Joint Comments and Suggestions on the Draft Recommendation of the Committee of Ministers to member States on human rights and business of 22 August 2014

Amnesty International, the European Coalition for Corporate Justice (ECCJ), the International Federation for Human Rights (FIDH), the Corporate Responsibility Coalition (CORE) and Sherpa appreciate this new opportunity to provide comments and suggestions on the Draft Recommendation of the Committee of Ministers to member States on human rights and business of 22 August 2014 (the Recommendation). We would like to draw your attention to the following comments in advance of the forthcoming meeting of the Drafting Group on Human Rights and Business on 24-26 September 2014. We have provided alternative formulations with regard to some of the provisions highlighted below and hope to be able to suggest alternative language with regard to other provisions during the forthcoming meeting. The organisations would like to highlight in particular the following key recommendations:

- **Scope of State Obligations**: Reformulate the scope of state obligations, which should not be limited from the outset to "jurisdiction" as interpreted by the European Court of Human Rights;

- **State Duty to Protect**: Expand and revise section II on the State Duty to Protect, which should spell out specific recommendations of a legislative, regulatory and adjudicative nature to *require* (rather than *encourage*) corporate respect for human rights throughout their operations (both within and beyond member States' territory) and mandatory human rights due diligence, and to ensure effective enforcement through regulatory bodies;

- **Right to Remedy**: Recognise member States' duty to ensure remedy for violations of the full range of human rights (not just rights under the European Convention on Human Rights) and include, in addition to specific measures to improve access to the courts, a general principle requiring member States to identify and remove barriers to remedy in cases of corporate-related human rights abuse, regardless of where the abuse occurs.

- **Corporate criminal liability**: Include recommendations to member States to ensure that corporate actors are held criminally liable for committing crimes that either are or contribute to human rights abuses, regardless of where these crimes are committed.

- **Human Rights Defenders**: Strengthen section VI on Human Rights Defenders, in particular by requiring member States to adopt measures to ensure government officials support and protect human rights defenders both domestically and abroad.

- **Consultation:** Introduce a new section addressing and developing recommendations on consultation and the right of individuals and communities to participate in decision-making processes likely to affect their rights, including the right of Indigenous Peoples to free, prior and informed consent.

Territorial scope of state obligations to protect and ensure remedy

We note the clarification in footnote 2 (in relation to **recommendation 3**) regarding the understanding of the term "jurisdiction" as applied and interpreted by the European Court of Human Rights. However, we believe that the scope of state duties should not be limited from the outset by reference to one particular principle or interpretation, since member States are bound by a number of international human rights instruments, many of which recognise or have been interpreted to recognise extraterritorial obligations.[1] For example, authoritative interpretations of UN human rights treaties by a number of UN treaty bodies such as the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights are explicit in asserting State extraterritorial obligations in the area of business and human rights.

We therefore recommend that **recommendations 3 and 18** in particular are amended to avoid a potential misalignment with other relevant international human rights instruments, and to provide the required flexibility to recognise progress in this area.

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

General

Together with the section on access to remedy, this section is one of the most important components of the Recommendation, since it addresses and aims to develop existing obligations of member States under international human rights law. However, despite its importance, the section is very short and its terms are very general. As clarified by the UN Guiding Principles on Business and Human Rights (UNGPs), the duty to protect against corporate-related human rights abuses must be implemented through "effective policies, legislation, regulations and adjudication."[2] The role of legislation and other regulatory measures is therefore vital. The section however contains no specific and concrete recommendation on what measures of a legislative, regulatory or adjudicative nature member States should take in order to effectively protect from corporate-related human rights abuses.

