



The EU as a Regional Actor: Human Rights

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Working Paper N° 11

February 2010





EU-GRASP

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Abstract

The EU enacts its security policy on different levels and through various frameworks and structures of cooperation. One of these levels is the regional dimension (i.e. within the Union) where the EU acts as a regional security actor. This paper puts forward an analysis of the regional dimension of human rights by assessing (i) the institutional dimension underpinning this issue, (ii) the EU's policy output in the field of human rights, and (iii) an evaluation of the Union's institutional and output dimension. This 'check-up' of EU policy through the assessment of its coherence, the current levels of accountability, and the legitimacy of EU action, enables a reflection on the merits of EU policy in the security field.

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The EU as a Regional Actor : Human Rights¹

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Introduction

Human rights constitute one of the core principles within the European Union and have played a central role in its foreign policy. Human rights policy is, more than any other external policy, horizontal and transversal, integrated into substantive external policies yet with a distinctiveness of its own. Many Common Foreign and Security Policy (CFSP) decisions are motivated or inspired by human rights concerns. Development cooperation must contribute to respect for human rights, and policies in this area have an important human rights component. Bilateral agreements with non-member countries, either development-oriented or directed towards general cooperation, partnership or association, are now all predicated on respect for human rights.

This paper provides first an overview of the role that human rights have played in the EU's recent history as well as a description of its institutional dimension. Second, an overview is given of the Union's policy output and legal instruments in the field of human rights at the EU level. Third, an evaluation is made of the Union's policy coherence, the checks and balances on its output, as well as its legitimacy in enforcing human rights.

The Institutional Dimension of Human Rights

The original Treaties did not expressly refer to human or fundamental rights. These were located in the European Convention on Human Rights (ECHR) and the framework of the Council of Europe. It was the European Court of Justice (ECJ) in the course of the late 1960s and during the 1970s which initially formulated and defined the system of respect for fundamental rights, based on the general principles of EC Law (see *infra*) (Eeckhout 2004: 465; Lampe 2005: 43).

¹ An earlier version of this paper was presented at an EU-GRASP workshop in July 2009 hosted by UNU-CRIS.

The European Economic Community (EEC) first came into real contact with human rights issues in its external policies in the context of the Lomé Conventions with African, Caribbean and Pacific (ACP) countries.² During the 1970s and 1980s there were significant human rights issues in some of these countries, and the EEC was legally committed under those conventions to continue aid, even in the face of grave violations. With the fall of the Berlin Wall and the end of the Cold War came the policy of reuniting the European continent and of expanding the EC, but also the conflict in Yugoslavia, where the EEC was again struggling to act to put an end to large-scale human rights violations (Eeckhout 2004: 467).

The 1987 Single European Act's (SEA) main objective was to achieve an internal market among the Member States characterised by the free movement of goods, services, people and capital by the end of 1992. The third preambular paragraph of the SEA provides that Member States "... are determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, the ECHR and the European Social Charter, notably freedom, equality and social justice".

In its policy-making and legislative activity the EU has become more oriented towards fundamental rights. In 1991 the Maastricht negotiations led to the formulation of (current) Article 177(2) TEC in the context of development cooperation, and set up the CFSP, the objectives of which included (and include): "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms" (current Article 11(1) TEU). This indicated that external human rights policy had a vocation to transcend development cooperation (Eeckhout 2004: 466 & 468; Lampe 2005: 54).

In 1991 the Commission adopted a communication³ which was followed by a Council resolution on human rights, democracy and development.⁴ This resolution highlighted the links between human rights and development, and outlined future policy (Eeckhout 2004: 468). The general protection of human rights in terms of civil and political rights came with the entry into force of the Maastricht

² The Lomé Conventions concerned a series of conventions on trade and aid between the European Community and developing ACP countries. The original Convention was signed in Lomé, Togo in February 1975. The Convention was renegotiated and renewed three times. The Lomé Convention was eventually replaced by the Cotonou Agreement, see Council Decision 2005/599/EC: Council Decision of 21 June 2005 concerning the signing, on behalf of the European Community, of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, on the one hand, and the European Community and its Member States, on the other, signed in Cotonou on 23 June 2000, OJ L 209 of 11 August 2005.

³ See European Commission, Commission Communication to the Council and Parliament Human Rights, Democracy and Development Cooperation Policy, COM(1991) 61 final, Brussels, 25 March 1991.

⁴ See Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, 28 November 1991, Bull. EC 11/1991, pp. 122-123.

Treaty and became justifiable later with the Amsterdam Treaty. In those days the emphasis was strongly on economic matters and Community competence was initially rather limited. The lack of human rights provisions was therefore not seen as a problem (Lampe 2005: 43).

The Maastricht Treaty recognised for the first time fundamental rights as an integral part of the Union.⁵ The Amsterdam Treaty reaffirmed that the Union is founded “on the principles of liberty, respect for human rights and fundamental freedoms, democracy and the rule of law”.⁶ The Amsterdam Treaty also inserted several provisions related to discrimination (Article 13 TEC, see *infra*).

The Copenhagen European Council of June 1993 established what came to be known as the *Copenhagen Criteria*. In relation to the associated countries of Central and Eastern Europe, the European Council agreed that if they so desired they would in time become members of the European Union. Accession would take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required (European Council 1993: 7A(iii)). The Presidency Conclusions state that “[m]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union” (European Council 1993: 7A(iii)).

As is explained in more detail *infra* the internal human rights policy of the EU initially developed mainly through the jurisprudence of the ECJ. As this became more fragmented over time, due to its case-by-case nature, a more systematic approach was required. In 1999 the Cologne European Council stated that “there appears a need, at the present stage of the Union’s development, to establish a Charter of Fundamental Rights in order to make their overriding importance and relevance more visible to the Union’s citizens” (European Council 1999: Annex IV). At the December 2000 meeting in Nice the Heads of Government of the European Union proclaimed the Charter of Fundamental Rights of the European Union (European Council 2000). In addition to civil and political rights, the Charter also contains a multitude of economic and social rights. The Charter

⁵ TEU. Current Art., 6(2) states that the Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

⁶ TEU. Current Art., 6(1).

foresees the protection of human rights at the EU level, in addition to the internationally protected human rights.⁷ The Charter is currently a political agreement, though it will have the same legal value as the Treaties when the Lisbon Treaty is ratified (see *infra*).

Division of Competences in the Field of Human Rights

Provisions under the TEC and TEU

External action by the Union in the field of human rights takes two forms. The first is the conclusion of international agreements that aim to legislate as regards human rights, in the sense of laying down rules and standards of human rights protection for all the contracting parties. EC competence for this category is precarious and disputed and has not been exercised, with the exception of the signing by the Community on 30 March 2007 of the United Nations Convention on the Rights of Persons with Disabilities on the basis of Article 13 TEC. The Community is still to ratify the Convention, yet it can be seen as a landmark Convention as it constituted the first time that the EC signed a human rights convention in its own right.⁸ Furthermore, the ECJ stated in its *Opinion 2/94* that there are no Treaty provisions which confer on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field (see *infra*).

The second concerns agreements which do not have human rights as their main object, but which are predicated on respect for human rights, or contain provisions on cooperation in this field. Within this category come the Community powers under Articles 300(1) and 310 TEC, concerning the conclusion of international agreements, and Articles 177(2) TEC and 181a(1) TEC (for both see *infra*). Whereas Article 300(1) TEC confers competence to conclude international agreements, for example, in the area of trade and development with third countries, Article 310 TEC gives power to the Community to conclude cooperation, partnership, and association agreements between the EC and third countries. In order to give development a more political content, human rights were linked to unilateral trade preferences and comprehensive programmes on technical (financial)

⁷ See, for example, the International Convention on Civil and Political Rights, the European Convention on Human Rights, the Convention against Torture or the Convention on Elimination of Discrimination against Women. All of these create obligations for States to protect the fundamental rights of their citizens.

⁸ See European Commission, 2007. *Proposal for a Council Decision on the signing, on behalf of the European Community, of the United Nations Convention on the Rights of Persons with Disabilities and its Optional Protocol*. COM, 77 final, 27 February 2007. The Convention entered into force as of 3 April 2008. For the signing of the Optional Protocol two proposals are needed. One for concluding the Convention, the other for acceding to the Optional Protocol. The Commission tabled these proposals in August 2008. See European Commission, 2008. *Proposal for a Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities*. COM, 530-1, 2008; and European Commission, 2008. *Proposal for a Council Decision concerning the conclusion, by the European Community, of the Optional Protocol to the United Nations Convention on the Rights of Persons with Disabilities*. COM, 530-2, 2008.

assistance for democracy and human rights building activities.⁹ There is considerable practice in this field based on express provisions in the EC Treaty, which was also confirmed by the ECJ in *Portugal v Council* (see *infra*).

Provisions within the TEC that refer to human rights in one way or another are: Article 39 TEC on the freedom of movement of workers; Article 43 TEC on the freedom of establishment of nationals of one Member State in the territory of another Member State; Article 49 TEC on the freedom to provide services within the Community; Articles 63(1) and 63(2) TEC on asylum and refugees; Article 141 TEC on the recognition of the principle of equal pay for equal work; Article 12 TEC on the general principle of prohibiting discrimination on the grounds of nationality; Article 13 TEC on action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation; Article 137(i) TEC on equality between men and women regarding labour market opportunities and treatment at work; Article 177(2) TEC (see *supra*) in the context of development cooperation, the objectives of which included (and include): “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms” (TEU: Article 11(1)); and Article 181a(1) TEC on Community policy in the area of economic, financial, and technical cooperation with third countries having to contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms. Moreover, trade agreements concluded on the basis of Article 133 TEC can contain references to human rights (see *infra*).

With the amendment of the former Article F (now Article 6(1) TEU) by the Treaty of Amsterdam came a reaffirmation of the principles on which the Union is based, including human rights (see

⁹ See for example the Lomé Conventions, *supra* note 2 and the subsequent Cotonou Agreement, see *supra* note 2. The Fourth Lomé Convention, concluded in 1989 with 69 countries, emphasised human rights by stating in its Art. 5(2)(2) “... every individual shall have the right, in his own country or in a host country, to respect for his dignity and protection by the law”. See Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, OJ L 229/3 of 17 August 1991. The revised Fourth Lomé Convention of 1995 goes further by inserting a non-compliance clause. Art. 5(1) third subpara. Lomé IV 1995 states “Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of the Convention”; and Art. 366a Lomé IV 1995 reads: “If one Party considers that another party has failed to fulfil an obligation in respect of one of the essential elements referred to in Art. 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail, and if necessary, remedying it”. The Cotonou Agreement, *supra* note 2, sets out in Art. 9 that human rights and democratic principles are an “essential element” of the Agreement. Art. 96 reads that “If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to Art. 9(2), it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties... The term “cases of special urgency” shall refer to exceptional cases of particular serious and flagrant violation of one of the essential elements referred to in Art. 9(2), that require an immediate reaction... The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so... It is understood that suspension would be a measure of last resort”.

supra) and the ECJ. Under the CFSP, the Union is able to adopt common strategies, joint actions and common positions. With regard to human rights, the scope of common positions has broadened considerably since their inception to include the Union's objectives and priorities on matters such as the problems in Rwanda (Council of the European Union 1994a), Ukraine (Council of the European Union 1994b), East Timor (Council of the European Union 1996a) and Myanmar (Council of the European Union 1996b). Moreover, an arms embargo on Sudan was imposed through a Common Position (Council of the European Union 1994c). In spite of the competence to issue common positions that include human rights references, the introduction of the CFSP has made little difference to the number of statements and demarches concerning human rights made by the Member States in their coordination of foreign policy in the past (King 1999: 325). Other powers in the TEU include Article 29 TEU on police and judicial cooperation in criminal matters, which refers to the prevention and combating of racism and xenophobia.

ECJ Case Law

As stated *supra*, prior to the Amsterdam Treaty it was rather the ECJ in the late 1960s that began to affirm in its judgments the respect shown for fundamental rights by the Community institutions and the Member States whenever they took action within the areas covered by Community law. Several cases were influential.

In the *Internationale Handelsgesellschaft v. Einfuhr- und Vorratstelle fuer Getreide und Futtermittel-Case* the Court ruled that human rights, which are protected in national constitutions, had an interpretative role for EC decisions (ECJ 1970). The Court found that "fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. In safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States and it cannot therefore uphold measures which are incompatible with fundamental rights recognised and protected by the constitutions of those States" (ECJ 1970).

Similarly, in the *Nold Case* the Court stated that fundamental rights form an integral part of the general principles of law and that it draws inspiration from constitutional traditions common to Member States, but also emphasised that "measures which are incompatible with fundamental rights on which the Member States have collaborated or of which they are signatories, can supply guidelines, which should be followed within the framework of Community law" (ECJ 1974). This recognition of international human rights law as a source of inspiration was later recognised by the Joint Declaration of the European Parliament (EP), the Council and the Commission of 5 April 1977,

which recalls the ECJ's case law, but also refers to the ECHR of 1950 (Council of the European Union 1977).

The Court also referred to international treaties as guidelines for its decisions and explicitly referred to provisions of the ECHR, for example, in the *Hauer Case* (ECJ 1979), where the Court recognised the right to property, which is protected by the First Protocol of the ECHR (ECJ 1979).¹⁰ In its decision, the Court referred back to its decisions in *Nold* and *Internationale Handelsgesellschaft*, reaffirming the principle that the fundamental human rights recognised under the constitutions of Member States are also an integral part of the Community legal order. Furthermore, the extra-Community instruments under which States have undertaken international obligations in order to ensure better protection for those rights can, without any question of their being incorporated as such into the Community order, be used to establish principles which are common to the States themselves (Lampe 2005: 46). In the case of *Staatsanwalt Freiburg v Keller* the Court found that "the validity of measures adopted by the institutions of the Community can be judged only in the light of Community law. A claim that fundamental rights laid down in the constitution of a Member State have been infringed cannot in itself affect the validity of a Community measure or its effects within the State" (ECJ 1986: para. 7).

Later cases¹¹ showed the ECJ taking the protection of fundamental rights (i.e. the right in itself) from the ECHR, but interpreting it in light of the Community's interests. In trying to lay foundations for the development of fundamental rights in Community law, certain problems arose, with some decisions of the European Court of Human Rights (ECHR) being in contradiction with decisions of the ECJ in their interpretation of certain rights provided for in the ECHR.¹²

¹⁰ Art. 1 of the First Protocol to the ECHR provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law".

¹¹ See ECJ, 1976. *Prais v Council*. Case 130/75, ECR 1589. The applicant relied on Article 9 ECHR (freedom of religion) in relation to a date of an open competition for a post for which the applicant had applied to take place on a Jewish festival day during which she could neither travel nor write. In this case the Court's reasoning implied that the Council should take steps to respect the requirements of a candidate's religion so long as it was given sufficient notice of these requirements by the candidate; see also ECJ, 1989. *Oyowe and Traore v Commission*. Case 100/88, ECR 4285. Here the Court required the Commission to change its employment practice in relation to journalists from ACP countries in such a way as to respect their freedom of expression protected under Art. 10 ECHR.

¹² See *inter alia* ECJ, 1989. *Hoechst AG v Commission*. Case 46/87, ECR 2859. In this case the Court recognised the right to the inviolability of the home (Art. 8 ECHR) as a principle common to the laws of the Member States and a right protected under the Community legal order, but only in regard to the private dwellings of natural persons and not with respect to undertakings; *Niemitz v Germany*, Series A, No 251 (1992). Here the ECtHR held that Art. 8 ECHR on the right to respect for private and family life, home and correspondence, did indeed extend to business premises; ECJ, 1989. *Orkem v Commission*. Case 374/87, ECR 3283. Here the ECJ ruled on the issue of self-incrimination that in the context of a European anti-trust investigation that "as far as Art. 6 ECHR is concerned, although it may be relied upon by an undertaking subject to an investigation relating to competition law, it must be observed that neither the wording of that article nor the

In the early 1990s the idea that the Community should accede to the ECHR had begun to circulate. The Council had asked the Court's opinion on whether membership to the Convention would be compatible with the Treaties. In *Opinion 2/94* on the Accession to the ECHR (ECJ 1996a) the Court stated that no Treaty provisions conferred on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field (ECJ 1996a). In the absence of express or implied powers, it was necessary to consider whether Article 308 TEC could constitute a legal basis for accession. This was however not the case as its effect would, in substance, be to amend the Treaty without following the procedure which is provided for that purpose (ECJ 1996a: paras 27-30). Furthermore, accession to the ECHR would entail a substantial change in the Community system for the protection of human rights, in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the ECHR into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and the Member States, would be of constitutional significance and would therefore go beyond the scope of Article 308 TEC. It could only be brought about by way of Treaty amendment. As such, as Community law stood, the Community had no competence to accede to the ECHR (ECJ 1996a: paras 32-36; Eeckhout 2004: 84-85; Lampe 2005: 51).

