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RESPECT FOR HUMAN RIGHTS AS A GENERAL OBJECTIVE OF THE EU'S EXTERNAL ACTION

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ABSTRACT

This paper aims to provide an accessible and primarily descriptive introduction to the issue of respect for human rights as a general objective of the EU's external action. It does so from a legal perspective, starting with a brief historical overview which will show that the initial reluctance to explicitly articulate the EU's commitment towards human rights has given way to a legal framework which firmly places human rights at the centre of the EU's external relations (Section 2). The main EU actors as regards the task of formulating, implementing and monitoring the external relations policy of the EU, including its global human rights policy will be subsequently described (Section 3), after which a broad overview of the EU's policy framework (Section 4) and main external instruments (Section 5) will be offered. This paper concludes with some critical remarks on the EU's professed aspiration to establish itself as a global promoter of values and the recurrent challenges it has faced on this front and in particular the need to improve the coherence and effectiveness of its human rights external policy.

KEYWORDS

Human Rights; EU External Action; EU Human Rights Promotion; EU External Instruments

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1. INTRODUCTION

Federica Mogherini, the High Representative of the EU for Foreign Affairs and Security Policy and Vice-President of the European Commission in the Juncker Commission since 1 November 2014, recently confirmed that respect for human rights would be one of her overarching priorities and 'a compass in all relations within EU Institutions, as well as with third countries, international organizations and civil society.'¹ In doing so, the High Representative did not break new ground but merely reaffirmed the EU's commitment to become a 'global force for human rights',² and to place human rights at the heart of the EU foreign policy agenda following the entry into force of the Lisbon Treaty on 1 December 2009, an amending Treaty which resulted in the adoption of provisions making clear *inter alia* that the Union's action on the international scene shall be guided by a number of principles such as democracy, the rule of law and the universality and indivisibility of human rights.³

This paper will exclusively focus on respect for human rights as a general objective of the EU's external action. It aims to provide an accessible and primarily descriptive introduction to this topic from a legal perspective, starting with a brief historical overview which will show that the initial reluctance to explicitly articulate the EU's commitment towards human rights has given way to a legal framework which firmly places human rights at the centre of the EU's external relations (Section 2). The main EU actors as regards the task of formulating, implementing and monitoring the external relations policy of the EU, including its global human rights policy will be subsequently described (Section 3), after which a broad overview of the EU's policy framework (Section 4) and main external instruments (Section 5) will be offered. This paper will conclude with some critical remarks on the EU's professed aspiration to establish itself as a global promoter of values and the recurrent challenges it has faced on this front and in particular the need to improve the coherence and effectiveness of its human rights external policy.⁴

¹ European Commission, EU proposes new Joint Action Plan on Human Rights and Democracy, Press release IP/15/4893, 29 April 2015.

² Joint Communication by the European Commission and EU High Representative, *Human Rights and Democracy at the Heart of EU External Action – Towards a more Effective Approach*, COM(2011) 886, 12 December 2011, p. 5.

³ Art. 21 TEU.

⁴ Joint Communication on Human Rights and Democracy at the Heart of EU External Action, *op. cit.*, p. 6.

2. PROMOTING RESPECT FOR HUMAN RIGHTS ABROAD: A BRIEF HISTORICAL OVERVIEW

As originally conceived, the EU was resolutely economic in character and the establishment of a common market the most immediate and tangible objective of European integration. Neither the Treaty of Paris nor the subsequent Treaty of Rome made explicit reference to respect for human rights as either a foundational value or a guiding principle for Community action.⁵ This is not to say that the initial lack of express and exhaustive provisions for the protection of human rights meant the absence of any protection. In 1969, the European Court of Justice held that fundamental rights were enshrined in the general principles of law that the Court protects.⁶ The Court's motivation for protecting fundamental rights did not however derive from a sudden passion for rights. It is generally accepted that this decision was motivated by the need to respond to the German Federal Constitutional Court, which had threatened to disregard the primacy of EU law so long as the Community legal order lacked specific protection for fundamental rights.⁷

This initial reluctance to explicitly articulate the EU's commitment towards human rights did not however last long. In 1973, respect for human rights was formally identified as one of the 'fundamental elements of the European Identity', along with the principles of representative democracy, the rule of law and social justice.⁸ A few years later, a Declaration issued jointly by the European Parliament, the Council and the European Commission went further by referring to respect for human rights as a general principle underlying the establishment of the European Communities and binding them.⁹ The purpose of this declaration was to 'fuse the forces of law and rights into the core of the Community' by demonstrating its human rights pedigree.¹⁰ By making clear the EU's commitment towards a number of key values of Western constitutionalism, it was hoped that the authority and legitimacy of the 'European construct' would be enhanced.

