related human rights abuses.

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22 For a judgment by the European Court of Human Rights concerning Article 6 ECHR and the “Act of state”-doctrine, see the case of *Markovic and Others v. Italy* [Grand Chamber] (no. 1398/03), judgment of 14 December 2006.
Applying the domestic law in consistence with international human rights treaties

61. Paragraph 39 of the Recommendation reminds member States that they should apply such legislative and other measures to ensure compliance with the Convention and the judgments of the Court, as well as other international and European human rights instruments, such as the International Covenant on Civil and Political Rights, the International Covenant on Social, Economic and Cultural Rights, the (revised) European Social Charter, as well as the Charter of Fundamental Rights of the European Union, as far as they are bound by these treaties.

Assessment of human rights diligence where the harm occurred in a third State

62. Faced with a claim for harm that has occurred in another jurisdiction, domestic courts have to determine which law should apply to the case. Within the European Union, the Rome II Regulation in principle designates the law of the State in which the harm occurred (lex loci damni) as the applicable law. The Regulation however provides for certain exceptions to this general rule. Paragraph 40 of the Recommendation suggests that member States consider possible ways to ensure that, in regard to the question whether a business enterprise has acted to ensure that its subsidiaries exercise human rights due diligence, the standard of the law of the forum State applies, as opposed to that of the third State where the harm occurred.

Legal standing for third parties and collective determination of similar cases

63. Paragraph 38 of the Recommendation suggests that member States consider adopting measures to allow third parties, such as foundations, associations, trade unions or other organisations, to bring claims on behalf of alleged victims, whereas paragraph 42 of the Recommendation suggests that member States consider possible solutions for the collective determination of similar cases in respect of business-related human rights abuses. Although not all Council of Europe member States provide for class action mechanisms (i.e. where a large group of claimants may be represented by a lawyer in one proceeding), there may be other ways for the collective determination of numerous identical claims which those member States could consider. Such collective solutions could benefit alleged victims by significantly reducing their personal involvement and legal costs in such proceedings, while at the same time augmenting their access to a remedy. One such possibility may be to allow certain organisations to bring claims on behalf of an unlimited number of alleged victims, as adressed in paragraph 38 of the Recommendation. Other options could include the possibility to create “opt in”-systems for decisions that would be valid for a large number of claims, to join cases with similar facts and legal questions, or to transfer a claim for a third party to litigate before a court. It is understood that the term “collective determination of similar cases” also includes the adjudication of joint cases.

Equality of arms and legal aid

64. Civil claims by alleged victims of business-related human rights abuses may regularly lead to the situation that the defendant’s financial resources by far outweigh the plaintiff’s, especially where the defendant company is a multinational enterprise. At the same time, litigation on such abuses may be very costly, which may lead to a barrier to access to justice and may inevitably raise fair-trial issues under Article 6 ECHR. The Court has stated that it is not incumbent on the State to seek through the use of public funds to ensure total “equality of arms” between the assisted person and the opposing party, as long as each side is afforded a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis the adversary.23 However, while the right of access to court under Article 6 ECHR is not unlimited and

23 Steel and Morris v. the United Kingdom (no. 68416/01), judgment of 15 May 2005, para. 62.
may be subject to restrictions which serve a legitimate aim and are not disproportionate, the granting of legal aid may in certain cases be necessary to ensure an “equality of arms” between the parties. Therefore, the Court considers it acceptable to impose conditions on the grant of legal aid based, *inter alia*, on the financial situation of the litigant or his or her prospects of success in the proceedings.\(^{24}\) In the light of these requirements, paragraph 41 of the Recommendation reminds member States of their obligations under Article 6 ECHR to avoid claims related to alleged business-related human rights abuses in which the denial of legal aid deprive the alleged victims of the opportunity to present their case effectively before the domestic courts, thereby contributing to an unacceptable inequality of arms under that provision. In this regard, the possibility to provide for legal aid for alleged victims who are foreign plaintiffs residing outside of Europe should also be considered by member States.

