COST
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COST Action IS0702 „The Role of the EU in UN Human Rights Reform"

Final Document

Preamble

In the framework of COST IS0702, various human rights research centres, notably members of the Association of Human Rights Institutes (AHRI), have carried out joint research activities relating to achievements, gaps and weaknesses in the United Nations human rights protection mechanisms as well as the contribution of the EU and its member States in strengthening these mechanisms. These monitoring bodies and procedures have gradually developed since the founding of the world organization in 1945 without following a clear strategy. During the times of the Cold War, such developments were primarily influenced by the East-West conflict, the ideological debate between the Western and the socialist concept of human rights and the traditional view that human rights protection was essentially falling into the domestic jurisdiction of States. With the Vienna World Conference on Human Rights 1993, the universality, indivisibility and interdependence of human rights as well as the legitimacy of international action for the protection of human rights was explicitly recognized, and the Vienna Declaration and Programme of Action became the basis for the further development and strengthening of the United Nations human rights system. The newly created Office of the UN High Commissioner for Human Rights was entrusted with the role of promoting and coordinating a multitude of UN bodies and procedures for the promotion and protection of human rights. With the UN policy of mainstreaming human rights into all policy areas of the world organization, human rights also started to play an increasingly important role in the fields of security policy and new generations of peace-building operations, development policy and poverty reduction strategies, humanitarian action and other policy areas. In the 2005 World Summit Outcome Document, the General Assembly has established the new concept of Responsibility to Protect (R2P) populations from genocide, war crimes, ethnic cleansing and crimes against humanity, consisting of three pillars: The protection responsibilities of the State; international assistance and capacity building; and timely and decisive response by the international community, acting through the Security Council. Of particular importance is the Action II initiative for the human rights based approach which has impacted significantly on the work of UN agencies in development. The UNDG Human Rights Mainstreaming Mechanism created in 2009 is the latest in a series of institutional commitments to strengthening human rights across the UN system.

Traditionally, one can distinguish between the so-called Charter based and the treaty based system of human rights protection by the United Nations. On the basis of ten core human rights treaties, a total of ten independent expert bodies have been established and entrusted with the task of monitoring States' compliance with their respective treaty obligations. In addition to reviewing State reports, these treaty monitoring bodies also examine individual complaints, conduct ex officio inquiry procedures and carry out other functions. The main political body entrusted with the promotion of human rights was the UN Commission on Human Rights, a functional commission of the Economic and Social Council, which in 2006 was replaced by the Human Rights Council, a subsidiary body of the

General Assembly. Its main new procedure is the "Universal Periodic Review" of the domestic implementation of human rights in all 193 member States of the world organization. The Human Rights Council consisting of 47 States is assisted in its various human rights activities by non-governmental organizations and many independent experts, which serve as members of the Advisory Committee and as so-called "special procedures", i.e. country-specific and thematic working groups, special rapporteurs, special representatives and other individual experts. In addition to providing secretariat functions for the Human Rights Council, its Advisory Committee and more than 30 "special procedures", the Office of the High Commissioner for Human Rights is carrying out a broad variety of other tasks aimed at monitoring, promotion, protection and capacity building in the field of human rights, both at its seat in Geneva, at UN headquarters in New York and in various regional and local field offices around the world. To some extent, human rights have also been mainstreamed into Vienna based UN programmes, such as in the field of crime prevention, combating terrorism, and in relation to UN drug policies.

Human rights play a crucial role within external relations of the European Union, both in its bilateral relationship with third States and in multilateral fora, such as the UN Human Rights Council. During the Cold War, Western States were the main driving force behind the development of a universal system for the promotion and protection of human rights. Although this situation has dramatically changed since the 1990s and the political dynamics have become much more complex, the European Union and its 27 member States remain one of the most influential players in shaping United Nations human rights policies.