The role of the EU as an *external* human rights actor evolved alongside the development of this foundational doctrine, whereby the EU is presented as a value-based community, which not only aims to adhere to a number of foundational values but also seeks to promote them, especially beyond its borders.¹¹ Although human rights were not mentioned in the 1970 Luxembourg report, which established the European Political Cooperation mechanism as a precursor to the Common Foreign and Security Policy (CFSP), rights promotion quickly became a focal point for the coordination of member state negotiating positions in the Conference on Security and Cooperation in Europe, which resulted in the 1975 Helsinki

⁵ For a superb historical account and the original argument that the silence of the original EC Treaties reflected a pragmatic and conscious decision that the project of supranational European integration should move cautiously following France's failure to ratify the European Defence Community in 1954, see G. de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 *American Journal of International Law* 649.

⁶ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

⁷ For a general overview of the role played by the Court of Justice since the early days of European integration, see B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in P. Alston (ed.), *The EU and Human Rights* (OUP, 1999), 860.

⁸ *Declaration on the European Identity* by the Nine Foreign Ministers on 14 December 1973 in Copenhagen, Bull. EC, December 1973, No. 12, p. 118.

⁹ Joint Declaration [1977] OJ C/103, 1.

¹⁰ A. Williams, *EU Human Rights Policy: A Study in Irony* (OUP, 2004), 151.

¹¹ The concept of 'normative power' is often used to describe the EU's understanding of itself as an organisation uniquely preoccupied with adherence to and promotion of its foundational values in a normative way. The concept itself was coined by I. Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40(2) *Journal of Common Market Studies* 235.

Final Act.¹² But this focus was not maintained thereafter and beyond the need to react to 'cases of atrocities', the EU did not begin to incorporate the protection of human rights as an objective of external relations policy in its own right until the end of the Cold War provided the impetus to do so.¹³

Article J(1) of the Treaty on European Union signed at Maastricht in 1992, established the development and consolidation of democracy, the rule of law and respect for human rights as an objective of the newly created CFSP. At the same time Article 130u of the Treaty Establishing the European Community also confirmed the promotion of democracy, the rule of law and respect for human rights as among the core objectives of development cooperation policy. The role of human rights in the external relations of the Union was further extended by Article 181(a) of the EC Treaty as amended by the Nice Treaty, which confirmed the promotion of human rights as an objective not only of development cooperation and the CFSP but all forms of cooperation with third countries.

In addition to committing itself to the development of external policies that aimed to promote abroad the values proclaimed by the EU at home, numerous Treaty amendments adopted in the 1990s also made it clear that respect for human rights, along with the other EU's foundational values now codified in Article 2 TEU,¹⁴ constituted an eligibility condition for EU membership and an accession benchmark.¹⁵ The 1993 Copenhagen European Council was also noteworthy in this regard, setting firm conditions for EU membership, including stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.¹⁶

Notwithstanding these developments, the Lisbon Treaty, which came into effect in December 2009, represents a significant landmark in terms of the place of human rights in the primary law of the EU. Article 6 TEU brought the primary law of the EU more firmly into line with its foundational doctrine by providing the EU Charter of Fundamental Rights of 7 December 2000 with the same legal value as the Treaties and by committing the EU to acceding to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms. At the same time, Article 21(1) TEU placed human rights at the centre of the EU's external relations by providing that the Union's action on the international scene shall be guided by a number of principles which it seeks to advance in the wider world, and in particular democracy, the rule of law and the universality and indivisibility of human rights.¹⁷

¹² K. Smith, *European Foreign Policy in a Changing World* (Polity Press, 2nd ed., 2008), p. 117. The Helsinki Final Act lists respect for human rights and fundamental freedoms as among a total of 10 core principles which are supposed to guide relation between participating states.

¹³ On the emergence of human rights as a 'transversal' EU objective, see B. Brandter and A. Rosas, 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice' (1998) 9 *European Journal of International Law* 468.

¹⁴ The 1997 Amsterdam Treaty inserted a new provision into the TEU making clear that the Union is founded on a number of fundamental values. As amended by the Lisbon Treaty, this provision now provides that 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

¹⁵ See Art. 49 TEU as amended by the Lisbon Treaty: 'any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union.'

¹⁶ Council of the EU, Presidency Conclusions: Copenhagen European Council 21-22 June 1993.

¹⁷ Also noteworthy is Art. 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests...'

The insertion of such unequivocal language regarding the role of human rights in the external relations of the EU into the Treaties called for a robust response from the EU institutions with responsibility for formulating, implementing and monitoring it, prompting a period of intense internal reflection.¹⁸ This culminated in the adoption in June 2012 of the first ever ‘Strategic Framework and Action Plan on Human Rights and Democracy’,¹⁹ the aim of which is to give practical expression to the promise of Lisbon and to guide the EU’s external human rights policy into the future. The 2012-2014 ‘Human Rights and Democracy Package’ and the recently adopted Action Plan on Human Rights and Democracy for the period 2015-2019²⁰ will be discussed in further detail in section 3 below. Before doing so, a brief overview of the EU’s institutional framework will be offered.