Many of the regulatory measures necessary to meet the duty to protect have been developed under the following section related to the Corporate Responsibility to Respect. This could be interpreted as implying that these measures are voluntary rather than obligatory in nature, which is inconsistent with member States' obligations under international human rights law. We would therefore recommend expanding section II on the State Duty to Protect by transferring to this section some of the provisions currently in section III on the Corporate Responsibility to Respect. This includes in particular

[1] See the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights. For further analysis of the State duty to protect extraterritorially see ICAR, CORE and ECCJ, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business" (December 2013), pages 24-26, available at: http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf and Amnesty International, "Injustice Incorporated: Corporate Abuses and the Human Right to Remedy" (March 2014), pages 23-26, available at: http://www.amnesty.org/en/library/asset/POL30/001/2014/en/33454c09-79af-4643-9e8e-1ee8c972e360/pol300012014en.pdf

[2] UNGP, Principle 1.

recommendations 7 to 12. In addition, some of the language used in these recommendations should be changed to make clear the measures contained in them are "mandatory" (that is, "required" of companies) and not optional (see further below).

As part of the State Duty to Protect, this section should also contain a specific recommendation regarding the need for member States to establish strong regulatory bodies with a mandate to monitor and enforce business and human rights standards, as well as to receive complaints, investigate and adjudicate where appropriate (see further below).

This section should furthermore include specific recommendations regarding mandatory human rights due diligence and reporting (see further below).

Finally, we would recommend including specific recommendations to ensure that States' policies in areas such as trade, investment, international cooperation, aid and development are aligned with States' human rights obligations. In particular, this section should contain recommendations for member States to ensure that measures they adopt, including trade agreements and related dispute resolution mechanisms, do not hinder States' ability to uphold their human rights obligations.

Specific Recommendations

Recommendation 6 sets out important principles aimed at creating a coherent normative framework in which progress in some areas is not hindered or obstructed by provisions in other areas of law. In this respect it is particularly important to examine the extent to which the corporate law doctrines of "separate legal personality" and "limited liability" may result, when applied to cases of human rights abuses involving corporate groups, in denial of justice. To address this specific concern we suggest an insertion to **recommendation 6** as follows:

> *6. Member States should ensure that their legislation, including civil law, criminal law and corporate law,* ***including the corporate law doctrines of separate legal personality and limited liability,*** *does not create an obstacle to the respect for human rights by business enterprises* ***or to effective remedy when corporate-related human rights abuses occur.*** *They should evaluate new relevant legislation with regard to any impact on human rights.*

Draft **recommendations 7, 8 and 9** (which we recommend are placed under section II on the State Duty to Protect) are critical as they refer to what exactly companies should do to respect human rights. **Recommendation 8** is particularly strong and welcomed by the organisations. However, the combined reading of all three provisions makes for a very unclear and potentially weak interpretation as regards the nature of companies' expected conduct (mandatory or voluntary) and the companies and activities actually covered (national or multinational companies, domestic or global operations).

Therefore, we recommend that a principle be stated up front making clear that all companies are *required* to respect human rights throughout their operations (both within

and beyond member States' territory) and that in order to achieve this, all companies should be *required*, by means of legislative and other regulatory means, to carry out human rights due diligence throughout their operations (both within and beyond member States' territory) in accordance with international standards.

To be consistent with the above, **recommendation 9** should be redrafted so that it is clear that all companies are *required* to "know and show" respect for human rights through greater transparency, the establishment of policy commitments, adequate human rights due diligence processes, remediation of adverse impacts and regular reporting. It should be made clear here that reporting should be comprehensive and meaningful, and should include a detailed description of human rights due diligence policies, measures of human rights due diligence taken, risks to and impacts on human rights identified and action plans to address these.

The organisations agree with and therefore welcome and support the reference in **recommendation 8** to the development of measures specifically designed to ensure business enterprises carry out human rights due diligence, or the incorporation of these measures into corporate or civil law. To be effective however, these measures must be accompanied by appropriate enforcement mechanisms and regulatory bodies capable of monitoring effective implementation of human rights due diligence processes, carrying out investigations and sanctioning due diligence failures when appropriate. We recommend the addition of a recommendation to this effect.

