



**DIRECTORATE-GENERAL FOR EXTERNAL POLICIES
POLICY DEPARTMENT**



**BUSINESS
AND
HUMAN RIGHTS
IN EU
EXTERNAL
RELATIONS**

HUMAN RIGHTS



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- POLICY DEPARTMENT -

STUDY

**BUSINESS AND HUMAN RIGHTS IN EU EXTERNAL
RELATIONS**

**MAKING THE EU A LEADER AT HOME AND
INTERNATIONALLY**

This study was requested by the European Parliament's Subcommittee on Human rights.

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EXECUTIVE SUMMARY

Resulting from the impacts of globalisation, the size and power of enterprises has tremendously grown as their activities now potentially span the entire planet and as a consequence, the issue of business enterprises and their impact on human rights have gained enormous prominence in the recent past. However, the views and initiatives of governments, corporations and civil society have largely diverged as to the means in ensuring that corporations abide by human rights globally. The business and human rights issue has moved up one notch on the international agenda with the appointment, in 2005, of John Ruggie as Special Representative of the UN Secretary-General, in charge of seeking consensus on the business and human rights issue. As an important political and economic actor on the international stage, as well as a self-declared leader in the human rights field, the EU has the potential to globally make a difference on this issue, most importantly through its tight network of external policies. This briefing paper, commissioned by the European Parliament, (i) takes stock of the current global debate, (ii) reviews and analyses the current state of the political process at EU level, (iii) evaluates EU external policies with respect to business and human rights, and (iv) formulates policy recommendations in this respect.

In his third report, rendered in April 2008, the Special Representative designed a conceptual framework for business and human rights, revolving around three axes, namely: (i) the duty of States to protect their citizens against human rights violations, including those by business; (ii) the responsibility of business to respect human rights wherever they operate, including, to a certain extent, along their supply chain; and (iii) the overall access to effective remedies for victims of human rights violations committed by business. The reception of the report was mainly positive, in that it posits a clear conceptual framework for business and human rights in which all initiatives in this field can be inserted, while clarifying the various responsibilities of the actors involved in the business and human rights puzzle. Critics however regretted a certain lack of depth in the report, as well as the approach of the Special Representative to the responsibility of business in regard of human rights, alleging the report to be composed mainly of soft terms, while civil society and certain governmental circles advocate a stronger approach that includes enforceable obligations for companies to respect human rights (Chapter I).

The EU's external policies are committed to fostering human rights through mainstreaming – notably in the EU trade and development policies, like the economic partnership agreements, the trade preferences regimes (most prominently the GSP scheme), and its overall external action in favour of the ILO decent work agenda. However, the promotion of human rights through external policies tends to be addressed in a one-dimensional way, by means of dialogue with and incentives for third countries that have problematic human rights records. As a consequence, the issue of business and human rights is insufficiently embedded in EU external policies that rely on the EU's CSR policy to make a difference with specific concern for corporate behaviour. In this connection, CSR is repeatedly invoked in EU external policy documents as an avenue for advancing human rights, but little concrete action is taken in this regard. What is more, the EU's CSR policy is widely denounced as exclusively voluntary and market-based, process-oriented rather than focused on accountability, and largely pre-empted by the minimalist approach of business. Furthermore, the EU's CSR policy has to date failed to rationalise voluntary CSR initiatives, making corporate behaviour hardly assessable by consumers and the general public. As a result, it is doubtful that EU external policies, coupled with the EU's CSR policy, will significantly impact corporate respect for human rights, as was already underlined by the European Parliament in several instances.

In light of the foregoing, this briefing paper's recommendations run along two lines, namely: (i) that specific action be taken with regard to corporate respect for human rights in the framework of EU external policies, and (ii) that the EU's CSR policy be based on an approach which, without discarding soft and voluntary initiatives, includes a clear and solid legal framework for corporations concerning respect for human rights wherever they operate (Chapters II and III).

This briefing paper therefore suggests the following of EU institutions and EU Member States:

- Strive for a clear international legal framework over the responsibilities and obligations of business with regard to human rights;
- Remain a leader in international fora on the issue of business and human rights;
- Reconsider the all-voluntary approach of EU's CSR policy;
- Rationalise and benchmark private initiatives in the field of CSR;
- Rebalance EU external policies with regard to human rights between dialogue and accountability;
- Embed the business and human rights issue in external relations instruments;
- Establish a global set of remedies for victims of corporate violations of human rights (Chapter IV).

Section 1 - INTRODUCTION

1. The issue of the potentially negative impact of enterprises on human rights where they operate has gained enormous prominence during the last decade, spurred on by globalisation. All constituencies of the international society, from the UN to national governments, enterprises and civil society actors, have contributed to finding ways of minimising such negative impact, within and alongside international law. Much has been written on the subject, and many differing views have been expressed. The vibrancy of the debate has caused its outcomes to emerge anarchically, and so far, no discourse or legal and policy framework has been universally agreed upon. As a result of the relative stalemate caused by the erratic proliferation of standpoints on the business and human rights issue, Professor John Ruggie was appointed as the Special Representative of the UN Secretary-General in 2005 in order to seek global consensus on the topic. The Special Representative's first mandate has ended in 2008, and since then has been renewed.
2. While the debate is going on, governments and other policy makers must act already. The European Union (the "EU"), as the seat of many multinational corporations, as well as one of the most influential political and economic powers in the world, and as a self-declared moral leader in the field of human rights, is bound to pave the way for others, and possesses particular leverage to do so in the framework of its dense network of external relations. This briefing paper, commissioned by the European Parliament, aims at evaluating the merits of the Union's policies, most prominently its external relations policies, for achieving worldwide respect for human rights by corporations, and to formulate ambitious policy recommendations in this regard. A first chapter summarises the report rendered in 2008 by Professor Ruggie at the end of his first mandate, and gives an account of the global debate that has ensued. This chapter will also address the significance of the report for the EU specifically. The second chapter outlines the external policies of the EU for fostering corporate respect for human rights, and will evaluate them in the light of the political objectives expressed by the European Parliament in this regard. The third chapter evaluates more in detail the contribution of two of the most significant instruments of EU external policymaking – the Generalised System of Preferences and the Decent Work Agenda – to the business and human rights issue. By way of conclusion, a fourth chapter formulates general and specific policy recommendations to EU institutions and EU Member States, which are likely to enhance the positive impact of the EU's external policies on the overall respect of corporations for human rights

Chapter I – THE DEBATE CONCERNING THE 2008 REPORT OF THE UN SPECIAL REPRESENTATIVE FOR BUSINESS AND HUMAN RIGHTS

1. The Report

3. On 7 April 2008, Professor John Ruggie, the Special Representative of the UN Secretary General on the issue of human rights and transnational corporations and other business enterprises (“the Special Representative”) rendered his third report, *“Protect, Respect and Remedy: A Framework for Business and Human Rights”* (“the report”).¹ The Special Representative starts by noting that corporations have the potential to be a major source of welfare where they operate. However, markets are only able to function well and to yield socially beneficial outcomes if they are kept in check by rules and institutions. In the human rights field, the Special Representative notes, the system of rules as it is supposed to apply to corporations is still largely underdeveloped, therefore potentially creating a *hiatus* between the operations of business and respect for human rights. This problem is made more stringent by the fact that, in a globalised economy, global market rules are needed, but are also more difficult to put in place. In short, as far as business and human rights are concerned, there are “governance gaps” caused, or worsened, by globalisation, which allow certain States and companies to “fly below the radar”.² Finding ways to bridge those gaps is therefore the main objective of the Special Representative’s mandate.
4. According to the Special Representative, this is not an easy task, as “[t]he business and human rights debate currently lacks any authoritative focal point. Claims and counter-claims proliferate, initiatives abound, and yet no effort reaches significant scale.”³ Also, it appears that existing isolated actions by governments and businesses are insufficient to address the issue of corporate impact on human rights, and a more holistic approach is needed.⁴ In his report, the Special Representative therefore attempts to anchor the debate in “a common conceptual and policy framework, a foundation on which thinking and action can build.”⁵ The reflections of the Special Representative as to this framework have been fed by a large consultation process, during which the Special Representative has collected the views of a large number of stakeholders – governments, businesses, NGOs or civil society actors.⁶ The way to the report was also paved by the preliminary clarification work of the Special Representative and of his team, and most importantly by his two interim reports.⁷
5. The Special Representative immediately reiterates that he does not believe in a framework which would rely on “a limited list of human rights for which companies would have responsibility, while extending to companies, where they have influence, essentially the same range of responsibilities as states.”⁸ The Special Representative therefore discards the approach taken by the Draft Norms on the Responsibilities of Transnational Corporations and Other

¹ UN Doc. A/HRC/8/5, hereinafter the “Special Representative’s report”.

² *Id.*, p. 4, par. 5.

³ *Ibid.*

⁴ *Ibid.*, p. 4, par. 7.

⁵ *Ibid.*, p. 4, par. 8.

⁶ *Ibid.*, p. 3, par. 4.

⁷ UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, Commission on Human Rights, “Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie”, 22 February 2006, UN Doc. No. E/CN.4/2006/97; and UNITED NATIONS GENERAL ASSEMBLY, Human Rights Council, “Business and Human Rights: Mapping International Standards on Responsibility and Accountability for Corporate Acts – Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie”, 9 February 2007, UN Doc. No. A/HRC/4/035.

⁸ Special Representative’s report, p. 4, par. 6.

Business Enterprises with Regard to Human Rights (the “Norms”)⁹, as he already had done on several prior occasions.¹⁰ The Special Representative has indeed come to the conclusion that, in the course of their operations, corporations could potentially affect any human right. The foundational starting point of the framework outlined by the Special Representative is therefore not the human rights themselves, but rather a set of three differentiated “responsibilities” that States and businesses have in relation to all human rights, namely:

- the *duty* of the State to *protect* against violations of human rights, including on the part of businesses;
- the *responsibility* of business to *respect* human rights;
- the need to provide access to effective *remedies* for victims of human rights violations by enterprises, which befalls both States and businesses, but in a differentiated way.

6. The content of these three axes of the report is briefly summarised below.

1.1. The State's Duty to Protect

7. According to the Special Representative, there is a clear basis in international law that States are obligated to take any and all appropriate measures in order to enforce human rights on their territories and to sanction abuses by individuals and corporations.¹¹ A less clear question is that of the extraterritorial jurisdiction of States to sanction human rights abuses committed in other States by the corporations based in their territories. The Special Representative argues that, if international law does not yet recognise States an obligation to do so, at least it does not prohibit it, save the principle of non-intervention into a State’s internal affairs.¹² Accordingly, a promise for the State's duty to protect lies with the prosecution of corporations for international crimes. Arguably, this body of law is indeed adapting to the growing complexities of corporate operations under globalisation.¹³
8. Even if principles in this respect are fairly clear, putting them into practice poses practical problems, as they need to be balanced with other legitimate objectives, most notably economic development through the attraction of foreign investments. The Special Representative therefore stresses the importance of providing guidance to governments in how to install a corporate environment ensuring respect for human rights by business.¹⁴
9. First, the Special Representative underlines the necessity of building a corporate culture which internalises respect for human rights. Accordingly, governments can support this in two ways: first, by sustaining market demands for human rights-accountable behaviour; secondly, by taking “corporate culture” into account when judging (criminally or civilly) certain facts pertaining to human rights, rather than reflecting only in terms of individual behaviour.¹⁵ In this connection, the Special Representative stresses the particular position occupied by State-owned enterprises, and by sovereign wealth funds, which may be considered as State agents, and for the actions of which a State may be held internationally responsible.¹⁶

⁹ UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, Commission on Human Rights, Subcommission on the Promotion and Protection of Human Rights, “Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights”, 26 August 2003, UN Doc. No. E/CN.4/Sub.2/2003/12.

¹⁰ See notably J. RUGGIE, “Business and Human Rights: The Evolving International Agenda”, *American Journal of International Law*, Vol. 101, 2007, p. 819.

¹¹ Special Representative’s report, p. 7, par. 18.

¹² *Id.*, p. 7, par. 19.

¹³ *Ibid.*, p. 7, par. 20.

¹⁴ *Ibid.*, p. 9, par. 27.

¹⁵ *Ibid.*, p. 10, par. 30-31.

¹⁶ *Ibid.*, p. 11, par. 32.

10. Second, the Special Representative insists on the coherence that must exist in a State's policies with regard to human rights. State policies must be vertically coherent – that is, States, when they take on international commitments, should do so with a view to their implementation. In addition, a State's policies should also be horizontally coherent. This means that a State's policies in a number of domains should not work at cross purposes with its human rights policies. An example in this regard is that of investment policies enshrined in investment treaties which, while granting legitimate protection to foreign investors, allow the latter to challenge before arbitral tribunals legislations of the host State aiming at advancing protection for human rights.¹⁷
11. Third, there should be additional guidance coming from the international level to help States tackle their difficulties on the issue of business and human rights. The Special Representative underlines the role of the UN human rights treaty bodies in issuing recommendations to States in this regard.¹⁸ Peer learning and technical and financial assistance amongst States should also be enhanced.¹⁹ Finally, the OECD Guidelines for Multinational Enterprises (the "Guidelines") should be reviewed, as they lack specificity and appear outdated with regard to the latest commitments taken by a number of leading enterprises.²⁰
12. Finally, special regard should be had for conflict zones, where the most egregious violations of human rights take place. States' policies in this regard are often inexistent, or at best very fragmented and unilateral, and are not likely to foster improved governance or the rule of law so as to guarantee respect for human rights.²¹ The Special Representative points here to the role of Security Council sanctions targeting certain companies²², or the role of home States, which should proactively monitor the activities or their enterprises in those zones, with the help of a series of "indicators", for example, to complement host States' efforts in the enforcement of human rights in their jurisdictions.²³

1.2. The Corporate Responsibility to Respect

13. Whereas the State duty to protect arguably forms the solid base of the international human rights regime including for what concerns human rights violations committed by corporations, the Special Representative is of the opinion that the solution to the business and human rights puzzle also necessitates active participation by companies²⁴, who have a corporate responsibility to respect human rights, as this is "the basic expectation society has of business."²⁵
14. The contents of this responsibility to respect seem simple: respect the domestic law where they operate, and, when absent, abide by internationally recognised standards. However, in practice, what respect entails is much more complex. The responsibility to respect imposes enterprises to "do no harm". Yet this obligation is not one-dimensional, and the Special Representative stresses the fact that regard for their responsibility to respect by companies must take account of their position and of the overall context. More precisely, certain companies perform public functions, and some operate in violations-prone areas.²⁶ Companies therefore have a general responsibility to act with "due diligence" in all situations and with regard to all human rights. This obligation of due diligence entails both respecting human rights and managing the risk of

¹⁷ *Ibid.*, p. 11, par. 33-34.