**Access to information**

65. Paragraph 43 of the Recommendation suggests that member States should consider revising their civil procedure where the applicable rules impede the access to information in the possession of the defendant or a third party, if such information is relevant for alleged victims of business-related human rights abuses. While it must be considered that “barriers to access to justice” may not be equated with “barriers to winning a legal case” by removing evidentiary burden the plaintiff must provide, member States have recognised in their legal systems that there may be situations where a plaintiff cannot legitimately be expected to provide certain evidence if the latter rests entirely in the sphere of the defendant. One example is product liability where the burden of proof may shift towards the defendant producing company under certain conditions. While it is for each member State to define the conditions under which domestic courts are to assess the evidence with which they are presented, they should reflect upon their evidentiary rules, while taking into account that the confidentiality of the information requested also must be considered in balancing the competing interests.

**ii. Criminal liability for business-related human rights abuses**

**Corporate criminal liability**

66. In the member States of the Council of Europe, corporate criminal responsibility is not applied uniformly. Penalties for legal entities may take various forms, from criminal sanctions to punitive measures under administrative or civil law.\(^{25}\) The Recommendation follows the approach taken in various Council of Europe treaties which provide for corporate liability with regard to the criminalisation of certain acts. For example, Article 22 of the Convention against Trafficking in Human Beings provides that States “shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention”. Paragraph 250 of the Explanatory Report to that Convention clarifies that:

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

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\(^{24}\) Ibid.

\(^{25}\) For an overview over the various legal situations, see FIDH, *Corporate Accountability for Human Rights Abuses – A Guide for Victims and NGOs on Recourse Mechanisms*, March 2012, pp. 276 et seq.
67. In the same manner, paragraph 44 of the Recommendation does not suggest to member States a particular legislative measure to ensure liability for business enterprises for the crimes enlisted in that paragraph. Such discretion does, however, not touch upon their general obligations under international law to provide for individual criminal responsibility for certain international crimes. In this respect, member States should also consider revising their criminal and other laws as well as their enforcement practices to ensure that business enterprises can be held liable under their criminal or other equivalent law for the commission of serious human rights abuses.

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

**Crimes under international law**

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

**Treaty-based crimes**

70. It should be noted that the list of treaty-based obligations in paragraph 44 of the Recommendation to criminalise certain acts is not exhaustive, but relates to those crimes which may be of particular relevance in the area of certain business activities. That paragraph also encourages member States which have not yet ratified the treaties figured in this indicative list to do so. Where States are not yet bound by those treaties, their obligations under the European Convention on Human Rights may nevertheless oblige them to criminalise certain acts with regard to individual criminal responsibility. Within the ambit of Article 4 ECHR, this is for example the case for human trafficking\(^\text{26}\) or domestic servitude and exploitation\(^\text{27}\). It is understood that references in paragraph 44 also include the additional and optional protocols to the treaties listed. The following gives a short overview of the treaty-based crimes mentioned in paragraph 44:

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

- The **Convention against Trafficking in Human Beings** entered into force in 2008 and seeks the protection of victims of trafficking and the safeguard of their rights. It also aims at preventing trafficking as well as prosecuting traffickers. The Convention applies to all forms of trafficking; whether national or transnational, whether or not related to organised crime

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\(^{26}\) Rantsev v. Cyprus and Russia (no. 25965/04), judgment of 7 January 2010.

\(^{27}\) Siliadin v. France (no. 73316/01), judgment of 26 July 2005; C.N. v. the United Kingdom (no. 4239/08), judgment of 13 November 2012.
and whoever the victim, women, men or children and whatever the form of exploitation, sexual exploitation, forced labour or services. The Convention obliges states to criminalise human trafficking, the use of services of a victim, or certain acts relating to travel or identity documents. Article 22 of the Convention requires States to regulate corporate liability.

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

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

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

- The **United Nations Convention on the Rights of the Child**, which entered into force in 1990, recognises in Article 32 the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development. That provision also requires legislative measures to ensure its implementation. Parties shall in particular provide for a minimum age for admission to employment; provide for appropriate regulation of the hours and conditions of employment; and provide for appropriate penalties or other sanctions to ensure the effective enforcement of that article. Article 34 deals with sexual abuse and exploitation, while Article 35 covers trafficking in children. According to Article 38, States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. The Convention is