In *Portugal v Council*, on the cooperation agreement with India, the Court accepted the human rights clause in the agreement, but one passage of the judgment could be read as ruling out that human rights could be a specific field of cooperation (ECJ 1996b: para 28). In response to the questions raised by these cases the Commission proposed a Council regulation in 1997 on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms (European Commission 1997). This proposal was, however, contested by the Council Legal Service with regard to the EU's powers concerning human rights. This was further complicated by the ruling of the ECJ in the 1998 case of *United Kingdom v Commission*, which effectively implied that many projects on human rights lacked a satisfactory legal basis. It is in this case that the Court held that the implementation of Community expenditure relating to any significant Community action presupposed not only the entry of the relevant appropriation in the budget of the Community, which was a matter for the budgetary authority, but in addition the prior adoption of a basic act authorising that expenditure, which was a matter for the legislative authority (ECJ 1998: para. 26).

decisions of the ECHR indicate that it upholds the right not to give evidence against oneself". The ECHR meanwhile held in the case of *Funke* (*Funke v France*, Series A, No 256 A (1993)) that Art. 6 did indeed protect "the right to remain silent and not to contribute to incriminating oneself".

Current Status of EC/EU Competence in Human Rights

The Court's decision in *Opinion 2/94* did not rule out EC participation in the negotiation and conclusion of human rights treaties. The fact that the Court concentrated on the specific constitutional and institutional consequences of EC participation in the ECHR system would indicate that the ECJ did not wish to erect a general barrier for EC involvement with human rights treaties (Arnull 2000: 71-72). As the EU institutions are committed to respecting fundamental rights (TEU: Art. 6(1)) there must be power to legislate to ensure such respect. One example is the anti-dumping regulation¹³, which even if in itself is not connected to human rights, must contain provisions on rights of defence (Eeckhout 2004: 471).

However, the requirement of "respect" for fundamental rights cannot be a solely negative requirement, a condition of abstention that is judicially enforced; it must also include positive obligations, as is emphasised by the ECtHR in its case law.¹⁴ If, within its spheres of competence, the Community is under an obligation to respect fundamental rights and needs to have the legal tools to ensure such respect, it may also be necessary for the Community to commit itself at the international level, thereby hinting at an implied power to act (Eeckhout 2004: 471).

Increasingly, the EU is active in areas which are either closely linked with the protection of fundamental rights or which concern human rights as such. Examples of the first include asylum policy and police and judicial cooperation in criminal matters. Examples of the second are Community non-discrimination policies, originally confined to gender equality, but expanded by two directives based on Article 13 TEC.¹⁵ With Article 13 TEC conferring power onto the Community in the field of human rights and those powers having been exercised, the *ERTA* principle¹⁶ applies to the conclusion of international agreements in this field. This implies that there is currently exclusive Community competence for the conclusion of Protocol 12 to the ECHR, which also deals with non-discrimination, in so far as the provisions of that Protocol affect Community legislation. Difficulties exist, however, as the Protocol to the Convention can currently only be

¹³ See Council Regulation 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, OJ L 56 of 6 March 1996. The most recent version of this regulation is Council Regulation (EC) No 2117/2005 of 21 December 2005 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community, OJ L 340/17 of 23 December 2005.

¹⁴ See ECHR, 1998. *Matthews v United Kingdom*. App. No. 24833/94, 28 EHRR 361. In this case the ECtHR decided that under Art.1 of Protocol 1 to the ECHR the citizens of Gibraltar must have the right to vote in elections for the European Parliament. The implementation of that decision – the realisation of the right to vote generally – requires positive action setting up an election process.

¹⁵ See Council Directive 2000/43/EC, 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22, 19 July 2000; and Council Directive 2000/78/EC, 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 of 2 December 2000.

¹⁶ See ECJ, 1971. *Commission v Council (ERTA)*. Case 22/70, ECR 263.

signed by States (Eeckhout 2004: 471-472). Nonetheless the EU Member States are under an obligation to consult within the Council on this matter and to define a common approach enabling the defence of the Community interest.¹⁷

The EC's powers to conclude agreements which do not have human rights as their main object, but which are predicated on respect for human rights, or contain provisions on cooperation in this field, are less precarious given the contents of the provisions on development cooperation and other cooperation policies (see *supra*) (Peers 2000: 166-168). Under Article 181a(1) TEC all cooperation and association agreements with third countries should contribute to the objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

Furthermore, trade agreements concluded under Article 133 TEC can contain a human rights clause (Fierro 2003: 256). Both Articles 177(2) and 181a(1) TEC (see *supra*) speak of a "general objective" of respect for human rights, to which the respective policies must contribute. Furthermore, Article 11(1) TEU speaks of an objective "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms". Moreover, when looking at Article 3 TEU requiring the EU to "ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies", the picture becomes more clear. The "general objective" in Articles 177(2) and 181a(1) TEC is a general objective of EU action (Eeckhout 2004: 472).

Therefore, all EU external policies, be they first, second or third pillar, are to contribute to the general objective of developing and consolidating democracy and the rule of law, and of respecting human rights and fundamental freedoms. However, the scope of that objective remains subject to debate. In *Portugal v Council* (see *supra*) the Court accepted the "essential element" clause, which could, if the above reasoning is correct, be part of any substantial agreement with a third country. In the EC-India agreement the clause was generally phrased, and did not refer to any specific sources for human rights protection, or standards of democracy or of the rule of law (Eeckhout 2004: 473). Others suggest that the clause is increasingly oriented towards the Universal Declaration of Human Rights, because this may be regarded as *ius cogens*, thereby avoiding the debate about EC competence to lay down rules on human rights (Brandtner & Rosas 1998: 475).

¹⁷ See ECJ, 1993. Opinion 2/91, ECR I-01061, para. 6.

In sum, a specific agreement providing for particular, concrete cooperation in the domain of human rights would need to be based on either Article 177(2) TEC, in the case of developing countries, or on Article 181a(1) TEC, for other third countries.

Decision-Making Methods

Acts issued on the basis of Article 12 TEC are adopted with the Council acting in accordance with the co-decision procedure. Measures taken on the basis of Article 13 TEC require the Council to act unanimously on the basis of a proposal from the Commission and after consulting the EP. By way of derogation from Article 13(1) TEC, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in Article 13(1) TEC, the Council acts in accordance with the co-decision procedure (TEC: Art. 13(2)).

Measures taken on the basis of Article 39 TEC are adopted with the Council issuing directives or making regulations according to the co-decision procedure and after consulting the Economic and Social Committee (TEC: Art. 40). Acts on the basis of Article 43 TEC proceed with the Council issuing directives in accordance with the co-decision procedure and after consulting the Economic and Social Committee (TEC: Art. 44(1)). However the Council may, acting by qualified majority on a proposal from the Commission, rule that the provisions concerning the right of establishment shall not apply to certain activities (TEC: Art. 45).

Measures taken on the basis of Article 63 TEC on asylum take place with the Council acting unanimously according to the procedure described in Article 67(2) TEC. The exception to this rule relates to Articles 63(1) on asylum¹⁸ and 2(a) TEC with regard to minimum standards for giving temporary protection to displaced persons from third countries who cannot return to their country of origin and for persons who otherwise need international protection. Measures taken on this basis proceed with the Council acting unanimously subject to the co-decision procedure of Article 251 TEC.¹⁹ Measures to ensure the application of Articles 137(i) and 141 TEC are adopted with the

¹⁸ TEC. Art. 63(1). relates to (a) criteria and mechanisms determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States; (b) minimum standards on the reception of asylum seekers in Member States; (c) minimum standards with respect to the qualification of nationals of third countries as refugees; and (d) minimum standards on procedures in Member States for granting or withdrawing refugee status.

¹⁹ The applicability of this rule is subject to whether the Council has previously adopted, in accordance with Art. 67(1) Community legislation defining common rules and basic principles governing these issues. As this is the case, TEC. Art. 251 applies.

Council acting in accordance with the co-decision procedure, and after consulting the Economic and Social Committee.²⁰

Acts issued on the basis of Article 177(2) TEC proceed with the Council acting by qualified majority in accordance with the co-decision procedure described in Article 251 TEC (TEC: Art.179(1)). Measures adopted on the basis of Article 181a(1) TEC are taken with the Council acting by a qualified majority on a proposal of the Commission and after consulting the EP. With regard to association and accession agreements however, as referred to in Article 310 TEC, the Council acts unanimously (TEC: Art. 181a(2)).

Decisions taken under Title V TEU (CFSP) are *generally* taken by the Council acting unanimously (TEU: Art. 23(A)). Abstentions by members present in person or represented shall not prevent the adoption of such decisions. In the case of abstention (qualified by making a formal declaration under Article 23(1) TEU), the member of the Council in question is not obliged to apply the decision, yet accepts that the decision commits the Union (this is also known as the *constructive abstention* provision). However, if the members of the Council qualifying their abstention in the way described above represent more than one third of the votes weighed in accordance with Article 205(2) TEC, the decision shall not be adopted (TEU: Art. 23(A)§2).

The Council acts by qualified majority, as a derogation from Article 23(1) TEU, when adopting joint actions, common positions or taking any other decision on the basis of a common strategy; when adopting any decision implementing a joint action or a common position; and when appointing a special representative in accordance with Article 18(5) TEU (TEU: Art. 23(2)). If a member of the Council declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision to be taken by qualified majority, a vote shall not be taken. The Council may, acting by qualified majority, request that the matter be referred to the European Council for decision by unanimity (TEU: Art. 23(2)§2). The votes of the members of the Council are weighted in accordance with Article 205(2) TEC. For adoption, decisions require at least 232 votes in favour cast by at least two thirds of the members. In case of a qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. If this condition is not met, the decision in question is

²⁰ See TEC. Arts. 137(2), second paragraph; and TEC. 141(3).

not adopted (TEU: Art. 23(2)§3).²¹ For procedural questions, the Council acts by a majority of its members (TEU: Art. 23(3)).

When it is necessary to conclude an agreement with one or more States or international organisations in implementation of Title V TEU (TEU: Art. 24(1)), the Council acts unanimously when the agreement covers an issue for which unanimity is required for the adoption of internal decisions (TEU: Art. 24(2)). When the agreement is envisaged to implement a joint action or common position the Council shall act by a qualified majority in accordance with Article 23(2) TEU (TEU: Art. 24(3)). The provisions of Article 24 TEU also apply to matters falling under Title VI on Police and Judicial Cooperation in Criminal Matters. When the agreement covers issues for which a qualified majority is required for the adoption of internal decisions or measures, the Council acts by qualified majority in accordance with Article 34(3) TEU (TEU: Art. 24(4)). No agreement is binding on a Member State whose representative in the Council states that it has to comply with its own constitutional procedure. The other members of the Council may agree that the agreement applies provisionally (TEU: Art. 24(5)).

The provisions in Title VI TEU (Police and Judicial Cooperation in Criminal Matters) enable the Council, acting unanimously on the initiative of any Member State or of the Commission, to adopt common positions²², framework decisions²³, decisions for any other purpose consistent with the objectives of Title VI TEU²⁴, and to establish conventions²⁵. Where the Council is required to act by a qualified majority, the votes of its members shall be weighted as laid down in Article 205(2) of the EC Treaty²⁶, and for their adoption acts of the Council require at least 232 votes in favour, cast by at least two thirds of the members. If a decision is to be adopted by qualified majority, a member of the Council may request verification that the Member States constituting the qualified majority represent at least 62% of the total population of the Union. The decision is not adopted if this

²¹ This paragraph does not apply to decisions having military or defence implications.

²² TEU. Art. 34(2)(a) speaks of common positions defining the approach of the Union to a particular matter.

²³ TEU. Art. 34(2)(b) speaks of framework decisions for the purpose of approximation of laws and regulations of the Member States. Framework decisions are binding upon the Member States as to the result to be achieved but leave to the national authorities the choice of form and methods. They do not entail direct effect.

²⁴ TEU. Art. 34(2)(c) states that such decisions exclude any approximation of the laws and regulations of the Member States. These decisions are binding and do not entail direct effect. The Council acts by a qualified majority and adopts measures necessary to implement such decisions at the level of the Union.

²⁵ TEU. Art. 34(2)(d) speaks of conventions which the Council shall recommend to the Member States for adoption in accordance with their respective constitutional requirements. Member States begin procedures applicable within a time limit set by the Council. Unless they provide otherwise, conventions shall, once adopted by half of the Member States, enter into force for those Member States. Measures implementing conventions are adopted within the Council by a majority of two thirds of the Contracting Parties.

²⁶ See TEC. Art. 205(2) for an overview of the way in which the votes are weighted.

condition is not met (TEU: Art. 34(3)). Procedural questions are dealt with by qualified majority of the Council members (TEU: Art. 34(4)).

Article 36(2) TEU states that “the Commission shall be fully associated with the work in the areas referred to in this title”. Assessing the degree of Commission involvement based on the notion of “associated” is, however, difficult given the vague meaning of the word “associated”. For measures adopted on the basis of Articles 34(2)(b), (c) and (d), the Council consults the EP before any measures are adopted. The Parliament gives its opinion within a time limit set down by the Council, which is not less than three months. If such an opinion is not provided within the time limit, the Council may act (TEU: Art. 39(1)). It is further the duty of the Presidency and the Commission to regularly inform the EP of discussions in the areas covered by this title. The Parliament is furthermore allowed to ask questions of the Council or make recommendations to it. Also, each year the Parliament holds a debate on the progress made in the areas referred to in this title (TEU: Art. 39(2) and 39(3)).

Member States that intend to establish enhanced cooperation (pursuant to Article 40 TEU) in the AFSJ address a request to the Commission, which may submit a proposal to the Council to that effect. In the event of the Commission not submitting a proposal, it informs the Member States concerned of the reason for not doing so. Those Member States may then submit an initiative to the Council designed to obtain authorisation for the enhanced cooperation concerned (TEU: Art. 40a(1)). This authorisation is granted in compliance with Articles 43 to 45 TEU, with the Council acting by a qualified majority, on a proposal from the Commission or on the initiative of at least eight Member States, and after consulting the EP. The votes of the members of the Council again proceed according to Article 205(2) TEC (TEU: Art. 40a(2)). A member of the Council may request that the matter be referred to the European Council, where, after it has been raised, the Council may act in accordance with Article 40a(1) TEU.

Any Member State that wishes to participate in enhanced cooperation in accordance with Article 40(a) TEU needs to notify its intention to the Council and to the Commission, which gives an opinion to the Council within three months of the date of receipt of that notification, possibly accompanied by a recommendation for such specific arrangements as it may deem necessary for the Member State to become a party to the cooperation in question. The Council then takes a decision within four months of the date of receipt of that notification. This decision is deemed to be

taken unless the Council decides to hold it in abeyance, for which the Council will then state the reason for that decision and will set a deadline for its re-examination (TEU: Art. 40b).²⁷

Article 42 TEU states that the Council may, acting unanimously on the initiative of the Commission or a Member State, and after consulting the EP, decide that action in the areas referred to in Article 29 TEU shall fall under Title IV TEC, and at the same time determine the relevant voting conditions relating to it. The Council then recommends adopting the decision in accordance with their respective constitutional requirements.

Human rights policy constituting a policy that is being *mainstreamed* within the EU's other policies, it is fair to state that this is the most cross-pillar policy to date. Human rights share linkages with Community trade and development policy, the CFSP, and police and judicial cooperation in criminal matters. The level of cross-pillarisation is as such very high.

The Impact of the Treaty of Lisbon

As mentioned *supra*, under the Lisbon Treaty the Union will recognise the rights, freedoms and principles as set out in the Charter of Fundamental Rights, and the latter will have the same legal value as the Treaties (Treaty of Lisbon 2007: Art. 6(1)). Furthermore, the Treaty states that “[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” (Treaty of Lisbon 2007: Art. 6(1)§2).

The Treaty allows the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. This has to be decided unanimously by the Council after obtaining the consent of the EP and is subject to ratification by the Member States (Treaty of Lisbon 2007: Art. 188N(6)(a)(ii)). Here, it is also specified that “[s]uch accession shall not affect the Union’s competences as defined in the Treaties” (Treaty of Lisbon 2007: Art. 6(2)).

The Charter confirms that “fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law” (Treaty of Lisbon 2007: Art. 6(3)). These are therefore the general principles of Community law from the case law of the Court of Justice (Gros-Verheyde 2007: 13). It does not, however, extend the scope of application of the Union’s law beyond the powers of the Union, it establishes no new powers or tasks for the Union and it does not amend its powers or its tasks such as defined in the Treaties.

²⁷ See also TEU. Art. 44(1) on the conditions for voting concerning TEU. Art. 40(b).

Also, the Charter applies to institutions and Member States only when they are implementing the Union's law. Furthermore, the explanations of Member States present in the Charter are stated in the entirety and the rights and liberties of the Charter must be interpreted in accordance with these provisions (Gros-Verheyde 2007: 13).

The protection mechanism for the rights set out in the Charter is reused: the frame of limitations to the rights and principles of the Charter (compulsory respect for the principle of proportionality and responding to the objectives of the Union or the protection of others), interpretation at least identical to the articles of the ECHR (when the provisions are similar, with the possibility of granting wider protection), no possible limit for rights already recognised in other instruments (the Union's law, international conventions, ECHR, constitutions of Member States, etc.), and the ban of abuse of a right.²⁸ The Charter no longer features in the text of the Treaty itself. Before the final signature of the Treaty, the Charter of Fundamental Rights will have to be announced again, in a formal session of the EP, and republished in the Official Journal. This is necessary as, since its first announcement in December 2000, amendments (text explanations and footnotes) have been added (Gros-Verheyde 2007: 13).

The UK and Poland have a different position under the Treaty of Lisbon. Protocol 7 on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom states several derogations specific to the UK and Poland.²⁹ Article 1(1) to the Protocol states that "[t]he Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms". Here the specific aspects of the British judicial system and the laws on justice and home affairs are envisaged (Gros-Verheyde 2007: 13).