¹⁸ *Ibid.*, p. 13, par. 43.

¹⁹ *Ibid.*, p. 13, par. 44-45.

²⁰ *Ibid.*, p. 13, par. 46.

²¹ *Ibid.*, p. 13, par. 47.

²² *Ibid.*, p. 14, par. 48.

²³ *Ibid.*, p. 14, par. 49.

²⁴ *Ibid.*, p. 14, par. 50.

²⁵ *Ibid.*, p. 5, par. 9.

²⁶ *Ibid.*, p. 9, par. 24.

human rights harm with a view to avoiding it.²⁷ In this connection, the Special Representative emphasises again that the responsibility of business should not be limited to a list of certain rights. To substantiate this standpoint, the Special Representative draws on the results of more than 300 case studies which have demonstrated that corporations could virtually affect all rights, whether or not related to labour.²⁸ The focus of the debate should therefore not be on the human rights that corporations are or are not likely to affect, but on what concrete responsibilities they bear in respect of all rights, bearing in mind that in this regard, corporations cannot be equated with States, even though they certainly ought to be considered as “organs of society”.²⁹

15. The obligation to respect human rights derives from the law, but should also be in line with social expectations, which are enshrined in what is called a company’s “social license to operate”.³⁰ According to the special representative, a company’s obligations with regard to human rights are self-standing, and exist independently of those of States in the same respect. Therefore, the debate about whether States have “primary” obligations with regard to human rights while corporations would bear “secondary” obligations is moot and counterproductive.³¹
16. As has been pointed out above, the manner in which corporations should operationalise their responsibility to respect human rights is substantiated in an obligation to act with “due diligence”, which “describes the steps a company must take to become aware of, prevent and address adverse human rights impact.”³² This must entail taking positive steps, and the design of a “system” within the company, which is to date often absent.³³ Mindful of the potential vagueness of such a concept, the Special Representative attempts to bring a few clarifications by highlighting that, while necessarily inductive and fact-based, a due diligence “system” should rest on a set of three factors, namely the country context in which the company operates, the potential impact on human rights that a corporation’s own activities can have in such a context, and its potential contribution to violations of human rights through their business relationships.³⁴
17. Concretely, on the substantive side, the due diligence system of a company should draw, at the very least, from the international bill of rights, and from the core ILO conventions, “because the principles they embody comprise the benchmarks against which other social actors judge the human rights impacts of companies.”³⁵ On the formal side, a due diligence system within a company should be comprised of at least four elements: specific human rights policies; impact assessments of the activities of the company; integration of the human rights policies within the company; and monitoring processes aimed at tracking performance and accordingly adapting the human rights policies.³⁶
18. The Special Representative then moves to an attempt to clarify the notion of “sphere of influence”³⁷, which is notably used in the context of the Global Compact as a way to describe the declining responsibilities that companies have regarding the impact on human rights caused by their own activities (centre of the sphere) and by the activities of their suppliers and other business relations at different degrees (concentric circles emanating from the centre of

²⁷ *Ibid.*, p. 9, par. 25.

²⁸ *Ibid.*, pp. 15-16, par. 51-53, and annex II to the report.

²⁹ *Ibid.*, p. 16, par. 17.

³⁰ *Ibid.*, pp. 16-17, par. 54.

³¹ *Ibid.*, p. 17, par. 55.

³² *Ibid.*, p. 17, par. 56.

³³ *Ibid.*, p. 9, par. 25.

³⁴ *Ibid.*, p. 17, par. 57.

³⁵ *Ibid.*, p. 17, par. 58.

³⁶ *Ibid.*, p. 18, par. 59-63.

³⁷ UNITED NATIONS HUMAN RIGHTS COUNCIL, “Clarifying the notions of ‘sphere of influence’ and ‘complicity’ – Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises – Annex to the report”, 15 May 2008, UN Doc. No. A/HRC/8/16.

the sphere). Much confusion is associated with such a concept, as the “declining responsibility” of corporations is too often compared with the jurisdiction of States. Therefore, if the idea of “sphere of influence remains a useful metaphor for companies in thinking about their human rights impacts beyond the workplace and in identifying opportunities to support human rights”, “a more rigorous approach is required to define the parameters of the responsibility to respect and its due diligence component.”³⁸

19. “Influence”, the Special Representative reiterates, designates both “impact” and “leverage”.³⁹ This clarification is useful as it allows to stress that companies should not be deemed responsible for every human rights harm on which they have an impact, especially when it is determined that they are not a causal agent, and that companies should not be deemed responsible to act wherever they have leverage, as this could for example lead governments to default on their duty to protect, and to excessively rely on companies in this respect.⁴⁰ Finally, the concept of sphere of influence should not lead to confer human rights responsibilities to companies on the basis of spatial proximity alone, but rather on the basis of their relationship with the entity causing the harm.⁴¹ The Special Representative therefore concludes that “the scope of due diligence to meet for corporations to respect human rights is not a fixed sphere, nor is it based on influence. Rather it depends on the potential and actual human rights impacts resulting from a company’s business activities and the relationships connected to those activities.”⁴²
20. The final considerations of the Special Representative on the corporate responsibility are dedicated to the notion of complicity for human rights abuses, which also suffers from many misconceptions, as it carries both a legal and a non-legal meaning. Complicity refers to situations in which a violation of human rights has been caused by another actor than the corporation, but in which the latter was directly involved.⁴³ Companies can be prosecuted legally for such involvement, and this is increasingly the case, or can face non-legal consequences stemming from the general public, like reputational costs⁴⁴ In the Special Representative’s opinion, due diligence from a company can help avoid situations of complicity. Yet the (international) (legal) standard for complicity still lacks clarity, notably as a result of the scarce case history, and the role of elements such as compliance with the law, the mere knowledge of the situation or the derivation of benefits from it is not yet well defined.⁴⁵

1.3. Access to Remedies

21. As the Special Representative emphasises, even functioning institutions applying a clear framework for the State duty to protect and for the corporate responsibility to respect will never totally eliminate human rights violations by business, hence the need for effective remedies to punish the guilty corporations and to provide redress for the victims of such violations. Existing remedies leave a lot to be desired. Judicial systems in weak governance zones are at best ineffective and non-judicial mechanisms such as company schemes are largely underdeveloped.⁴⁶

³⁸ Special Representative’s report, p. 19, par. 65-67.

³⁹ *Id.*, p. 19, par. 68.

⁴⁰ *Ibid.*, pp. 19-20, par. 69-70.

⁴¹ *Ibid.*, p. 20, par. 71.

⁴² *Ibid.*, p. 20, par. 72. Emphasis Added.

⁴³ *Ibid.*, p. 20, par. 73.

⁴⁴ *Ibid.*, p. 20, par. 73-75.

⁴⁵ *Ibid.*, p. 21, par. 76-81.

⁴⁶ *Ibid.*, p. 9, par. 26.

22. International expectations with regard to judicial mechanisms are expanding⁴⁷, while non-judicial mechanisms such as administrative oversight agencies or multistakeholder mechanisms monitoring respect for a number of standards, play a very important role, as they may supplement courts with cheaper and more adaptable ways to redress, or even provide relief where courts are inexistent. Such mechanisms should however not replace judicial mechanisms, or undermine their development.⁴⁸ In any case, the patchwork of judicial and non-judicial mechanisms is incomplete and flawed.⁴⁹
23. Judicial mechanisms, especially in regions of weak governance or conflict zones, are often underperforming, either because the resources for their functioning are not present, or because there are legal, social, economic or other policy reasons preventing their prosecuting violating companies. In the face of such problems, the concept of extraterritorial jurisdiction over abuses caused by a State's companies operating abroad has gained exposure.⁵⁰ This avenue is however plagued by a number of disadvantages, such as their cost for the plaintiff, or legal doctrines denying "far-fetched" jurisdiction to home courts, like *forum non conveniens*.⁵¹ The Special Representative therefore insists that States' capacities in this respect should be greatly strengthened.⁵²
24. Non-judicial mechanisms, according to the Special Representative, should meet certain standards of credibility and effectiveness, and therefore should be designed so as to be legitimate, accessible, predictable, equitable, rights-compatible and transparent.⁵³
25. Furthermore, the Special Representative believes that the corporate responsibility to respect human rights entails establishing grievance mechanisms by business itself, either at the company level or through external resources. Such grievance mechanisms would benefit business in numerous ways. They could for example help companies to demonstrate due diligence when faced with lawsuits and public campaigns as a result of claims of human rights violations. Also, they could allow companies to anticipate claims of violations and to avoid their escalating into a lawsuit or into public naming and shaming.⁵⁴ When operating such mechanisms, companies should be mindful of not playing judge and party, and should not prevent complainants to subsequently take legal actions should they not have received satisfaction. They should be designed in cooperation with relevant parties, and should make sure that imbalances in information and expertise between the parties do not negatively affect the grievance process.⁵⁵
26. The Special Representative also underlines the role of State-based non-judicial mechanisms that are increasingly put in place, like the OECD Guidelines National Contact Points.⁵⁶ It is argued that such mechanisms are "particularly well-positioned to provide processes – whether adjudicative or mediation-based – that are culturally appropriate, accessible, and expeditious."⁵⁷ Also, when they cannot handle the grievance themselves, they could act as relays toward the other entities in the network of remedies.⁵⁸ Multistakeholder or industry initiatives seeking to advance respect for human rights are a quite positive development, as are lending and financing schemes providing respect for human rights. However, the credibility of such voluntary initiatives is very much dependent on the existence of a clear grievance process, so as

⁴⁷ Human rights treaty bodies are increasingly issuing recommendations in this regard. See *Ibid.*, p. 22, par. 83.

⁴⁸ *Ibid.*, p. 22, par. 84-86.

⁴⁹ *Ibid.*, p. 22, par. 87.

⁵⁰ In the US, for example, the Alien Tort Claims Act has repeatedly been invoked for that purpose.

⁵¹ *Ibid.*, p. 23, par. 89-90.

⁵² *Ibid.*, p. 23, par. 91.

⁵³ *Ibid.*, p. 24, par. 92.

⁵⁴ *Ibid.*, p. 24, par. 93.

⁵⁵ *Ibid.*, p. 25, par. 95.

⁵⁶ The Special Representative is however rather critical of the current functioning of this instrument. See *Ibid.*, p. 26, par. 98.

⁵⁷ *Ibid.*, p. 25, par. 97.

⁵⁸ *Ibid.*, p. 25, par. 96.

to not only be “tokenistic”. What is more, such initiatives must be designed according to the principles above.⁵⁹

27. In conclusion, even though the number of remedies is increasing, it is still described as a “patchwork” and is filled with lacunae, stemming notably from the lack of public awareness as to their existence and functioning, and from “intended and unintended limitations in the competence and coverage of existing mechanisms.”⁶⁰ To address those shortcomings, some actors, amongst which the European Parliament⁶¹, have proposed the appointment of a “global ombudsman” who could receive and handle complaints pertaining to corporate violations of human rights. The Special Representative does not reject this proposal outright, but recognises that its realisation would be faced with a great number of challenges.⁶²

1.4. Conclusion

28. The Special Representative concludes that, while globalisation has not yet allowed a number of countries to move toward prosperity, it also has created many governance gaps which are as many avenues for human rights violations, despite efforts by the international community, States and business in this field. Such efforts however prove insufficient, and none meet the scale of the challenge. Initiatives are fragmented and do not partake of a “systemic response with cumulative effect.”⁶³ The “protect, respect and remedy” framework is supposed to be the cornerstone of such system. Recognising that the United Nations cannot solve the problem by itself, the Special representative however urges it, and most notably the Human Rights Council, to become an intellectual leader and to set expectations and aspirations.⁶⁴

2. Reception of the Report and Debate

2.1. The Debate on the Report

29. Whereas certain responses were plainly negative (see *infra*), the report was mainly well received by observers, even though the intensity of the praise varies a great deal.⁶⁵ The main quality largely attributed to the report is that it sketches a clear and simple framework for advancing the debate on business and human rights⁶⁶, and that it removes the latter from the stalemate caused by the attempts at adopting the Norms. It is seen as “realistic” and rooted in “the realities of international governance structures.”⁶⁷
30. The fact that the report aims to give the business and human rights issue an “authoritative focal point”⁶⁸ is seen as a major step forward and many hope that future initiatives will be rooted in that framework, therefore adding coherence to the debate. In short, “[t]his governance

⁵⁹ *Ibid.*, pp. 26-27, par. 100-101.

⁶⁰ *Ibid.*, p. 27, par 102-103.

⁶¹ EUROPEAN PARLIAMENT, “Draft report on corporate social responsibility: A new partnership”, 8 November 2006, EU Doc. No. 2006/2133(INI), Rapporteur: Richard Howitt. Hereinafter the “Howitt Report”.

⁶² Special Representative’s report, p. 27, par. 103.

⁶³ *Id.*, p. 28, par. 106.

⁶⁴ *Ibid.*, p. 28, par. 107.

⁶⁵ In a response to the Ethical Corporation Magazine, which stated that support for the Report had been present but somewhat “muted”, the Special Representative in turn affirmed that, upon its presentation to the Human Rights Council, the Report had been “unanimously” welcomed. See P. DAVIS, “Business and human rights: Ruggie report – Ignore human rights at your peril”, *Ethical Corporation*, 2 June 2008, available at <http://www.ethicalcorp.com/content.asp?ContentID=5927>; and J. RUGGIE, “Response by John Ruggie to Ethical Corporation Magazine”, 5 June 2008, available at <http://www.reports-and-materials.org/Ruggie-response-Ethical-Corp-5-Jun-2008.pdf>.

⁶⁶ SLOVENIA PRESIDENCY OF THE EU 2008, “Business and Human Rights – Draft Statement”, Statement delivered on behalf of the European Union at the 5 June 2008 Meeting of the UN Human Rights Council, on file with authors, p. 3.