During the timeframe of COST Action IS0702 both the United Nations and the European Union experienced a number of significant changes. In 2011, the newly established UN Human Rights Council was subjected to a first official review process and shortly thereafter, the first cycle of the "Universal Periodic Review" was completed. The "Arab Spring" and other recent developments had a profound impact on the political dynamics in the Human Rights Council and other UN bodies, including the debate on the implementation of the concept of Responsibility to Protect (R2P) in the Security Council and the General Assembly. Long-term efforts aimed at reforming the human rights treaty monitoring mechanisms, which have their origins in the early 1990s, resulted in a June 2012 report of the UN High Commissioner for Human Rights entitled "Strengthening the United Nations human rights treaty body system" which contains a number of proposals for treaty body reform. These and other reform efforts were influenced, inter alia, by the EU and by civil society actors, including academics and human rights institutes involved in the present COST Action. One example of a close cooperation between the High Commissioner, treaty bodies and academic institutions participating in the present COST Action is the Dublin II outcome document of November 2011 which had a major impact on the current UN treaty body reform process. Another example of close cooperation between Geneva based diplomats and academic institutions involved in the present COST Action is the so-called "Swiss Agenda for Human Rights" which has led, inter alia, to the proposal for the creation of a World Court of Human Rights. The idea of a World Court of Human Rights goes back to an Australian proposal in the former Commission of Human Rights of 1947 and gained momentum after the creation of the High Commissioner for Human Rights in 1994 and the adoption of the Rome Statute for the International Criminal Court in 1998. The present proposal deriving from COST action IS0702 is based on the model of a full-time European Court of Human

Rights but goes beyond its competences by enabling individuals, groups and legal entities to lodge complaints alleging violations of civil, political, economic, social and cultural rights enshrined in any of the UN core treaties against States, international organizations, transnational corporations and other non-State actors. The proposed World Court of Human Rights should be established by a separate treaty and be empowered to hand down legally binding judgments that should also order the respondent parties to provide the victims of human rights violations with adequate reparation for the harm suffered.

With the entry into force of the Lisbon Treaty in December 2009, the European Union was subjected to a major reform. The EU's commitment to human rights has been further strengthened by the binding legal force of the EU Charter of Fundamental Rights and by the decision to accede to the European Convention on Human Rights. Article 21 of the Treaty on European Union has reaffirmed the EU's determination to promote human rights and democracy through all its external actions. The function of an EU High Representative for Foreign Affairs and Security Policy was created, assisted by a newly established European External Action Service with EU delegations accredited to around 160 countries around the world and international organizations, in particular the United Nations. On the basis of a joint communication of the European Commission and the High Representative entitled "Human rights and democracy at the heart of EU external action – Towards a more effective approach", the Council of the European Union in June 2012 adopted an "EU Strategic Framework and Action Plan on Human Rights and Democracy" which, inter alia, strongly supports the independence and effectiveness of the UN High Commissioner for Human Rights, of UN treaty monitoring bodies, special procedures and other human rights mechanisms. In order to assist the High Representative in her efforts to implement the EU Action Plan, an EU Special Representative for Human Rights was created who took office on 1 September 2012, only a few days before the final conference of COST Action IS0702 in Vienna.

The academics and human rights institutes participating in the present COST Action divided their work into three working groups. While Working Group 1 dealt with the traditional Charter based and treaty based mechanisms of the United Nations, Working Groups 2 and 3 went beyond the traditional Geneva based procedures and concentrated their joint research work on human rights and development tools based upon a theory of change framework on the one hand, and human rights partnerships, in particular in the field of human rights and business, on the other hand.

The following recommendations are addressed to all relevant policy makers of both the UN, and the EU including its member States:

Recommendations

A. Treaty Body System

a. Strengthening the Universal Human Rights Framework

1. The EU is requested to encourage its member States and third countries to ratify all universal human rights treaties, in particular the ten core human rights treaties and all optional protocols thereto, and to make the relevant declarations in order to ensure the acceptance of all individual complaints and inquiry procedures.

2. The EU and its member States should work towards the inclusion of a "regional integration organization" (RIO) clause in UN human rights conventions enabling the EU to adhere to such conventions if its competences allow for it. While this may only be realistically achievable in future conventions, the EU should commit itself unilaterally to the ten core UN human rights conventions if formal accession remains legally impossible.

b. Strengthening Treaty Bodies

The EU is asked:

3. To support the High Commissioner and her office in promoting the implementation of the recommendations contained in the High Commissioner's report of June 2012 - Strengthening the United Nations human rights treaty body system, particularly in the context of deliberations at the General Assembly and within other political bodies.

4. To continue being a strong supporter of the UN human rights treaty body system by contributing to the implementation cost of the High Commissioner's proposals.

5. To encourage member States and third countries to comply with their obligations under the UN treaties, including reporting obligations, and to encourage an exchange of best practices in this regard.

More specifically:

6. To encourage member States and third countries to consider positively and support the "Simplified Reporting Procedure" (SRP).

7. To encourage member States and third countries to use the simplified and harmonized reporting system – consisting of a common core document (CCD) and a treaty-specific report or a SRP report – to streamline their treaty body reporting, to adhere to the page limits, to regularly update the CCD, to focus reports on the implementation of previous recommendations.