3. INSTITUTIONAL FRAMEWORK

Until the entry into force of the Lisbon Treaty, the formulation and implementation of internal and external commercial, economic and social policy fell under the first of three distinct ‘pillars’ created by the Treaty of Maastricht, and was primarily the responsibility of the European Commission as well as the Council. At the same time, traditional foreign policy outside of these areas fell under the second pillar, or Common Foreign and Security Policy (CFSP), and was negotiated between national governments through the Council, with action on the part of the EU normally requiring unanimity.

The entry into force of the Lisbon Treaty has not radically simplified this rather byzantine framework.²¹ While it did formally abolish the EU’s ‘pillar structure’, in practice the distinction between the first and second pillars remains in relation to external relations. This means, in a nutshell, that decision-making under the CFSP still remains largely intergovernmental in nature and that unanimity is still normally required in the Council before specific CFSP instruments may be adopted.²² The Lisbon Treaty did however innovate with the creation of the posts of President of the European Council and of High Representative of the EU for Foreign Affairs and Security Policy.²³ It also introduced a number of more limited institutional changes with respect to the European Commission, Council and European Parliament, which will be described below, with the advertised goal of guaranteeing more coherence and strengthening the Union’s external unity and representation. However, the new senior positions previously mentioned were created without it having been made clear in the Treaty how they would interact, leaving many hostages to fortune. Furthermore, by strengthening the legislative, budgetary and supervisory roles of the European Parliament – although the powers of the Parliament continue to remain significantly limited in the area of external

¹⁸ EU High Representative for Foreign Affairs and Security Policy Catherine Ashton, Annual Human Rights Report, SPEECH/10/757, Strasbourg, 15 December 2010.

¹⁹ Council of the EU, EU Strategic Framework and Action Plan on Human Rights and Democracy 11855/12, Luxembourg, 25 June 2012.

²⁰ See European Commission, Joint Communication to the European Parliament and the Council, Action Plan on Human Rights and Democracy (2015-2019). “Keeping human rights at the heart of the EU agenda”, JOIN(2015) 16 final, 28 April 2015.

²¹ For a general overview of the EU’s institutional framework pre and post Lisbon Treaty, see e.g. L. Pech, *The Institutional Development of the EU: A Case of Plus Ça Change...?* in N. Countouris et al. (eds), *The EU After The Treaty Of Lisbon (CUP, 2012)*, 1.

²² P. Van Elsuwege, ‘EU External Action after the Collapse of the Pillar Structure: In Search of a New Balance Between Delimitation and Consistency’ (2010) 47 *Common Market Law Review* 987, 1013-14.

²³ The Treaty of Lisbon also provided that the High Representative had to be simultaneously appointed one of the Commission’s Vice-Presidents (Art. 17(4) TEU), and assisted by a new ‘European External Action Service’ (Art. 27(3) TEU).

relations²⁴ – the Lisbon Treaty has also increased the potentiality for inter-institutional conflicts and rendered the definition and pursuit of a coherent and effective external human rights policy as challenging as before.²⁵ Be that as it may be, the primary objective of the developments below is to offer a succinct overview of how the task of formulating, implementing and monitoring the external relations policy of the EU, including its global human rights policy, is shared between the main EU institutions post Lisbon Treaty.

3.1 THE EUROPEAN COUNCIL

Formally speaking, the European Council, which consists of the Heads of State or Government of the 28 EU Member States, together with its President and the President of the Commission, defines the general political direction and priorities of the EU but cannot exercise legislative functions.²⁶ Prior to Lisbon, it was chaired by the Head of State or Government from the state holding the rotating presidency however this practice was abolished in 2009 with the appointment of the first permanent President of the European Council, former Belgian Prime Minister Herman Van Rompuy. Amongst other things, the President of the European Council is supposed to ensure the external representation of the Union on issues concerning its common foreign and security policy but without prejudice to the powers of the High Representative of the Union for FASP,²⁷ whose remit will be described below.

The European Council may be briefly presented first not because it plays a crucial role as regards the day-to-day task of formulating, implementing and monitoring the EU's external human rights policy – it does not as will be shown below – but because it has progressively established itself as the EU's 'political demiurge'. To put it differently, in incrementally transforming itself as a kind of 'cabinet'²⁸ where the EU's long term political priorities are discussed and agreed before they are being implemented by other EU institutions, the European Council has progressively emerged as the decisive player when strategic or controversial decisions ought to be taken. When it comes however to operationalising the post Lisbon's commitment, as set out in Article 21(2) TEU, to define and pursue common EU policies and actions in order to consolidate and support democracy, the rule of law, human rights and the principles of international law abroad, the European Council tends to merely provide broad, strategic directions on these issues and expect instead the Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, to cooperate in order to adopt and implement policies and actions which promote the values and principles which the EU seeks to advance in the wider world.

²⁴ See *infra* Section 2.3.