⁶⁷ P. DAVIS, *op. cit.*

⁶⁸ C. OCHOA, “The 2008 Ruggie Report: A Framework for Business and Human Rights”, 18 June 2008, *ASIL Insights*, available at <http://www.asil.org/insights080618.cfm>.

roadmap serves multiple functions. First, it highlights many previous successful governance efforts. Second, it allows interested parties to see the business and human rights 'space' in similar ways--to share a vision of the legal and governance progress of the past decade and the gaps, incongruities, and on-going failures that remain to be addressed."⁶⁹ Certain respondents however emphasise that the ability of the report to unite all actors around the framework it proposes and to become a catalyst for concerted action will be a function of its reception and endorsement by the different interested groups. It is arguably still too early to pass judgment on this point.

31. More precisely, observers welcome the fact that the report focuses "on the system's deficiencies (its gaps), but doing so, in a way as to differentiate the responsibilities, duties and roles of each."⁷⁰ Actors in the field are mostly satisfied with the fact that the report is bringing nuance into the respective obligations of States, businesses and other relevant constituencies, and does away with the tendency to equate corporate responsibilities with States' duties under international law. It now appears clear that, while the core of human rights protection against corporate abuses is located in national circles, not only States have obligations in this regard, but also that responsibilities of States and corporations must be balanced and are not of the same nature.⁷¹
32. Also, the report receives widespread tribute for being based on extensive hard data, collected after numerous consultations involving a wide range of relevant actors from across the globe.⁷² Finally, a particularly enthusiastic source notes that "perhaps one of the most important implications that stems from the report is that a high UN official is making the critiques about an incoherent corporate accountability system, which we often hear from non-governmental and academic groups, but which many States, and corporations are unwilling to acknowledge."⁷³
33. Apart from these positive comments, certain responses to the report were quite critical of it on a number of accounts. In particular, some observers fustigate the report for a perceived lack of ambition, and for being limited to what is feasible and politically expedient, while not considering what would be necessary or desirable.⁷⁴ The report would in this regard be a problematic example of "principled pragmatism."⁷⁵ Given the length of the Special Representative's mandate and the number of consultations performed and interim reports delivered, a response calls the result "modest" and falling "way short of the expectations of civil society", which allegedly were to:
 - "help to deepen the focus by the UN on actual situations relating to human rights and business, especially with regard to the perspective of victims so as to illustrate the scope and nature of abuses;
 - analyze the factors driving the failure of States to adequately discharge their duty to protect the human rights of individuals, communities and indigenous peoples;
 - assess the inherent limitation of voluntary initiatives, in order to avoid an overreliance on such initiatives; and

⁶⁹ *Id.*

⁷⁰ CENTER FOR HUMAN RIGHTS AND ENVIRONMENT, "Closing the Governance Gap", Written Statement Submitted to the Human Rights Council, 29 May 2008, UN Doc. No. A/HRC/8/NGO/45.

⁷¹ *Id.*

⁷² SLOVENIA PRESIDENCY OF THE EU 2008, *op. cit.*, p. 3.

⁷³ CENTER FOR HUMAN RIGHTS AND ENVIRONMENT, "UN Special Representative Releases Report on Human Rights and Business Calling for New UN Policy Framework to Address Corporate Abuse of Human Rights", 18 April 2008, available at http://www.cedha.org.ar/en/more_information/un_special.php.

⁷⁴ MISEREOR & GLOBAL POLICY FORUM EUROPE, "Problematic Pragmatism – The Ruggie Report 2008: Background, Analysis and Perspectives", June 2008, available at http://ungcdocuments.googlegroups.com/web/gpf-misereor-comment-on-ruggie-report-2008.pdf?gda=c4L2BV8AAABH54bfagLYA3q7MZzkEDTJ_Pj5YX_WtUkVg5yDc5dHjWG1qiJ7UbTlup-M2XPURDShVOVw9GrmVIRI6j5fz6-iUm2yCHwuYwwnQwm73f7K5d21OW0xyAHEM1QeXGXmWNs, p. 2.

⁷⁵ *Id.*, p. 5.

- help to spread awareness of the compelling need for global standards on business and human rights to be outlined in a UN declaration or similar instrument adopted by Member States.”⁷⁶
34. Comments pertaining to the State duty to protect were not very extensive, as the principles in this regard are better established, except maybe for what concerns the extraterritorial jurisdiction of States for corporate human rights abuses. The fiercest criticism generally comes in relation to the way the Special Representative handles the obligations of business with regard to human rights. Some apparently consider that the approach is too lax and “fails to harness the leverage of corporations to advance human rights”, and does not consider enough legal options.⁷⁷ In other words, the Special Representative would be “steer[ing] the UN away from pressing for binding legislation.”⁷⁸
 35. For example, some think tanks consider that corporate responsibility to respect is limited in the report to being strictly voluntary, and that the report provides very little information on how that responsibility can be regulated, if not through the State duty to protect, which is in many instances theoretical.⁷⁹ Amnesty International agrees and would have liked to see more concrete links between the corporate responsibility to respect and the State duty to protect, notably by adding some focus on the notion of accountability of business, and not only on “remedial measures”.⁸⁰ It indeed considers that the report relies too much on preventive action on the part of business through the due diligence model. In this connection, the report would only be meaningful for companies which are already willing to respect human rights, but would have little added value for tackling situations where companies recklessly violate human rights because they feel they have impunity.⁸¹ Quite telling in this respect is the fact that a Memorandum drafted by an international law firm emphasises that “the report does not create any new legal obligations” for US companies, and that “[r]isk-conscious companies already comply with principles described in the report.”⁸²
 36. Also, the report is said to detach corporate human rights obligations from the traditional body of human rights law. The rejection of the Norms-style “list of rights-approach” by the Special Representative is in that sense criticised as removing the possibility to set “some minimum fundamental human rights obligations [for] corporations, and a starting point for regulation of corporations in relation to other human rights. This is not only to limit the obligations of corporations for fundamental rights, but also to set out a normative floor of human rights obligations, which each and every corporation would be required to comply with.”⁸³ Also, traditionally, obligations with regard to human rights are supposed to comprise elements of “respect”, “protect” and “fulfil”. Without equating State and corporate obligations, it is said that

⁷⁶ *Ibid.*

⁷⁷ P. DAVIS, *op. cit.*

⁷⁸ CENTRE FOR HUMAN RIGHTS AND ENVIRONMENT, “UN Special Representative Releases Report on Human Rights and Business Calling for New UN Policy Framework to Address Corporate Abuse of Human Rights”, *op. cit.*

⁷⁹ MISEREOR & GLOBAL POLICY FORUM EUROPE, *op. cit.*, p. 9

⁸⁰ ACTIONAID *et al.*, “Joint NGO Statement to the Eighth Session of the Human Rights Council”, 19 May 2008, available at <http://www.hrw.org/en/news/2008/05/19/joint-ngo-statement-eighth-session-human-rights-council>.

⁸¹ AMNESTY INTERNATIONAL, “Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises”, July 2008, available at <http://www.reports-and-materials.org/Amnesty-submission-to-Ruggie-Jul-2008.doc>, p. 6.

⁸² E. MILLSTEIN *et al.*, “Corporate Social Responsibility for Human Rights – Comments on the UN Special Representative’s Report Entitled ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’”, Memorandum, 22 May 2008, available at <http://www.reports-and-materials.org/Weil-Gotshal-legal-commentary-on-Ruggie-report-22-May-2008.pdf>, pp. 2-3. Admittedly, however, the US legal framework in which the policies of those risk-conscious companies are enshrined is “much higher than that in most legal systems around the globe.”

⁸³ J. CERNIC, “Corporate Responsibility for Human Rights”, *Libertas Working Paper No. 1/2008*, 27 June 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152354, p. 14.

- the report absolutely evacuates the “protect” and “fulfil” dimensions for what regards corporations, to the sole benefit of the narrow “responsibility” to respect.⁸⁴
37. From a more technical point of view, the distinction between the duty of States and the responsibility of business is said to be imprecise and to create uncertainty, and may send a wrong message to corporations, as the term “responsibility” is arguably much less strong than the term “duty” in a legal sense.⁸⁵ A more rigorous use of terms would therefore be appropriate, and some would in this connection have welcomed a higher degree of substantiation as to what the “due diligence” requirement for business might encompass. A noteworthy suggestion in this regard is the elaboration of “benchmarks” in relation to the critical elements of corporate human rights due diligence. A more thorough exposition of the inner limitations of “soft” approaches was also cited as missing in the report.⁸⁶ By way of clarification on this issue, the Special Representative argued that “the distinction between duties/obligations on the one hand, and responsibilities based on expectations on the other, is generally accepted U.N. terminology; and that his use of the term ‘responsibility’ in the Report refers to moral obligations and social expectations – not binding law.”⁸⁷ In this connection, some criticised the way the Special Representative based the corporate responsibility to respect human rights on social expectations alone, as “[t]he pertinent question is [...] whether social expectations are sufficient in themselves to guide corporate actions. [...] [W]hile social expectations indicate the duty generally, there is a need for more clarity as to what is owed, which the law may be best placed to provide.”⁸⁸
38. In a response to a reaction to his report, the Special Representative has however given some elements of explanation as to why he was apparently considering the corporate responsibility to respect from a rather soft point of view. The Special Representative States that he is not opposed to a legal approach as a matter of principle, but that his report reflects the step-by-step approach he has adopted since the beginning of his mandate. According to him, softer approaches are in the short term more likely to have leverage on business than harder ones.⁸⁹ This mirrors a comment by the High Commissioner on Human Rights, Louise Arbour, who declared “it would frankly be very ambitious to promote only binding norms considering how long this would take and how much damage could be done in the meantime.”⁹⁰
39. With regard to remedies, criticism focused on the alleged vagueness of the Special Representative’s considerations, and many wish that the recommendations made by the Special Representative were more elaborate, notably in relation to what the States should do to improve judicial and non-judicial redress mechanisms.⁹¹ What is more, the recommendations

⁸⁴ *Id.*, p. 15.

⁸⁵ MISEREOR & GLOBAL POLICY FORUM EUROPE, *op. cit.*, p. 13; E. MILLSTEIN *et al.*, *op. cit.*, p. 2.

⁸⁶ AMNESTY INTERNATIONAL, *op. cit.*, p. 4.

⁸⁷ E. MILLSTEIN *et al.*, *op. cit.*, p. 2, emphasis in original.

⁸⁸ O. AMAO, “Review of the Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Professor John Ruggie to the United Nations Human Rights Council, ‘Protect, Respect and Remedy: A Framework for Business and Human Rights’ AH/HRC/8/5, 7 April 2008”, 19 May 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1131682.

⁸⁹ J. RUGGIE, “Response by John Ruggie to Misereor / Global Policy Forum”, 2 June 2008, available at <http://www.reports-and-materials.org/Ruggie-response-to-Misereor-GPF-2-Jun-2008.pdf>, p. 1. Also, in an opinion published in the magazine “Ethical Corporation”, the Special Representative stated “I have three main reservations about recommending to states that they launch a treaty process at this time. First, treaty-making can be painfully slow, while the challenges of business and human rights are immediate and urgent. Second, and worse, a treaty-making process now risks undermining effective shorter-term measures to raise business standards on human rights. And third, even if treaty obligations were imposed on companies, serious questions remain about how they would be enforced.”. See J. RUGGIE, “Business and human rights – Treaty road not travelled”, *Ethical Corporation*, 6 May 2008, available at <http://www.ethicalcorp.com/content.asp?contentid=5887>.

⁹⁰ Quoted by Sir R. CHANDLER, “Comment on the joint NGO statement on a follow-on mandate for Professor Ruggie”, 28 May 2008, available at <http://www.reports-and-materials.org/Chandler-comment-on-NGO-statement-28-May-2008.doc>.

⁹¹ AMNESTY INTERNATIONAL, *op. cit.*, p. 5: “Law can evolve faster if clear guidance is given on the type of legal and policy changes that are needed.”

would have gained from drawing from practical instances of human rights violations and victims' experiences, so as to be more concrete and so as to render the debate on remedies more victim-oriented.⁹² In response to this, the Special Representative argues that his report was not intended to make practical recommendations, but only to serve as "a framework for understanding, a foundation on which thinking and action could build in a cumulative fashion."⁹³ Hence, says the Special Representative, the report only makes one solitary recommendation: "that the Human Rights Council welcome the 'protect, respect, and remedy' framework and invite its further operationalization." All the rest would be "illustrative material, intended to throw light on what the three foundational principles of the framework mean and imply".⁹⁴

2.2. Debate on the Extension of the Special Representative's Mandate

40. With this third report, the Special Representative was reaching the end of a mandate which had begun in July 2005. The question therefore arose of a possible renewal of that mandate for another term of three years, so as to give the Special Representative the opportunity to elaborate on his framework, and to make it operational. Most observers supported such an idea,⁹⁵ even though some favoured certain adaptations, like the "explicit capacity to examine situations of corporate abuses", so as "to give greater visibility and voice to those whose rights are negatively affected by business activity and to deepen understanding of the drivers of corporate human rights abuses."⁹⁶ The EU opposed this view, arguing that "with over 70,000 multinational corporations in existence, relying on millions of individual suppliers and subsidiaries, as well as millions of national businesses, it would be an impossible task for any mandate holder to accept and respond to complaints that might come from any part of the globe. That is a task that must form part of a State's responsibility, with the Special Representative working to improve the framework within which this happens."⁹⁷
41. As a result of the report and of the ensuing debate, the Human Rights Council welcomed the report and commended the work of Professor Ruggie. The Council thus extended his mandate by another three years, and phrased it as follows:
- "[The Human Rights Council] requests the Special Representative:
- (a) To provide views and concrete practical recommendations on ways to strengthen the fulfilment of the duty of the State to protect all human rights from abuses by or involving transnational corporations and other business enterprises, including through international cooperation;
 - (b) To elaborate further on the scope and content of the corporate responsibility to respect all human rights and to provide concrete guidance to business and other stakeholders;
 - (c) To explore options and make recommendations, at the national, regional and international level, for enhancing access to effective remedies available to those whose human rights are impacted by corporate activities;

⁹² J. CERNIC, *op. cit.*, pp. 16-17; AMNESTY INTERNATIONAL, *op. cit.*, pp. 5-6.