8. To support, including financially, OHCHR's capacity-building activities aimed at assisting States parties in meeting their reporting obligations and in supporting them in the

implementation of the treaty bodies' recommendations, and to provide as appropriate direct technical assistance and capacity-building support to third countries facing difficulties in meeting their obligations. To encourage member States and third countries to be represented by well-informed delegations comprising both high-level officials and technical experts.

9. To reflect, at the policy level through the Governmental Bodies of United Nations agencies, the principle that United Nations agencies should support the work of treaty bodies as relevant to their institutional mandates.

10. To ensure that every effort is made by its member States to prevent any form of reprisals against persons because of their engagement with treaty bodies and to promote a culture that prevents reprisals in third party States. To ensure that when reprisals occur they are fully investigated and prosecuted and those found responsible should be punished accordingly. Victims of acts of reprisal should receive appropriate forms of redress. These actions should be informed by the principles outlined in the EU Guidelines on Human Rights Defenders.

11. To encourage the adoption of national policies and processes, with respect to the nomination of experts as candidates for treaty body membership further to the criteria established in the treaties. These should consider the need to ensure adequate expertise, availability and independence of treaty body members. Good practices in the nomination of candidates should be shared with OHCHR, with a view to allowing OHCHR to compile such information and make it available to the treaty bodies for consideration before the adoption of their guidelines on independence and impartiality of treaty body members.

12. To encourage the establishment in its member States and third countries of a standing national mechanism for reporting, implementation and engagement with the UN human rights mechanisms, including the treaty bodies. Such mechanisms should be responsible for ensuring implementation of treaty body recommendations, including on individual communications, among others through the adoption of enabling legislation or a national human rights strategy or action plan. National Human Rights Institutions should be fully included in this process.

13. To call upon the OHCHR to improve the visibility of the work of the treaty bodies and to make it more accessible to the public at large. In this respect the EU is requested to support the proposal on webcasting and videoconference and provide adequate funding for the creation of a permanent capacity for webcasting.

c. World Court of Human Rights

14. Considering that most human rights treaty bodies have also been entrusted with the task of examining individual complaints, the High Commissioner is requested to take up the

proposal for the establishment of a World Court of Human Rights as a supplement to her June 2012 report which aims primarily at streamlining the State reporting procedure.

15. The proposal for a World Court of Human Rights should take the draft Statute for a World Court of Human Rights, including a detailed commentary, which has been elaborated in the course of COST Action IS0702 as a starting point for further discussions in the relevant UN bodies, above all the Human Rights Council.

16. The EU is requested to support the proposal for creating a World Court of Human Rights by means of cross-regional cooperation within the UN Human Rights Council.

B. UN Human Rights Council

17. The EU should become a more pro-active actor in the UN Human Rights Council (HRC). Therefore, the EU and its Member States should identify common priorities before each session of the HRC, preventing long internal coordination meetings during the sessions. In this regard, the annual identification of EU priorities in the HRC, as proposed by the 2012 EU Strategic Framework and Action Plan on Human Rights is welcomed.

18. The EU should continue to strengthen its cross-regional outreach at the HRC. The EU and its Member States are encouraged to adopt a flexible approach, envisaging cooperation with all countries that can be potential partners in a HRC where flux coalitions are formed depending on the issue area concerned.

19. At the same time, the EU should not allow compromises on its core principles, such as the universality of human rights. The EU should also continue to support the effective functioning of the independent mechanisms of the HRC as well as the independence of OHCHR.

20. The EU and its Member States should cooperate with, and support initiatives of other regional groupings in the HRC in order to prevent polarized block dynamics at the HRC.

21. Particularly in the context of country-specific action, the EU should seek support of countries from the region concerned in order to enhance the legitimacy of the action taken by the HRC.

22. In order to encourage non-European partners to join EU initiatives, a cooperative approach needs to be adopted that allows for substantive input and co-ownership of third country partners. In this regard, enhanced attention for economic, social and cultural rights in the Council, as reflected in the 2012 “EU Strategic Framework and Action Plan on Human Rights and Democracy” is encouraged.

23. The EU should more effectively include human rights concerns in all appropriate forms of bilateral political dialogue, as reflected in the "EU Strategic Framework and Action Plan on Human Rights and Democracy". The recommendations made in the context of the UPR and Special Procedures should be consistently taken up in bilateral dialogues with third countries.