Article 1(2) to the Protocol reads that "[i]n particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law". This refers to the following aspects of social and solidarity rights: information of workers, collective negotiation and the right to strike, employment services, individual dismissal, working conditions,

²⁸ See Charter of Fundamental Rights of the European Union, *supra* note 10, Arts. 52 to 54.

²⁹ See Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, OJ C 306/156, 17 December 2007.

child labour, family life, social security and social assistance, health, access to services of general economic interest, and the protection of the environment and consumers (Gros-Verheyde 2007: 13).

Article 2 to the Protocol states that “[t]o the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom”. This Protocol, however, does not challenge the respect of other obligations for the UK related to the European Treaties or the Union’s law in general (Gros-Verheyde 2007: 13).

Poland had additionally specified in another unilateral declaration that “[t]he Charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity”.³⁰

EU Human Rights Policy Objectives, Output and Legal Instruments

Key Legislative Measures

Measures taken that concern human rights as such or are closely linked with the protection of human rights include such measures with respect to fundamental rights and the promotion of democracy and human rights worldwide;³¹ non-discrimination and equal opportunity and

³⁰ Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union, OJ C 306/270, 17 December 2007.

³¹ Examples of such measures include, *but are not limited to*, Council Decision 2008/203/EC of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, OJ L 63/14 of 7 March 2008; Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice, OJ L 257/16 of 3 October 2007; Council Decision of 19 April 2007 establishing for the period 2007-2013 the specific programme Fundamental rights and citizenship as part of the General programme Fundamental Rights and Justice, OJ L 110/33 of 27 April 2007 (Corrigendum was listed in OJ L 141/83 of 2 June 2007); Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L 53 of 22 February 2007; Council Decision 2007/126/JHA of 12 February 2007 establishing for the period 2007 to 2013, as part of the General Programme on Fundamental Rights and Justice, the Specific Programme ‘Criminal Justice’, OJ L 58/13 of 24 February 2007; 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 of 29 December 2006. This instrument is also used under the European Neighbourhood Policy (ENP); Regulation (EC) No 1567/2003 of the European Parliament and of the Council of 15 July 2003 on aid for policies and actions on reproductive and sexual health and rights in developing countries, OJ L 224 of 6 September 2003; Common Strategy 1999/414/CFSP on Russia OJ L 157/1 of 24 June 1999; Common Strategy 1999/877/CFSP on Ukraine OJ L 331/1 of 23 December 1999; and Common Strategy 2000/458/CFSP on the Mediterranean Region OJ L 183/5 of 22 July 2000; Council Regulation (EC) No 1488/96 of 23 July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean partnership, OJ L 189 of 30 July 1996 (Corrigenda were listed in OJ L 255/24 of 9 October 1996; 187/56 of 1 July 1998).

treatment;³² preventing and combating racism and xenophobia;³³ severe forms of human rights violations;³⁴ human trafficking;³⁵ combating violence towards children, adolescents and women;³⁶

³² Examples of such measures include, *but are not limited to*, Commission Decision of 16 June 2008 relating to the setting up of an Advisory Committee on Equal Opportunities for Women and Men (codified version), OJ L 190 of 18 July 2008; Regulation (EC) No 1922/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a European Institute for Gender Equality, OJ L 403/9 of 30 December 2006; Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity — Progress, OJ L 315 of 15 November 2006 (Corrigendum was listed in OJ L 65/12 of 3 March 2007; Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast), OJ L 204/23 of 26 July 2006; Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) — towards a just society, OJ L 146 of 31 May 2006; Commission Decision 2006/33/EC of 20 January 2006 establishing a high-level advisory group on social integration of ethnic minorities and their full participation in the labour market, OJ L 21/20 of 25 January 2006; Decision No 1554/2005/EC of the European Parliament and of the Council of 7 September 2005 amending Council Decision 2001/51/EC establishing a programme relating to the Community framework strategy on gender equality and Decision No 848/2004/EC establishing a Community action programme to promote organisations active at European level in the field of equality between men and women, OJ L 255/9 of 30 September 2005; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, OJ L 373/37 of 21 December 2004; Council Resolution of 6 May 2003 on accessibility of cultural infrastructure and cultural activities for people with disabilities, OJ C 134 of 7 June 2003; Council Resolution of 5 May 2003 on equal opportunities for pupils and students with disabilities in education and training, OJ C 134 of 7 June 2003; Council Resolution of 6 February 2003 on "eAccessibility" -- Improving the access of people with disabilities to the knowledge-based society, OJ C 39 of 18 February 2003; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 269/15 of 5 October 2002; Council Decision 2001/903/EC of 3 December 2001 on the European Year of People with Disabilities 2003, OJ L 335/15 of 19 December 2001; Council Decision 2001/51/EC of 20 December 2000 establishing a Programme relating to the Community framework strategy on gender equality (2001-2005), OJ L 17 of 19 January 2001; Council Decision 2000/750/EC of 27 November 2000 establishing a Community action programme to combat discrimination, OJ L 303/23 of 2 December 2000; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16 of 2 December 2000; and Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, OJ L 180/22 of 19 July 2000; Regulation (EC) No 1784/1999 of the European Parliament and of the Council of 12 July 1999 on the European Social Fund, OJ L 213/5 of 13 August 1999; Council Directive 98/52/EC of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland, OJ L 205/66 of 22 July 1998; Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex, OJ L 14/6 of 20 January 1998; Council Directive 97/75/EC of 15 December 1997 amending and extending, to the United Kingdom of Great Britain and Northern Ireland, Council Directive 96/97/EC of 20 December 1996 amending Directive 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 46/20 of 17 February 1997; Directive 96/34/EC on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 10/24 of 16 January 1998; Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC, OJ L 145/4 of 19 June 1996; Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes, OJ L 225 of 12 August 1986 (Corrigenda were listed in OJ L 225 of 12 August 1986; 283 of 4 October 1986; and 46 of 17 February 1997); Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, OJ L 6/24 of 19 January 1979; Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ L 39/40 of 14 February 1976; Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, OJ L 45/19 of 19 February 1975.

³³ Examples of such measures include, *but are not limited to*, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, OJ L 328/55 of 6 December 2008; Council Regulation (EC) No 1652/2003 of 18 June 2003 amending Regulation (EC) No 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 245/33 of 29 September 2003; Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L

protection of personal data in the electronic communications sector;³⁷ and development cooperation and partnership and cooperation agreements.³⁸

151 of 19 June 1997; Council Joint action/96/443/JHA of 15 July 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning action to combat racism and xenophobia, OJ L 185 of 24 July 1996.

³⁴ Examples of such measures include, *but are not limited to*, Commission Regulation (EC) No 1377/2006 of 18 September 2006 amending Council Regulation (EC) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ L 255/3 of 19 September 2006; Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ L 200 of 30 July 2005 (Corrigendum was listed in OJ L 79/32 of 16 March 2006); Council Decision 2002/494/JHA of 13 June 2002, setting up a European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes, OJ L 167 of 26 June 2002.

³⁵ Examples of such measures include, *but are not limited to*, Commission Decision 2007/675/EC of 17 October 2007 setting up the Group of Experts on Trafficking in Human Beings, OJ L 277 of 20 October 2007; Council Decisions 2006/618/EC and 2006/619/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, OJ L 262 of 22 September 2006; Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L 261/3 of 6 August 2004; Commission Decision 2003/209/EC of 25 March 2003 setting up a consultative group to be known as the "Experts Group on Trafficking in Human Beings", OJ L 79 of 26 March 2003; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 1 August 2002; Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (STOP), OJ L 63 of 4 March 1997.

³⁶ Examples of such measures include, *but are not limited to*, Decision No 779/2007/EC of the European Parliament and of the Council of 20 June 2007 establishing for the period 2007-2013 a specific programme to prevent and combat violence against children, young people and women and to protect victims and groups at risk (Daphne III programme) as part of the General Programme Fundamental Rights and Justice, OJ L 173/19 of 3 July 2007; Decision No 854/2005/EC of the European Parliament and of the Council of 11 May 2005 establishing a multiannual Community Programme on promoting safer use of the Internet and new online technologies, OJ L 149 of 11 June 2005; Decision No 803/2004/EC of the European Parliament and of the Council of 21 April 2004 adopting a programme of Community action (2004 to 2008) to prevent and combat violence against children, young people and women and to protect victims and groups at risk (the Daphne II programme), OJ L 143 of 30 April 2004; Council framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, OJ L 13 of 20 January 2004; Council Decision of 29 May 2000 to combat child pornography on the Internet, OJ L 138 of 9 June 2000; Decision No 293/2000/EC of the European Parliament and of the Council of 24 January 2000 adopting a programme of Community action (the Daphne programme) (2000 to 2003) on preventive measures to fight violence against children, young persons and women, OJ L 34 of 9 February 2000.

³⁷ Examples of such measures include, *but are not limited to*, Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105/54 of 13 April 2006; Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201/37 of 21 July 2002; Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, OJ L 8 of 12 January 2001 (Corrigendum was listed in OJ L 164/36 of 26 June 2007; Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281/31 of 23 November 1995.

³⁸ See for example Regulation (EC) No 1905/2006 of the European Parliament and of the Council of 18 December 2006 establishing a financing instrument for development cooperation, OJ L 378/41 of 27 December 2006; 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 of 29 December 2006., (Currently a Proposal is pending in Council for a regulation amending both 1905/2006 and 1889/2006. See: Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1905/2006 establishing a financing instrument for development cooperation and Regulation (EC) No 1889/2006 on establishing a financing instrument for the promotion of

In addition to these “hard” measures, the Council set up a Working Group on Human Rights (COHOM) in 1987³⁹, which regularly issues declarations on individual cases of human rights violations in particular countries;⁴⁰ and has in recent years published so-called “guidelines for EU

democracy and human rights worldwide, COM(2009) 194 final of 21 April 2009); Regulation (EC) No 806/2004 of the European Parliament and of the Council of 21 April 2004 on promoting gender equality in development cooperation, OJ L 143/40 of 30 April 2004; Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, OJ L 120/8 of 8 May 1999; Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, OJ L 120 of 8 May 1999. In addition many development cooperation and partnership and cooperation agreements list “human rights clauses”. Providing a full list of such agreements is however beyond the scope of this paper.

³⁹ The Working Group on Human Rights was originally established in 1987. Its mandate was extended in 1999 and 2003. Its task include: enhancing the capacity to jointly assess the human rights situation in the world by closer coordination and otherwise ensure that all pertinent means for action are available within the framework of the Union, including through the possible publication of an annual EU human rights report; further developing cooperation in the field of human rights, such as education and training activities, in coordination with other relevant organisations, and ensuring the continuation of the Human Rights Masters Programme organised by fifteen European universities; reflecting on the usefulness of convening a periodic human rights discussion forum with the participation of EU institutions as well as representatives of academic institutions and NGOs; strengthening the capacities to respond to international operational requirements in the field of human rights and democratisation, such as through the possible establishment of a common roster of European human rights and democracy experts, for human rights field operations and electoral assistance and monitoring; fostering the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms in third countries, in particular through working towards the earliest possible adoption of the draft regulations, currently under consideration in the EU framework, on the implementation of cooperation operations; ensuring all means to achieve the coherent realisation of these goals, including through the consideration of strengthening relevant EU structures. In 2003 the mandate of COHOM was extended to include first pillar matters, without prejudice to the existing competencies of the CFSP geographical working groups, so as to have under its purview all human rights aspects of the external relations of the EU. First pillar issues may be addressed only within the limits of the powers conferred upon the European Community by the EC Treaty and of the objectives assigned to it therein.

⁴⁰ Declarations issued in 2009 include, *but are not limited to*, Declaration by the Presidency on behalf of the European Union of 25 May 2009 on the violation of religious freedom in Iran; Declaration by the Presidency on behalf of the European Union of 20 May 2009 on the Execution of Seven Offenders, Including Two Juveniles, Carried Out in Saudi Arabia on 12 May 2009; Declaration by the Presidency on behalf of the European Union 18 May 2009 on the death penalty of Mr Troy Davis in the United States. For a full list see: http://www.consilium.europa.eu/applications/HumanRights/docs.asp?cmsid=943&lang=EN&command=show_subdocs&id=150. [Accessed June 2009]. Declarations issued in 2008 include, *but are not limited to*, Déclaration de la Présidence au nom de l'UE de 23 Décembre 2008 concernant la peine de mort à Saint Christophe et Nieves; Declaration by the Presidency on behalf of the European Union of 19 December 2008 on the repeated violations of human rights in Iran; Déclaration de la Présidence au nom de l'Union européenne de 16 Décembre 2008 au sujet de la « Charte 2008 » et des arrestations de défenseurs de droits de l'Homme qui ont eu lieu à la veille du 60ème anniversaire de la Déclaration Universelle des droits de l'Homme. For a full list see: http://www.consilium.europa.eu/applications/HumanRights/docs.asp?cmsid=943&lang=EN&command=show_subdocs&id=64. [Accessed June 2009]. Declarations issued in 2007 include Human Rights Council - Declaration by the Presidency on behalf of the EU of 21 June 2007 on the outcome of the Institution Building Process; Declaration by the Presidency on behalf of the EU of 26 March 2007 on the commemoration of the 200th anniversary of the abolition of the transatlantic slave trade; Declaration by the Presidency on behalf of the European Union of 21 March 2007 on the occasion of the International Day for the Elimination of Racial Discrimination on 21 March 2007; Declaration by the Presidency on behalf of the European Union of 2 February 2007 on the situation of Hmong refugees in Thailand. Declarations issued in 2006 include, *but are not limited to*, Declaration by the Presidency on behalf of the European Union of 1 December 2006 on the situation of children affected by armed conflict in Sri Lanka; Declaration by the Presidency on behalf of the European Union of 8 November 2006 on the sentencing of Dmitry Dashkevich, a member of the unregistered Belarusian opposition youth organisation Malady Front, and the situation of Aleksandr Kozulin; Declaration by the Presidency on behalf of the European Union of 10 October 2006 on the occasion of the World Day against Death Penalty (10 October). For a full list see:

human rights policy” with respect to, *inter alia*, the death penalty;⁴¹ third countries on torture and other cruel, inhuman or degrading treatment or punishment;⁴² dialogues with third countries;⁴³ children in armed conflict;⁴⁴ human rights defenders;⁴⁵ the promotion and protection of the rights of the child;⁴⁶ and violence against women and girls and combating all forms of discrimination against them.⁴⁷

http://www.consilium.europa.eu/applications/HumanRights/docs.asp?cmsid=943&lang=EN&command=show_subdocs&id=72. [Accessed June 2009]; Declarations issued in 2005 include Declaration by the Presidency on behalf of the European Union of 20 May 2005 on Iran Human Rights Dialogue; Declaration by the Presidency on behalf of the European Union on the sentencing of Shan Leaders - Brussels, 15 November 2005; Declaration by the Presidency on behalf of the European Union on Nepal's media ordinance - Brussels, 10 November 2005; Declaration by the Presidency on behalf of the European Union on the Human Rights situation in Uzbekistan - Brussels, 8 November 2005; Declaration by the Presidency on behalf of the European Union on the case of Wang Wanxing - Brussels, 10 November 2005.

⁴¹ EU Guidelines on the Death Penalty: revised and updated version. Its objectives are to work towards the universal abolition of the death penalty as a strongly held policy view agreed by all EU Member States; if necessary with the immediate establishment of a moratorium on the use of the death penalty with a view to abolition; and where the death penalty still exists, to call for its use to be progressively restricted and to insist that it be carried out according to minimum standards as set out in the attached paper, while seeking accurate information about the exact number of persons sentenced to death, awaiting execution and executed. For more information, see: <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>. [Accessed June 2009].

⁴² Guidelines on EU policy towards third countries on torture, and other cruel, inhuman or degrading treatment or punishment (An up-date of the Guidelines). The EU's objective is to influence third countries to take effective measures against torture and ill-treatment and to ensure that the prohibition against torture and ill-treatment is enforced. In its contacts with third countries, the EU will, when deemed necessary, express the imperative need for all countries to adhere to and comply with the relevant international norms and standards and will consequently emphasise that torture and ill-treatment are forbidden under international law. The EU will make its objectives known as an integral part of its human rights policy and will stress the importance it attaches to the prevention of torture and ill-treatment with a view to its global eradication. For more information, see: <http://ue.eu.int/uedocs/cmsUpload/8590.en08.pdf>. [Accessed June 2009].

⁴³ EU Guidelines on human rights dialogues with third countries – Update. The guidelines on human rights dialogues have several aims, namely to: identify the role played by this instrument in the global framework of the CFSP and the EU's policy on human rights; strengthen the coherence and consistency of the European Union's approach towards human rights dialogues by analysing on a case-by-case basis the added value of opening a dialogue on human rights and the resulting workload for the Committee on Human Rights (COHOM); facilitate use of that instrument by defining the conditions in which it is to be applied and made effective; notify third parties (in particular, international organisations, non-governmental organisations, civil society, the media, the European Parliament, third countries) of this approach. For more information, see: <http://ue.eu.int/uedocs/cmsUpload/16526.en08.pdf>. [Accessed June 2009].

⁴⁴ Update of the EU Guidelines on children and armed conflict. The EU's objective is to influence third countries and non state actors to implement international and regional human rights norms, standards and instruments, as well as international humanitarian law (as listed in Annex II) and to take effective measures to protect children from the effects of armed conflict, to end the use of children in armed forces and armed groups, and to end impunity for crimes against children. For more information, see: <http://ue.eu.int/uedocs/cmsUpload/10019.en08.pdf>. [Accessed June 2009].