⁹³ J. RUGGIE, "Presentation of Report to United Nations Human Rights Council", available at <http://www.business-humanrights.org/Documents/Ruggie-Human-Rights-Council-3-Jun-2008.pdf>, p. 2.

⁹⁴ J. RUGGIE, "Response by John Ruggie to Misereor / Global Policy Forum", *op. cit.*, p. 1.

⁹⁵ ACTIONAID *et al.*, *op. cit.*; BUSINESS LEADERS INITIATIVE ON HUMAN RIGHTS, Initial Statement by the Business Leaders Initiative on Human Rights (BLIHR) on the 2008 Report of the Special Representative for Business and Human Rights", available at <http://www.reports-and-materials.org/BLIHR-statement-Ruggie-report-2008.pdf>, 14 May 2008, p. 2; SOCIALLY RESPONSIBLE INVESTORS, "Statement by Socially Responsible Investors to the Eighth Session of the Human Rights Council on the Third Report of the Special Representative on Business and Human Rights", 3 June 2008, available at <http://www.reports-and-materials.org/SRI-letter-re-Ruggie-report-3-Jun-2008.pdf>.

⁹⁶ ACTIONAID *et al.*, *op. cit.*; See *contra* Sir R. CHANDLER, *op. cit.*

⁹⁷ SLOVENIA PRESIDENCY OF THE EU 2008, *op. cit.*, p. 4.

- (d) To integrate a gender perspective throughout his work and to give special attention to persons belonging to vulnerable groups, in particular children;
- (e) Identify, exchange and promote best practices and lessons learned on the issue of transnational corporations and other business enterprises, in coordination with the efforts of the human rights working group of the Global Compact;
- (f) To work in close coordination with United Nations and other relevant international bodies, offices, departments and specialised agencies, and in particular with other special procedures of the Council;
- (g) To promote the framework and to continue to consult on the issues covered by the mandate on an ongoing basis with all stakeholders, including States, national human rights institutions, international and regional organisations, transnational corporations and other business enterprises, and civil society, including academics, employers' organisations, workers' organisations, indigenous and other affected communities and non-governmental organisations, including through joint meetings;
- (h) To report annually to the Council and the General Assembly"⁹⁸

3. European Perspectives on the Report

- 42. The report of the Special Representative carries particular significance for the EU and its Member States. Even though its main aim is to outline a general frame of reference for the business and human rights issue, it nonetheless makes a series of practical recommendations which are quite relevant in the context of the EU and its Member States' policies.
- 43. The EU has always been a strong proponent of the Special Representative's mandate. During the 2008 debate at the Human Rights Council⁹⁹, the EU welcomed the latter's report, while not advocating any legal turn in the relationship between business and human rights, and notably "no fundamental shift in international law from the duty of States to protect against human rights abuses."¹⁰⁰ Other EU Member States did however convey a slightly more progressive message. Belgium underlined that, while the central role of States in this issue could not be overstated, in light of the globalisation of economic actors, a better protection of victims of human rights by business necessitated a more coherent and operational international framework.¹⁰¹ Switzerland also asked the Special Representative to devote some of his time to the definition of a clear framework for the reparation of human rights abuses by businesses, and to address the issue of the limitations in the access of victims to justice on that account.¹⁰²
- 44. Due to its ambition to become a "pole of excellence" for CSR¹⁰³, to its human rights tradition and commitment, its economic and moral influence, and its large network of external relations, the EU is certainly one of the best positioned actors to make a true difference in the field of business and human rights. Based on the report of the Special Representative, there are a few

⁹⁸ UNITED NATIONS HUMAN RIGHTS COUNCIL, "Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Multinational Corporations and Other Business Enterprises", Resolution 8/7, 18 June 2008, UN Doc. No. A/HRC/8/52, p. 30.

⁹⁹ During which Slovenia spoke on behalf of the EU, and Belgium submitted a statement of its own as an observer to the Human Rights Council.

¹⁰⁰ DEMOCRACY COALITION PROJECT, "Human Rights Council Report Card – Government Positions on Key Issues 2007-2008", available at <http://www.demcoalition.org/pdf/Human%20Rights%20Council%20Report%20Card%202007-2008.pdf>, p. 6.

¹⁰¹ REPRESENTATIVE OF BELGIUM TO THE UN HUMAN RIGHTS COUNCIL, "Belgique – RRI Ruggie – TNC and HR's", Statement delivered at the 5 June 2008 meeting of the UN Human Rights Council, on file with authors, p. 1. See also, DEMOCRACY COALITION PROJECT, *op. cit.*, p. 5.

¹⁰² REPRESENTATIVE OF SWITZERLAND TO THE UN HUMAN RIGHTS COUNCIL, "Intervention de la Suisse", Statement delivered at the 5 June 2008 Meeting of the UN Human Rights Council, on file with authors, p. 1.

¹⁰³ COMMISSION OF THE EUROPEAN COMMUNITIES, "Implementing the Partnership for Growth and Jobs: Making Europe a pole of excellence on CSR", 22 March 2006, EU Doc. No. COM(2006) 136 final.

general points which the EU and its Member States should regard as special opportunities for them to further the business and human rights agenda:

- The EU is active and listened to in a number of international organisations as decisively connected to the business and human rights issue. Even though the debate may appear fragmented between those different fora, the EU should nonetheless use all its weight within those organisations to push for ambitious advances for corporate respect for human rights. Most notably, the EU and its Member States should follow closely the works of the Human Rights Council and other Human Rights bodies at the UN on this issue, and notably request them to make appropriate recommendations to the relevant actors and help identify a relevant regulatory framework in relation to human rights in the business. Also, as the Special Representative himself suggested, the Commission¹⁰⁴ and EU Member States should initiate a debate in the OECD to review the Guidelines which, though remaining the most high profile CSR reference document to date, is becoming outdated;
- As the seat of many multinational corporations committed to CSR, the EU and its Member States should endeavour to “benchmark” best practices in the field, in order to have a better and more definite understanding of the responsibilities of business in respect of human rights, and a fair idea of the opportunities for improvement.¹⁰⁵ Most notably certain voices are increasingly advocating establishing some form of obligation for EU-based corporations to report on their CSR performance at home and abroad, as this already exists in a few Member States;
- The EU and its Member States should also pay particular attention to the question of remedies. In light of the EU’s virtually unmatched resources and expertise in this regard, it should be able to take an innovative stance toward creating judicial and non-judicial redress mechanisms providing accountability for corporate human rights violations, even taking place outside of its territorial jurisdiction. The question of the easy access of victims to such mechanisms should be given particular attention. The suggestion of the European Parliament to appoint an EU-wide ombudsman for such questions, which was relayed by the Special Representative in its report, is a clear example of the leading role the EU should play in this regard;
- As they maintain a very dense network of external relations, notably in the fields of trade and investment, the EU and its Member States should actively pursue the human rights dimension of the corporate activities taking place in those fields. In his report, the Special Representative has emphasised in several instances the importance of having a foreign investment policy geared toward corporate respect for human rights. The Special Representative has notably raised the possibility of inserting provisions to that effect in bilateral (or multilateral) investment treaties with third countries, or in investment agreements signed between an EU-based company and a third country. The Special Representative also favours the inclusion of human rights clauses in insurance policies provided by State-based export credit agencies.

¹⁰⁴ Represented by DG Trade in the OECD Investment Committee which oversees the implementation of the Guidelines.

¹⁰⁵ J. RUGGIE, “Corporate Social Responsibility at the Global Level – What Role for the EU?”, Keynote address at the conference on Corporate Social Responsibility: CSR at the Global Level – What Role for the EU?, Brussels, 7 December 2007, available at http://www.destree.be/conferences/csr/presentations/docs/1_ruggie.doc, p. 4. Many have expressed doubts that the EU-led CSR Alliance was the best formula to achieve such objective. See J. WOUTERS & L. CHANET, “Corporate Human Rights Responsibility: A European Perspective”, *Northwestern University Journal of International Human Rights*, Vol. 6, 2008, p. 281.

Chapter II – CURRENT STATE OF EU EXTERNAL RELATIONS WITH REGARD TO BUSINESS AND HUMAN RIGHTS

45. In the words of article 21-2 TEU, “[t]he Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [notably] consolidate and support democracy, the rule of law, human rights and the principles of international law [...]” The current EU’s external policy with regard to human rights was outlined by the Commission in a 2001 Communication.¹⁰⁶ Accordingly, the promotion of human rights is supposed to consistently and coherently permeate all of the EU’s external policies, in reference to its internal human rights tradition, and of its political and moral weight in this field.¹⁰⁷ The approach privileged by the EU external human rights policy is one of dialogue and communication with third States as well as with civil society.¹⁰⁸ The coordination, programming and financing of the EU external action in respect of human rights is conducted through the overall strategy known as the “European Instrument for Democratisation and Human Rights” (“EIDHR”).¹⁰⁹
46. The EU disposes of many tools to generally further human rights through its external relations. The Council has for example developed a set of guidelines on various human rights issues in the framework of the Common Foreign and Security Policy (“CFSP”), as article 11-1 TEU notably lists respect for human rights and fundamental freedoms as an objective of the CFSP. No guidelines however exist on the specific issue of business and human rights.¹¹⁰ Action taken in this respect notably includes diplomatic demarches with third countries regarding problematic human rights situations.¹¹¹ Targeted sanctions against third countries for human rights violations are also used.¹¹² A very interesting instrument for the promotion of human rights abroad are the “Human Rights Dialogues”, which notably consist of “highly structured dialogues” conducted at the senior level of human rights officials with selected countries. Such Human Rights Dialogues focus exclusively on the issue of human rights.¹¹³ Human Rights Dialogues are promising as

¹⁰⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, “The European Union’s role in promoting human rights and democratisation in third countries”, 8 May 2001, EU Doc. No. COM(2001) 252 final.

¹⁰⁷ *Id.*, p. 4.

¹⁰⁸ *Ibid.*, pp. 8 ff. “Tools for implementing EU policies on democracy and human rights range from political dialogue, diplomatic demarches and specific human rights dialogues to various instruments of financial and technical cooperation.” See also EUROPEAN COMMISSION, “European Instrument for Democracy and Human Rights (EIDHR) – Strategy Paper 2007-2010”, available at http://ec.europa.eu/europeaid/where/worldwide/eidhr/documents/eidhr-strategy-paper-2007_en.pdf, p. 4

¹⁰⁹ See Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, *OJ L 386*, 29 December 2006, p. 1–11. Hereinafter the “EIDHR Regulation”.

¹¹⁰ See COUNCIL OF THE EUROPEAN UNION, “EU Human Rights Guidelines”, available at http://ec.europa.eu/external_relations/human_rights/guidelines/index.htm.

¹¹¹ See EUROPEAN COMMISSION, “Furthering Human Rights and Democracy across the Globe”, 2007, available at http://ec.europa.eu/external_relations/human_rights/doc/brochure07_en.pdf, p. 7.

¹¹² See notably the sanctions taken against Myanmar: Council Common Position 2007/750/CFSP of 19 November 2007 amending Common Position 2006/318/CFSP renewing restrictive measures against Burma/Myanmar *OJ L 308*, 24 November 2007, p. 1; and Council Regulation (EC) 194/2008 of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar and repealing Regulation (EC) No 817/2006, *OJ L 66*, 10 March 2008, p. 1.

¹¹³ “The objectives of human rights dialogues will vary from one country to another and will be defined on a case-by-case basis. These objectives may include:

(a) discussing questions of mutual interest and enhancing cooperation on human rights inter alia, in multinational fora such as the United Nations;

(b) registering the concern felt by the EU at the human rights situation in the country concerned, information gathering and endeavouring to improve the human rights situation in that country.

Moreover, human rights dialogues can identify at an early stage problems likely to lead to conflict

in the future.” See COUNCIL OF THE EUROPEAN UNION, “European Union Guidelines on Human Rights Dialogues”, 13 December 2001, available at http://ec.europa.eu/external_relations/human_rights/doc/ghd12_01.htm, p. 4.

they allow for direct contact with selected third countries with a view to improving their human rights situation.¹¹⁴ The business and human rights issue does however not seem to be a priority in this respect.¹¹⁵

47. Apart from these initiatives, the bulk of the external policies of the EU in respect of human rights is rather situated in the EU's development and trade policies. According to the "European Consensus on Development", which is the main EU policy statement on development, jointly published by the Council, the Member States, the European Parliament and the Commission, "[t]he primary and overarching objective of EU development cooperation is the eradication of poverty in the context of sustainable development, including pursuit of the Millennium Development Goals."¹¹⁶ Admittedly, the focus upon poverty eradication within EU development policy is "multi-dimensional", notably in that it is pursued in the framework of sustainable development, which notably includes democratic governance, social justice, human rights, trade and development, gender equality and promoting social cohesion and decent work.¹¹⁷ The consensus emphasises that such development strategy is to be conducted primarily on the basis of an "in-depth political dialogue"¹¹⁸, and shall be supported by the participation of "civil society, including economic and social partners such as trade unions, employers' organisations and the private sector, NGOs and other non-state actors [who] play a vital role as promoters of democracy, social justice and human rights."¹¹⁹ What is more, since 2005 the EU has been committed to bringing coherence into all its policies so that they can contribute, or at least do not run counter to, development objectives and to the overall EU sustainable development strategy.¹²⁰ Hence, as of now, many non-development policies are being mobilised in order to provide positive leverage for development-related agendas.^{121 122}

¹¹⁴ For an assessment of the Human Rights Dialogues, see J. WOUTERS, S. BASU, P. LEMMENS, A. MARX & S. SCHUNZ, "EU Human Rights Dialogues – Current Situation, Outstanding Issues and Resources", Leuven Centre for Global Governance Studies, *Policy Brief No. 1.*, July 2007, available at <http://ghumweb2.ghum.kuleuven.ac.be/ggs/publications/policybriefs/PB%201%20-%20EU%20Human%20Rights%20Dialogues.pdf>

¹¹⁵ See COUNCIL OF THE EUROPEAN UNION, "European Union Guidelines on Human Rights Dialogues", *op. cit.*, p. 4: "The issues to be discussed during human rights dialogues will be determined on a case-by-case basis. However, the European Union is committed to dealing with those priority issues which should be included on the agenda for every dialogue. These include the signing, ratification and implementation of international human rights instruments, cooperation with international human rights procedures and mechanisms, combating the death penalty, combating torture, combating all forms of discrimination, children's rights, women's rights, freedom of expression, the role of civil society, international cooperation in the field of justice, promotion of the processes of democratisation and good governance, and the prevention of conflict."