24. The EU should better connect its multilateral engagement in the area of human rights. As the actions taken in relation to the situations in Libya and Syria illustrate, the responses of the Council on urgent situations can feed into action taken in the context of the UN General Assembly and the UN Security Council. The proposal adopted in the "EU Strategic Framework on Human Rights and Democracy" to identify annual priorities at the UN across all human rights related meetings in Geneva and New York is a positive step in this regard.

C. National Human Rights Institutions (NHRIs)

25. The EU should encourage and support EU member States to establish effectively functioning NHRIs, which are at least in compliance with the international minimum standards set forward in the Paris Principles, requiring: a broad human rights mandate clearly set forth in a constitutional or legislative document; a pluralistic composition with independent expert members, including from civil society; and sufficient resources, staff, and infrastructure enabling them to fulfill their mandates in an independent manner.

26. The EU should encourage European NHRIs to apply for accreditation by the International Coordinating Committee of NHRIs (ICC), which assesses whether NHRIs are in compliance with the Paris Principles (A-status).

27. At the same time, the EU should encourage the ICC to strengthen its accreditation procedure, particularly by involving independent experts to assess compliance with the Paris Principles. The EU could consider providing financial support for independent experts to be involved in the ICC accreditation procedure.

28. The EU might consider using the ICC accreditation as a benchmark for its own cooperation with NHRIs, similar to the practice of the UN Human Rights Council.

29. The EU should promote NHRIs as "overarching" human rights bodies which should include, as far as possible, cooperate with or serve as umbrella organizations for other national non-judicial bodies, such as equality bodies or special bodies for the rights of children, minorities, older persons, the sick, or persons with disabilities. Therefore, the EU institutions should refer to the Paris Principles and the need for a comprehensive approach to monitoring in the wording of relevant proposals for EU legislation, such as the proposed Horizontal Directive on Equal Treatment across All Grounds of Discrimination.

30. The EU should promote NHRIs to serve as national focal points for EU citizens to obtain comprehensive information on the protection of their rights on the basis of the EU Charter of Fundamental Rights as well as international human rights treaties. NHRIs should be encouraged to provide country-specific information to treaty bodies on States parties' compliance with their respective treaty obligations. NHRIs should be promoted to serve as "one-stop-shops" directing EU citizens towards the competent human rights mechanisms (local, national, European, international) in case of a violation of their human rights.

31. The EU should strengthen the cooperation among European NHRIs, including through the delivery of financial support for the recently established Secretariat of the European Group of NHRIs.

32. The Council, Commission, and European Parliament should actively involve European NHRIs and the European Group of NHRIs in fundamental rights initiatives, including in consultations and in the development of fundamental rights policy, and provide financial support for these services.

33. In addition, EU institutions should consult NHRIs when assessing the impact of their legislative proposals upon the enjoyment of fundamental rights in EU member States.

34. The European Commission should consult the European NHRIs before the drafting of the Annual Report on the Application of the EU Charter of Fundamental Rights.

35. The EU Agency for Fundamental Rights (FRA) should continue its consistent cooperation with European NHRIs, while informing the EU institutions and EU member States of the state of affairs of NHRIs in the European Union, as it has done in a 2010 Report.

36. The EU is requested to take more seriously FRA's expertise and functioning as its own "NHRI". Accordingly, the EU should further develop the mandate and composition of FRA in order to ensure the full compliance of FRA with the Paris Principles. Especially, the mandate of FRA should include the competence to monitor the respect for human rights in the EU's internal and external policy and action.

37. The European institutions, and in particular the European External Action Service and the EU Special Representative for Human Rights should consistently integrate NHRIs as partners in the EU's promotion of human rights across the globe, especially on common thematic human rights priorities (such as business and human rights, or the rights of persons with disabilities), but also on specific country situations (e.g.: the consultation of NHRIs in the context of the Universal Periodic Review of the UN Human Rights Council).

38. The EU should consult NHRIs and their regional and international coordinating networks when determining its human rights priorities and action plans, and before drafting the annual EU report on human rights and democracy around the world.

39. The EU should organize annual special meetings with NHRIs and their regional and international coordinating networks in order to determine best practices and to discuss improvements in cooperation and further areas for interaction with the European Union.

D. Responsibility to Protect (R2P)

40. The EU should continue supporting the concept of the responsibility to protect as laid down in the 2005 World Summit Outcome Document.

41. The EU should strengthen its effort, in the context of the second pillar, by taking early warning signals seriously and assisting States in addressing root causes of gross and systematic human rights violations.

42. If the UN Security Council has taken action under Chapter VII of the UN Charter as part of its responsibility to protect, the EU should continue to take timely and decisive action to fully implement the respective resolutions, including by making EU military forces available in a “bridging capacity”.