⁴⁵ Ensuring protection – European Union Guidelines on Human Rights Defenders. The EU's objective is to influence third countries to carry out their obligations to respect the rights of human rights defenders and to protect them from attacks and threats from non-State actors. In its contacts with third countries, the EU will, when deemed necessary, express the need for all countries to adhere to and comply with the relevant international norms and standards, in particular the UN Declaration. The overall objective should be to bring about an environment where human rights defenders can operate freely. The EU will make its objectives known as an integral part of its human rights policy and will stress the importance it attaches to the protection of human rights defenders. For more information, see: <http://ue.eu.int/uedocs/cmsUpload/16332-re01.en08.pdf>. [Accessed June 2009].

⁴⁶ EU Guidelines for the Promotion and Protection of the Rights of the Child. With these Guidelines the EU reaffirms its determination to observe, as a matter of priority, in its external human rights policy the promotion and protection of ALL rights of the child, i.e. persons below the age of 18 years, taking into account the best interests of the child and its right to protection from discrimination and participation in decision-making processes, founded on the principles of democracy, equality, non-discrimination, peace and social justice and the universality, indivisibility, interdependence and

The Internal and External Dimension of Human Rights v Security

As can be seen *supra*, EU human rights policy has developed significantly since the 1970s, with the internal policy on non-discrimination and equal opportunity and treatment being among the policies that lie at the basis of the Union's current portfolio of measures with respect to human rights. The internal dimension of human rights has been largely formed by the development of measures related to gender equality, equal opportunities, women in matters of employment and occupation, equal pay for men and women, as well as many others.

Notwithstanding the immense value that this legislative framework has, the above mentioned measures do not have an explicit link with issues of security. Matters where the question of the Union's internal security *does* come into play in relation to human rights are, for example, the treatment of asylum seekers and refugees; measures to combat and prevent discrimination, racism and xenophobia; as well as the handling of terrorism suspects within the Union; violence against citizens of the Union, in particular children, young people, women and groups at risk; and the fight against human trafficking. It is predominantly these types of issues that fall within the focus of this paper.

The internal dimension has to a large degree laid the basis for the development of a more externally oriented human rights policy. This external dimension of human rights has gradually become more important as the promotion of democracy and human rights in other parts of the world is seen as contributing to the overall stability of these regions, thereby reducing the risks of conflict and its negative spill-over effects. To this end, in 1994 the European Initiative for Democracy and Human Rights (EIDHR-'94) was established at the initiative of the EP. Its mission was to promote human rights, democracy and conflict prevention in third countries by providing financial support for activities supporting these areas.⁴⁸ The EIDHR-'94 was superseded by the European Instrument for Democracy and Human Rights (EIDHR-'06, hereinafter the EIDHR) which the Community established in 2006.⁴⁹

interrelatedness of all human rights, including the right to development. For more information, see: <http://ue.eu.int/uedocs/cmsUpload/16031.07.pdf>. [Accessed June 2009].

⁴⁷ EU guidelines on violence against women and girls and combating all forms of discrimination against them. The objectives of these guidelines are to promote gender equality and combat discrimination against women; to collect data on violence against women and to develop indicators; to devise effective, coordinated strategies; to combat the impunity of perpetrators of violence against women and to ensure access to justice for victims. For more information, see: <http://ue.eu.int/uedocs/cmsUpload/16173cor.en08.pdf>. [Accessed June 2009].

⁴⁸ The legal bases upon which the EIDHR-'94 was established were Council Regulations EC No. 975/1999 and EC No. 976/1999, *see supra* note 38.

⁴⁹ The legal basis upon which the EIDHR-'06 was established was Regulation (EC) No 1889/2006, *supra* note 31.

Human rights and the external dimension of EU-internal security are linked through initiatives such as the EIDHR and the projects funded under this instrument, as well as through (development) cooperation, partnership, and association agreements (see *supra*), and election monitoring and assistance. All these have as their aim to either directly promote human rights, democracy and conflict prevention, or indirectly, through the so-called “human rights clauses” that are part of such agreements.

The focus of this paper being on the link between human rights and security, more attention is given to the external dimension of EU human rights policy. Internal policy measures are discussed in detail, yet are limited to those aspects which are relevant in terms of EU internal security.

Human Rights within the European Union

Non-Discrimination, Racism and Xenophobia

In November 1999 the Commission proposed a package of measures to implement Article 13 TEC, consisting of two directives and one programme of action.⁵⁰ The Programme pursued three main objectives: an analysis of issues related to discrimination and evaluation of the effectiveness of policies and practices adopted in this field; the development of capacity to effectively prevent and address discrimination, in particular by strengthening organisations' means of action and through support for the exchange of information and good practice and networking at the European level; and the promotion and dissemination of the values and practices underlying the fight against discrimination, including through the use of awareness-raising campaigns (European Parliament 2001: 21).⁵¹ By September 2004 around 300 initiatives had been supported which directly impact on the fight against racism and xenophobia (European Parliament 2004: 20).

In 2001 this programme funded a wide range of activities, including the establishment of independent expert groups to report on measures existing in Member States to combat discrimination on various grounds (including racial or ethnic origin), the evaluation of activities carried out by the European Monitoring Centre on Racism and Xenophobia (EUMC) in Vienna, transnational exchange actions, umbrella networks of NGOs, a European Conference on Discrimination (18 to 19 October 2001) and the launch of a prize for diversity in companies (European Parliament 2002: 24). In November 2001 the Commission tabled a proposal for a

⁵⁰ These Directives were adopted in 2000, see: Council Directive 2000/43/EC and Council Directive 2000/78/EC, *supra* note 37. The Programme of Action was established in the same year on the basis of Council Decision 2000/750/EC, *supra* note 32. The programme ran from 2001 to 2006.

⁵¹ See also (European Parliament 2002: 24).

framework decision on combating racism and xenophobia, with two main purposes: to ensure that racism and xenophobia are punishable in all Member States by effective, proportionate and dissuasive criminal penalties, which can give rise to extradition and surrender, and to improve and encourage judicial cooperation by removing potential obstacles (European Commission 2001a). This proposal was eventually adopted in 2008.⁵²

As mentioned *supra*, agreement was reached in 2000 on the Charter of Fundamental Rights of the European Union. When ratified, the Treaty of Lisbon grants the Charter the same legal value as the Treaties (see *supra*). The text consists of a total of 54 Articles relating to dignity (Articles 1-5), freedoms (Articles 6-19), equality (Articles 20-26), solidarity (Articles 27-38), citizens' rights (Articles 39-46) and justice (Articles 47-50).⁵³

In 2002 the European Racism and Xenophobia Information Network (RAXEN) was established. It has since been involved in generating country reports on a number of thematic issues, including employment, racist violence, education, legislation and housing. Other activities of RAXEN include responding to urgent information requests. For example, in 2002 the NFPs were asked to provide information on the nature and strength of Islamophobia after 11 September 2001. The RAXEN is a key instrument of the European Union Agency for Fundamental Rights (FRA). The European Union Agency for Fundamental Rights (FRA), which was established in 2007 (European Parliament 2007a)⁵⁴, uses RAXEN reports to generate comparative analyses on racism and discrimination in Europe. The FRA effectively replaced the EUMC in February 2007. The principal tasks of the FRA are to collect, analyse and disseminate objective, reliable and comparable information, to develop methods to improve the objectivity and reliability of data at the European level and to carry out or encourage scientific research and surveys; to draft and publish conclusions and opinions for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission; to publish an annual report on the fundamental rights issues covered by the areas of the Agency's activity, highlighting examples of good practice; to publish thematic reports based on its research; and to develop a communication strategy and promote dialogue with civil society, in order to raise public awareness of fundamental rights and to actively disseminate information about its work. Its

⁵² See Council Framework Decision 2008/913/JHA, *supra* note 33.

⁵³ See Charter of Fundamental Rights of the European Union, *supra* note 10.

⁵⁴ For more information on RAXEN, see: http://fra.europa.eu/fraWebsite/research/raxen/raxen_en.htm. [Accessed June 2009].

activities are defined by a thematic Multi-Annual Framework covering five years on the basis of a Council Decision that was adopted in February 2008.⁵⁵

Other awareness-raising activities have included a European Conference in Copenhagen in November 2002. The EUMC on Racism and Xenophobia⁵⁶ provided additional support. Its research is essential to a proper understanding of the problems of racism and to the formulation of policies and practices to promote equality and fight discrimination. The EUMC and the European Commission organised a series of roundtables on anti-Semitism and Islamophobia in late 2002 and early 2003 (European Parliament 2003: para. 3.1.2). In June 2003, the Commission launched the information campaign "For Diversity, Against Discrimination" to raise awareness of discrimination and to provide information about the new EU rules aimed at combating discrimination, which were due to come into force in 2003.

Through the AGIS programme⁵⁷, which was established in 2003 (and ran until 2006), the Commission co-financed actions on police and judicial cooperation in criminal matters covering, amongst other issues, racism and xenophobia and assistance to victims. Its purpose was to help legal practitioners, law enforcement officials and representatives of victim assistance services from the EU Member States and candidate countries to set up Europe-wide networks, as well as to exchange information and best practices. It also aimed at encouraging Member States to step up co-operation with applicant and third countries (European Parliament 2003: para. 3.1.2).

In 2003 concerns were raised about the protection of persons belonging to minorities in the EU, for example the situation of Roma, which is often one of discrimination and social exclusion. This remains the case in spite of the Copenhagen criteria (see *supra*), specifically highlighting the protection of minorities. In this context, the Programme of Community aid to the countries of Central and Eastern Europe (PHARE)⁵⁸ funded projects that aimed to improve the situation of Roma and other minorities in Central and Eastern European candidate countries (European Parliament 2003: para. 3.1.4). To this end, the EU has actively participated in the elaboration of the Action Plan

⁵⁵ See Council Decision 2008/203/EC, *supra* note 31.

⁵⁶ The EUMC was still operational at that time.

⁵⁷ AGIS was established by Council Decision 2002/630/JHA of 22 July 2002 establishing a framework programme on police and judicial cooperation in criminal matters (AGIS), OJ L 203 of 1 August 2002. Its purpose was to help legal practitioners, law enforcement officials and representatives of victim assistance services from the EU Member States and candidate countries to set up Europe-wide networks, as well as to exchange information and best practices. It also aimed at encouraging Member States to step up cooperation with applicant and third countries. AGIS supported trans-national projects for a maximum duration of two years. For more information, see: http://ec.europa.eu/justice_home/funding/2004_2007/egis/funding_egis_en.htm. [Accessed June 2009].

⁵⁸ See Council Regulation (EEC) No 3906/89, 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic, OJ L 375/11 of 23 December 1989. This act has been amended several times, the most recent acts dating back to 2004 and 2005 around the time of accession of the Central and Eastern European Member States.

on Improving the Situation of Roma and Sinti within the Organisation for Security and Cooperation in Europe (OSCE) area, adopted at the Maastricht meeting of the OSCE Ministerial Council in December 2003, and supported its implementation (European Parliament 2004: 28).

The “2007 European Year of Equal Opportunities for All”⁵⁹ can be seen as the hallmark of the European Commission’s framework strategy for non-discrimination and equal opportunities. Activities during the thematic year were carried out at both the European and national levels. The aim of the Year was to inform people of their rights, to celebrate diversity and to promote equal opportunities for everyone in the Union, be it in economic, social, cultural or political life. Other new initiatives include the creation of a high-level advisory group to look at integration in social and labour markets of ethnic minorities, including the Roma.⁶⁰

On 18 June 2008, the European Community and the Council of Europe signed an agreement establishing a comprehensive cooperation framework concerning the Fundamental Rights Agency and the Council of Europe. The agreement includes provisions on the organisation of regular meetings, exchanges of information and coordination of activities (European Parliament 2008: 51).

Migration, Asylum and Human Trafficking

Human rights play a central role with respect to asylum and migration policy in the dialogues with third countries (see *infra*). Furthermore, in relation to the internal dimension of human rights, significant progress has been made with regard to the forming of an EU Common Asylum Policy and the treatment of third country nationals therein; the combating of human trafficking, in particular of women and children; and family reunification, through the adoption of a significant body of legislation. References to human rights are included in the provisions of these legislative acts.⁶¹ In

⁵⁹ See Decision No 771/2006/EC of the European Parliament and of the Council of 17 May 2006 establishing the European Year of Equal Opportunities for All (2007) — towards a just society, *supra* note 32.

⁶⁰ See Commission Decision 2006/33/EC, 20 January 2006 establishing a high-level advisory group on social integration of ethnic minorities and their full participation in the labour market, *supra* note 32.

⁶¹ Several important pieces of legislation have been adopted, such as Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 of 24 December 2008; Council Decision 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General Programme ‘Solidarity and Management of Migration Flows’, OJ L 144 of 6 June 2007; Council Decisions 2006/618/EC and 2006/619/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime, OJ L 262 of 22 September 2006; Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13 of 13 December 2005; Council Decision 2004/573/EC of 29 April 2004 on the organisation of joint flights for removals from the territory of two or more Member States, of third-country nationals who are subjects of individual removal orders, OJ L 261/5 of 6 August 2004; Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12 of 30 September 2004;

relation to trafficking, in July 2003 the EP adopted for the first time a resolution on trafficking of children and child soldiers, followed by a resolution in September on human rights in the world. In these resolutions, the EC was called upon to integrate children's rights into development cooperation and to support programmes in the areas of health and nutrition, education, armed conflict, violence and abuse and child trafficking (European Parliament 2004: 30).

In June 2001 the Council initiated the second phase of the exchange and incentive programme "STOP" to combat trafficking in human beings and the sexual exploitation of children. The initial phase of the programme supported a total of 85 projects in its first five-year period. The STOP programmes involved the various parties responsible for combating these crimes at the European Union level. Its aim was to create a framework for training, information, study and exchange programmes for persons responsible for combating trade in human beings and the sexual exploitation of children in all its forms, to prevent those phenomena and to fight them more effectively. The STOP programme was renewed for two years to ensure continuity for the projects it supported.⁶²

Both the Commission's Communication and the subsequent EU Action Plan on human trafficking that were released in 2005 advocate a multidisciplinary approach to trafficking, which is not limited to law enforcement strategies, but also includes a broad array of prevention and victim support measures.⁶³

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, OJ L261/3 of 6 August 2004; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents; Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12 of 3 October 2003; Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, OJ L 50 of 25 February 2003; Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 31/18 of 6 February 2003, Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, OJ L 203 of 1 August 2002; Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, OJ L 212/12 of 7 August 2001.

⁶² See Council Decision of 28 June 2001 establishing a second phase of the programme of incentives, exchanges, training and cooperation for persons responsible for combating trade in human beings and the sexual exploitation of children (STOP II), OJ L 186 of 7 July 2001; and Joint Action 97/154/JHA of 24 February 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children (STOP), OJ L 63 of 4 March 1997.

⁶³ See European Commission, 2005. *Communication from the Commission to the European Parliament and the Council Fighting trafficking in human beings – an integrated approach and proposals for an action plan*. COM, 514 final, 18 October 2005. This Communication provided the basis for the later Action Plan. See Council of the European Union, EU plan on best practices, standards and procedures for combating and preventing illegal trafficking in human beings, OJ C 311 of 9 December 2005. The Annex to this plan details a table of actions for the EU ranked according to objective, type of action envisaged, time of implementation, responsible party and the indicator for its post-implementation assessment.

The first EU Anti-Trafficking day, on 18 October 2007, focused on a human rights-centred approach to anti-trafficking policy. On that occasion, the Commission presented “Recommendations on the identification and referral to services of victims of trafficking in human beings”, which call for the establishment of national mechanisms based on cooperation between governments and civil society organisations (European Parliament 2008: 36).

Rights of Children, Young People and Women

STOP II's activities (see *supra*) were tied in with those carried out under the Daphne programmes, which were also more open to applicant countries. The first Daphne programme was adopted in January 2000. It has since been renewed twice, with the latest renewal dating back to June 2007.⁶⁴

The general objective of the latest edition, Daphne III, is to contribute to the protection of children, young people and women against all forms of violence and to attain a high level of health protection, well-being and social cohesion. These general objectives should contribute to the development of Community policies, in particular those related to public health, human rights and gender equality, as well as actions aimed at the protection of children's rights, and the fight against trafficking in human beings and sexual exploitation, thereby contributing to the mainstreaming of human rights policy within other domains. The programme's specific objective is to contribute to the prevention of and the fight against all forms of violence occurring in the public or the private domain against children, young people and women, including sexual exploitation and trafficking in human beings, by taking preventive measures and by providing support and protection for victims and groups at risk. The programme works by means of transnational actions (grant funding), the Commission's own-initiated actions (contracts) or operating grants to NGOs, which are to: assist and encourage NGOs and other organisations active in this field; develop and implement targeted awareness-raising actions; disseminate results obtained under Daphne; undertake actions contributing to positive treatment of people at risk; set up and support multidisciplinary networks; expand the knowledge base and exchange, identify and disseminate information and good practices; design and test awareness-raising and educational materials; study phenomena related to violence and its impact; develop and implement support programmes for victims and people at risk and intervention programmes for perpetrators.⁶⁵ Also, in 2002 political agreement was

⁶⁴ For the legal bases of the DAPHNE I, II and III Programmes see *supra* note 36.