²⁵ For the argument that the Lisbon Treaty does not solve the most significant issues that impact on the coherence of EU external action but rather offers to relevant players the framework and legal tools to achieve coherence provided that there is political will, see J. Wouters and T. Ramopoulos, 'Revisiting the Lisbon Treaty's Constitutional Design of EU External Relations' (2013) *Leuven Centre for Global Governance Studies Working Paper* no. 119.

²⁶ See Art. 15(1) TEU.

²⁷ See Art. 15(6) TEU.

²⁸ A. Dashwood, 'The Institutional Framework and the Institutional Balance' in M. Dougan and S. Currie (eds), *50 years of the European treaties. Looking back and moving forward* (Oxford: Hart, 2009) p. 1, at p. 6.

3.2 THE COUNCIL

Prior to the Lisbon Treaty, external relations issues were discussed and decided within the Council by the foreign affairs ministers of the EU Member States meeting in the General Affairs and External Relations Council (hereinafter: GAER Council) which sat in two configurations, one addressing general policy questions and one addressing external relations, including the development of the CFSP. The GAER Council, like all configurations of the Council prior to Lisbon, was chaired by the Presidency of the Council of EU, which rotated among the Member States every six months.

The Lisbon Treaty brought about a number of arguably minor changes to this framework by permanently splitting the GAER Council into two distinct bodies, the General Affairs Council and the Foreign Affairs Council, and abolishing the role of High Representative for CFSP held by former Spanish Foreign Minister Javier Solana from 1999-2009. Instead, the British labour politician Catherine Ashton was chosen as the first High Representative for Foreign Affairs and Security Policy, a new and more broadly defined role created under Lisbon. In November 2014, Federica Mogherini succeeded Catherine Ashton as the new EU's High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission.

The High Representative presides over the Council in the area of foreign affairs, represents the EU on the international stage and is also Vice President of the European Commission.²⁹ The High Representative is also mandated to conduct the Union's Common Foreign and Security Policy, to contribute to its development as well as to 'ensure the consistency of the Union's external action.'³⁰ While the Lisbon Treaty did not strictly speaking require this reform but one may argue, calls for it considering how the new Article 21(1) TEU placed human rights at the centre of the EU's external relations, it is worth noting that the role of EU Special Representative for Human Rights was created in 2012 following the adoption of the new Strategic Framework and Action Plan on Human Rights and Democracy previously mentioned. It replaced that of Personal Representative on Human Rights.³¹ The former Vice President of the European Parliament and Greek Foreign Affairs Minister, Stavros Lambridinis, was appointed to the position on 25 July 2012.³²

A number of lower level intergovernmental bodies also play an important role in formulating and monitoring the external EU human rights policy. The Political and Security Committee, comprised of ambassadorial level representatives of the EU Member States posted in Brussels, serves as an advisory body for the Council. It is responsible for monitoring the international situation and helping to define EU policies under the CFSP and the Common Security and Defence Policy.³³ In relation to human rights, the Political and Security Committee is informed and supported by the Working Group on Human Rights (COHOM),

²⁹ See Articles 17-18 TEU.

³⁰ Art. 18(4) TEU.

³¹ Council Decision 2012/440/CFSP appointing the European Union Special Representative for Human Rights [2012] OJ L 200/21.

³² Article 33 TEU provides that 'The Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues. The special representative shall carry out his mandate under the authority of the High Representative.' The High Representative currently supervises the work of nine EU Special Representatives (EUSRs). More information on the material and geographical scope of the missions allocated to the EUSRs is available at <http://www.eeas.europa.eu/background/eu-special-representatives/index_en.htm>

³³ Art. 38 TEU.

which comprises the Council's Directors for Human Rights, national delegates, European External Action Service (EEAS) representatives and Commission representatives, and is a key focal point for human rights in the Union's external relations. Indeed, the primary mission of COHOM, which was established by the Council in 1987 and has since seen its mandate extended in 1999 and 2003, is 'to address all human rights aspects of the external relations of the EU and to support the Council's decision-making process in this area.'³⁴

Depending on the issues under consideration, other thematic and/or geographic Council working parties may also have a role to play – for example the United Nations Working Party, the Working Party on Development Cooperation, the Asia-Oceania Working Party and the Working Party on Latin America. With regard to the protection of human rights within the EU, the **Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP)** is the key Council working party. FREMP is responsible inter alia for securing compliance with the EU Charter of Fundamental Rights, considering the question of EU accession to the European Convention on Human Rights and contributing to preparatory work in the legislative procedures of the Council.

3.3 THE EUROPEAN COMMISSION

Prior to the entry into force of the Lisbon Treaty, the Directorate General with primary responsibility for the EU's external relations policy, and as a result its global human rights policy, was the Directorate General for External Relations. However, several other Directorates also had a potentially important role to play in this regard including, in particular, the Directorate General for Development, the EuropeAid Cooperation Office and the Directorate General for Trade.