In addition, failures of due diligence should provide victims of human rights abuse resulting from such failures with a cause of action to claim reparations. To this end, we recommend the inclusion of an additional recommendation in the following or similar terms:

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

We commend and support **recommendations 10 and 11** (which we recommend are placed under section II on the State Duty to Protect). It must be pointed out however that there is no justifiable reason for *requiring* business respect for human rights and human rights due diligence in instances where businesses are owned or controlled by, or receive substantial support from the state (recommendation 10) or where the state contracts with or purchases from private companies (recommendation 11) and *not requiring* the same standard of conduct of private companies acting independently from, and with no involvement or support of the State. The risk to communities and potential impact on their human rights is the same one way or the other. Rights holders should be equally protected.

<u>IV. Measures to Promote Access to Remedy</u>

<u>General</u>

We commend the inclusion of a number of very relevant recommendations which, if implemented effectively by member States, stand a chance of significantly improving access to remedy. The enumeration of specific measures to improve access to member State courts is particularly welcome. However, an enumeration can only go so far and important barriers to remedy might not be addressed. We would therefore recommend the inclusion of a general principle recommending that member States identify and remove barriers to remedy in cases of corporate-related human rights abuse, regardless of where the abuse has occurred.

Specific recommendations

The right to an effective remedy has been recognised under most international and regional human rights treaties and instruments and also as a rule of customary international law. It applies to violations of all civil, political, economic, social and cultural rights. For this reason, **recommendation 18** is insufficient, since it limits member States' obligation to provide an effective remedy to violations of rights under the European Convention on Human Rights. This recommendation should therefore be amended in the following or similar terms:

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

We welcome **recommendation 19** to ensure domestic courts have jurisdiction over civil claims related to corporate-related human rights abuses. However, courts must exercise this jurisdiction in practice. The use of doctrines such as *forum non conveniens* allows courts that in principle have jurisdiction over a case to decline it in favour of another forum they believe is more appropriate to hear the case. These decisions do not always take human rights sufficiently into consideration. We therefore suggest draft recommendation 19 to be amended as follows:

> *19. Member States should apply such legislative and other measures as may be necessary to ensure that their domestic courts have jurisdiction,* ***and exercise it effectively****, over civil claims related to business-related human rights abuses against business enterprises domiciled within their jurisdiction irrespective of where the abuse occurred.*

In addition, we suggest amending **recommendation 20** as follows:

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

We also welcome **recommendation 24** which addresses two important aspects of remedy regarding rules of standing and collective claims. However, we would recommend breaking down this recommendation into two separate provisions addressing rules of standing and collective actions respectively. Regarding the latter, member States should be encouraged to make "class", "group" or other forms of collective action widely available for individuals and communities affected by corporate-related human rights abuses, whether these have occurred within or outside their jurisdiction.

Finally, we suggest amending recommendation 26 as follows:

> *26. Member States should ensure that they do not* ***~~disproportionately~~*** *interfere with the right of access to court under Article 6, paragraph 1 of the European Convention on Human Rights of victims of corporate human rights abuses.*

IV.a.ii. Criminal liability of corporate actors for human rights abuses

The organisations welcome the inclusion of a separate section exclusively focused on the criminal liability of corporations for certain serious human rights abuses. We particularly welcome and support **recommendation 27**.

In addition to the current provisions, we would like to suggest the inclusion of a more general recommendation focused on addressing the legal and practical barriers to corporate criminal liability, such as by ensuring the adoption of new laws or the effective enforcement of existing criminal laws under member states' domestic legal systems and providing for the extension of the territorial reach of national criminal law. Currently, criminal laws that could be used by member States to hold corporate actors accountable for committing crimes that are or contribute to human rights abuses either do not exist or, if they exist, are not being enforced effectively or contain too many obstacles to be of any use in practice. Modifications might also be needed so that criminal laws can be used to hold corporations liable and to ensure they apply to crimes committed abroad. These issues are compounded by practical and systemic barriers to prosecution, such as the lack of priority given to these cases, resources, expertise in this area and international cooperation. We would therefore suggest the inclusion of an additional recommendation to address these protection gaps in the following or similar terms:

> *Member states should examine their criminal legislation and justice systems as well as enforcement practices and policies to identify legal and practical obstacles to ensuring corporate accountability for crimes that are or contribute to human rights abuse. Member States should address these prosecution gaps, in particular by ensuring new laws are adopted, existing criminal laws are enforced effectively, and/or thresholds or other obstacles in existing laws are revised so that their application is not rendered impossible in practice. They should furthermore ensure these laws apply to legal entities and, where this is not possible at present, extend their reach to apply to crimes committed abroad.*

To ensure alignment with these recommendations, we suggest reviewing the wording of **preambular paragraph [g].**

IV.b. Access to non-judicial mechanisms

To meet their obligation to provide an effective remedy, member states must ensure victims of corporate-related human rights abuses have access to a "national authority" to obtain reparations for the abuses they have suffered. This is expressly stated in draft preambular paragraph [d]. Despite the importance assigned to "national authorities" or, for our purposes, State-based mechanisms, only courts are addressed in the current draft in any significant length. When it comes to State-based non-judicial mechanisms, only National Contact Points are mentioned.

There is no reference to the wide ranging options available to states for effective State-based non-judicial mechanisms, such as regulatory agencies, ombudspersons and administrative or quasi-judicial tribunals, among others. Many of these already regulate and adjudicate aspects of corporate activity in many states, such as in the areas of consumer protection, labour, the environment, competition and fair trading. Several lessons can be drawn from the strengths and weaknesses of these bodies in order to put in place effective State-based non-judicial mechanisms in the area of business and human rights. We therefore suggest the insertion of a recommendation making explicit reference to these mechanisms and prompting states to explore the possibility of extending the mandate of existing State-based non-judicial bodies or creating new ones with the capacity to receive and adjudicate complaints of corporate-related human rights abuses and afford reparations to the victims.

VI. The role of human rights defenders

The organisations welcome the inclusion of a specific section on the role of human rights defenders. We would like to reiterate the importance of member States giving full recognition and particular attention to the legitimate and important role human rights defenders play in the context of human rights and business, and their situation of extreme vulnerability.

We suggest reinforcing this section to ensure it contains specific and concrete recommendations to member States on measures of a legislative, regulatory or adjudicative nature they should take in order to effectively protect human rights defenders from corporate-related human rights abuses. In particular, member States should take measures, including the adoption of guidelines, to ensure that government officials effectively support and protect human rights defenders both domestically and outside their territory.

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

It is important that efforts to implement the UNGPs take fully into account existing obligations under international human rights law and standards to which member States are bound. The UNGPs provide recommendations on "how" to implement these obligations, so UNGPs implementation efforts should not lose sight of the wider international human rights framework. As a means of emphasizing this we would recommend adding a first paragraph under Section I on General Principles clearly stating

the obligation of member States under international human rights law to protect from corporate-related human rights abuses and to provide an effective remedy for such abuses, and clarifying that the UNGPs are an important tool through which to implement these obligations. In addition, we would recommend inserting a line in **recommendation 43** as follows:

> *43. In their implementation of the UN Guiding Principles on Business and Human Rights, member States should* ***take into account the full spectrum of relevant international human rights law and standards and*** *ensure consistency and coherence at all levels of government.*

These additions would also bring coherence with other sections of the Recommendation which refer to member States' obligations under general international human rights law and standards, such as preambular paragraph [d].

New Section

Despite its importance in ensuring the effective protection of human rights in the context of business activity, there is no mention at present of the principles of consultation and the right of individuals and communities to participate in decision-making processes likely to affect their rights, including the right of Indigenous Peoples to free, prior and informed consent. This is particularly important with regard to certain business activities with a large physical footprint such as natural resource extraction and big infrastructure and development projects. We recommend the insertion of a new section dedicated exclusively to developing recommendations in this realm, which could immediately follow section VI on human rights defenders.