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

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

**Other serious business-related human rights abuses**

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

**Corporate and individual liability**

72. Paragraph 45 of the Recommendation clarifies that corporate liability does not exclude individual liability of the natural person who may be perpetrator, instigator or abettor to the crime committed. In a particular case, there may be criminal liability at several levels simultaneously – for example, liability of one of the legal entity’s organs, liability of the legal entity as a whole and individual liability of a corporate representative in connection with one or the other. It should be noted that criminal liability of a legal person should also ensure responsibility for a lack of supervision and control that has enabled the commission of the crime by a person under the legal person’s authority.29

**Effective investigations in accordance with the European Convention on Human Rights**

73. Paragraph 46 of the Recommendation recalls that effective criminal investigations, in order to be in conformity with Article 6 ECHR, must satisfy certain criteria which the European Court of Human Rights has established in its case-law. They apply irrespective of whether the defendant is a legal person, or a natural person representing the former. Such criteria are: “Adequacy”, “Thoroughness”, “Impartiality”, “Independence”, “Promptness”, and “Public scrutiny”. In the context of Article 2 ECHR (right to life), the Court has interpreted these criteria as follows.

- **Adequacy**

  “In order to be ‘effective’ as this expression is to be understood in the context of Article 2 of the Convention, an investigation into a death that engages the responsibility of a Contracting Party under that Article must firstly be adequate. That is, it must be capable of leading to the identification and punishment of those responsible. This is not an obligation of result, but one of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to identify

the perpetrator or perpetrators will risk falling foul of this standard (cf. *Tahsin Acar v. Turkey* [GC], No. 26307/95, § 223, ECHR 2004-III).”30

- **Thoroughness**

“The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death (see concerning autopsies, e.g. *Salman v. Turkey* cited above, § 106; concerning witnesses e.g. *Tannrklu v. Turkey* [GC], No. 23763/94, ECHR 1999-IV, § 109; concerning forensic evidence e.g. *Gül v. Turkey*, 22676/93, [Section 4], § 89). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard.”31

- **Independence and impartiality**


- **Promptness**

“The investigation must be effective in the sense that it is capable of leading to the identification and punishment of those responsible (see *Oğur v. Turkey* [GC], No. 21954/93, § 88, ECHR 1999-III). Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling below this standard. ... It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.”33

- **Public scrutiny**

“The degree of public scrutiny required may well vary from case to case. In all cases, however, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Gülç*, cited above, p. 1733, § 82, where the father of the victim was not informed of the decision not to prosecute; *Oğur*, cited above, § 92, where the family of the victim had no access to the investigation and court documents; and *Gül*, cited above, § 93).”34

Statutory limitations for international crimes

74. It has not been conclusively determined whether and to what extent customary international law provides that the most serious crimes under international law – such as genocide,
war crimes or crimes against humanity – may not be subject to statutory limitations.\(^{35}\) Two international treaties have sought to codify the law in this respect. The United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity entered into force in 1970 and has, as to date (May 2015), fifty-five States Parties. The European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes, which entered into force in 2003, has as to date (May 2015) only been ratified by seven Council of Europe member States. Regardless of the rather reluctant acceptance of these treaties by States, Article 29 of the Statute of the International Criminal Court provides that the above-mentioned crimes shall not be subject to any statutory limitations. Moreover, according to Principle 6 of the United Nations General Assembly’s “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” of December 2005\(^{36}\), statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law.

75. However, there may be other international crimes than the ones provided for by the Statute of the International Criminal Court which member States are obliged to criminalise in their national laws. This concerns the crimes referred to in paragraph 44, second bullet-point, such as the crimes provided for by the United Nations Convention against Transnational Organised Crime or the Council of Europe Convention against Trafficking in Human Beings. International law does not necessarily prevent those treaty-based crimes to be subject to statutory limitations. However, Principle 7 of the United Nations General Assembly’s “Basic Principles and Guidelines on the Right to a Remedy” states that domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive. Where the respective international treaty also requires States Parties to provide for the liability of legal persons, paragraph 47 of the Recommendation provides that States should ensure in their national laws that any statutory limitations are the same for both natural and legal persons.

b. Access to non-judicial remedies

Awareness-raising for non-judicial mechanisms

76. In addition to the judicial remedies available, non-judicial grievance mechanisms serve as an additional alternative remedy for alleged corporate human rights abuses. Such remedies may be State-based, such as ombudspersons, national human rights institutions, arbitration, mediation and complaints-handling mechanisms, national contact points established in accordance with the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development, labour inspectorates, labour tribunals (where they exercise a mere conciliatory, as opposed to a judicial, function), consumer agencies or national equality bodies. Other remedies may be non-State based and administered by a company, industry associations or multi-stakeholder group. Paragraph 48 of the Recommendation encourages member States to raise awareness and knowledge-sharing of the available non-judicial grievance mechanisms.