Following Lisbon, the Directorate General for Development and the EuropeAid Cooperation Office were merged to form a single entity, the EuropeAid Directorate General for Development and Cooperation, tasked with designing and delivering EU financed aid programmes around the globe. At the same time, the Directorate General for External Relations was also abolished and its functions transferred in large part to the newly created European Union External Action Service (EEAS).³⁵

3.4 THE EEAS

While strictly speaking not an EU institution, it is nevertheless worth briefly highlighting the composition and role of the EEAS. In a nutshell, the EEAS is composed of a central administration and each of the EU's approximately 140 delegations worldwide. It serves as the EU's diplomatic corps, supports the High Representative for Foreign Affairs and Security Policy in fulfilling his/her mandate and is supposed to work in close cooperation with the diplomatic services of the Member States.³⁶ In terms of personnel, the EEAS is dominated by former staff of the European Commission and counterparts working in the General

³⁴ Mandate of the Working Party on Human Rights, Brussels, 10 December 2014, document available at < http://eeas.europa.eu/human_rights/workgroup/index_en.htm>

³⁵ On the potential impact the establishment of the EEAS may have on EU external policy making, see B. Van Vooren, 'A Legal Institutional Perspective on the European External Action Service' (2011) 48 *Common Market Law Review* 475.

³⁶ Art. 27 TEU.

Secretariat of the Council on external relations and politico-military affairs as well as staff seconded from national diplomatic services of the Member States.

Within the EEAS, the Directorate for Human Rights and Democracy Division is a focal point for activity in this area and as of 1 April 2015, consists of three divisions: human rights strategy and policy implementation; human rights and multilateral diplomacy; democracy and electoral observation. The creation of this Directorate in the face of initial reluctance from Ashton, who considered human rights to be part and parcel of every thematic and geographic desk whereas the Parliament and the Council advocated a specialised unit, was greeted as a significant victory for those pushing for a more coherent and visible human rights framework in the new service. However, as a cross-cutting issue, human rights also regularly feature in the work of a great many other thematic and geographic departments. The EEAS also works closely with the Service for Foreign Policy Instruments, created within the European Commission in 2010. The Service manages a range of CFSP operations, including their financing, as well as numerous other EU foreign policy actions such as election observation missions, the implementation of sanctions, measures to prevent the trade in goods that could be used for the purpose of torture, and measures to address the trade in the conflict diamonds through the 'Kimberley Process'.

3.5 THE EUROPEAN PARLIAMENT

Even prior to the first direct election to the European Parliament in 1979, the Parliament had established itself as a strong and vocal advocate for the promotion of human rights both within the Union and externally in its relations with third countries.³⁷ As such, the work of the Parliament has evolved to include human rights at all levels on almost all issues.³⁸

Within the Parliament, work relating to EU external human rights policy centres on the Foreign Affairs Committee, and in particular the Subcommittee on Human Rights under it, which is responsible for issues concerning human rights, the protection of minorities and the promotion of democratic values in third countries. However, human rights have also been the focus of much activity in a number of other parliamentary committees, including the Development Committee and the Committee on Women's Rights and Gender Equality. In each case, parliamentary committees are comprised of a broad spectrum of serving members of the European Parliament from all political groupings.

The power of the Parliament in the area of EU external action was extended by the Lisbon Treaty, but only marginally so. In particular, Lisbon solidifies the influence of the Parliament as regards the designation and appointment of the President of the Commission, of the new High Representative, and the other members of the Commission, but these changes can hardly be described as 'ground-breaking'. In addition, the requirement for parliamentary consent to conclude certain types of international agreements - excluding those that deal only with CFSP matters - also allows the Parliament some leeway to promote a human rights agenda.³⁹ However, on the whole the Parliament continues to play a fairly limited role in the

³⁷ R. Rack and S. Laussegger 'The Role of the European Parliament: Past and Future' in P. Alston, op. cit., 801.

³⁸ See G. Harris 'The Role of the European Parliament in Human Rights Protection' (2009) *European Yearbook of Human Rights* 100.

³⁹ See Art. 218(6) TFEU.

area of external relations.⁴⁰ While the same can also be said of the involvement of national parliaments in the foreign policy of most EU member states, it does mean that the European Parliament remains 'at a distance from any particular CFSP measure, and can only exercise influence on the general policy choices,' including in the EU's external human rights policy,⁴¹ save however the situation where the agreement of the European Parliament is required, for instance, to adopt EU financial instruments such as the European Instrument for Democracy and Human Rights (EIDHR).⁴²

3.6 EU FUNDAMENTAL RIGHTS AGENCY

A brief reference to the EU Agency for Fundamental Rights (EU FRA), established on the basis of Regulation 168/2007,⁴³ is required if only to make clear that this Agency is not empowered to play a role in the area of EU's external action. Instead, the primary objective of the EU FRA is to provide EU institutions and its Member States – but only when they implement EU law – with assistance and expertise relating to fundamental rights.⁴⁴ The provision of this limited mandate means that in effect the EU has denied its own human rights agency the power to provide information and analysis on human rights in relations to third countries with which the EU cooperates, and in particular those with which it has concluded association agreements and those which have been granted the status of candidate countries. Although this failure to empower the EU FRA to look at human rights protection in third countries is difficult to justify it may be explained by the reluctance of the Commission and Council to share this mission with an independent agency over which they would have no control. However, in excluding the FRA from this mission the EU has also denied itself access to greater expertise and objectivity in the monitoring of third countries with respect to their adherence to EU's values.