¹¹⁶ Joint declaration by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on the development policy of the European Union entitled "The European Consensus", *OJ C 46*, 24 February 2006, p. 3.

¹¹⁷ *Id.*, p. 4.

¹¹⁸ *Ibid.*, p. 7.

¹¹⁹ *Ibid.*, p. 8. See also p. 25, "All people should enjoy all human rights in line with international agreements. The Community will on this basis promote the respect for human rights of all people in cooperation with both states and non-state actors in partner countries. The Community will actively seek to promote human rights as an integral part of participatory in-country dialogue on governance."

¹²⁰ COMMISSION OF THE EUROPEAN COMMUNITIES, "Policy Coherence for Development - Accelerating progress towards attaining the Millennium Development Goals", 12 April 2005, COM(2005) 134 final.

¹²¹ The Communication on Policy Coherence for Development discusses the following areas as containing potential synergies with the development policy: trade, environment, security, agriculture, fisheries, social dimension of globalisation, employment and decent work, migration, research and innovation, information society, transport. (See *Id.*, p. 5)

¹²² On a general level, criticism arose as to the Human Rights approach taken by the EU in its development policies, arguing that the human rights language used in the EU policy documents often lack (legal) accuracy and often fails to be rooted in the legal human rights framework, therefore potentially causing legal human rights standards to collapse into vaguer political commitments. Also, the general EU Development policy in respect of human rights is accused of not focusing enough on accountability issues, or to be based on misconceived accountability principles. See INTERNATIONAL HUMAN RIGHTS NETWORK, "Human Rights-Based Approaches and European Union Development Aid Policies", 2008, available at <http://www.ihrnetwork.org/uploads/files/10.pdf>.

48. In that framework, the contribution of EU external relations to the solution of the business and human rights puzzle can be divided into roughly two types of policies: (i) the policies directed to States, and (ii) the policies directed to business, which will be examined separately.

4. Policies Directed to States

1.1. Partnerships and Trade Agreements

49. As will be seen more in detail below, the EU makes extensive use of partnership-based development agreements with certain (groups of) countries to promote human rights. Most prominent in this framework are the Economic Partnership Agreements (“EPAs”), and notably the Cotonou Agreement¹²³, concluded with 79 countries from Africa, the Caribbean, and the Pacific Islands. Such agreements are termed “partnerships”, and therefore involve a great deal of political dialogue and shared responsibility on the issues that they cover, which are numerous. Arguably, those partnerships are geared toward the eradication of poverty, sustainable development and the progressive integration of the developing countries into the global economy.¹²⁴ Therefore, on top of cooperation in the fields of trade, investment, development of the private sector, financial cooperation or regional integration, EPAs contain language concerning such issues as democracy, good governance, migration, and human rights. Human rights, democracy and the rule of law are made essential elements on which cooperation is to be based: according to art. 9 (2) of the Cotonou Agreement “[r]espect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.”¹²⁵ The role and importance of non-state actors and of civil society in the coming about of such principles is also emphasised.¹²⁶ Article 33 1 (b) states that “[c]ooperation shall pay systematic attention to institutional aspects and in this context, shall support the efforts of the ACP States to develop and strengthen structures, institutions and procedures that help to: [...] promote and sustain universal and full respect for and observance and protection of all human rights and fundamental freedoms”. Article 50 states that the parties reiterate their commitment to the internationally recognised core labour standards, as defined by the relevant ILO Conventions and commit to cooperate in this area.¹²⁷
50. The spirit is one of dialogue¹²⁸, and the EPAs are being adjoined permanent joint EU-ACP institutions.¹²⁹ However, article 96 of the Cotonou Agreement provides that “appropriate measures” may be taken in certain cases when obligations stemming from respect for human rights are not fulfilled, despite political dialogue. Those appropriate measures can go as far as the suspension of cooperation, sometimes redirecting aid to civil society so as not to prejudice the civilian population.¹³⁰ According to the focus on dialogue of those instruments, this is

¹²³ Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou on 23 June 2000 (*OJ L 317*, 15 December 2000, p. 3) and Revised in Luxemburg on 25 June 2005 (*OJ L 209*, 11 August 2005, p. 26). Hereinafter the “Cotonou Agreement”.

¹²⁴ Cotonou Agreement, art. 19.

¹²⁵ *Id.*, art. 9

¹²⁶ *Ibid.*, art. 10.

¹²⁷ See *Ibid.*, art 50 2.

¹²⁸ *Ibid.*, art. 12.

¹²⁹ Namely the Council of Ministers, the Committee of Ambassadors, and the Joint Parliamentary Assembly. *Ibid.*, art 14-17.

¹³⁰ L. BARTELS, “The Application of Human Rights Conditionality in the EU’s Bilateral Trade Agreements and Other Trade Arrangements with Third Countries”, Report to the European Parliament’s Committee on International Trade, 25 November 2008, available at <http://www.europarl.europa.eu/activities/committees/studies.do?language=EN>, p 11.

however supposed to remain a solution of last resort¹³¹, the effectiveness of which on respect for human rights is in any case in doubt for a number of reasons.¹³²

51. Besides general considerations on the importance and role of civil society and the private sector for human rights, and the loose language on core labour standards there is very little, if any, specific reference to the business and human rights issue in the Cotonou Agreement.¹³³ Even the lengthy sections on investment¹³⁴ do not contain language as to this, even though investment regulation is considered a promising avenue for the disciplining of business with regard to human rights by the Special Representative's report.¹³⁵ The partnership agreements are however considered by the EU as potential vectors for the promotion of CSR, which arguably encompasses the business and human rights issue. Another cause of criticism of such "human rights conditionality" policy is that it is hardly comprehensive. Development agreements with many countries do not contain such clauses, and sectoral trade agreements concerning fisheries, steel and textile also lack such mechanisms¹³⁶, even though the textile industry is often targeted for poor human rights performance in developing countries.
52. Apart from EPAs, the EU has also developed "Regional Strategies" for development, which are more focused on specific regions.¹³⁷ In this framework, an Africa-EU Partnership on Democratic Governance and Human Rights was signed as part of a broader Africa-EU Strategic Partnership at the Joint EU-Africa Lisbon Summit on 9 December 2007.¹³⁸ One of the foremost objectives of the Partnership is notably the promotion of democratic governance and human rights.¹³⁹ In the first plan of action (2008-2010) implementing this partnership¹⁴⁰, the parties notably foresee to "[e]nhance cooperation in the context of international initiatives against the illicit trade in natural resources, such as the Kimberley Process and the Forest law Enforcement Governance and Trade (FLEGT)", and to "[p]romote transparency in the management of natural resources and conduct a dialogue on relevant international initiatives such as the Extractive Industry Transparency Initiative."¹⁴¹ The partnership is however in the very early stages of its implementation and does not seem to address the issue of business and human rights in a specific way¹⁴², yet focusing a lot on the role of civil society for the promotion of human rights.¹⁴³

¹³¹ Cotonou Agreement, art. 96. The procedure of article 96 provides for many rounds of consultations before suspension can occur. To date, several consultations on the basis of article 96 have been conducted, most of them resulting in the taking of "appropriate measures", and some involving the suspension of commitments made by the EU pursuant to the Cotonou Agreement.

¹³² L. BARTELS, *op. cit.*, p. 12.

¹³³ See A. GATTO, "Corporate Social Responsibility in the External Relations of the EU", *Yearbook of European Law*, Vol. 24, 2005, pp. 450-451.

¹³⁴ Cotonou Agreement, art 74 ff.

¹³⁵ See H. MANN, "International Investment Agreements, Business and Human Rights: Key Issues and Opportunities", International Institute for Sustainable Development, February 2008, available at http://www.iisd.org/pdf/2008/iiab_business_human_rights.pdf.

¹³⁶ L. BARTELS, *op. cit.*, p. 4.

¹³⁷ "The objective of the proposed EU regional strategies is to highlight how the challenges facing each of the regions can be transformed into opportunities by focusing on the right "policy-mix", in parallel with full optimisation of the opportunities of the Cotonou Agreement. These objectives are to be achieved through a new enhanced partnership composed of a set of interrelated facets: shaping political partnership and help the region address its economic, social and environmental vulnerabilities." See http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.5.4.pdf, p. 5.

¹³⁸ See "The Africa-EU Strategic Partnership – A Joint Africa-EU Strategy", available at http://ec.europa.eu/development/icenter/repository/EAS2007_joint_strategy_en.pdf#zoom=100.

¹³⁹ *Id.*, pp. 7-8.

¹⁴⁰ Available at

http://ec.europa.eu/development/icenter/repository/EAS2007_action_plan_2008_2010_en.pdf.

¹⁴¹ *Id.*, p. 11.

¹⁴² See Africa-EU Ministerial Troika, "Joint Progress Report on the implementation of the Africa-EU Joint Strategy and its first Action Plan (2008-2010)", Addis Ababa, 20-21 November 2008, available at http://www.africa-union.org/root/au/Conferences/2008/november/au_eu/final%20documents/2008%2011%2021%20Joint%20Progress%20Report%20Final%20clean.doc.

53. The EU also has a specific partnership strategy directed at its neighbours: the European Neighbourhood Policy which aims at building, between the EU and its neighbours, a “privileged relationship”, building “on mutual commitment to common values principally within fields of the rule of law, good governance, the respect for human rights, including minority rights, the promotion of good neighbourly relations, and the principles of market economy and sustainable development.”¹⁴⁴ Accordingly, it contains many elements of dialogue and cooperation in the field of human rights and labour standards.¹⁴⁵

1.2. Trade Incentives

54. Complementing the Generalised System of Preferences (GSP) for market access granted by the Community to developing countries, a “special” duty-free market access regime is extended on a very wide range of tariff lines to “vulnerable” developing countries¹⁴⁶ which have ratified and are effectively implementing a number of international conventions pertaining to core human and labour rights, and to the environment and governance principles (GSP+).
55. So far, sixteen countries are benefiting from that scheme.¹⁴⁷ In order to benefit from that preferential scheme, interested countries must submit a request to that effect, which will undergo a phase of evaluation regarding conditions pertaining to human rights.¹⁴⁸ In case of “serious and systematic violations” of the human rights and core labour standards conventions on which the GSP regulation is based, the preferences can be temporarily withdrawn in respect of all or certain products,¹⁴⁹ and notably, with respect to GSP+, if the national legislation no longer incorporates such conventions, or if such legislation is not effectively implemented.¹⁵⁰ In implementing those schemes, the EU sees opportunities for the promotion of CSR.¹⁵¹
56. A later section will elaborate on how such policy is actually implemented (see *infra*, Chapter III, Section 1.).

1.3. The Decent Work Agenda

57. The “Decent Work Agenda” was inaugurated by the International Labour Organisation (ILO) in 1999 with the objective of “securing decent work for women and men everywhere as a primary goal for the ILO in this period of global transition”.¹⁵² Even though the Commission only has observer status at the ILO, it generally subscribed to the above agenda and concluded a

¹⁴³ See X., “The Joint Africa-EU Partnership on Democratic Governance and Human Rights”, Proceedings of a Conference organised by the European office of the Konrad-Adenauer-Stiftung and the Brussels office of the Hans-Seidel-Stiftung, Brussels, 28-29 October 2008, available at http://www.kas.de/wf/doc/kas_15516-544-2-30.pdf.

¹⁴⁴ COMMISSION OF THE EUROPEAN COMMUNITIES, “The European Neighbourhood Policy – Strategy Paper”, 12 May 2004, EU Doc. No. COM(2004) 373 final, p. 3

¹⁴⁵ See S. GSTÖHL, “EU Social Policy in the Neighbourhood: A Coherent Policy Export?”, *Journal of European Social Policy*, Vol. 19, 2009, p. 107.

¹⁴⁶ Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007, *OJ L 211*, 6 August 2008, pp. 1–39, article 9(3). Hereinafter the “GSP Regulation”.

¹⁴⁷ For the period 2009-2011, the beneficiary countries will be Armenia, Azerbaijan, Bolivia, Colombia, Costa Rica, Ecuador, El Salvador, Georgia, Guatemala, Honduras, Mongolia, Nicaragua, Paraguay, Peru, Sri-Lanka and Venezuela.

¹⁴⁸ GSP Regulation, art 10 1.

¹⁴⁹ *Ibid.*, art. 16 1.

¹⁵⁰ *Ibid.*, art 16 2.

¹⁵¹ COMMISSION OF THE EUROPEAN COMMUNITIES, “Corporate Social Responsibility: A business contribution to Sustainable Development”, 2 July 2002, EU Doc. No. COM(2002) 347 final, p. 22.

¹⁵² INTERNATIONAL LABOUR ORGANISATION, “Report of the Secretary-General: Decent Work”, 87th Session, 1-17 June 1999, Geneva, available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm>.

strategic partnership with the ILO¹⁵³, as it considers “collaboration with the ILO as the privileged forum of discussion on labour rights, and adherence to its legal instruments [...] an integral part of the EU strategy to promote CSR at international level.”¹⁵⁴ The partnership underlines the shared interests and the potential synergies between both organisations in the pursuance of the decent work initiative, and notably in the promotion of core labour standards.¹⁵⁵ As can be seen from the several mentions made of the decent work agenda in the above instruments, it has become a running thread in many of the EU’s external relations policies, notably in relation to development. This is a result of the commitment of the EU to develop its external policies more effectively with a view to promoting decent work. This is notably to be done through EU development policies, and through CSR¹⁵⁶, which is identified as an important area of potential cooperation between the EU and the ILO.¹⁵⁷

58. A later section will evaluate how this policy is being implemented (see *infra*, section Chapter III, Section 2.).

1. Policies Directed at Corporations: the Corporate Social Responsibility Strategy

59. The business and human rights question is of course a very important component of the concept of CSR, and therefore, the EU’s CSR policy, as addressed to corporations, and more in particular corporations operating abroad, would be expected to contribute to the promotion of good corporate conduct with respect to human rights.
60. The EU has worked at developing its CSR policy for a decade already. The European Parliament had advocated in 1999 a rather legal approach to CSR¹⁵⁸, but this road was ultimately not taken, as the EU’s “official” CSR policy, enshrined in many documents of reference, considers CSR as a voluntary tool for promoting ethical conduct by corporations, notably in the field of human rights.¹⁵⁹ What is more, many underlined the overreliance of the EU on the Business Case argument to promote CSR¹⁶⁰, which certain authors have argued was flawed.¹⁶¹ In its latest Communication on CSR, published in 2006, the Commission indeed intends to make the EU a “pole of excellence” on CSR, and to make CSR part of the measures implementing the Lisbon Strategy, focused on “Growth and Jobs”.¹⁶² The voluntary character of CSR is clearly restated, as enterprises are described as the “primary actors” of CSR. The Commission’s CSR policy with regard to corporations is now mainly one of facilitation, as it focuses on raising awareness of

¹⁵³ EUROPEAN COMMISSION & INTERNATIONAL LABOUR ORGANISATION, “Corrigendum to the Exchange of Letters between the Commission of the European Communities and the International Labour Organisation”, 14 May 2001, *OJ C 165*, 8 June 2001, p. 23.