⁶⁵ See The Daphne III Programme (2007-2013) to prevent and combat violence against children, young people and women and to protect victims and groups at risk, call for proposals 2008-1 (specific transnational projects). Available at: http://ec.europa.eu/justice_home/funding/daphne3/doc/ag_call_2008_en.pdf. [Accessed June 2009]; also see The Daphne III Programme (2007-2013) to prevent and combat violence against children, young people and women and to

reached on the Draft Framework Decision on combating the sexual exploitation of children and child pornography (European Parliament 2003: para. 3.1.5). The Framework Decision was eventually adopted in December 2003.⁶⁶

In December 2004 agreement was reached between the EP and the EU Telecommunications Council to follow up the Safer Internet programme (1999-2004). One of the programme's aims is to protect children from web-based sexual exploitation. "Safer Internet plus" covered four themes: fighting illegal content, tackling unwanted and harmful content, promoting a safer environment and awareness-raising. The four-year programme (2005-2008) focused more closely on end-users: parents, educators and children. The programme included European networks of hotlines allowing the public to report illegal content such as child pornography, illegal adult pornography and racism on the Internet (European Parliament 2005: 43).

Since 1 March 2005, judgements regarding parental responsibility are recognised throughout the EU pursuant to Council Regulation (EC) No. 2201/2003.⁶⁷ These rules reinforce the fundamental right of the child to maintain contact with both parents when they live in different Member States by allowing judgements on visiting rights to circulate freely between Member States. The Regulation also seeks to effectively solve the problem of parental child abduction within the EU by imposing strict rules to assure the immediate return of the child (European Parliament 2005: 44).

The Group of Commissioners on Fundamental Rights, Non-Discrimination and Equal Opportunities decided in April 2005 to launch a specific initiative to advance the promotion, protection and fulfilment of children's rights in the internal and external policies of the EU. This initiative was put in place with the preparation of a Commission Communication entitled "Towards an EU Strategy on the Rights of the Child" (European commission 2006a). This communication marked the Commission's launch of a long-term strategy, structured around seven specific objectives: the capitalisation of ongoing activities; the mainstreaming of children's rights throughout the Commission's policies and programmes; the identification of future priorities and the launching of a wide consultation in order to develop a long-term strategy on children's rights; promoting children's rights in external relations (e.g. within the framework of the UN); establishing effective

protect victims and groups at risk, call for proposals JLS/DAP/2008-2 (Support to the activities of NGOs or other organisations through operating grants).

⁶⁶ See Council framework Decision 2004/68/JHA, *supra* note 36.

⁶⁷ See Council Regulation (EC) No 2201/2003, 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000, OJ L 338 of 23 December 2003.

communication on children's rights; increasing capacity on children's rights and putting in place efficient coordination and consultation mechanisms (European Parliament 2006: 65-66).

The framework programme dealing with solidarity and the management of migration flows (2007-2013) in the area of Justice, Freedom and Security⁶⁸ addresses in most of its instruments (the European Refugee Fund, the European Fund for Integration of Third-country Nationals and the Return Fund), directly or indirectly, the vulnerable situation of unaccompanied minors (European Parliament 2007: 32).

The European Forum for the Rights of the Child, established in cooperation with the German Presidency in 2007, contributed to strengthening EU action in the field of child trafficking. The Forum brought together key players – Member States, the German Presidency, the UN, the EP, the Council of Europe, Interpol, Unicef, national observatories on childhood, Ombudspersons for children, civil society and other stakeholders. How to ensure children's effective participation, as they will attend future forums, was discussed (European Parliament 2007: 37). In December 2007, the Council adopted new European Union Guidelines on the rights of the child (see *supra*).

Terrorism

In the aftermath of the September 11 2001 terrorist attacks the European Council approved the “Action Plan to combat terrorism”.⁶⁹ Since its adoption, several pieces of legislation have been adopted, including the Framework Decision on combating terrorism.⁷⁰ This Framework Decision offers for the first time a common definition at the EU level of “terrorist offence” and of persons and organisations responsible for such offences, aiming at a common minimum harmonisation of Member States’ criminal law in this respect.⁷¹ March 2004 saw the adoption of the EU Guidelines for a Common Approach to Combating Terrorism, an internal document to the EU Action Plan to Combat Terrorism, which sets out the EU approach on terrorism and human rights. With respect to human rights in relation to national and international efforts to combat terrorism, the 2004 Annual Report states that such efforts “must respect human rights and fundamental freedoms, the rule of law and, where applicable, humanitarian law. Violence should never be directed against civilians in

⁶⁸ See Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice, *supra* note 31.

⁶⁹ See: http://ue.eu.int/uedocs/cmsUpload/EU_PlanOfAction10586.pdf [Accessed June 2009].

⁷⁰ See Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, OJ L 164 of 22 June 2002. The most recent version is Council Framework Decision 2008/919/JHA of 28 November 2008 on combating terrorism, amending Framework Decision 2002/475/JHA on combating terrorism, OJ L 330/21 of 9 December 2008.

⁷¹ Many more references to fundamental rights are included, including a reiteration of the basic principles on which the Union is based. For a full overview see Annual Report on Human Rights 2003: para. 3.1.1.

the name of combating terrorism. Terrorism must not be answered by disregarding human rights, and the fight against terrorism must be carried out in accordance with international human rights law. Human rights apply to all persons, including persons who have committed or are suspected of having committed terrorist acts”.⁷²

Furthermore, the EU participated actively in the summit of the Council of Europe that took place on 16-17 May 2005 in Warsaw. The Warsaw Declaration adopted at the event paved the way for reinforced pan-European cooperation and solidarity, including in the fight against terrorism, while respecting human rights. The Warsaw Declaration is complemented by an Action Plan which addressed the issues of “Strengthening the security of European citizens” and “Promoting common fundamental values: human rights, rule of law and democracy”. The EU fully endorsed the objectives introduced in the Action Plan, which strongly condemns terrorism and notes the need for a firm and united response from Europe. At the same time, it calls on states to respect human rights and to protect victims while combating this threat. Two relevant new Council of Europe conventions were opened for signature at the Summit: on the prevention of terrorism, and on laundering, search, seizure and confiscation of the proceeds from crime and on the financing of terrorism (European Parliament 2005: 54).

In its Communication on prevention, preparedness and response to terrorist attacks of 20 October 2004 (European Commission 2004) the Commission developed three concepts concerning the balance between fundamental rights and fighting terrorism: (i) the fight against terrorism must not only be “integrated” into all policies, but also “inclusive”: the preservation of life, security and freedom is a fundamental task requiring the participation of all social actors; (ii) linked to the previous point is the call for the Union to contribute towards a “civic and democratic debate on securing freedom”. The term “securing freedom” draws on Article 6 of the Charter of Fundamental Rights and underlines the inextricable link between security and freedom; (iii) the notion that if new effective tools are required to fight global terrorism then “new effective controls are required to maintain the balance between collective security and individual freedom”.⁷³

The European Council of 16/17 December 2004 decided to create the post of the Personal Representative of the SG/HR on Human Rights in the area of CFSP, as a contribution to the coherence and continuity of the EU Human Rights Policy, with due regard to the responsibilities of

⁷² The 2004 Report further lists respect for the ECHR as well as other references. For a full overview see Annual Report on Human Rights 2004: 18-19.

⁷³ See also Annual Report on Human Rights 2005: 55.

the European Commission.⁷⁴ In January 2005 Javier Solana, EU High Representative for the CFSP, appointed Michael Matthiessen as his Personal Representative on Human Rights. Riina Kionka has served as Personal Representative for Human Rights in the area of CFSP for Javier Solana, Secretary-General/High Representative for CFSP, since 29 January 2007 (European Parliament 2005: 12; 2008: 13). With their appointment, the Council Secretariat made a fundamental change in its approach to Human Rights by combining responsibility for Human Rights in the Council Secretariat with that of the Personal Representative's role. This double function means that the Personal Representative represents SG/HR Solana in matters related to Human Rights, and as such is engaged in much public diplomacy. On the Council side, however, he/she also focuses on the main issues of EU Human Rights policy: the mainstreaming of human rights into CFSP and ESDP, human rights dialogues and consultations, implementation of EU Human Rights and International Humanitarian Law Guidelines, EU Human Rights policy in the UN, the Council of Europe and OSCE (European Parliament 2007: 9).

In December 2005 the Council adopted the EU Counter-Terrorism Strategy and the European Union Strategy for Combating Radicalisation and Recruitment to Terrorism (Council of the European Union 2005a). The Counter-Terrorism Strategy states that it is "to combat terrorism globally while respecting human rights, and make Europe safer, allowing its citizens to live in an area of freedom, security and justice". Furthermore, paragraph 22 of the Counter-Terrorism Strategy provides that all efforts to disrupt terrorist activity and to bring terrorists to justice will be undertaken with respect for human rights and international law. Moreover, in the context of radicalisation, paragraph 11 of the Counter-Terrorism Strategy notes that the Union must promote even more vigorously good governance, human rights and democracy, as well as education and economic prosperity, and engage in conflict resolution (Council of the European Union 2005b). The Strategy for Combating Radicalisation and Recruitment also commits the EU to targeting inequalities and discrimination within the Union and to promoting inter-cultural dialogue, debate and long-term integration (Council of the European Union 2005a).

On 12 December 2007 the EP adopted a resolution on the fight against terrorism, calling for the utmost respect for human rights during anti-terrorist actions. On 28 February 2008, the EP held a public hearing on Guantánamo Bay. The hearing considered the issue of the international legal obligations applicable to Guantánamo Bay, such as procedural rights for detainees and non-

⁷⁴ See http://ue.eu.int/uedocs/cmsUpload/Extract_from_the_Presidency_Conclusions.pdf. [Accessed June 2009].

refoulement, and the issue of resettlement of detainees leaving Guantánamo (Council of the European Union 2008: 38).

Action on Human Rights in International Affairs

Mainstreaming Human Rights Policy

In its 2001 Communication on promoting human rights and democratisation in third countries the Commission reiterated the basic principles upon which the Union is based. The Communication identifies three areas where the Commission can act effectively: (i) through the promotion of coherent and consistent policies in support of human rights and democratisation, referring to coherence between European Community policies and between those policies and other EU actions, especially the CFSP, as well as to the promotion of consistent and complementary action of human rights through development and other official assistance; (ii) by placing a higher priority on human rights and democratisation in the EU's relations with third countries and taking a more pro-active approach, in particular by using the opportunities offered by political dialogue, trade and external assistance; (iii) by adopting a more strategic approach to the EIDHR⁷⁵, matching programmes and projects in the field with EU commitments on human rights and democracy (European Commission 2001: 5). Also, the Commission explicitly called for the mainstreaming of human rights and democracy in the EC's assistance programmes (European Commission 2001: 11).

In 2002 the EU committed itself to raising human rights issues in all meetings with third countries at all levels.⁷⁶ In this context, there are also dedicated human rights dialogues with third countries. In addition, with respect to trade, the granting of additional preferences or withdrawal of preferences in relation to human rights issues is factored into the Generalised System of Preferences. The basis for temporary withdrawal of general preferences was extended to cover the serious infringement of all ILO core conventions in 2001 (European Parliament 2003: para. 2.4).

The Commission's 2003 Communication on "Reinvigorating EU actions on human rights and democratisation with Mediterranean partners"⁷⁷ identified ten areas for the improvement of dialogue and making a better use of instruments with regard to the mainstreaming of human rights. These areas included the development of National and Regional Action Plans on Human Rights, a

⁷⁵ At that time, reference was made to the 1994 EIDHR.

⁷⁶ See Council of the European Union, 2002. *Council Conclusions of 10 December 2002*. Council Doc., 15138/02. See also Council of the European Union, 2003. *Progress Report on EU External Action*. Council Doc., 6429/03.

⁷⁷ See European Commission, 2003. *Communication from the Commission to the Council and the European Parliament Reinvigorating EU actions on Human Rights and democratisation with Mediterranean partners Strategic Guidelines*. COM, 294 final, 21 May 2003.

more operational focus on human rights in political dialogue and greater attention to human rights and democratisation issues in Country Strategy Papers and National Indicative Programmes (European Parliament 2003: para. 2.4).

The Commission Communication of 8 May 2001 on human rights and democratisation (see *supra*) highlighted the need to train Commission staff as a key element in mainstreaming human rights and democratisation throughout the policies and programmes of the EU. The Commission has started to implement three distinct levels of training: basic human rights training for External Relations staff, involving one day introductory courses for groups of 20 participants (two sessions were held on 13 March and 13 May 2003); advanced human rights training for Delegation staff (posted or in the context of pre-posting) and geographical desk officers (the first session was held on 11/12 June 2003 and involved 25 participants); specialised training on key human rights thematic issues for staff requiring expert knowledge of key areas (training commenced in May 2003 with courses on indigenous people and the rights of refugees and further courses were provided before the end of that year) (European Parliament: para. 2.4).

On 23 February 2004 the Council endorsed a report drawn up by COHOM on the implementation of measures to achieve, *inter alia*, the goal of mainstreaming. These included the establishment of a subgroup on governance and human rights under the cooperation agreement with Bangladesh, intensified training on human rights for Commission staff in Brussels and in Commission Delegations, and the finalisation of a model *EU human rights fact sheet*, which will be used by EU Heads of Missions to report on human rights (the first of which was due in October 2004). Such reports serve to ensure that dialogue on human rights with third countries is based on comprehensive information. The importance of mainstreaming human rights in relations with developing countries was reiterated in the Council Conclusions of 17 November 2003 on the Commission Communication on Governance and Development (European Parliament 2004: 15).

With a view to the effective “mainstreaming” of children’s rights generally in Community policy, specific training sessions on children’s rights for EC officials were undertaken in July 2004, October 2004 and April 2005, in close co-operation with the UNICEF Innocenti Research Centre. In addition, a new informal inter-institutional group on children’s rights was launched in September 2004, drawing together representatives of the European Commission, Council Secretariat and EP. The group aims for closer co-ordination amongst EU institutions and cooperates closely with NGOs (European Parliament 2005: 47).

During 2006-2007 human rights issues were integrated into political dialogue meetings and other high level meetings between the EU and third countries in a more systematic way. In the context of ESDP, a relatively new area for human rights mainstreaming, the EU has further intensified its efforts aimed at fully integrating human rights and gender, and believes that these efforts are contributing to the overall efficiency of ESDP missions (European Parliament 2007: 84).

Joint Actions, Common Positions, Bilateral Dialogues and Human Rights Clauses vis-à-vis Third Countries

In its external policy on human rights the Union issues many declarations (see *supra*). In addition to these declarations, many Joint Actions and Common Positions are adopted that aim to strengthen democracy, the rule of law and emphasise respect for human rights in third countries.⁷⁸ In addition to Joint Actions and Common Positions, political dialogue, including human rights-specific dialogue, takes place with, *inter alia*, the United States, Canada, Japan, New Zealand, Iran, the Central Asian States, Russia associated countries and China.⁷⁹

Since the early 1990s, the EU has inserted human rights clauses in a substantial number of bilateral trade and cooperation agreements with third countries, such as the association agreements, Mediterranean agreements and the Lomé Convention (see *supra*). In light of events in these countries that constitute a (potential) breach of the human rights clauses in such agreements, the Union may at times resort to consultations with the government to resolve matters with sanctions, with the possible suspension of the agreements as ultimate enforcement. Cases such as these have been recorded numerous times since the end of the 1990s.⁸⁰

Cooperation with Multilateral Organisations

The EU works closely with organisations such as the United Nations (in particular the Human Rights Council, the successor of the Commission on Human Rights), the OSCE, the Council of Europe (CoE) as well as many others. The Member States and the Commission, acting on behalf of the EC, coordinate their activities in international organisations and at international conferences, and

⁷⁸ See for example the Annual Report on Human Rights, 2008. p. 9. Every edition of this report lists the set of countries to which Joint Actions and Common Positions have been directed. See <http://www.consilium.europa.eu/showPage.aspx?id=970&lang=EN> for an overview of annual reports on human rights. [Accessed June 2009].

⁷⁹ See for example the Annual Report on Human Rights, 2008. Every edition of this report lists the set of countries with which such dialogues have taken place. See <http://www.consilium.europa.eu/showPage.aspx?id=970&lang=EN>. [Accessed June 2009].

⁸⁰ One example from the consultations held with the government of Niger after the coup d'état in 1999. The EU's annual reports on human rights provide a yearly overview of dialogues and consultations with third countries, including with regard to agreements holding human rights clauses. See <http://www.consilium.europa.eu/showPage.aspx?id=970&lang=EN> for an overview. [Accessed June 2009].

defend the common position of the EU within those bodies. Positions adopted by the EU in international fora are regularly coordinated in various bodies, including Council working parties, and on the spot. In general, the EU works in these bodies to promote the strengthening of monitoring mechanisms and the effective respect for human rights, and for coordinated participation in developing new standards at the international level.⁸¹

Thematic areas in which the EU is active at the international level through multilateral organisations include, *inter alia*, the abolition of the death penalty; the fight against torture; the rights of children, young people and women; non-discrimination, the rights of refugees and displaced people; racism and xenophobia; strengthening human rights defenders, as well as many others.

With regard to the death penalty, the EU adopted guidelines on its policy in 1998 (see *supra*). Under these guidelines, the EU will make representations: (i) in individual cases where the use of the death penalty falls below UN minimum standards (such as executing pregnant women, mentally retarded persons or those aged under eighteen when the crime was committed); and (ii) in situations where a government's policy on the death penalty is in flux (for example, when they are considering lifting a moratorium, or de facto moratorium, on the use of the death penalty) (European Parliament 2003: 4.3.4). In its resolutions of 1 February and 26 April 2007, the EP reiterated its request for the worldwide abolition of the death penalty, and called on the EU and its Member States to take diplomatic and political action in support of a universal moratorium, as a first step towards universal abolition (European Parliament: 29).