4. POLICY FRAMEWORK

The EU's approach to the promotion of human rights in its relations with third countries is characterised by a long-standing preference for the use of positive measures, including in particular dialogue and development assistances, a strong rhetorical commitment to the concept of human rights mainstreaming, which has yet to be realised in practice, and a recent recognition of the need for separate policies and actions tailored to each individual target State.

As soon as the EU first began to elaborate the external dimension of its human rights policy,⁴⁵ a clear preference for the use of what was termed 'positive' measures, including

⁴⁰ See e.g. Article 36 TEU, which merely requires the High Representative for FASP to regularly consult the Parliament on the basic choices of the CFSP and the CSDP and inform it of how those policies evolve. Furthermore, the Parliament may only address questions or make recommendations to the Council or the High Representative.

⁴¹ G. de Baere, 'EU External Action' in C. Barnard and S. Peers (eds), *European Union Law* (OUP, 2014), 728.

⁴² See Section 4.2.3 below.

⁴³ [2007] OJ L53/1.

⁴⁴ See e.g. G. Toggenburg, 'The role of the new EU Fundamental Rights Agency: Debating the 'sex of angels' or improving Europe's human rights performance?' (2008) 33 *EL Rev.* 385.

⁴⁵ See generally G. Balducci, 'The EU's promotion of human rights' in *Routledge Handbook on the European Union and International Institutions* (2013), p. 193 et al.

‘support and encouragement’, has been repeatedly expressed.⁴⁶ That this preference was to extend to all areas of the EU’s external human rights policy was confirmed in a 1995 communication issued by the European Commission which states that in pursuing its human rights objectives ‘the Commission has gradually identified the areas of activity that correspond to a positive, practical and constructive approach based on the concepts of exchange, sharing and encouragement’.⁴⁷

In order to pursue its external human rights objectives, the EU has developed over time a range of policy instruments including: soft law instruments; unilateral trade, technical and financial instruments; and bilateral external agreements.⁴⁸ However, the question of how, and when, to employ negative measures in a policy which favours a positive approach has not been comprehensively addressed in the official discourse to date, leaving the EU open to accusations of incoherence and selectivity in the choices it has made.⁴⁹ For instance, it has been argued that in treating differently countries with similar, dire human rights records, the EU has ‘raised doubts about the extent to which human rights are a genuine concern in foreign policy’.⁵⁰ Moreover, it has been suggested that often glaring inconsistencies between the EU’s strong pro-human rights rhetoric and EU actions, which tend to primarily reflect a cold assessment of its strategic interests, have not only diminished the impact of EU’s human rights demands in external relations, but also undermined the credibility of the EU as a human rights actor⁵¹ and left it open to accusations of selectivity motivated by self-interest.⁵²

In an effort to address these issues, the EU has sought, first and foremost, to ensure the mainstreaming of human rights in its relations with third countries. The requirement to mainstream human rights at a practical level across all policy areas was established as a core principle of the EU’s external relations in a 2001 communication from the European Commission on the role of the EU in promoting human rights and democratisation in third countries and in the conclusions of the Council on the same subject.⁵³ Since that time, the obligation to ensure the effective integration of human rights into EU external actions has been written into law and has been confirmed repeatedly in numerous policy statements.⁵⁴

Following the entry into force of the Lisbon Treaty, Ashton announced a major review of all human rights processes within the EU’s foreign affairs machinery.⁵⁵ As part of this review, the EU commissioned its first independent assessment of all EU funded human rights

⁴⁶ European Commission Communication, *Human Rights, Democracy and Development Cooperation Policy*, SEC (91)61 final, 25 March 1991, 6.

⁴⁷ European Commission Communication, *The European Union and the External Dimension of Human Rights Policy - From Rome to Maastricht and Beyond*, COM(95) 567 final, 22 November 1995, p. 6.

⁴⁸ See Section 4 *infra* for an overview of the main human rights instruments employed by the EU.

⁴⁹ See e.g. H. Sjørnsen, ‘What Kind of Power?’ (2006) 13(2) *Journal of European Public Policy* 169.

⁵⁰ K. Smith ‘The EU’s Human Rights Relations with Third Countries: Foreign Policy with an Ethical Dimension?’ in K. Smith & M. Light (eds), *Ethics and Foreign Policy* (CUP, 2001), p. 193.

⁵¹ P. Alston, ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy’ in P. Alston, op. cit., p. 18.