¹⁵⁴ A. GATTO, *op. cit.*, p. 442.

¹⁵⁵ J. WOUTERS & N. HACHEZ, “The EU’s International Corporate Social Responsibility Strategy: A Business-Driven, Voluntary and Process-Oriented Policy”, *Journal of European Social Policy*, Vol. 19, 2009, p. 112.

¹⁵⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, “Promoting Decent Work for All – The EU Contribution to the Implementation of the Decent Work Agenda in the World”, 24 May 2006, EU Doc. No. COM(2006) 249 final.

¹⁵⁷ EUROPEAN UNION & INTERNATIONAL LABOUR ORGANISATION, “Joint Conclusions of the 5th High-Level Meeting between the European Commission and the International Labour Office”, 13 October 2006, available at http://ec.europa.eu/employment_social/international_cooperation/docs/fora_documents/ilo_conclusions_%202006en.doc.”

¹⁵⁸ EUROPEAN PARLIAMENT, “Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct”, A4-0508/98, 15 January 1999, *OJ C 104*, 14 April 1999, p. 180.

¹⁵⁹ See notably COMMISSION OF THE EUROPEAN COMMUNITIES, “Green Paper – Promoting a European Framework for Corporate Social Responsibility”, 18 July 2001, EU Doc. No. COM(2001) 366 final; and “Corporate Social Responsibility: A Business Contribution to Sustainable Development”, 2 July 2002, EU Doc. No. COM(2002) 347 final.

¹⁶⁰ S. MACLEOD, “Reconciling Regulatory Approaches to Corporate Social Responsibility: The European Union, OECD and United Nations Compared”, *European Public Law*, Vol. 13, 2005, p. 681.

¹⁶¹ Olivier De Schutter argues that the business case depends on particular market conditions which are not present in many EU Member States. See O. DE SCHUTTER, “Corporate Social Responsibility European Style”, *European Law Journal*, Vol. 14, 2008, pp. 218-219.

¹⁶² COMMISSION OF THE EUROPEAN COMMUNITIES, “Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility”, 22 March 2006, EU Doc. No. COM(2006) 136 final.

relevant constituencies, providing information to consumers, educating business leaders, and promoting research and cooperation with Member States. It also launched a “European Alliance” for CSR, supposed to constitute a meeting point for interested enterprises and a learning platform concerning CSR-related initiatives. Since it is a non-legally binding instrument, and since there is no record of participating enterprises, the Alliance was widely denounced by civil society as being a mere PR tool.¹⁶³

61. The main features of the EU’s CSR policy as they appeared over time are therefore its fundamentally business-driven, voluntary and process-oriented character.¹⁶⁴ The EU strategy is not centred on imposing hard obligations on enterprises, but rather on building processes for exchanging best practices, for mutual learning and raising awareness.¹⁶⁵ Since the very beginning of its dealing with CSR, the EU has however resolved to “mainstream” CSR in all its policies, and notably in its external relations¹⁶⁶, which is true to an uneven extent, as corporate social responsibility is not always given a real role in the various EU external relations policies.¹⁶⁷

2. Evaluation of the EU Strategy for the Promotion of the Business and Human Rights Agenda in Relation to the Political Objectives set by the European Parliament

62. Contrary to the Commission, which since 2001 has consistently advocated a business-driven, voluntary and process-oriented approach to CSR¹⁶⁸, the European Parliament has not given up on its views of a CSR policy which would be binding to a certain extent. Already in 1999, it had proposed to adopt a binding code of conduct for corporations.¹⁶⁹ Since then, it has always been critical of the Commission’s *parti pris* for voluntary CSR, accusing it of “opting out” of the debate on CSR and of having handed its policy to business.¹⁷⁰ It argues that so far, the Commission has only been putting “processes” in place for CSR, like the Multistakeholder Forum or the CSR Alliance, and that those processes have thus far produced little more than hot air, as they “succeeded in fostering an EU-wide debate on CSR, but largely failed to address what the EU could itself do to ‘add value’ to the debate, or to take concrete actions to promote responsible business.”¹⁷¹

¹⁶³ THE EUROPEAN COALITION FOR CORPORATE JUSTICE, “Corporate Social Responsibility at EU Level”, Advocacy Briefing, November 2006, available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/eccadvocacybriefing112006_/eccadvocacybriefing112006_en.pdf, p. 3, notably states that “[t]he credibility of CSR initiatives is highly dependent on a number of basic criteria, such as the level of the standard and commitments, the involvement of stakeholders, transparency requirements, and the quality of the monitoring and independent verification. The European Alliance fails on all these points. However, it is allowing companies to use their participation as a public relations tool.”

¹⁶⁴ See COMMISSION OF THE EUROPEAN COMMUNITIES, “Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility”, 22 March 2006, EU Doc. No. COM(2006) 136 final, p. 2: “Because CSR is fundamentally about voluntary business behaviour, an approach involving additional obligations and administrative requirements for business risks being counter-productive and would be contrary to the principles of better regulation.”

¹⁶⁵ O. DE SCHUTTER, *op. cit.*, pp. 206 ff.

¹⁶⁶ COMMISSION OF THE EUROPEAN COMMUNITIES, “Corporate Social Responsibility – A business contribution to sustainable development”, 2 July 2002, EU Doc. No. COM (2002)347 final, pp. 18 ff.

¹⁶⁷ See O. MARTIN-ORTEGA & M. EROGLU, “The European corporate social responsibility strategy – A pole of excellence?”, in J. ORBIE & L. TORTELL (eds.), *The European Union and the Social Dimension of Globalisation – How the EU influences the world*, London, Routledge, 2009, pp. 177-178.

¹⁶⁸ J. WOUTERS & N. HACHEZ, *op. cit.*

¹⁶⁹ EUROPEAN PARLIAMENT, “Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct”, *op. cit.*

¹⁷⁰ Howitt Report, Explanatory Statement, p. 19.

¹⁷¹ *Id.*, p. 17.

63. The European Parliament finds the Commission's "all voluntary" approach largely unwarranted.¹⁷² Even if it acknowledges that "companies should not be considered a substitute for public authorities when these fail to exercise control over compliance with social and environmental standards"¹⁷³, and recognises certain merits to emphasising the business case of CSR¹⁷⁴, it however stresses that "CSR policies should be promoted on their own merits and should represent neither a substitute for appropriate regulation in relevant fields, nor a covert approach to introducing such regulations."¹⁷⁵ The European Parliament therefore advocates a "mixed approach"¹⁷⁶ which would encourage corporations to take voluntary CSR initiatives, but which would also comprise binding rules allowing for holding corporations accountable in diverse ways.¹⁷⁷ In order to enhance market accountability through consumer preferences, the European Parliament for example invites the Commission to propose rules on the reporting of CSR performance, and to rationalise the erratic proliferation of CSR instruments, making the current CSR situation "impenetrable" for consumers.¹⁷⁸ On the harder side, the European Parliament "[c]alls on the Commission to implement a mechanism by which victims, including third-country nationals, can seek redress against European companies in the national courts of the Member States."¹⁷⁹ It also reiterates the possibility of appointing an EU Ombudsman for the business and human rights issue, which was reflected in the Special Representative's report¹⁸⁰, or the need to review the way OECD National Contact Points operate.¹⁸¹ In other words, the European Parliament thinks it is time to shift EU CSR policies from "processes" to "outcomes"¹⁸² and to not disconnect such policies from questions of corporate accountability. In the Parliament's view, the CSR debate should be more connected, if not fully integrated, to the Commission's corporate governance action.¹⁸³
64. Right now, one can say that, for what concerns the external promotion of responsible corporate human rights behaviour, the EU only relies on partner States to promote human rights in a binding way. What is more, in the development policies pertaining to human rights, the corporate dimension is rarely addressed beyond hortatory statements to work for the promotion of CSR in general, the ILO Conventions or the OECD guidelines. Very few aspects of EU development policy are thus geared toward the particular problematic of business and human rights, and therefore those policies rather tend to treat the human rights issue in a one-

¹⁷² Not everyone at the European Parliament seems convinced of this. For example, the Committee on Industry, Research and Energy is of the opinion that "the Commission must not undertake initiatives to establish yet another redundant regulatory framework that brings rules that do not exist in the Member States into play" and that "the involvement of companies in CSR should always be voluntary and should take into account the current state of development of the market in all of the Member States, as well as their business culture, compliance with the social partnership principle and political aspects" See Howitt Report, Opinion of the Committee on Industry, Research and Energy, p. 21.

¹⁷³ European Parliament resolution of 13 March 2007 on corporate social responsibility: a new partnership (2006/2133(INI)), EU Doc. No. P6_TA(2007)0062, point A. Hereinafter the "EP Resolution 2007".

¹⁷⁴ *Id.*, par. 19.

¹⁷⁵ *Ibid.*, par. 4.

¹⁷⁶ J. WOUTERS & L. CHANET, *op. cit.*, p. 281.

¹⁷⁷ A view with which many constituencies of civil society concur. See for example THE EUROPEAN COALITION FOR CORPORATE JUSTICE, *op. cit.*, p. 4: "The European Commission should recognize that voluntary CSR initiatives are only credible if effective legal standards are put in place to ensure European companies respect minimum internationally agreed social, human and environmental rights within their spheres of influence, wherever they operate."

¹⁷⁸ EP Resolution 2007, par. 27, 34, 35, 37-39; Howitt Report, Explanatory Note, p. 19.

¹⁷⁹ EP Resolution 2007, par. 32. An important impediment to such proposals notably concerns the rules on the extraterritorial jurisdiction of national courts, and the difficulties linked to the responsibilities of parent companies for acts of their foreign subsidiaries. In this connection, see the UK-focused report by J. ZERK, "Corporate Abuse in 2007: A Discussion Paper on what Changes in the Law Need to Happen", The Corporate Responsibility Coalition, November 2007, available at http://www.corporate-responsibility.org/module_images/corporateabuse_discussionpaper.pdf, pp. 16 ff.

¹⁸⁰ *Id.*, par. 36.

¹⁸¹ *Ibid.*, par. 65 and 47.

¹⁸² *Ibid.*, par. 7.

¹⁸³ *Ibid.*, par. 41.

dimensional way. The more specific business and human rights aspect is thus supposed to be tackled by the EU's CSR policy, any piece of which seems necessarily of a voluntary nature.

65. The Parliament seems to disagree with this approach, in which it sees an artificial divide between the issue of CSR and those of accountability and governance.¹⁸⁴ The European Parliament would therefore seem to favour an increased embeddedness of CSR in the EU's trade and development policies, this being understood as working directly with corporations in the trade and development framework, rather than relying only on the mediate intervention of partner States, the leverage of which on corporations is often quite reduced, for furthering – or, even better, enforcing – human rights in the business environment. This alleged shortcoming of the EU's external policy could be redressed, in the opinion of the European Parliament, if the debate on CSR was shifted toward the establishment of global CSR strategies. This is even presented as a potential solution to the sterile divide between voluntary and binding conceptions of CSR, as “[c]ompanies are much more comfortable with this approach, in order to allay fears that the EU action could put them at a disadvantage against international competitors. Trade unions are increasingly negotiating worldwide International Framework Agreements recognising the global markets in which EU companies operate. Activists recognise that the biggest examples of violations of environmental, labour or human rights take place down the global supply chain of ‘Northern’ companies in ‘Southern’ developing country markets, and that the ultimate end must be for a binding international convention on corporate accountability [...]”.¹⁸⁵ Trade and development policies directed at partner States and global CSR policies would therefore be mutually reinforcing in the promotion of human rights.¹⁸⁶
66. The European Parliament makes concrete suggestions with regard to this approach, most notably to include binding provisions in trade agreements calling for respect for internationally agreed standards such as the OECD Guidelines and the ILO Tripartite Declaration and the Rio Principles.¹⁸⁷ As noted above, trade and development instruments such as the Cotonou Agreement already include language on human rights, but not specifically on the business and human rights issue. Other than passing references to the instruments cited above are in this regard not made in the Cotonou Agreement. The GSP+ scheme is surely based on many very relevant international conventions, but it is only addressed to States and, arguably, does not encompass a specific business and human rights dimension. This is why the European Parliament “[a]sks the Commission to make sure that EU-based transnational companies with production facilities in third countries, in particular those participating in the GSP+ scheme, abide by core ILO standards, social and environmental covenants and international and international agreements to achieve a worldwide balance between economic growth and higher social and environmental standards.”¹⁸⁸ Additionally, the European Parliament requests that the Commission reserves regulatory powers to partner States with regard to issues of

¹⁸⁴ Howitt Report, Explanatory Note, p. 19.