In relation to the fight against torture, Article 4 of the EU Charter of fundamental rights reiterates the prohibition against torture and other cruel, inhuman or degrading treatment or punishment. To further strengthen its policy towards the abolition of torture the Council adopted Guidelines for an EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment.⁸² The EU's objective is to influence third countries to take effective measures against torture and other inhuman and degrading treatment or punishment and to ensure that the prohibition against torture and ill-treatment is enforced (European Parliament 2001: 77). In December 2002 the PSC adopted a working paper to ensure a more systematic implementation of

⁸¹ Each annual report on human rights of the EU lists an overview of the activities that took place within the framework of multilateral organisations. For an overview, see: <http://www.consilium.europa.eu/showPage.aspx?id=970&lang=EN>. [Accessed June 2009].

⁸² See Guidelines to EU policy towards third countries on torture, and other cruel, inhuman or degrading treatment or punishment (An up-date of the Guidelines), *supra* note 42.

the guidelines. As a first step, the EU Heads of Mission in all third countries have reported on possible patterns of torture in their countries of residence (European Parliament 2003: para. 4.3.5). In 2006-2007 the EU further pursued its policy of raising the issue of torture systematically with all countries under its “Global Action Plan on Torture”, *inter alia* through seven rounds of demarches to around 90 countries worldwide (European Parliament 2007: 31).

With regard to racism, xenophobia and discrimination the EC ran a Programme relating to the Community framework strategy on gender equality (2001-2005), which covered the enforcement of the human rights of women. One of its areas of intervention was gender equality in civil life between women and men, regardless of race or ethnic origin, religion or belief (European Parliament 2001: 100). The EU recognises that education is an essential tool to change attitudes and behaviour patterns and prevent the occurrence of racist phenomena. In the fields of education, vocational training and youth, the Community runs the Socrates, Leonardo da Vinci and Youth programmes. By funding projects proposed by those directly concerned, these programmes enable universities, teachers, educators and associations to organise trans-European actions against racism and xenophobia (European Parliament 2001: 101). Furthermore, the Council of Europe also plays an important role in promoting and protecting the rights of persons belonging to minorities. Alongside the European Convention for the Protection of Human Rights and Fundamental Freedoms, other relevant instruments in this field are the Framework Convention for the Protection of National Minorities and the European Charter for Regional and Minority Languages. The Council of Europe Framework Convention for the Protection of National Minorities is a legally binding instrument devoted to the protection of national minorities in general. Its aim is to specify the legal principles that States should respect in order to ensure the protection of national minorities within their borders (European Parliament 2001: 105).

On 8 December 2003, the EU adopted new Guidelines on Children and Armed Conflict (see *supra*) following consultations with the UN Secretary-General’s Special Representative on Children and Armed Conflict, UNICEF and NGOs. The Guidelines constitute a commitment to use the tools at the EU’s disposal to address the short, medium and long-term impact of armed conflict on children, including through monitoring and reporting by EU Heads of Mission, EU Military Commanders and Special Representatives, demarches, political dialogue, multilateral cooperation and crisis-management operations (European Parliament 2004: 85). Furthermore, a range of priority countries for EU action have been identified by COHOM, where the situation of children affected by armed conflict is particularly serious: Burundi, Colombia, Cote d’Ivoire, DRC, Liberia, Rwanda,

Sierra Leone, Sri Lanka, Sudan and Uganda. In order to establish a solid basis for EU action, Heads of Mission in most of these countries have submitted reports containing analysis of six priority areas: recruitment and deployment of children by armies and armed groups, killing and maiming of children, attacks against schools and hospitals, blockage of humanitarian access, sexual and gender-based violence against children and the abduction of children. Drawing on these reports, a plan of action was adopted by the PSC in December 2004, which identified particular themes for increased and more comprehensive EU diplomatic and political interventions and project support in identified countries. The plan also highlighted the situation in Afghanistan, Burma and Nepal and requested reports from EU Heads of Mission in these countries. In June 2005, COHOM agreed terms of reference for EU troika démarches in twelve countries, with a view to setting out in detail the EU's position to the governments concerned (European Parliament 2005: 44-45).

Following on from the Commission's February 2008 Communication⁸³, the Council adopted, in May, conclusions on the promotion and protection of the rights of the child in the European Union's external action – the development and humanitarian dimensions. These conclusions call on the EU to adopt a comprehensive and integrated approach towards the rights of the child, using all available instruments such as political dialogue, trade negotiations, development cooperation, humanitarian aid and action in multilateral fora. Particular emphasis is put on combating the worst forms of child labour, including by addressing trade instruments (European Parliament 2008:31).

In addition, the EU attaches great importance to the work performed all over the world by human rights defenders, whether acting in their personal capacity or as members of nongovernmental organisations, democratic political parties or trade unions. The adoption of the EU Guidelines on Human Rights Defenders aided this purpose.⁸⁴ Furthermore, the Special Representative of the Secretary General reports on the situation of human rights defenders all over the world, as well as on possible means to enhance their protection (European Parliament 2001:108).

In October 2005 the Commission adopted its communication "Fighting trafficking in human beings – an integrated approach and proposals for an action plan", launched in a conference organised jointly by the UK Council Presidency, Sweden as chair of the Nordic Baltic Taskforce against

⁸³ See European Commission, 2008. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions A Special Place for Children in EU External Action*. COM, 55 final, 5 February 2008.

⁸⁴ See Ensuring protection – European Union Guidelines on Human Rights Defenders, *supra* note 45.

Trafficking in Human Beings, and the Commission. The Communication, inspired by the Report of the Experts Group on Trafficking in Human Beings, supports a human rights-based approach to the phenomenon, setting the rights of victims at the centre of policies in this area. One recommendation is to specifically include the prevention of and the fight against human trafficking, and in particular its human rights dimension, in political dialogue with third countries as well as in regional and international fora. In the framework of development cooperation the Communication suggests that human trafficking and policy frameworks and strategies for its prevention and mitigation are assessed in regional and national poverty reduction and cooperation strategies and that counter-trafficking measures receive support (European Parliament 2006: 91-92).

In October 2007, the Commission established a new Group of Experts on Trafficking in Human Beings⁸⁵, taking into account the need for new membership deriving from the latest EU enlargement process and the need to ensure specific expertise, especially in the field of labour exploitation (European Parliament 2008: 35).

The Communication advocates a multidisciplinary approach to the phenomenon, not exclusively limited to law enforcement strategies but including a broad array of measures, in particular at the level of prevention and victim support. One important aspect highlighted by the Communication is the plight of specific groups: women and children, but also individuals discriminated against on any ground, such as minorities and indigenous peoples. The Communication therefore advocates for the promotion of non-discrimination as an effective counter trafficking tool and for measures specifically targeted to these groups, as well as for the collection of reliable data and analytical research. Elements of the Communication have been fed into the EU Action Plan on best practices, standards and procedures for combating and preventing trafficking in human beings. The Action Plan was adopted by the Council in December 2005, in accordance with The Hague Programme on Strengthening Freedom, Security and Justice in the European Union (European Parliament 2006: 91-92).

Activities Funded under the EIDHR

The two Regulations 975/1999 and 976/1999, laying down the requirements for the implementation of human rights operations in third countries, came into force in 1999. In 2000, the thematic priorities for the EIDHR were: (i) human rights education and awareness-raising in civil society; (ii) innovative schemes in the field of conflict prevention and innovation in countries in

⁸⁵ See Commission Decision 2007/675/EC of 17 October 2007 setting up the Group of Experts on Trafficking in Human Beings, OJ L 277 of 20 October 2007.

crisis; (iii) promotion of inter-ethnic and inter-racial tolerance in preparation for the World Conference Against Racism (2001) and support for indigenous people; (iv) good governance — measures to promote transparency, accountability and the fight against corruption, notably those which would strengthen cooperation and dialogue between the EU and its partners; (v) economic, social and cultural rights; (vi) protection of particularly vulnerable groups, especially children. 560 proposals were received and 77 projects selected for funding in 1999. 44 projects were also earmarked for funding in 2000 in the framework of the call. Decentralised methods were used to use the full potential of small local grassroots NGOs in the countries of the former Yugoslavia, central and Eastern Europe and the Newly Independent States (NIS). Multiannual regional approaches were adopted in Asia (Bangladesh) and in Latin America. Five new joint programmes were signed with the Council of Europe in 1999 (European Parliament 2000: 36-37).

In 2001, the following thematic priorities were selected: support for education, training and awareness-raising in the area of human rights; support for measures to combat racism and xenophobia and to protect minorities and indigenous peoples; promoting and protecting the freedom of opinion, expression and conscience, and the right to use one's own language; promoting and protecting the rights of children; initiatives aimed at the abolition of the death penalty; contributions to promoting and strengthening the rule of law, the independence of the judiciary and a humane prison system; promotion of pluralism, both at the political and civil society level, by strengthening institutions and organisations and by promoting independent and responsible media and free press; promoting good governance, particularly by supporting administrative accountability and the prevention and combating of corruption; promoting the participation of the people in the decision-making process, in particular by promoting the equal participation of men and women in civil society, in economic life and in politics; supporting human rights and democratisation activities aiming at preventing, resolving and dealing with the consequences of conflict, including supporting measures facilitating the peaceful conciliation of group interests, and support and assistance for the victims of human rights violations during conflict; support to electoral processes and in particular electoral observation; and support to the International Criminal Court and International Tribunals (European Parliament 2001: 52-53).

In the field of external relations, numerous projects on the fight against racism and xenophobia are funded under the EIDHR. The fight against racism and xenophobia and the promotion of the rights of minorities and of indigenous peoples was one of the four funding priorities established under the Initiative for the period 2002 to 2004. A specific call for proposals addressed to NGOs was launched

in April 2002 on these issues. The section of the call dealing with racism targets measures aimed at (i) promoting the universal ratification of the UN International Convention on the Elimination of all forms of Racial Discrimination by 2005; (ii) elaborating and implementing effective national measures to combat discrimination on the grounds of racial or ethnic origin; and (iii) tackling caste discrimination (European Parliament 2002: 57).

In 2002, five thematic Calls for Proposals were launched. For the first four Calls for Proposals, the Commission selected a total of 66 projects worth EUR 47 264 594. With respect to support for the abolition of the death penalty 7 projects worth EUR 4 897 328 were selected. Concerning fighting Impunity & Promoting International Justice three projects worth EUR 3 518 169 were chosen. Combating (i) racism & xenophobia; (ii) discrimination against ethnic minorities & indigenous people contained a total of 32 projects worth EUR 21 066 323. For the prevention of torture and (iii) the provision of support for the rehabilitation of torture victims 24 projects worth EUR 17 782 774 were picked. Furthermore, between July 2002 and June 2003 a total of 47 targeted projects (projects for joint programmes with partners, which can include international governmental organisations or national authorities) were financed for a total EU contribution of EUR 41 041 048 (European Parliament 2003: para. 4.1.6).

Although the Call for Proposals relating to Support for Democratisation, Good Governance and the Rule of Law was launched in 2002, 58 projects totalling EUR 39 954 641 were selected and financed in the second half of 2003 and targeted the focus countries only. A further five projects amounting to EUR 4 297 954 were deferred from the 2002 Call for Proposals Fighting impunity and promoting International Justice and implemented with the 2003 budget. One project worth EUR 623 000 was selected from the restricted call for proposals Promoting Women's Rights in the Maghreb Region (Morocco, Algeria and Tunisia) by means of Awareness raising, Strengthening Women's Organisations and by Legal and Political Reforms. The Call for Proposals relating to Support for the Rehabilitation of the Victims of Torture was launched in August 2003. This call aimed at selecting projects which supported the rehabilitation of torture victims in rehabilitation centres based inside the EU. The actions are funded under "Support to rehabilitation centres for torture victims based on EU territory". A total of eight projects were selected for an overall amount of EUR 4 955 949. The Calls for Proposals relating to the Promotion of democratisation and human rights in Iran and Support for Democracy, Good Governance and the Rule of Law were launched respectively in April and May 2004 with a budget of EUR 2 500 000 for the first call and EUR 39 300 000 for the latter. Furthermore, in 2003, 39 targeted projects (including electoral assistance and observation

projects) were selected for a global EU contribution of EUR 38 846 110 (European Parliament 2004: 50-51).

From April 2004, management of EIDHR country level projects was decentralised from Brussels to EC delegations as part of the de-concentration process. Dialogue between organisations implementing activities and the EC now takes place locally, which enables a more effective sharing of information and networking between EIDHR partners, as well as with EU Missions and EC Delegations. At the end of June 2005, the EIDHR was supporting more than 1000 projects around the world, covering the full range of priorities as set out in the basic regulations and in the programming document (European Parliament 2005: 32).

To achieve greater clarity and coherence of the programmes, four thematic campaigns were set and four global calls for proposals were launched in December 2005 and January 2006. An approximate amount of EUR 74,8 million was made available. The four calls (or Campaigns) targeted several priorities: (i) promoting justice and the rule of law, (ii) fostering a culture of human rights, (iii) promoting the democratic process, and (iv) advancing equality, tolerance and peace (European Parliament 2006: 48). For 2005-06, an amount of EUR 66 million was made available for calls for proposals launched by EC delegations in 54 countries. In addition, 17 projects were selected without a call for proposals, with an EU contribution of EUR 15,59 million. Major grants were made to organisations such as the Office of the High Commissioner for Human Rights, the CoE, OSCE and the international criminal tribunals. An additional specific envelope of EUR 10 million was allocated to three projects focusing on Human Rights in Iraq. A further EUR 26 million was allocated to Election Observation Missions (European Parliament 2006: 49).⁸⁶

Four global calls for proposals were launched during December 2005 and January 2006, with a total amount of EUR 74,6 million drawn from the 2005 and 2006 budgets. Also, 480 grant contracts for EIDHR micro-projects were signed and 20 projects were selected without a call for proposals in 2006. In 2007 the EIDHR was reformed and its successor (see *supra*) provides a total amount of EUR 1 104 million for the period of 2007 to 2013. Assistance under the new EIDHR is geared to support civil society, including organisations and natural persons. The multi-annual EIDHR Strategy Paper 2007-2010 is geared towards defending the fundamental freedoms which form the basis for all democratic processes, and to help civil society to become an effective force for dialogue, democratic reform and the defence of human rights. In this way, it complements and contrasts with the new generation of geographic assistance programmes, which increasingly mainstream

⁸⁶ See Annex I for a full list of projects funded under the EIDHR in 2005-2006.

democracy and human rights issues, though with a primary focus on public institution building and sectoral reforms (European Parliament 2007: 25-26).

Seven global calls for proposals were launched between July 2007 and June 2008 with a total amount of EUR 57,5 million drawn from the 2007 and 2008 budgets. These calls for proposals focused on enhancing respect for human rights and fundamental freedoms in countries and regions where they are most at risk; supporting actions in areas covered by the EU human rights guidelines (human rights dialogues, human rights defenders, death penalty, torture); providing support to global civil society campaigns related to the ICC as well as to Masters' Degree programmes in human rights and democratisation outside the EU (European Parliament 2008: 20). In 2007–2008 the EU contribution to strategic partnerships amounted to EUR 18,2 million and included, among others, the Joint Programme with the CoE, the EC-OSCE joint management project to promote democratisation and human rights in Eastern Europe, and a contribution to the production and presentation of films as human rights communication tools within the framework of the 60th anniversary of the Universal Declaration of Human Rights. The partnerships further include an annual contribution to the Office of the High Commissioner for Human Rights' Strategic Management Plan, as well as the Master's Degrees in Human Rights and Democratisation of the European Inter University Centre for Human Rights and Democratisation (EIUC) (European Parliament 2008: 20-21).

Election Monitoring and Assistance

With more and more countries moving towards democracy, Community assistance to support these transitions has increased consistently. Support for election organisation and electoral observation takes various forms: (i) technical assistance to needs identification; (ii) provision of long-term technical assistance to national electoral commissions and election administration bodies; (iii) provision of electoral and voters' registration material and other financial support to national electoral commissions and election administration bodies; (iv) support for electoral jurisdiction bodies; (v) financing of training for civic education and electoral administration officers; (vi) financing of civic education activities, either via the country's authorities or via civil society organisations; (vii) support for media monitoring by independent bodies; (viii) support for civil society organisations promoting democratic values and acting as 'watchdogs' during electoral processes and observing elections; (ix) supporting training courses for electoral observation; (x) supporting seminars and training for journalists covering electoral processes; (xi) financing seminars and research on electoral issues; (xii) supporting actions aimed at promoting a common

European approach to electoral observation; (xiii) contributions to UN-managed trust funds; (xiv) support for parties' observers during the registration and voting processes (European Parliament 2000: 34).

On 11 April 2000 the Commission adopted a Communication on Electoral Assistance and Observation⁸⁷ aimed at creating a new framework for EU election assistance and observation by defining a coherent European policy with a clear strategy, drawing heavily on lessons learned from previous EU electoral missions. The communication makes proposals to improve the decision-making process and to coordinate the roles of the EU institutions. In particular, it underlines the importance of appropriate arrangements among EU institutions in the field of electoral observation to clearly define the respective responsibilities of the Commission, the Council and the Parliament. The Council planned to consider the communication in the near future (European Parliament 2000: 34).