⁵² See e.g. K. Smith ‘The European Union, Human Rights and the United Nations’ in K. Laatikainen & K. Smith (eds), *The European Union at the United Nations: Intersecting Multilateralisms* (Palgrave MacMillan, 2006), p. 126 and from the same author, see also *The European Union and the Review of the Human Rights Council*, Report commissioned by the European Parliament Sub-Committee on Human Rights, PE 433.87, 2011.

⁵³ European Commission, *The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries*, COM(2001) 252 final, 8 May 2001, p. 5

⁵⁴ See e.g. Council of the EU, *Mainstreaming Human Rights Across CFSP and other EU Policies*, 10076/06, 7 June 2006.

⁵⁵ Cited *supra* note 14.

programming in third countries over a ten-year period, from 2000-2010. The report, published in 2011, identifies 'limited Commission leadership at political and managerial level to push for the mainstreaming of human rights in all aspects of cooperation' as a key 'systemic constraint', which had 'structurally hampered' the impact of EU action.⁵⁶ Reflecting an initiative already underway since 2010, which saw the EU's 140 worldwide delegations being tasked with the development of individual 'human rights country strategies' to guide EU policy on a country-by-country basis, the report also highlights the need for rigorous target state analysis in order to construct a more effective external human rights policy.⁵⁷

This theme, and that of mainstreaming, is also taken up in the December 2011 communication from Ashton before being endorsed and further developed by the Member States in the ambitious June 2012 EU Strategic Framework and Action Plan for Human Rights adopted by the Council.⁵⁸ In language reflective of the Lisbon Treaty, the Strategic Framework states:

The EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade, investment, technology and telecommunications, Internet, energy, environmental, corporate social responsibility and development policy as well as into Common Security and Defence Policy and the external dimensions of employment and social policy and the area of freedom, security and justice, including counter-terrorism policy. In the area of development cooperation, a human rights based approach will be used to ensure that the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations.⁵⁹

In relation to the core issues of policy formulation and implementation, the Strategic Framework is accompanied by an Action Plan which reaffirms the EU's commitment, as noted above, to produce a tailor made human rights country strategy for each target State, and also commits the EU to a number of measures intended to ensure more effective mainstreaming of human rights with a commitment to the inclusion of human rights impact assessment at the heart of this.⁶⁰ More generally speaking, it is important to note that the Framework and the Action Plan were designed by the EU with the explicit and overarching

⁵⁶ PARTICIP GmbH Consortium (2011) Thematic Evaluation of the European Commission Support to Respect of Human Rights and Fundamental Freedoms (including solidarity with victims of repression) EuropeAid/122888/C/SER/Multi, December 2011, Part I, p. 12.

⁵⁷ Council of the EU, *EU Annual Report on Human Rights and Democracy in the World 2010* 11502/2/11, p. 5.

⁵⁸ Joint Communication by the European Commission and EU High Representative, *Human Rights and Democracy at the Heart of EU External Action – Towards a more Effective Approach*, COM(2011) 886, 12 December 2011; Council of the EU, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12, 25 June 2012.

⁵⁹ EU Strategic Framework and Action Plan cited above, 2.

⁶⁰ The use of impact assessments is not unprecedented. Since 2005, the Commission has undertaken to systematically examine the compatibility of its main legislative proposals and policy initiatives with the EU Charter of Fundamental Rights by requiring inter alia that impact assessments take into account the potential impact of any new EU action on fundamental rights as laid out in the Charter. See Report on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights, COM(2009) 205 final, 29 April 2009.

goal 'to improve the effectiveness and consistency of EU policy as a whole'.⁶¹ The Action Plan itself explicitly refers to a number of thematic areas as priorities for the EU for the period 2012-2014: e.g. the abolition of the death penalty; the eradication of torture; freedom of expression; the implementation of the UN guiding principles on business and human rights. In a positive development, the Action Plan also comprised a list of no less than 97 actions, which the EU and its Member States are committed to implementing by the end of December 2014, and which were intended to enhance the coherence and effectiveness of the EU as a human rights actor.

The Commission has now adopted an updated Action Plan, which cover the 2015-19 period so as to align the duration of the plan with the duration of the mandate of the High Representative and of the European Commission.⁶² No extensive analysis of its terms is required as for the most part, it merely reaffirms the EU's commitment to place human rights at the heart of its foreign policy agenda and the need to address a number of continuous challenges not only as regards human rights violations but also, and more prosaically, as regards the need to further increase the coherence and effectiveness of EU policies and actions in this area. Five new, more strategically focused areas of action have been however identified whereas previously the Action Plan was more encompassing and covered virtually every single aspect of the EU's external human rights policy: (1) Boosting the ownership of local actors; (2) Addressing targeted thematic human rights challenges; (3) Ensuring a comprehensive human rights approach to conflict and crises; (4) Fostering better policy coherence and consistency and (5) Deepening the effectiveness and results-based culture in human rights and democracy. Another more minor new feature is a mid-term implementation review, which will take place in 2017 in order to evaluate progress and make any necessary adjustments.