43. If the Security Council is deadlocked the EU shall consider adopting non-military coercive measures aimed at protecting the civilian population from genocide, war crimes, ethnic cleansing and crimes against humanity.

44. In the case that EU military forces have been involved in R2P action authorized by the Security Council, the EU has the responsibility to contribute to rebuild the country by all necessary means.

45. The EU shall consider strengthening the concept of R2P by developing solidarity rights such as the right to peace which encompasses opposition and resistance to oppression and the right to self-determination.

46. The members of the Security Council are requested to implement the concept of R2P as laid down in the 2005 World Summit Outcome Document. In particular, vested State interests should be subordinated to the collective responsibility to protect the civilian population against genocide, war crimes, ethnic cleansing and crimes against humanity.

47. The Security Council is requested to act upon early warning signals and recommendations from bodies such as the Human Rights Council, the High Commissioner for Human Rights and the Special Representatives on R2P and the Prevention of Genocide.

E. Development Cooperation

48. Both the EU and the UN need to adopt an explicitly articulated theory of change on how human rights influence development outcomes. This should incorporate both inward-

looking and outward-looking theories of change. Both organisations need to look at how their own organisations are changing in response to human rights-based approach (HRBA) commitments (inward-looking change) and also how they understand theories of change in their external HRBA programme activities (outward-looking change).

49. The intended outputs of the HRBA are more complex than conventional development interventions and usually take longer to see results. They can also be more difficult to measure with mainstream indicators. Unlike conventional results-based management thinking, there may also not be a direct causal link between interventions and results. Both the EU and the UN need to take these points into account when developing, monitoring and evaluating their own development interventions and in support to development work of other organisations.

50. As a consequence of this more complex and lengthy process entailed in HRBA, it is necessary to devise longer project cycles than is generally used in the sector. This would mean moving, for example, to at least 5-year cycles. Consideration also needs to be given to longer-term project management, to provide, for example, for institutional memory through staff turnovers.

51. The EU and UN should extend support both to civil society oganisations (CSOs) and directly to governments. Civil society organisations should be seen as complementary to state action to protect and promote human rights. The function of CSOs, whether complementary or critical, should be encouraged and supported.

52. The EU and UN should consider ways to vernacularise human rights concepts for both civil society and state actors. This will help to focus on relevant human rights issues through localised understandings and discourse rather than only through adherence to legalistic discourse.

53. The EU and UN should use both mainstreaming and targeted approaches in complementary ways. Mainstreaming commitments can be ignored if there are no specific tangible outcomes sought. However, targeting without mainstreaming can lead to short-term results, without an underlying strategy for deeper change.

54. The EU and UN should undertake to document and share good practice in HRBA applications.

55. EU and UN evaluations of the HRBA should take into account the particularities of this approach. For example, a long view may be needed in making evaluations of project impacts. Because HRBA requires collaboration between a wide range of actors, it can be difficult to distinguish effects or impact of single actors.

56. The EU and UN should continue to develop HRBA indicators. For a human rights based approach, an analysis of root causes of violations and vulnerability must precede the

design of appropriate indicators. Moreover, questions of validity should always be at the forefront of considerations – what are the standard indicators revealing or concealing? Who do those indicators serve? Disaggregation, rather than relying on national averages, can be one tool in this regard. Importantly, both quantitative and qualitative analysis will be needed for HRBA situation analysis and evaluation and monitoring.

a. Specifically to the UN:

57. There is an urgent need to end the disconnect between UN development actors and UN human rights actors. Whereas development actors see their role as promotion of human rights in cooperation with governments, they tend to see UN human rights actors as taking a more adversarial and confrontational role. This is a misunderstanding of the theory of change guiding UN human rights actors, which includes also a great deal of persuasion and socialisation.

58. UN development and human rights actors can be drawn closer together in cooperation. The outputs of treaty bodies and the UPR, for example, can be better integrated into development programming for identifying priorities, as can outputs of other UN human rights institutions.

59. The UN can more effectively bring together MDG indicators and human rights indicators. The 60 current MDGs indicators are not sufficiently rights-based. More MDGs indicators could be converted into human rights indicators and human rights indicators could bebetter integrated into MDGs data collection, for example, through the adoption of MDGs-plus indicators. The use of MDGs indicators could better inform human rights monitoring, whilst the integration of HRBA indicators into MDGs assessments could facilitate the socialisation of more development actors to the HRBA.

b. Specifically to the EU:

60. There is an urgent need for a strategic thinking about how change occurs in those countries where the EU invests via its development cooperation instruments. The country strategy papers on human rights need to incorporate reflections on theories of change in each country context. There is potential in elaborating the country strategy papers to link with the UN's Common Country Assessment/ UN Development Assistance Framework, which has integrated an HRBA.