Effectiveness criteria

77. Principle 31 of the UN Guiding Principle establishes certain criteria for the effectiveness of non-judicial mechanisms, irrespective of whether or not the mechanisms are State-based. These criteria are: legitimacy, accessibility, predictability, equitability, transparency, and rights-


\(^{36}\) Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.
compatibility.\textsuperscript{37} The Commentary to Principle 31 should also be noted in this respect, stating that where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism, since a business cannot be both the subject of complaints and unilaterally determine their outcome.\textsuperscript{38} Principle 31 also states that such mechanisms should be a source of continuous learning, and based on engagement and dialogue. Paragraph 49 of the Recommendation recalls that member States’ own non-judicial mechanisms should meet these criteria, and that they should encourage non-State based non-judicial mechanisms to ensure that they also meet them. Paragraph 53 of the Recommendation further encourages businesses to establish such mechanisms, as a complement to regular access of alleged victims to the domestic court system or State-based non-judicial mechanisms. Paragraph 50 of the Recommendation invites member States to assess and evaluate their State-based non-judicial grievance mechanisms on a regular basis, and where necessary, extend their mandate or create appropriate mechanisms where those are not yet already in place.

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

78. Paragraph 51 of the Recommendation provides that member States which have not yet done so to take steps to adhere and/or implement the Guidelines for Multinational Enterprises of the Organisation for Economic Cooperation and Development (hereinafter: the OECD Guidelines). Adopted in 1976 as a response to increasing activity of companies from OECD member States in developing countries, the OECD Guidelines constitute a set of voluntary recommendations to multinational enterprises in all the major areas of business ethics. They have been updated five times, the last time in 2011 with a specific chapter on human rights issues which draws upon the UN Guiding Principles. Moreover, the OECD Guidelines Proactive Agenda seeks to elucidate the guidelines for specific sectors, such as the financial sector, the extractive sector, the agricultural sector and the textile sector. As to date, twenty-seven member States of the Council of Europe have given declarations that they adhere to the Guidelines, which are also open for adherence by non-OECD member States.

79. The OECD Guidelines address the operation of multinational enterprises in or from the territories of the governments which adhere to them, most notably through the operation of National Contact Points (NCPs). These are government offices charged with promoting the Guidelines and handling enquiries in the national context, but also liaising with NCPs from other countries in cases with extraterritorial contexts. Moreover, the NCPs assist enterprises and their stakeholders to take appropriate measures on human rights-related issues and provide a mediation and conciliation platform. Any individual or non-governmental organisation may file a complaint. Depending on whether mediation between the parties is successful, the NCP will either issue a report or make a recommendation to the parties involved, although there is no obligation to make a decision whether or not the Guidelines have been violated. At the conclusion of the procedures and after consultation with the parties involved, the NCPs make the results of the procedure publicly available, taking into account the need to protect sensitive business and other stakeholder information. An annual report by the adhering governments provides an account of the actions taken following NCP mediation.

80. Paragraph 52 of the Recommendation makes a number of suggestions of how to improve the effectiveness of NCPs, in particular with regard to human and financial resources, transparency and visibility, and publication of their outcome documents. Moreover, the taking into account of the

\textsuperscript{37} For more information about the meaning of these criteria, see Principle 31 of the UN Guiding Principles and its commentary.