Following the adoption of the Commission Communication on Election Assistance and Observation in April 2000, the EP and the Council started a debate on election observation and assistance, which proved instrumental in clarifying the EU's policy in the field. As a conclusion to this debate, the EP adopted a resolution on 13 March 2001 and the Council adopted its conclusions (see annex 12) a few months later, on 31 May 2001. Both documents welcomed the Commission Communication, which, according to the Parliament, put an end to eight years of ad hoc interventions, and contributed to the establishment of a coherent framework for an EU policy in the election field (European Parliament 2001: 81).

In 2002, the EIDHR financed electoral observation missions to the presidential elections in Congo Brazzaville and East Timor, and the legislative and presidential elections in Sierra Leone (European Parliament 2002: 57). In 2002 and 2003 several other missions were sent to Cambodia, Ecuador, Pakistan, Madagascar, Kenya, Nigeria, Mozambique, Guatemala and Rwanda. In addition to these missions, a whole range of election assistance activities took place in 2002-2003, some of which were funded under the EIDHR, some through other programmes.⁸⁸ In 2004 missions were sent to Sri Lanka, Indonesia and Malawi (European Parliament 2004: 79).

Between July 2004 and June 2005, six EU election observation and two special support missions were deployed using EIDHR funding in Afghanistan, Burundi, Ethiopia, Guinea Bissau, Iraq,

⁸⁷ See European Commission, 2000. *Communication from the Commission on EU Election Assistance and Observation*. COM 191 final, 11 April 2000.

⁸⁸ See (European Parliament 2003: para. 4.3.7) for a full list of activities. See also (European Parliament 2004: 78 & 80).

Lebanon, Mozambique, West Bank and Gaza (European Parliament 2005: 62-64 & 67). Between July 2005 and June 2006, twelve EU EOMs and four special support missions were deployed in Afghanistan, Burundi, the Democratic Republic of Congo, Ethiopia, Fiji, Guinea Bissau, Haiti, Iraq, Liberia, Mauritania, Sri Lanka, Tanzania, Uganda, Venezuela, West Bank and Gaza, mostly using EIDHR funding (European Parliament 2006: 107-118 & 121-122).

Between July 2006 and June 2007, twelve EU election observation and two election support missions were deployed, mostly using EIDHR funding. Countries included Mexico, Bolivia, Zambia, the Democratic Republic of Congo, Nicaragua, Yemen, Mauritania, Bangladesh, Venezuela, Nigeria, Indonesia (Aceh) and East Timor. Furthermore, several expert missions were conducted in Guyana and Madagascar (European Parliament 2007:41-46). Between July 2007 and June 2008, eight EU election observation missions were deployed, using EIDHR funding. Countries included Sierra Leone, Guatemala, Ecuador, Kenya, Togo, Pakistan, Bhutan and Nepal (European Parliament 2008: 40-43).

Evaluation of the Institutional and Output Dimensions

Coherence

The 2001 Communication from the Commission on the EU's role in promoting democracy and human rights and democratisation in third countries explicitly calls for a more coherent and consistent EU approach (European Commission 2001b). It states that the Commission's approach is guided by compliance with the rights and principles contained in the EU Charter of Fundamental Rights, as this will promote coherence between the EU's internal and external approaches. The Charter makes the overriding importance and relevance of fundamental rights more visible to EU citizens by codifying material from various sources of inspiration, such as the European Convention on Human Rights, common constitutional traditions, and international instruments (European Commission 2001b: 3).

The Commission states that it can act effectively through promoting coherent and consistent policies in support of human rights and democratisation. It refers in particular to coherence between EC policies, and between those policies and other EU action, especially the CFSP. It also refers to the promotion of consistent and complementary action by the EU and Member States, in particular in the promotion and mainstreaming of human rights through development and other official assistance (see also *supra*) (European commission 2001b: 5).

Human rights are seen as having a significant cross-cutting nature, which makes for Community policies to not be viewed in isolation from other EU actions. The Union's tools (see *supra*) should be used in a coherent manner, to achieve synergy and consistency and to ensure the maximum effective use of resources to promote sustainable development and respect for human rights and democratisation worldwide. Furthermore, the Commission can best ensure that EP and Commission approaches are coherent and consistent by regularly exchanging views, and by reflecting Parliament's priorities in the Commission's approach wherever appropriate. In following up the Communication on Election Assistance and Observation (European commission 2000), the Commission and the Parliament have already begun to reinforce coordination, in particular through the involvement of Members of the European Parliament (MEPs) in EU observation missions. Existing contacts should, however, be intensified (European commission 2001b: 6).

The Commission's important role in ensuring that Community decisions are consistent with other EU areas should not be overlooked. For example, while a Community decision is needed to establish an EU election observation mission, the Commission should ensure that such decisions are consistent with the EU's political priorities and the CFSP. The Commission also ensures, through its input into Council discussions and the development of positions in international human rights forums, that these reflect Community action, as well as the CFSP. This is ever more important because the Council's approach can be fragmented as it discusses these questions both geographically and thematically, and in EC as well as CFSP configurations (European Commission 2001b: 7).

Furthermore, the Commission chairs the Committees of Member States which are charged with agreeing the strategies and in some cases individual projects under the Community's cooperation. It should ensure that the approach taken in these Committees is consistent with both CFSP positions taken by the Council, and with other Committees. The Commission should be alert to opportunities to foster coherence, for example by ensuring that Committees are aware of all policy and programming documents which have an impact on their area of interest (while ensuring that decisions are only made in the appropriate body) (European Commission 2001b: 7).

The Community's assistance programmes, whether past or present, (e.g. Phare, TACIS, MEDA, etc.) are available, *inter alia*, to promote human rights, democracy and the rule of law, through programmes focussed primarily, but not exclusively, on assistance channelled via governments, much of it targeted at tackling the root causes of poverty. With the exception of the European Development Fund (EDF) (which operates under the Cotonou Agreement), programmes are based

on Council Regulations, which specifically identify human rights and democratisation as principles or priorities, although the way in which this is done varies (European Commission 2001b: 11-12). A more consistent approach here would foster transparency.

Early evaluations⁸⁹ of EC assistance through both the EIDHR and the main assistance programmes have shown that its impact is reduced because of a lack of focus on priorities, as well as the limited sustainability of action. These reports suggested that its impact could be considerably enhanced through the development of a more strategic vision of how to use the instruments available to the Community in support of human rights and democracy objectives. The management of the programme has also been criticised. The emphasis has been on “single issue” projects, assessed on their individual merits. Whilst their collective impact or synergies at national level have not been so evident, most EIDHR projects, taken individually, have been of high quality, achieving positive outcomes, often in difficult circumstances (European Commission 2006b: 5). The Commission went on to state that there is a need for a more strategic approach for the EIDHR and its relationship with other instruments, where the focus should be on the EIDHR’s added value in promoting EU human rights and democratisation objectives (European Commission 2001: 13-14).

The added value lies largely in the fact that the EIDHR is complementary to the EC programmes carried out with governments, in that it can be implemented with different partners, in particular NGOs and international organisations. In addition, it represents a form of 'human rights venture capital fund', allowing the launch of initiatives on a pilot or experimental basis, which may subsequently be taken up by governments on a wider scale; it can be used without host government consent, or where the main EC programmes are not available for other reasons, such as their having been suspended; and that it is an essential complement to the CFSP objectives in the fields of human rights, democratisation and conflict prevention. In some regions, it provides the only legal basis for certain activities, including the promotion of political and civil rights, election observation and conflict resolution initiatives (European Commission 2001b: 15).

⁸⁹ See, for example, the Lenz Report on setting up a single coordinating structure within the European Commission responsible for human rights and democratisation, PE 220.735/fin, 4.12.97; Imbeni Report on the report from the Commission on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995), COM (96) 672 – C4 – 0095/97, PE 223.610/fin, 2.12.97; Roubatis Report on COM(95) 567 – C4 – 0568/95, PE228.009fin. 6.11.98. See also Evaluation of Aspects of EU Development Aid to the MED Region, COWI, Denmark, November 1998; Evaluation of Community Aid concerning positive actions in the field of human rights and democracy in the ACP countries, 1995– 1999; Evaluation of the PHARE and TACIS Democracy Programme: European Institute (Sussex)/ISA Consult/GJW, November 1997. See also European Court of Auditors Special Report 12/00 on the management by the Commission of European Union support for the development of human rights and democracy in third countries (OJ C 230, 10.08.2000).

Since this Communication much work has been done, however, to improve the programme's impact and overall coherence and consistency vis-à-vis other Community and EU policies and to avoid double standards. The EIDHR's strategy now revolves more around thematic priority areas, certain "focus countries", and overall possesses a larger degree of flexibility in its implementation. Moreover, the Commission generally decided to start using so-called "Country Strategy Papers", which ensure that EC assistance instruments are mobilised in support of human rights and democratisation objectives (European Commission 2001b: 21). Shortly after this Communication, the Council's Conclusions of 25 June 2001 further reaffirmed the need to ensure, *inter alia*, coherence and consistency between Community action and the CFSP, as well as development policy through close cooperation and coordination between its competent bodies and with the Commission, and to "mainstream" human rights and democratisation into EU policies and actions (European Commission 2003: 6).

Dialogues on human rights and democratisation should be pursued in a coherent and consistent way, based on internationally agreed standards and instruments, in particular those of the UN. They should aim, *inter alia*, at examining the respect of international conventions and treaties to which partners have agreed and the pertinence of current reservations to these treaties and conventions (European Commission 2003: 10). In its 2003 Communication the Commission recommended ensuring coherence and consistency through, *inter alia*, strengthening coordination between Commission Delegations and Member States' embassies. This should then take the form of: regular contact between Commission Delegations and civil society in close coordination with Member States' embassies; enhanced input into Heads of Missions meetings on human rights and democracy issues; increased attention to human rights and democratisation issues in the Commission's Country Strategy Papers and greater account taking of progress made in these areas in the National Indicative Programmes, including through a special additional facility; enhanced complementarity between the MEDA programme and the EIDHR; and working to ensure a more active role in the implementation of UN Resolutions and recommendations in the area of human rights, including through appropriate follow-up by its Delegations of the recommendations made by UN treaty bodies and in connection with visits by UN Special Rapporteurs and Working Groups to the countries concerned (European Commission 2003: 12 & 19).

Furthermore, all the available instruments for election support (political dialogue, MEDA and EIDHR) should be used in a coherent and complementary manner to seek the improvement of the overall election framework through cooperation with both public authorities and civil society. The

observation of elections should be considered when, given the specific situation, it has a real added value to offer (European Commission 2003: 18).

Democracy and human rights are *by virtue* issues of global concern and relevance. There is therefore a need for an EC capacity to articulate and support specific objectives and measures at the international level, which are neither geographically linked nor crisis related. Furthermore, global campaigns relating to human rights and democracy require a transnational approach and may involve operations both within the EU and in a range of partner countries. For operations such as EU election observation, a single thematic programme⁹⁰ is required to ensure policy coherence, a unified management system and common operating standards (European Commission 2006b: 6).

The decision by the European Council to create the post of Personal Representative of the SG/HR on Human Rights in the area of CFSP has contributed to the coherence and continuity of EU Human Rights Policy.⁹¹ In the context of ESDP, a relatively new area for human rights mainstreaming, the EU has further intensified its efforts aimed at fully integrating human rights and gender, and believes that these efforts are contributing to the overall efficiency of ESDP missions. These developments once more underscore the continued need to promote the mainstreaming of human rights, and the coherence and consistency of the policies and actions of the EU and its Member States in the field of human rights. Failures or inconsistencies in this respect would undermine the credibility of our policies (European Parliament 2007: 84). During 2007-2008 the Personal Representative of the SG/HR on Human Rights in the area of CFSP sought to increase coherence within the Secretariat, especially in implementing commitments the Member States have taken to mainstream human rights and gender into ESDP operations. However, coherence of overall EU action with respect to civil-military operations, including in support of further progress on reforms remains a priority to this date (European Parliament 2008: 13).

In its initiative report prepared by Hélène Flautre, the Subcommittee on Human Rights of the EP dealt with the functioning of EU sanctions against third countries. The draft report called for the rationalisation of the European Union's use of sanctions as a foreign policy instrument. Overall, the report stressed the need to develop a transparent and effective sanctions policy, in coherence with other EU human rights instruments, in line with the humanitarian and human rights commitments

⁹⁰ See Decision No 1149/2007/EC of the European Parliament and of the Council of 25 September 2007 establishing for the period 2007-2013 the Specific Programme Civil Justice as part of the General Programme Fundamental Rights and Justice, *supra* note 31.

⁹¹ See http://ue.eu.int/uedocs/cmsUpload/Extract_from_the_Presidency_Conclusions.pdf. [Accessed June 2009].

of the EU, consistent in its practice and introducing clear and transparent benchmarking (European Parliament 2008: 23).

In April 2008, the EU completed a process of stocktaking of its action carried out under the EU Guidelines on Torture between January 2005 and December 2007. This assessment contained a number of key findings and recommendations. These include the need for the EU to develop a more effective and integrated approach to torture prevention, for example by raising the issue more consistently with third countries, enhancing cooperation with the UN and regional mechanisms, intensifying public diplomacy efforts, and ensuring coherence between external and internal policies and action when addressing torture issues (European Parliament 2008: 30).

The thematic evaluation on the Abolition of Death Penalty Projects undertaken between November 2006 and February 2007 covered a portfolio of all EIDHR 28 projects since 1998. The report stated that improvements were needed in terms of coherence and a strategic approach to death penalty projects. It is likely that well-positioned and well-designed projects will make significant contributions in the coming years and positively impact on the reputation of the EU in the fight against the death penalty (European Parliament 2007a: 27).

On 19 June 2008 the European Council adopted conclusions on the rights of the child, and in particular on children and armed conflict. The Council called on the Commission and Member States to continue ensuring coherence, complementarity, and coordination of human rights, security, and development policies and programmes, with a view to addressing the short, medium, and long-term impacts of armed conflict on children in an effective, sustainable, and comprehensive manner (European Parliament 2008: 32).

The EU's 2008 Annual Report on Human Rights noted that during 2007-2008 the EU had made additional efforts to strengthen the coherence and transparency of its human rights policy. It is, however, important to continue to make this policy more effective and to have human rights fully taken into account in all relevant policies and actions, within and outside the EU, in order to ensure the EU's credibility vis-à-vis third countries, including by systematically integrating clauses on human rights and core labour standards in EC negotiations and EU agreements with third countries. The EU human rights guidelines and other norms will be further elaborated and operationalised through the development of practical implementation tools (European Parliament 2008: 87).

Accountability

The EC Treaty has various provisions on which human rights acts can be based that are to be decided upon according to the co-decision procedure, thereby giving more power to the EP to hold Community action to account: Articles 12, 13(1), 39, 43, 137(i), 141, 177(2), 63(1) and 63(2)(a) TEC (see *supra*). The Parliament is merely consulted for measures taken on the basis of Articles 13 (with the exception of 13(1) TEC), 62(2)(b)(i), 62(2)(b)(iii), 63 (with the exception of 63(1) and 63(2)(a) TEC) and 181a(1) TEC, whereas the Parliament's assent is required for agreements under Article 310 TEC. Judging from the legal provisions, there appears to be ample basis for the Parliament to enforce its checks and balances on Community action.

In terms of practical action, the Passenger Name Records (PNR) proposal from the Commission⁹² was intensely debated in the Parliament. Eventually the Parliament voted on the issue in light of serious privacy concerns over the post 9/11 anti-terror measure, which caused the case to be referred to the ECJ. In its ruling, the ECJ held that the arrangements on the transfer of PNR data from the EC to the US Bureau of Customs and Border Protection was illegal and should be annulled.⁹³ The Opinion of Advocate General Léger recommended to the Court to do exactly that in his Opinion of 22 November 2005.⁹⁴

Case C-318/04 concerned the legality of Commission Decision 2004/535/EC on the adequate protection of personal data contained in the Passenger Name Record of air passengers transferred to the United States Bureau of Customs and Border Protection. The Court held that the Commission Decision was wrongly based on Directive 95/46/EC⁹⁵, because the processing of the data put at the disposal of the United States concerned public security and the activities of the state in relation to criminal law and the fight against terrorism. Processing data as such was outside the scope of the protection given by Directive 95/46/EC according to its Article 3 second paragraph. Consequently,

⁹² See European Commission, 2007. *Proposal for a Council Framework Decision on the use of Passenger Name Record (PNR) for law enforcement purposes*, COM 654 final, 6 November 2007. This Proposal was eventually adopted, see: Council Decision 2007/551/CFSP/JHA of 23 July 2007 on the signing, on behalf of the European Union, of an Agreement between the European Union and the United States of America on the processing and transfer of Passenger Name Record (PNR) data by air carriers to the United States Department of Homeland Security (DHS) (2007 PNR Agreement), OJ L 204 of 4 August 2007.

⁹³ See ECJ, 2005. Joined Cases *European Parliament v Council*. C-317/04, ECR I-2547 and *European Parliament v Council and Commission*. C-318/04, ECR I-2467.

⁹⁴ See Opinion of Advocate General Léger delivered on 22 November 2005 on Joint Cases *European Parliament v Council*. C-317/04 and *European Parliament v Council and Commission*. C-318/04.