61. The underlying assumptions about developmental change in recent EU documents need to be clarified, so as to be able to assess whether these assumptions can be substantiated and how development cooperation and other instruments the EU has at its disposal can best foster and support change in developing countries.

62. The EU need to pay more attention to inward looking change, i.e. how can/should EU institutions themselves change in order to be able to introduce a human rights approach to development?

63. The EU is urged to align Commission development cooperation policies with the EU Strategic Framework and Action Plan on Human Rights and Democracy, so that:

- an integrated understanding and approach of human rights is taken, whereby equal attention is paid to civil, cultural, economic, political and social rights;

- human rights are referenced as internationally agreed upon universal standards, not (just) European values; by referring to European values, there is a risk that the human rights agenda is perceived as imposed;

- human rights approaches to development guide both the development process and outcomes; they are about understanding development as human development, and about participation, accountability, non-discrimination, empowerment in the process to development;

- a human rights approach to development is not limited to conditionality and negative sanctions; it is also and primarily about assisting countries in their efforts to realize internationally agreed human rights norms to which they have committed.

64. There is also a vital need for the group of poor countries to have voice in global governance; there is a responsibility of the EU to promote this, which is also in its own interest.

F. Human Rights Partnerships

a. General Recommendations on Concept of Human Rights Partnerships

65. Human Rights Partnerships can mobilize additional actors for human rights and institutionalize common concerns in a multi-stakeholder approach. However, the concept of Partnerships which is widely used in various forms and contexts in the UN and the EU is found to be often too vague and disguising real power relations.

66. For human rights partnerships minimum standards and procedures of quality assurance should be developed, which will promote the credibility and sustainability of partnerships.

67. Human Rights Partnerships should meet certain criteria like inclusiveness of all relevant stakeholders, transparency on purposes and governance, clearly defined rights and

obligations and accountability in order to increase its effectiveness and legitimacy. They should contribute to the empowerment of civil society organizations.

68. The EU should enhance the UN human rights agenda by supporting a true partnership approach.

69. Further research is recommended on best practices of legitimate and efficient partnerships.

b. Recommendations on Business and Human Rights

- **National Plans for the Implementation of the Guiding Principles**

70. The EU has rightly communicated its expectations to European businesses as well as Member States. It is of utmost importance that Member States act to develop national plans for the implementation of the UN Guiding Principles on Business and Human Rights, as written in the 2011 EU Communication on CSR. The EU should insist not only on Member States meeting this expectation promptly – the end of 2012 – but also set up criteria to evaluate the progress states make in implementing the action plans in the years to come. The early steps undertaken in a broad participatory manner by the British Foreign & Commonwealth Office in relation to Business and Human Rights should be noted and inform EU's expectations from other Member States. This EU's stance is consistent with the emphasis John Ruggie placed on state obligations and state action at national level as part of the process delivering cumulative progress.

- **Using the Potential of the International Criminal Court**

71. In their consultations with the International Criminal Court, the European Union and its member States – which are the main funders of the Court – could request information from the Office of the Prosecutor regarding its efforts to investigate cases of corporate complicity in violations of international criminal law. During these consultations, the EU could emphasise that the evidentiary standard for holding corporate officials liable under the Rome Statute should not be prohibitively high. As to the material element of accomplice liability, the Court should require substantial assistance to, and knowledge of, the principal perpetrator's deeds. The Prosecutor need not prove a particular motivation or purpose on the part of the accomplice. At the same time, prosecutors in EU member States may want to initiate criminal proceedings against individual businessmen, and against corporations in legal systems, which allow corporations to be held criminally liable, for their complicity in violations of international criminal law committed abroad. The new legal concept of a "joint criminal enterprise" should be used in this context.

- **Support for Private Regulatory Regimes**

72. The EU should support and promote the use of transnational private regulatory regimes with specific focus on the field of business and human rights. Private regulatory regimes are designed and monitored by various types of organisation, ranging from sector and trade associations to NGOs (for example, the process standard SA8000 and the reporting instrument the Global Reporting Initiative (GRI)). Public-private regimes, such as the ISO26000 Social Responsibility Guidance Standard or the UN Global Compact, may be of particular relevance in this context because both include human rights. The EU and its member States could encourage participation in such regimes by making membership or application a condition in public procurement or require that company production processes conform with human rights-relevant standards (such as SA8000 or ISO26000 Social Responsibility Guidance Standard) both within the EU and when EU based companies of all sizes operate outside the EU.