¹⁸⁵ *Id.*, pp 19-20. See also, from the States' side, REPRESENTATIVE OF PAKISTAN TO THE UN HUMAN RIGHTS COUNCIL, “Statement by Pakistan on behalf of the OIC on Report by Mr. John Ruggie on the issue of human rights and transnational corporations and business enterprises at the 8th session of the Human Rights Council”, Statement delivered at the 5 June 2008 meeting of the UN Human Rights Council, on file with authors: “In the absence of clearly defined mandatory international human-rights approach to manage and regulate the businesses, States often have to make a difficult choice between providing an attractive investment environment and effectively regulating business activity. [...] Formulating guidelines regarding basic responsibilities of states and companies is a challenge. We, however, feel that in the absence of internationally agreed and mandatory minimum corporate responsibility standards, it would be difficult to address the issue from the human-rights perspective in totality. Voluntary standards by some of the business enterprises are a welcome step. The real challenge, however, will be to establish a standard international mechanism to address the issue.”

¹⁸⁶ The European Parliament “believes that EU assistance to the governments of third countries in implementing social and environmental regulation consistent with international conventions, together with effective inspection regimes, are a necessary complement to advancing the CSR of European business worldwide.” EP Resolution 2007, par. 3.

¹⁸⁷ *Id.*, par. 47.

¹⁸⁸ *Ibid.*, par. 49.

human rights notably, in its trade policies,¹⁸⁹ as well as “to reject lobbying including ‘host-country agreements’ drawn up by companies to evade the regulatory requirements in such countries.”¹⁹⁰ Again these are also points which find reflection in the Special Representative’s report.

¹⁸⁹ *Ibid.*, par. 47.

¹⁹⁰ *Ibid.*, par. 64.

Chapter III – EVALUATION OF SPECIFIC EU POLICIES WITH REGARD TO THE BUSINESS AND HUMAN RIGHTS ISSUE

1. GSP and GSP+

67. As noted above, benefiting from GSP+ notably requires ratification and effective implementation of sixteen “Core human and labour rights UN/ILO Conventions”. Such commitments are kept under review by the Commission.¹⁹¹ In case of failure, participation of the defaulting country in the GSP+ can be temporarily withdrawn. So far, two countries have suffered such sanctions, Myanmar and Belarus, and two others are currently undergoing investigation, Sri Lanka and El Salvador. GSP+ is often presented as the most ambitious EU policy in favour of human rights. However, some of its aspects are the subject of some concern.
68. First of all, specifically regarding the issue of business and human rights, it is quite unclear to what extent GSP+ is likely to make a real difference. GSP+ is an instrument directed to States and only requires from them that they ratify and effectively implement labour rights conventions. The GSP+ mechanism is not meant to directly intervene against enterprises in case of human rights violations. In such cases, any action taken by EU institutions would be against the recipient State and could result in a withdrawal of tariff preferences. The question of the involvement of private corporations in human rights violations was to some extent present in the investigations conducted against Myanmar and Belarus, but the ILO investigation reports fail to reach clear conclusions in that regard.¹⁹² Knowing that the leverage of developing countries is quite often reduced in the face of certain powerful enterprises, especially multinationals, the GSP+ mechanism may appear to be out of focus with regard to the business and human rights issue. Some thought could thus usefully be given to the possibility of exercising direct pressure on enterprises through GSP+ mechanisms.
69. A word should here be added about the customary international legal principle of non-intervention in a State’s internal affairs, which prevents a State, or in this context, the EU, to intervene in matters located within a third State’s domestic jurisdiction.¹⁹³ This principle, the scope and interpretation of which is always evolving, could in the eyes of some host States imply that the EU should refrain from actively pursuing cases of corporate human rights abuses through the extraterritorial exercise of prescriptive or enforcement jurisdiction. However this may be, a cooperative framework between the EU and GSP beneficiary countries which facilitates the investigation and follow-up of contentious cases should preferably be developed, and provisions in this respect could be added to the GSP Regulation.
70. The process according to which GSP+ advantages are granted or withdrawn has also come under criticism, notably for its lack of transparency and lack of access for the victims of human rights violations. The standards used by the relevant EU organs to make their decisions are rather vague, and withdrawals are described as exceptional measures that should apply “only in

¹⁹¹ GSP Regulation, art 9 (4).

¹⁹² See INTERNATIONAL LABOUR ORGANISATION, “Forced Labour in Myanmar (Burma) – Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29)”, Geneva, 2 July 1998, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm#Part%20I>, par. 47, 53-54, 75-76, 118; and INTERNATIONAL LABOUR ORGANISATION, “Trade Union Rights in Belarus – Report of the Commission of Inquiry appointed under Article 26 of the Constitution of the International Labour Organisation to examine the observance by the Government of the Republic of Belarus of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98)”, Geneva, July 2004, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb291/pdf/ci-belarus.pdf>, par. 283-290.

¹⁹³ See UNITED NATIONS GENERAL ASSEMBLY, “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations”, 24 October 1970, Resolution No. 2625 (XXV).

case of clearly unacceptable practices.¹⁹⁴ What happens thus in case of practices that fall short of such standard of egregiousness, but still constitute violations of human rights?

71. Moreover, it seems that the Commission, who has the competence to instigate investigations in consultation with the Generalised Preferences Committee¹⁹⁵, and the Council, to which the competence is given to make admissions and withdrawal decisions¹⁹⁶, rely heavily on the investigation resources of the ILO. This is argued to be “in line with the EU support for multilateralism.”¹⁹⁷ The respective inputs of EU bodies and of external bodies in such investigations are unclear from the texts and the practice.¹⁹⁸ The nature and the modalities of the investigations to be led by the Commission and the Committee are indeed not defined anywhere. The GSP regulation provides that, at the end of an investigation, the Commission is to report to the Committee, but not to the Parliament.¹⁹⁹ Even if the conduct of the investigations imply intense discussions with the concerned country²⁰⁰, publicity thereof is minimal. Details regarding the investigation are in any event very scarce in the withdrawal decisions of the Council.²⁰¹ In this respect, the decisions regarding the pending investigations against Sri Lanka and El Salvador will hopefully provide useful indicators of possible progress.
72. The role of the different institutional and civil society actors in the triggering and conduct of a possible investigation for violation of the conditions set to the GSP and GSP+ status is also vaguely defined in the regulation.²⁰² Perhaps most worrisome in this respect is the lack of a clear avenue for the victims of human rights violations to report them to the relevant EU instances, with a view to GSP investigations. Access to remedy, attention to victims and, ultimately, accountability of human rights violators, were indeed important points of the report of the Special Representative, and of the debate that surrounded it. The regulation provides that the Commission may start an investigation when it or a Member State receives information giving sufficient grounds to that effect.²⁰³ Admittedly, both investigations against Myanmar and Belarus were based on information obtained from international trade union associations, while that against Sri Lanka was partly based on information conveyed by NGOs.²⁰⁴

¹⁹⁴ See EUROPEAN COMMISSION, “User’s Guide to the European Union’s Scheme of Generalised Tariff Preferences”, February 2003, available at <http://ec.europa.eu/trade/issues/global/gsp/gspguide.htm>.

¹⁹⁵ The Generalised Preferences Committee assists the Commission in the management of the GSP scheme. It is composed of representatives of Member States and chaired by the Commission. See GSP Regulation, art. 27 (1).

¹⁹⁶ *Id.*, art. 20 (4).

¹⁹⁷ COMMISSION OF THE EUROPEAN COMMUNITIES, “Commission Staff Working Document – Report on the EU Contribution to the Promotion of the Decent Work Agenda”, 2 July 2008, EU Doc. No. COM(2008) 412 final, p. 28. Hereinafter the “Decent Work Report”.

¹⁹⁸ Article 18 (3) of the GSP Regulation states as follows: “The Commission shall seek all information it considers necessary, including the available assessments, comments, decisions, recommendations and conclusions of the relevant supervisory bodies of the UN, the ILO and other competent international organisations. These shall serve as the point of departure for the investigation into whether temporary withdrawal is justified [...]”

¹⁹⁹ The European Parliament had introduced many amendments so as to be more involved in the supervision of the GSP Scheme and of the related investigations. See EUROPEAN PARLIAMENT, “Report on the proposal for a Council regulation applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, No 1933/2006 and Commission Regulations (EC) No 964/2007 and No 1100/2006 (COM(2007)0857 – C6-0051/2008 – 2007/0289(CNS))

²⁰⁰ GSP Regulation, art. 16-20.

²⁰¹ See Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalised tariff preferences from the Union of Myanmar, *OJ L 85*, 27 March 1997, p. 8, and Council Regulation (EC) No 1933/2006 of 21 December 2006 temporarily withdrawing access to the generalised tariff preferences from the Republic of Belarus, *OJ L 405*, 30 December 2006, p. 35.

²⁰² L. BARTELS, *op. cit.*, pp. 8-10. The European Parliament has attempted to make itself explicitly associated to the process, through many amendments to the regulation, but in vain. See *supra*, note 200.

²⁰³ GSP Regulation, art. 17 (1).

²⁰⁴ See EUROPEAN COMMISSION, “Notice pursuant to Article 19(1) of Council Regulation (EC) No 980/2005 of the initiation of an investigation with respect to the effective implementation of certain human rights conventions in Sri Lanka”, *OJ C 265*, 18 October 2008, p. 1. The decision concerning El Salvador was as a result of the Salvadorian Supreme Court to declare certain provisions of ILO convention No. 87 unconstitutional.

73. This process is however only suited for very large scale patterns of human rights violations or potential violations, but probably misses many situations in which human rights violations are less evident or more punctual. In such cases, marginalised victims of human rights violations have virtually no possibility to appeal to the EU for inquiry and redress. The ILO has attempted to design such direct complaint mechanisms, notably in relation to issues of forced labour in Myanmar²⁰⁵, but apparently without much success.²⁰⁶ It would therefore be useful to reflect upon mechanisms guaranteeing a more direct involvement of victims of human rights in the implementation of the GSP scheme.

2. The Decent Work Agenda

74. The decent work agenda was inaugurated a decade ago by the ILO²⁰⁷, as a way to strengthen what has come to be called the social dimension of globalisation.²⁰⁸ It aims at ensuring that all workers exercise their activity in decent conditions, and rests on four pillars, namely fundamental principles and rights at work, the promotion of employment for women and men, the enhancement of social protection and the promotion of social dialogue. Since 2001, the EU has explicitly endorsed the decent work agenda, notably through a “strategic partnership” with the ILO in order to advance decent work across the planet on the basis of the priorities and reference documents established by the ILO.²⁰⁹ This commitment was reinforced as a result of the links it shares with the overarching “Lisbon Strategy for Growth and Jobs.”²¹⁰ In a 2006 Communication dedicated to decent work, the Commission has outlined its broad strategy in the field, and has resolved to use an “integrated approach” to the encompassing concept of decent work²¹¹ and to “mainstream” it in a number of policies, most importantly external relations policies.²¹² The approach taken by the EU in the promotion of decent work can roughly be described as three-pronged: the EU first attempts to develop the concept through analytical and quasi-academic reflection; it then puts a special emphasis on the social dialogue component of the agenda; and thirdly, it seeks to particularly use its development cooperation instruments in order to advance decent work.²¹³
75. Admittedly, the EU has given a lot of thought to the concept, and decent work components, notably the protection of core labour standards, are present in very many policy documents and instruments, such as the European Consensus for Development, the Cotonou Agreement, the joint Africa-EU action plan, the Communication on Policy Coherence for Development, the GSP and GSP+, etc. Therefore, the Union considers itself “mobilised” in relation to the decent work agenda: “The objective of decent work for all is now part of mainstream international development goals and frameworks and poverty reduction strategies. Promoting decent work is part of EU development and external assistance cooperation, or a number of EU partnership

²⁰⁵ INTERNATIONAL LABOUR OFFICE, Governing Body, “Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29)”, Geneva, March 2007, ILO Doc. No. GB.298/5/1.

²⁰⁶ KAREN HUMAN RIGHTS GROUP, “The limits of the new ILO mechanism and potential misrepresentation of forced labour in Burma”, 10 April 2007, KHRG #2007-C1, available at <http://www.khrg.org/khrg2007/khrg07c1.pdf>.

²⁰⁷ INTERNATIONAL LABOUR ORGANISATION, “Report of the Secretary-General: Decent Work”, *op. cit.*

²⁰⁸ INTERNATIONAL LABOUR ORGANISATION, World Commission on the Social Dimension of Globalisation, “A Fair Globalisation: Creating Opportunities for All”, February 2004, available at <http://www.ilo.org/public/english/wcsdg/docs/report.pdf>.

²⁰⁹ See *supra*, note 154.

²¹⁰ R. DELARUE, “ILO-EU cooperation on employment and social affairs”, in J. WOUTERS, F. HOFFMEISTER & T. RUYTS (eds.), *The United Nations and the European Union: An Ever Stronger Partnership*, The Hague, T.M.C. Asser Press, 2006, p. 111.

²¹¹ COUNCIL OF THE EUROPEAN UNION, “Promoting Employment through EU Development Cooperation – Conclusions of the Council and of the Representatives of the Governments of the Member States Meeting within the Council”, 21 June 2007, EU Doc. No. 11068/07, p. 2.

²¹² COMMISSION OF THE EUROPEAN COMMUNITIES, “Promoting Decent Work for All – The EU Contribution to the Implementation of the Decent Work Agenda in the World”, *op. cit.*

²¹³ J. ORBIE & O. BABARINDE, “The Social Dimension of Globalisation and EU Development Policy: Promoting Core Labour Standards and Corporate Social Responsibility”, *European Integration*, Vol. 30:3, 2008, pp. 466-468.

agreements and cooperation with third countries and regions and of ongoing discussions on EU bilateral trade agreements with third countries. Decent work is an element of the internal and external dimension of the EU Lisbon strategy for growth and jobs.”²¹⁴

76. However, the EU seems to have resolved to design its external relations efforts in the field of decent work in a mostly non-binding fashion²¹⁵, focusing mainly on improving the conditions of the social dialogue in problematic areas, notably through its strategic partnership with the ILO, which is truly located at the heart of the EU decent work policy. Arguably, decent work and core labour standards could be considered as “essential elements” of the ACP-EU partnership, and could possibly lead to sanctions under article 96 of the Cotonou Agreement, though this has still yet to occur.²¹⁶ All in all, the only “semi-hard” instrument at the disposal of the EU to foster the decent work agenda through its external relations is the GSP policy (see the discussion thereof supra).
77. Specifically in relation to the business and human rights issue, which should constitute the essence of the decent work agenda, it is quite striking to see how little embedded direct intervention with enterprises is in the EU's decent work policies, apart from the attempts at strengthening the dialogue with and among “social partners”. In this regard, the EU's CSR policy is supposed to form the corporate link in the EU's decent work strategy. However, concrete achievements on that account are scarce, and the way the EU's CSR policy is to be used in relation to the decent work agenda is hardly substantiated in the framework of the EU's actions for fostering decent work.²¹⁷ CSR is also supposed to be part of the cooperation between the EU and the ILO. One of the achievements of this cooperation is the issuing of recommendations on the promotion of sustainable enterprises.²¹⁸ In any event, CSR is understood in the EU-ILO relationship as a “voluntary undertaking on the part of businesses and while it can supplement, it cannot substitute for the role of the law and of public administration.”²¹⁹
78. From a different point of view, one could wonder whether core labour standards, which are the *raison d'être* of the decent work agenda, are really considered as being on the same level as other human rights. This is the causes concern to many²²⁰, as labour rights tend to receive a treatment different from other human rights (see the use of the term labour standards), as they are often viewed as coming in the way of the flexibility and competitiveness required for

²¹⁴ Decent Work Report, p. 33.