⁹⁵ Judgment of the Court of 30 May 2006 - (Protection of individuals with regard to the processing of personal data – Air transport – Decision 2004/496/EC – Agreement between the European Community and the United States of America – Passenger Name Records of air passengers transferred to the United States Bureau of Customs and Border Protection – Directive 95/46/EC – Article 25 – Third countries – Decision 2004/535/EC – Adequate level of protection) in Joined Cases C-317/04 and C-318/04, ECR I- 2457 and I-2467.

the Commission could not adopt Decision 2004/535/EC on the basis of article 25 paragraph 6 of Directive 95/46/EC. The Court reached this conclusion even though it noted that the data was initially collected by airlines, not governmental agencies. It held that the collection and transfer of the data by the airlines was required by law for reasons of public security unrelated to their provision of transport services to passengers. Case C-317/04 was about whether Article 95 TEC could serve as the legal basis for the adoption by the Council of Council Decision 2004/496/EC of 17 May 2004 on the conclusion of an Agreement between the European Community and the United States of America on the processing and transfer of PNR data by Air Carriers to the United States Department of Homeland Security, Bureau of Customs and Border Protection. The Court simply held that, as in Case C-318/04, the processing of data for reasons of public security and in respect of the activities of the state in relation to criminal law and the fight against terrorism, Council Decision 2004/496/EC could not be lawfully based on Article 95 EC.

This may indicate that the EP has successfully held the Commission and the Council to account on this matter, yet the Parliament raised a whole series of pleas (on proportionality, breach of fundamental rights, etc.), which the ECJ simply did not examine. Taking this into account it seems that the Parliament's reach in this matter was more limited, notwithstanding the annulment of the Decision.

In another case, the Parliament lodged an action for annulment before the European Court of Justice (ECJ 2006) by which it requested the partial annulment of certain provisions of the Directive on family reunification⁹⁶, on the grounds that they were in violation of fundamental rights. This constituted the first time that the EP introduced an action for annulment on the basis of non-respect of fundamental rights (European Parliament 2004: 25). In its judgment the Court rejected a claim by the Parliament that Directive 2003/86/EC breached the fundamental right to the respect of family life.⁹⁷ Directive 2003/86/EC provides in particular that a national of a non-Member State lawfully living in the EC is in principle entitled to the grant of authorisation by the host Member State allowing his/her children to join him/her by way of family reunification. But it nevertheless allows Member States in certain circumstances to apply national legislation derogating from the rules that apply in principle. The Parliament submitted that those provisions constituted a breach

⁹⁶ See Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, OJ L 251/12 of 3 October 2003.

⁹⁷ See Judgment of the Court of 27 June 2006 - (Immigration policy – Right to family reunification of minor children of third-country nationals – Directive 2003/86/EC – Protection of fundamental rights – Right to respect for family life – Obligation to have regard to the interests of minor children) in Case C-540/03, ECR I-05769.

of the fundamental right to family life and should therefore be annulled (they breached that right as they permitted Member States to breach them). The Court however disagreed.⁹⁸

The Court recalled that fundamental rights form an integral part of the general principles of law. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect.⁹⁹ Furthermore, the International Covenant on Civil and Political Rights is one of the international instruments for the protection of human rights of which it takes account in applying the general principles of Community law.¹⁰⁰ That is also true of the Convention on the Rights of the Child, which, like the Covenant, binds each of the Member States. The Court, however, held that those international instruments do not create an individual right for the members of a family to be allowed to enter the territory of a State and cannot be interpreted as denying Member States a certain margin of appreciation when they examine applications for family reunification. Directive 2003/86/EC imposes precise positive obligations on the Member States and allows them to verify whether a child aged 12, who arrives independently from the rest of his/her family, meets integration conditions. Being able to conduct that verification preserves a limited margin of discretion for those States, which is no different from that accorded to them by the ECtHR – in its case law relating to the right to respect for family life – for weighing, in each factual situation, competing interests. Thus, as the Directive confers no greater discretion on the Member States than they already enjoy under the different international conventions, the Directive itself does not breach the rights guaranteed by those conventions. The Parliament therefore lost the case.¹⁰¹

The EP established, on 18 January 2006, a Temporary Committee to investigate the alleged use of European countries by the United States' Central Intelligence Agency (CIA) for the transportation and illegal detention of prisoners. It presented an interim report in June 2006 to Parliament, which adopted on 6 July 2006 a resolution midway through the work of the Temporary Committee (European Parliament 2006: 17). The final report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners was released on 30 January 2007

⁹⁸ See *infra* note 97.

⁹⁹ In relation thereto see ECJ, 2004. *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn*. Case C-36/02, ECR I-9609, para.33.

¹⁰⁰ In relation thereto see ECJ, 1998. *Grant v South-West Trains*. Case C-249/96, ECR I-62, para. 44.

¹⁰¹ See Judgment of the Court of 27 June 2006 - (Immigration policy – Right to family reunification of minor children of third-country nationals – Directive 2003/86/EC – Protection of fundamental rights – Right to respect for family life – Obligation to have regard to the interests of minor children) in Case C-540/03, ECR I-05769.

(European Parliament 2007b). According to the report Britain, Poland, Germany, Italy and other EU nations were aware of secret CIA flights over Europe and the abduction of terror suspects by US agents. The report, the conclusion of a yearlong investigation into CIA activities in Europe, also accused the High Representative for CFSP, and other high-ranking officials, of not cooperating with the investigation and not revealing all they know about the US secret detention program. It called for unspecified sanctions against Member States found to have violated EU human rights principles. However, the report said evidence gathered does not prove that CIA secret prisons were based in Poland - an allegation that prompted the investigation in November 2005 (European Parliament 2007b).

Despite these “revelations” by the Parliament, the report was heavily criticised (also from within the Parliament itself) for being significantly based on hearsay, and for assertions being quickly turned into facts. No real concrete action resulted from the report in the end, partly due to there being no Community competences on the issue and the competence lying squarely with the Member States. Nonetheless, the fact that the Parliament raised the issue does give some credit to its powers to undertake such accountability enquiries.

Legitimacy

Input Legitimacy

In terms of the Union’s input legitimacy the above analysis of accountability indicates that enough provisions make parliamentary scrutiny possible, yet the question of competences remains an obstacle. When looking at public opinion, the 66th Eurobarometer of December 2006 highlights that peace (52%), respect for human life (43%) and human rights (42%) are the most important personal values of Europeans (Eurobarometer 2006: 34).¹⁰² When asked about the values that best represent the European Union, respondents also positioned human rights and peace in the top three. The respect for human life appears to be less embodied by the EU, while the importance of democracy and the rule of law seem more evident at the EU level than at a personal one.¹⁰³ The 70th Eurobarometer of December 2008 shows that 5% of respondents think that promoting democracy and human rights in the world *is* the main objective of the building of Europe (Eurobarometer 2008: 71)¹⁰⁴, whereas 7% think this *should* be the objective.¹⁰⁵

¹⁰² Response to question: “And in the following list, which are three most important values for you personally?”.

¹⁰³ Response to question: “Which three of the following values, best represent the European Union?”.

¹⁰⁴ Response to question: “In your opinion, at the current time, what is the main objective of the building of Europe?”.

¹⁰⁵ Response to question: “And what should be the main objective of the building of Europe?”

Keeping in mind that support for a common foreign policy is consistently high, the Union seems to have a mandate for conducting human rights policy *as part of general foreign policy* at the EU level, judging from the value that EU citizens attach to human rights and democracy (c.f. Eurobarometer 66).

Output Legitimacy

The 2005 Annual Report on Human Rights states that the EU aims to be a "convincing power" rather than an "imposing power", with engagement and dialogue as the preferred means of interaction with third states, and effectiveness the aim (European Parliament 2005: 35). One important challenge is, and will probably remain, to ensure coherence of human rights policy with the overall CFSP. That is one of the reasons why the Council welcomed the appointment by the SG/HR for CFSP of a Personal Representative for Human Rights. Key to coherence is effective mainstreaming. Therefore, individual EU Member States, the GSC and the Commission should seek effective mainstreaming of human rights in their own institutions. An area of particular importance in this regard is the whole area of civilian and crisis management (see *supra*) (European Parliament 2005: 35-36).

According to the 2006 report the challenge of coherence indeed remained. There is still room for improvement in coherence and the mainstreaming of human rights as an all-embracing tool in policy implementation. The EU's complicated structure and issues related to competences, as well as the roles of various actors, need to be taken into account. Delivering a coherent message is a key to being credible and achieving results in terms of promoting human rights on the ground (European Parliament 2006: 52). Furthermore, the horizontal approach to human rights in EU external policy (taking human rights more fully into account in political dialogues and by EU Special Representatives) remains one of the principal challenges for the Member States, the Council Secretariat, and the Commission (European Parliament 2008: 87).

During 2007-2008 increasing numbers of political dialogues with third countries for promoting human rights were set up. In a communication adopted in February 2008, the PSC welcomed the progress made in the development of specialised human rights dialogues with third countries, which testifies amply to the success of the EU's action in this area. It also noted that the EU needs to ensure consistency between these various dialogues and ensure that it has the capacity to respond to requests from third countries (European Parliament 2008: 88).

During 2006-2007 human rights issues have been integrated in a more systematic way into political dialogue meetings and other high level meetings between the EU and third countries. In the context of ESDP, a relatively new area for human rights mainstreaming, the EU has further intensified its efforts, aiming to fully integrate human rights and gender, and believing that these efforts are contributing to the overall efficiency of ESDP missions (European Parliament 2007: 84). During 2007-2008, one of the key results was undoubtedly the adoption of the European Council conclusions on human rights, concretely on the rights of the child, in particular children affected by armed conflict, in June 2008. The conclusions reaffirmed the need for a comprehensive approach to the rights of children affected by armed conflicts that encompasses security, development, and human rights. The conclusions reflected an effort to intensify the mainstreaming of the rights of children affected by armed conflict into EU development policy and programming (on which a set of conclusions was adopted by the GAERC in May 2008), into ESDP operations (with a revised Checklist adopted at the May General Affairs and External Relations Council), as well as the adoption of revised guidelines and with the publication of documents relevant for mainstreaming human rights into ESDP operations. Furthermore, the mainstreaming of human rights in the EU's policies has advanced substantially in recent years, particularly in the context of the ESDP, in particular by increasingly appointing human rights and gender advisers in all ESDP missions (European Parliament 2008: 87).

Another key challenge is the implementation of international measures. There are now a number of human rights Guidelines in place. Major UN human rights conventions have attracted a significant number of ratifications. What remains an issue, however, is their practical application (European Parliament 2005: 36). With respect to the EIDHR, EU political priorities are reflected in the programming of community aid. However, given that the EC is required to award grants through open competitive calls for proposals that attract a considerable number of proposals, the project-selection process can mean that project proposals which correspond to the EU's political priorities do not receive sufficiently swift support. Greater effort accordingly needs to be made to reduce the gap between priority setting (through programming) and its implementation. Moreover, the lack of information about the impact of previously funded projects on the human rights situations that they address remains a concern, given that policy should be based on the evidence of results (European Parliament 2005: 36-37).

On thematic issues, EU action is particularly effective where the EU is perceived as having a strong record of promoting and protecting particular human rights within its own borders. A good

example is the fact that all EU Member States have abolished the death penalty for all crimes, which permits the EU to speak from a position of authority. Conversely, where the EU's own record has been subject to criticism, whether justified or not, by domestic or international organisations, this may make it harder for the EU to get its message across to third countries (European Parliament 2005: 86).

Furthermore, EU policy may be particularly effective where there is a concerted effort by EU Member States to ratify and implement a new human rights instrument, thereby providing a solid basis for the EU to secure wider international support (such as with the Rome Statute of the International Criminal Court, for example) (European Parliament 2005: 86). Where such an approach is not possible, the EU's policy goals may not be realised as effectively. The EU calls upon States in various multilateral as well as bilateral fora to give early consideration to signing and ratifying the Optional Protocol to the Convention against Torture (OPCAT). However this objective is more difficult to achieve due to the slow progress towards ratification of the instrument by EU Member States, which is partly explained by the complex technical and constitutional issues which the instrument raises (European Parliament 2005: 86). In 2006-2007, besides regular démarches and public statements, the EU supported - through the EIDHR - a number of civil society-led projects on public education, outreach to the media and assistance to anti-death penalty organisations (European Parliament 2007a: 83). To increase overall effectiveness, COHOM advocates a systematic inclusion of human rights issues on the agenda of experts' meetings on thematic issues (terrorism, for instance) and first and third pillar decisions, and at summits between the EU and third countries. An improved horizontal approach would also increase the visibility of the EU's action on human rights worldwide (European Parliament 2008: 87).

Démarches taken during 2005-2006, which have been followed-up on, have shown in a short-term impact assessment both success and sometimes lesser or no effect. In many cases, EU actions have had direct influence as dissidents have been freed and punishments reduced. In general, evaluating the efficiency of the EU's human rights action is not easy, and a long-term view is also needed. Démarches on, for instance, individuals facing the death penalty naturally seek to alter the sentence of the individual concerned, yet at the same time also convey the message of the EU's general line of promoting abolition in all countries, and may thus also produce results in the longer term (European Parliament 2006: 53).

EU policy is also furthered most effectively where EU financial instruments – in particular the EIDHR – are successfully complementing EU policy priorities. The EIDHR, however, cannot support

projects relating to all EU human rights priorities (European Parliament 2005: 86). A thematic evaluation undertaken in 2005-2006 on the relevance and effectiveness of EIDHR projects dealing with the fight against racism, xenophobia and the promotion of minorities' rights (excluding indigenous peoples) showed that the majority of the 17 projects selected demonstrated substantial results, undoubtedly improving the lives of those who are victims of racism and discrimination. It was further reported that the EIDHR programme reached some of the most vulnerable members of discriminated against communities in some of the most challenging environments in the world (European Parliament 2006: 50).

The thematic evaluation on the Abolition of Death Penalty Projects undertaken in 2006-2007 covered a portfolio of all EIDHR 28 projects since 1998. It showed that implementing partners of the Commission have performed well and that the EU has much to be proud of after more than 10 years and over EUR 10 million of support. The report noted that there is a global abolitionist tendency and that this opportunity should not be missed. It also stated that improvements were needed in terms of coherence and a strategic approach to death penalty projects. It is likely that well-positioned and well-designed projects will make significant contributions in the coming years and positively impact on the reputation of the EU in the fight against the death penalty (European Parliament 2007a: 27).

During 2005-2006 the EU undertook evaluations of its policies, for instance with regard to human rights defenders. In this context the assistance provided by the Human Rights Defenders Guidelines in coordinating a common and more joined-up EU approach in many countries was welcomed. Awareness-raising on the Guidelines, however, is still needed (European Parliament 2006: 164). An important action has been taken in the context of the Guidelines on Human Rights Defenders in 2006-2007, when EU Missions worldwide were invited to develop consistent local strategies in order to increase protection of this vulnerable group (European Parliament 2007a: 83).

With regard to children and armed conflict, in its Conclusions of 12 December 2005 the Council welcomed the progress made towards implementing the Children and Armed Conflict Guidelines. At the same time it noted, however, that further mainstreaming of this aspect throughout the EU system, including crisis management, was necessary. The implementation of the guidelines further requires thorough reporting on action taken on the ground, and all actors concerned should devote special attention to this issue (European Parliament 2006: 164). With the aim of increasing the effectiveness of these Guidelines, several initiatives have been taken, such as developing country strategies for specific focus countries as well as action in relation with third countries aimed at

promoting the principles of the Guidelines (European Parliament 2007a: 83). New Guidelines on the rights of the child were adopted in December 2007. The EU then set about developing tailor made strategies for ten priority countries, in close cooperation with UNICEF and NGOs. This approach should lead to better implementation of these Guidelines (European Parliament 2008: 88).

Conclusion

In sum, considerable progress has been made since the Commission's 2001 Communication, which explicitly called for the increasing of coherence and consistency. Nonetheless, judging from the continued calls to do so, there appears to be an ever present need to further mainstream human rights into Community and EU policies. Areas of particular attention are the ESDP (both military and civilian aspects), dialogues on human rights and democratisation with third countries (see *supra* on recommendations to improve coherence), EIDHR projects (where focus should be more on benefiting from the collective impact or synergies at the national level), the need to develop a more effective and integrated approach to torture prevention and death penalty projects, and intensifying existing contacts between the Commission and the Parliament in the context of EU election observation missions.

Furthermore, judging from the above, the provisions within the EC Treaty give the Parliament ample opportunity to be on the record when it comes to decision-making concerning human rights. Furthermore, as case law shows, the Parliament has the ability to bring actions before the Court in order to hold the Commission and the Council to account. It has done so with mixed success. However, as the question of competences within the field of human rights remains a precarious issue, it is difficult for the Parliament to hold individual Member States to account when the competence clearly lies with them, as the mechanism allowing for the suspension of rights when Member States breach one of the principles enshrined in Article 6(1) TEU has never been implemented (TEU: Art. 7(1)). Consequently, the available powers are limited to undertaking enquiries such as the one above, with little enforcement mechanisms at their disposal. The investigation into the CIA flights is tantamount to that matter.

Finally, the level of output legitimacy of the Union's human rights policy has significantly increased in recent decades. Mainstreaming has been a priority for a long time and this approach has yielded good results. Nonetheless it remains a priority for the coming years, as improvements are still necessary, notably with regard to ESDP operations. On thematic issues, improvement is still needed

on the fight against the death penalty. Other areas for improvement are the promotion of the application of international human rights measures and ensuring that EIDHR projects are in fact used *complementarily* to Community actions in the field of human rights.

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