73. The EU should participate actively in the development of standards in such private regimes, which then become partly public and possibly more legitimate. In this regard, the EU may want to sponsor studies which (1) ascertain the effectiveness of regimes of private human rights regulation by drawing causal links between norm accumulation and the improvement of human rights enjoyment, and (2) develop a regulatory 'smart mix' which combines soft law with hard regulation (the latter also consisting of EU regulation). The 2011 CSR Communication's recognition of the relevance of a smart mix underscores the need to elaborate such modalities with due regard to their impact on human rights.

- **Access to EU Courts and Jurisdiction**

74. The EU and its member States may want to give effect to, fine-tune and revise principles of jurisdiction so as to enable courts to establish jurisdiction over human rights violations committed by globalised corporate actors whose operations no longer know territorial boundaries. EU member States' courts may exercise civil jurisdiction over EU corporations in respect of overseas human rights violations committed directly by those corporations or committed by foreign subsidiaries over which the former failed to exercise sufficient control (due diligence failures). In the first scenario, jurisdiction could be based on EU incorporation whereas in the second scenario the jurisdictional nexus may be formed by the EU corporation's failure to exercise due diligence from EU territory. This could be clarified in EU legal or political instruments based on the recommendations of the UN Special Representative of the Secretary-General (SRSG) on business and human rights, John Ruggie. Beyond the application of these classic principles of personality and territoriality, which are enshrined in the Brussels Regulation (2001), the EU may contemplate an amendment of the existing legal instruments, and in particular base jurisdiction on the strength of a State's economic interaction with transnational corporations (rather than a corporation's mere registration in a State). Careful consideration should be given to criteria to establish the relevant nexus to the EU

in order to avoid transnational corporations transferring formal territorial nexus to non-EU states. Tax-related criteria may lead to tax evasion and induce companies to set up elsewhere, whereas product use or number of EU employees may be better criteria. Various indicators of economic interaction will have to be developed to render this jurisdictional ground applicable in practice.

- **Transparency in Human Rights and Due Diligence**

75. Focusing on transparency, the EU should also consider whether companies be required to produce regular CSR reports (for example Global Compact Communication on Progress Reports) or whether non-financial reports are based on reporting instruments, which include human rights elements (such as GRI). Initially, such requirements could focus on tasks funded through public means. In a longer term perspective, the requirement could be widened to privately funded activities.

76. The EU should consider introducing due diligence reporting on human rights as part of more general measures to promote transparency on company practices and impacts on society. In this context too, the EU should consider the recommendations of the SRSG on human rights and business, in particular recommendations in the 2011 Guiding Principles and implementing guidelines from the UN Office of the High Commissioner for Human Rights (OHCHR) and the Working Group on Business and Human Rights.

77. In this context, as well as those stated above, the EU should collaborate with relevant UN organisations and initiatives (OHCHR, Global Compact Office) as well as national human rights institutions in order to develop human rights guidelines for sectors of particular relevance to the EU. For example, guidelines on human rights may complement measures which the EU has taken through the Forest Law Enforcement, Governance and Trade (FLEGT) programme and two related Regulations to promote sustainable forestry. Human rights-oriented guidelines would be a welcome supplement to the primarily environmental and legality-based focus of FLEGT and the two Regulations by addressing social issues and presenting thorough recommendations based on the broad and global take on human rights which informs the work of the UN SRSG. Also, Human Rights Impact Assessments should be modelled on environmental impact assessments.

- **Professional Responsibilities and Roles**

78. The EU has begun important work on specifying the meaning and implication of the Guiding Principles in diverse industry settings. This step is welcomed given that The Guiding Principles are a foundational and thus unavoidably general treatment of business and human rights that depends on further specification. It is recommended that the EU stimulates this effort for specification, precision and detail not only industry-by-industry but also profession-by-profession. A number of professions – accountants and auditors, arbitrators, mediators, jurists – have specific opportunities and channels to introduce CSR within businesses organizations. The EU should use its position to trigger discussion

within relevant professions to understand what responsibilities and roles are appropriate in the wake of the Guiding Principles adopted in 2011. Specific EU instruments should then be used or revised to reflect such new understanding. The EU's emphasis on professions would be highly consistent with John Ruggie's view of a rather decentralized regime of CSR where different actors fulfill different roles to move businesses towards accountability.