²¹⁵ J. ORBIE & L. TORTELL, “Exporting the European social model: broadening ambitions, increasing coherence?”, *Journal of European Social Policy*, Vol. 19, 2009, p. 99.

²¹⁶ J. ORBIE & O. BABARINDE, *op. cit.*, pp. 466-467. The authors argue that such stance had to be taken for reasons of political expediency, but doubt of its real effectiveness: “[the EU's] normative and development orientated role in the ILO is less contested by the EU Member States than legal activities related to labour standard conventions. However, a stronger role for the EU in the ILO does not necessarily increase Europe's impact in the field, especially where the ILO's influence is limited.”

²¹⁷ The section on the role of CSR in the Communication on decent work merely reads as follows: “The Commission acknowledges the important role of CSR, which complements legislation, collective bargaining and control of working conditions. It takes the view that codes of conduct and other CSR instruments should be based on instruments adopted at international level (OECD, ILO).

The Commission will continue to promote CSR. It calls on businesses, the European Alliance for CSR and other stakeholders to take action to promote decent work for all.” COMMISSION OF THE EUROPEAN COMMUNITIES, “Promoting Decent Work for All – The EU Contribution to the Implementation of the Decent Work Agenda in the World”, *op. cit.*, p. 9

²¹⁸ INTERNATIONAL LABOUR CONFERENCE, “Report VI – The Promotion of Sustainable Enterprises”, 96th Session, 2007, available at <http://www.ilo.org/dyn/empent/docs/F1377429635/ILCSustainableEnterprises.pdf>.

²¹⁹ EUROPEAN UNION & INTERNATIONAL LABOUR ORGANISATION, “Joint Conclusions of the 5th High-Level Meeting between the European Commission and the International Labour Office”, Geneva, 13 October 2006, available at http://ec.europa.eu/employment_social/international_cooperation/docs/fora_documents/ilo_conclusions_%202006gen.doc, p. 6

²²⁰ In a report cited above, a group of human rights NGOs is concerned by the fact that, while the 2007 EU Annual Human Rights Report “states that the EU attaches ‘the same importance to economic, social and cultural rights as to civil and political rights’ [...] this position is not reflected in development policy documents. Instead, there is repeated inaccurate use of ‘human rights’ as a synonym for civil and political rights and a general failure to acknowledge the legally binding status of socio-economic rights.” INTERNATIONAL HUMAN RIGHTS NETWORK, *op. cit.*, p. 21.

successful business.²²¹ In this connection, the above-cited 2001 Communication of the Commission states that it “believes respect for social rights and labour standards leads to durable and equitable social and economic development. It pursues a positive approach by promoting social development through incentives and capacity-building measures, rather than sanctions.”²²²

79. If one should not deny that the promotion of labour rights through the EU's CSR policy is rather bland, one should equally emphasise the importance given to the promotion of labour rights in EU external relations instruments, notably those participating in the EU decent work strategy. Actually, some authors even consider that the EU is more active in this field in its external relations policies than in its internal regulations.²²³ To be sure, the issue of labour standards is specifically present in very many policy documents and instruments concerning external relations²²⁴, even though the intensity of the action is quite uneven, from mere promotion through dialogue and the partnership with the ILO, to (human and) labour rights conditionality and actual enforcement. However, the issue of labour rights seems to receive reduced attention from more general EU initiatives concerning human rights. The predecessor of the EIDHR, i.e. the European Initiative for Democracy and Human Rights, for example, only focused on civil and political rights.²²⁵ The 2006 EIDHR somewhat filled the gap by including “the promotion of core labour standards and corporate social responsibility” into its scope.²²⁶ The reference is however very concise, and does not elaborate on the means to do so, contrary to other elements included in the Instrument, civil and political rights in the first place. What is more, the business and human rights issue is virtually absent from the 2007-2010 Strategy Paper for the EIDHR.²²⁷ The Cotonou Agreement, while it cites the protection of “all human rights” as one of its essential elements liable to trigger the sanctions regime of article 96, nevertheless contains a special article related to labour standards, which emphasises an action based mainly on dialogue and exchange of information in that regard (article 50). From the 2008 EU Annual Report on Human rights, it seems to appear that this divide, criticised by some, is intended, the Union relying mainly on its decent work policies and its cooperation with the ILO in order to promote labour rights.²²⁸

²²¹ P. ALSTON, “Labour Rights as Human Rights: The Not So Happy State of the Art”, in P. ALSTON (ed.), *Labour Rights as Human Rights*, Oxford, Oxford University Press, 2005, p. 4.

²²² *Id.*, p. 8.

²²³ T. NOVITZ, “The European Union and International Labour Standards: The Dynamics of Dialogue between the EU and the ILO”, in *Id.*, p. 216. The author even speaks of a “double standard”.

²²⁴ The European Union Guidelines on Human Rights Dialogues make the exception, as they do not specifically list labour standards as issues covered by the dialogues. See COUNCIL OF THE EUROPEAN UNION, “European Union Guidelines on Human Rights Dialogues”, *op. cit.*

²²⁵ See COMMISSION OF THE EUROPEAN COMMUNITIES, “Commission Staff Working Document – European Initiative for Democracy and Human Rights Programming Document 2002-2004”, 20 December 2001, available at: http://ec.europa.eu/external_relations/human_rights/doc/eidhr02_04.pdf

²²⁶ EIDHR Regulation, article 2 (b) viii).

²²⁷ EUROPEAN COMMISSION, “European Instrument for Democracy and Human Rights (EIDHR) – Strategy Paper 2007-2010”, *op. cit.* Only passing references are made to “the right to join a trade union” (p. 7), “promoting decent working conditions” (p. 8) or “all forms of modern slavery” (p. 10).

²²⁸ COUNCIL OF THE EUROPEAN UNION, “EU Annual Report on Human Rights 2008”, 27 November 2008, EU Doc. No. 14146/2/08, p. 95.

Chapter IV – RECOMMENDATIONS

80. Based on the review of the debate regarding business and human rights at the international level, and on EU external policies in this field, this chapter makes concrete recommendations to EU institutions and, by extension, to EU Member States. It is divided into recommendations which pertain to the contributions the EU could make to advance the business and human rights agenda at international level, and those that it could make through its internal policy and regulatory framework.

1. The EU and the Business and Human Rights Debate at International Level

1.1. Strive for a Clear International Legal Framework on the Responsibilities and Obligations of Business with Regard to Human Rights

81. Even though it was the position of the EU at the 2008 session of the Human Rights Council that no legal turn at international level was in order, this is actually what is most necessary for the business and human rights movement. The definition of clear legal obligations for business would put an end to speculation and to ambiguous positions by a number of actors in the debate. Most criticisms of the Special Representative's report concerned this question. The development of a clear framework of corporate human rights obligations could also be beneficial to western enterprises as this would level the global playing field. In this framework, the EU is encouraged to:

- Keep supporting the Special Representative's mandate, notably by means of funding, while encouraging him to pay more attention to the development of binding international rules for corporations, notably in respect of human rights issues all along the supply chain;
- Stimulate the development of a legal framework for foreign investment protection which, while protecting investors, provides for clear human rights priority, for host State regulatory space in human rights matters, and for accountability of investors in case of human rights violations;
- Seek to clarify the question of the possibility to prosecute multinational corporations before international courts and tribunals for violations of humanitarian law;
- Seek to clarify the status of labour standards in relation to other human rights, starting in its own policy documents.

1.2. Remain a Leader in International Fora on the Issue of Business and Human Rights

82. International organisations have continued to proliferate and the activities of more and more of them are now connected to the business and human rights issue. Those organisations are therefore ideal fora to discuss the question in relation with other points of policy. The positions of the Member States of such organisations however vary greatly, and, given its political and economic weight in most of those organisations (as a member or partner), the EU has a major role in becoming a leader in narrowing the gaps between differing visions of the business and human rights issue. Suggestions for the EU in this regard are thus to:

- Remain committed to the business and human rights issue in international fora, most notably the UN, the ILO, the WTO and the OECD, and constantly seek the formulation of clear and ambitious rules and policies on the business and human rights question;

- Initiate a debate at the OECD on the revision of the Guidelines, which would take stock of the evolution of best practices and would focus on the accountability of business with regard to it.

2. Gearing EU Policies toward Fostering Accountability for Corporate Human Rights Conduct

2.1. Reconsider the All-Voluntary Approach of the EU CSR Policy

83. While voluntary initiatives by business in the field of human rights are important, they should be complemented by a binding approach that focuses on the accountability of business for human rights violations. In this regard, it is recommended that the EU:
- Revise its CSR policy so as to identify clear (legal) obligations for corporations, and effective ways to hold them accountable in case of breach; most importantly, the CSR policy should focus on “outcomes” rather than “processes” allowing only for exchanges of views and mutual learning on best corporate practices;
 - Provide for mandatory reporting on human rights performance, including in a corporation’s operations abroad;
 - Regulate benchmarks on socially responsible practices so as to make the best enterprises in this regard stand out in comparison to other businesses; for example, the EU could define a legal framework for companies engaged in fair trade.

2.2. Rationalise and Benchmark Private Initiatives in the Field of CSR

84. Private initiatives for business are booming, but unfortunately in an uncoordinated manner. Such initiatives are very important as they allow for emulation between businesses, and potentially trigger positive market responses. Unfortunately, the current situation undermines such effects, notably as the proliferation of instruments blurs the consumer’s understanding of the real performance of enterprises. Therefore, the EU is encouraged to:
- Launch an effort for benchmarking private CSR initiatives in order to make them understandable and comparable for the consumer and the public in general, notably by establishing a single document of reference on the appropriate rules and practices that a socially responsible corporation should follow. This should start from the “due diligence” obligation outlined in the Special Representative’s report. The Multistakeholder Forum and the CSR Alliance are useful tools in this regard, but they should be monitored by the EU institutions so as to produce a meaningful and ambitious input;
 - Foster market responses to socially responsible conduct, by rewarding socially responsible investment, and by encouraging indexing based on best human rights and other socially responsible corporate practices.

2.3. Rebalance the EU External Policy with Regard to Human Rights between Dialogue and Accountability

85. The spirit of dialogue presiding over the EU’s external relations policies is very important in order to build confidence between the EU and its partners. However, respect for human rights should be a strong priority for external relations, and should only allow for limited compromise. Therefore, the EU is suggested to:
- Enhance the dialogue-based approach of the EU external relations by mechanisms of accountability for human rights violations; in this respect credible use should be made of

the conditionality mechanisms present in certain instruments, like GSP and the Cotonou Agreement;

- Thoroughly evaluate and refine conditionality mechanisms, as their effectiveness in relation to respect for human rights is increasingly put in doubt; regard should particularly be had for mechanisms allowing responses targeted directly at specific human rights violations, notably by enterprises.
- Focus the EU's capacity-building efforts in third countries on fostering awareness and knowledge of the business and human rights issue, and on developing judicial institutions capable of holding corporations accountable for human rights violations; formations for judges and financing and technical assistance for judicial institutions reform should be prioritised.

2.4. Embed the Business and Human Rights Issue in External Relations Instruments

86. The EU has comprehensively mainstreamed the issue of respect for human rights in its external relations policies. However, these tend to treat it in a rather general way, and focus almost exclusively on working with third States. Enterprises are becoming ever more important actors in international relations – especially multinationals – and should accordingly be given a place of choice in the EU's external relations policies. Therefore, the EU is advised to:

- Reinforce the focus on the business and human rights issue in its CFSP human rights policies, and notably in the Human Rights Dialogues;
- Establish contacts with enterprises on the issue of human rights in its external relations policies, while being mindful of the international legal principle of non-intervention in a third State's domestic affairs; the European Parliament could make use of its budgetary prerogatives to include a strong business and human rights dimension to the European Instrument for Democratisation and Human Rights;
- Make the mechanisms of conditionality for the GSP and the Cotonou Agreement more flexible so as to target enterprises directly, most notably when the domestic institutions of the third State where human rights violations occur are not in a position to do so.

2.5. Establish a Global Set of Remedies for Victims of Corporate Violations of Human Rights

87. As the Special Representative pointed out, remedies are one of the most fundamental aspects of a successful business and human rights policy. Given its outreach, expertise and resources, the EU should work toward establishing victim-oriented accountability and redress mechanisms at a global scale. It is therefore recommended that the EU:
- Studies the possibility of adopting rules permitting victims of corporate human rights violations to easily seek redress before the EU Member States' courts for human rights violations by EU-based corporations, and generally reflect on the issue of the access of victims to remedies for human rights violations committed abroad. Attention in this respect should be paid to the issue of the responsibility of EU parent companies for the human rights violations committed by their foreign subsidiaries;
 - Make the sanctions based on conditionality mechanisms present in EU external relations policies more readily accessible to direct victims of corporate human rights abuse;
 - Foster the development of non-judicial systems of (whether they are public, industry- or multistakeholder-based) grievance mechanisms for corporate human rights abuses, based on a list of requirements ensuring the credibility and fairness of such mechanisms, the Special Representative's report containing a useful starting point on this; in this regard, notably, a review of the overall functioning of the OECD Guidelines' system of National Contact Points should be conducted, and the proposal to appoint an ombudsman for corporate human rights abuse should be pursued.

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