\textsuperscript{38} See letter (h) of the commentary to Principle 31 of the UN Guiding Principles.
NCP findings by government agencies is being recommended. In this respect, it should be noted that the “OECD 2012 Common Approaches” include a requirement for export credit agencies to take into account relevant adverse project-related human rights impacts and to “consider any statements or reports made publicly available by their National Contact Points (NCPs) at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises”. Some Council of Europe member States have included in their national action plans a requirement that their export credit agencies consider any negative final NCP statements a company has received in respect of its human rights record when considering a project for export credit. Finally, it should be noted that some NCPs established in Council of Europe member States have the competence to take up cases on its own initiative, and paragraph 52 of the Recommendation encourages member States to allow for such a proactive approach.

c. General measures

Judicial cooperation

81. Paragraph 54 of the Recommendation provides that, in order to strengthen remedies for victims of business-related human rights abuses, member States should fulfill their obligations of judicial cooperation, and intensify such cooperation beyond their existing obligations. It should be noted that such obligations for judicial cooperation may derive from particular treaties (such as the European Convention on Extradition or the European Convention on Mutual Assistance), but also from their human rights obligations. In its case-law under Article 4 ECHR (prohibition of slavery and forced labour), the European Court of Human Rights has for example stated that States have, in addition to their obligations to conduct a domestic investigation into a case of cross-border human trafficking, also an obligation to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories. Paragraph 54 of the Recommendation also addresses cooperation with non-judicial grievance mechanisms. For both types of cooperation, it should be recalled that speediness in the cooperation is of high importance.

Training of professionals

82. Paragraph 55 of the Recommendation invites member States to 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 this respect, some national good practices cited in national action plans of Council of Europe member States could give member States some inspiration, such as the development of e-learning courses or toolkits on the UN Guiding Principles, or more generally on business and human rights. Moreover, the Council of Europe HELP Programme on business and human rights may provide some useful guidance and training in this respect.

Information for alleged victims about rights and remedies

83. Paragraph 56 of the Recommendation states that alleged victims of business-related human rights abuses within their jurisdiction should have general access to information about the content of the respective human rights as well as remedies. The expression “in a language which they can understand” is thereby a formulation commonly used in Council of Europe treaties, which is understood not to require any possible language, but rather “the languages most widely used in the country” (see, for example, paragraph 229 of the Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse).

39 Rantsev v. Cyprus and Russia (no. 25965/04), judgment of 7 January 2010, para. 289.
VIII. The role of human rights defenders

84. Human rights defenders play a significant role in both advising companies when identifying and assessing potential adverse impacts of their activities, as well as in detecting corporate-related human rights abuses where they occur. Paragraph 69 of the Recommendation suggests that member States encourage business enterprises to seek their expertise in this respect, including when they operate in third countries.

Human rights defenders in Council of Europe member States

85. Paragraph 70 of the Recommendation relates to possible challenges for human rights defenders, in particular with regard to freedom of expression (Article 10 ECHR) and the freedom of assembly and association (Article 11 ECHR), which may also arise in the business-related context. The Council of Europe has sought to protect and improve the situation of human rights defenders in general through a wide variety of measures. In 2012, the Parliamentary Assembly adopted a resolution on “The situation of human rights defenders in Council of Europe member states” in which it paid “tribute to human rights defenders, whose dedicated work is highly appreciated”. While it welcomed the fact that, in most European states, human rights defenders are able to work unimpeded and enjoy the protection of the law, the Assembly strongly condemned all attacks on human rights defenders that have nevertheless occurred, irrespective of whether they were carried out “by public officials or others”, the latter referring to non-state actors including businesses. In this context, the Committee of Minister’s declaration on the protection of freedom of expression with regard to the internet, in which it made particular reference to human rights defenders, is of particular relevance. In that declaration, the Committee deplored denial-of-service attacks against websites of human rights defenders by privately owned internet platforms. Usually the companies concerned would invoke as justification mere compliance with their terms of service. The Committee of Ministers underlined the necessity to reinforce politics that uphold freedom of expression for human rights defenders against such attacks.

Human rights defenders in third countries

86. Paragraph 71 of the Recommendation provides that member States should support, for example through their diplomatic and consular missions, the work of human rights defenders who focus on business-related impacts on human rights in third countries. Some member States have already taken up this aspect in their national action plans.

Relevant international and European standards

87. Irrespective of whether they are based in their jurisdiction or abroad, member States may wish to take into account, when protecting human rights defenders, the relevant international and European standards. These are, in particular, the “United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms” of 9 December 1998, the “Declaration of the

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

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

42 Another example would be situations in which human rights defenders are targeted by private media which are nevertheless de facto government controlled.
Committee of Ministers on Council of Europe action to improve the protection of human rights defenders and promote their activities” of 6 February 2008, as well as the “European Union Guidelines on Human Rights Defenders” of 6 December 2008.