- **Due Diligence on Conflict Minerals**

79. The EU may want to assist in improving monitoring and surveillance mechanisms aimed at stemming the supply of diamonds and gold from conflict-affected and high risk areas around the world. It may want to make sure that effective grievance mechanisms are available for (representatives of) victims of human rights violations related to the supply of precious stones. Existing monitoring and grievance mechanisms, e.g., the OECD National Contact Points, should be supported and strengthened. In principle, similar observations apply to the use of and sourcing of other natural resources, ranging from land and forest products to oil and gas, minerals, rare earths etc.

80. The EU and its member States may contemplate tackling the adverse effects of corporate activities on human rights through securities regulation including the regulation of commodities. The United States Securities Exchange Commission has embarked on this regarding conflict minerals (Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010). EU financial regulators may follow suit and require that corporations that use or trade in certain commodities certify the origins of such commodities in their disclosures to regulators. These disclosures should make it clear that the commodities do not fuel armed conflict, do not involve practices unfriendly to human rights, and do not cause adverse effects on human rights. Disclosures allow investors and consumers alike to take informed decisions.

- **Accountability of Private Military Companies**

81. With regard to the human rights accountability of private military companies, beside strengthening non-binding instruments on a partnership-basis, the EU may want to consider encouraging its member states to support and enter a treaty which regulates the international activities of private military companies with special emphasis on the prevention of violations of international human rights and humanitarian law, the prosecution of perpetrators and the provision of effective remedies to the victims. Such an instrument to be supported by the EU at UN-level could be the work on a possible Convention on Private Military and Security Companies (PMSCs).

- **Taxation as a CSR Issue**

82. Taxation is increasingly being discussed as a corporate responsibility issue given the

significant amount of funds leaving developing countries hosting multinational companies. The EU should make its voice heard in this debate as part of its CSR strategy of tackling comprehensively and sustainably corporate impacts in less developed countries. The EU should draw on the considerable effort the OECD has expanded on taxation-related issues. A process (joint task force EU-OECD) should be set in place to look at the links between taxation and responsible business practices.

- **Human Rights and the Financial Crisis**

83. Considering the long-term effects of the financial crisis, the EU and its member States are urged to take immediate steps to ensure that law and policy austerity measures taken to address the economic recession globally and the effects of the Eurozone crisis, do not violate economic and social rights. In particular, the EU and its member States should follow the guidelines set out in the letter from the Chairperson of the UN Committee on Economic, Social and Cultural Rights to States Parties in the context of the economic and financial crisis of 16 May 2012 with regard to policy changes or adjustments. In particular, retrogressive measures in the field of economic and social rights, such as wage cuts, the subsidisation of basic foodstuffs, the rationalisation of social security schemes and unemployment, must be necessary, proportionate, temporary, non-discriminatory, and should not disproportionately affect the rights of disadvantaged and marginalized individuals and groups. States must also ensure such policies identify, and ensure the protection of, the minimum core content of the rights affected In this context, the EU as well as the Troika should consider how the Fundamental Rights Charter could be made more effective in the field of social and economic rights.

84. The EU should take the lead in developing partnerships between government, private actors and civil society in scoping the impact of the financial crisis on the protection of economic and social rights. Based on this initial scoping exercise, which must include detailed budgetary analysis work, the EU should put forward practical solutions that are consistent with international economic and social rights standards that have been ratified by EU states parties, particularly the International Covenant on Economic, Social and Cultural Rights, the Fundamental Rights Charter, the European Social Charter and the UN Convention on the Rights of the Child. The EU should seek to maintain and increase as necessary international cooperation in terms of Article 2(1) ICESCR following the end of the financial crisis.

- **Bilateral Investment Treaties' Human Rights and CSR Deficit**

85. The EU should seek and exercise the power to review existing Bilateral Investment Treaties (BITs) when they are conflicting with the Lisbon Treaty provisions on human rights and human development. It should also seek to develop a template for future BITs that respects the capacity for public regulation with regard to human rights. This would be consistent with the 2011 UN Guiding Principles on Business and Human Rights, which

recommend that States should maintain adequate domestic policy space in order to meet their human rights obligations when pursuing business-related policy objectives such as through investment treaties.

86. As a final recommendation but definitely not concluding the options for EU collaboration with the UN on the emerging legal relevance of addressing business impact on human rights, the EU may consider modalities for promoting networking among European research, human rights and civil society organisations to feed ideas and lessons into the work of the UN Working Group on Business and Human Rights.