5. MAIN EXTERNAL INSTRUMENTS

As will be shown below, the EU 'engages in promoting its values in a variety of ways',⁶³ and may simultaneously rely on soft law instruments, unilateral trade instruments, technical and financial assistance instruments or bilateral/regional agreements to promote human rights abroad.

5.1 SOFT LAW INSTRUMENTS⁶⁴

5.1.1 Human rights guidelines

Since the late 1990s, the Council has developed a total of eleven guidelines covering the following human rights issues: (1) the death penalty; (2) torture; (3) freedom of religion and

⁶¹ Council of the EU, EU adopts Strategic Framework on Human Rights and Democracy, 11737/12 Press 285, 25 June 2012.

⁶² European Commission, Joint Communication to the European Parliament and the Council, Action Plan on Human Rights and Democracy (2015-2019). "Keeping human rights at the heart of the EU agenda", JOIN(2015) 16 final, 28 April 2015. The Council is expected to finalise the Action Plan in the next few months.

⁶³ M. Cremona, 'Values in EU Foreign Policy', in M. Evans and P. Koutrakos (eds.), *Beyond the Established Legal Orders* (Hart 2011), at 292.

⁶⁴ The EU's Human Rights and Democratic Strategic Framework and two action plans could also be described as soft law instruments. Considering the previous developments dedicated to them, they will not be subject to any further development.

belief; (4) the rights of the child; (5) children and armed conflict; (6) violence and discrimination against women and girls; (7) the rights of LGBT persons; (8) international humanitarian law; (9) human rights defenders; (10) human rights dialogues with third countries. Most recently, and as pledged in the 2012 Human Rights Action Plan, the EU adopted guidelines on freedom of expression online and offline.⁶⁵ Non-legally binding, the primary purpose of these guidelines is to signal the EU's priority concerns and guide the activities of EU representation in the field in relation to them.

Among the guidelines, those on human rights dialogues with third countries stand out as the only one to address the use of a particular policy instrument as opposed to EU policy on a particular issue. The necessity for Guidelines on Human Rights Dialogues was brought about by the rapid expansion in the use of this particular policy tool by the EU in its relations with third countries in the late 1990s.

The EU currently implements four types of human rights-focused bilateral dialogues: (i) those based on association or cooperation agreements, including for example the 78 States Parties to the Cotonou Agreement and the 17 states involved in the Union for the Mediterranean; (ii) ad hoc dialogues, with Russia and India; (iii) dialogues with like-minded states, including the United States, Canada, New Zealand and Japan, and (iv) structured dialogues on human rights, including those with China and Iran. Of these four types, only the first is based on a legally binding agreement.

Although the use of bilateral dialogue has spread rapidly over the years, its effectiveness in promoting structural human rights reform is questionable.⁶⁶ For example, since its inception in 1995, the EU has announced a positive result directly proceeding from its dialogue with China and relating to its own benchmarks for the dialogue on only one occasion: that of the 2002 invitation to the UN Special Rapporteur on education that was transmitted to the EU delegation at the November 2002 Dialogue under the Danish Presidency.⁶⁷ Despite the insistence of the EU that the dialogue remains an important channel for 'detailed' and 'frank' discussion of its core human rights concerns with China, dialogue fatigue is evident on both sides.⁶⁸ The frequency of the dialogue has been reduced unilaterally by the Chinese side to once per year and the EU has made no commitment to fund the accompanying legal seminars, which seek to involve civil society in the dialogue process, beyond the last such event in October 2012.⁶⁹

5.1.2 Bilateral and Multilateral Diplomacy

In addition to human rights dialogue, human rights are also frequently addressed by the EU through additional channels for bilateral diplomacy in the form of Council conclusions as

⁶⁵ Council of the EU, Foreign Affairs Council meeting, 12 May 2014. The full list of EU human rights guidelines is available at http://eeas.europa.eu/human_rights/guidelines/index_en.htm.

⁶⁶ Indeed, the 2015-19 Action Plan on Human Rights and Democracy highlights the need to increase the effectiveness of human rights dialogues and to adopt inter alia indicators of progress. See Strategic Area of Action no. 5, Action 28.

⁶⁷ Council of the European Union, EU Annual Report on Human Rights 2003, 13449/03, 37; UN Special Rapporteur on the Right to Education Katarina Tomasevski, Addendum to the Report on the Right to Education (21 November 2003) UN Doc: E/CN.4/2004/45/Add.1.

⁶⁸ European Union, EU China Dialogue on Human Rights, Press release A347/13, 25 June 2013.

⁶⁹ For further references and analysis, see A. Egan, *Constructive Engagement and Human Rights: The Case of EU Policy Towards China*, NUI Galway PhD Thesis, 28 September 2012.

declarations and both public and private démarches. Prior to the Lisbon Treaty, declarations and démarches were issued on behalf of the EU by the Member State holding the rotating presidency of the Council, or collectively by the EU member states in the Council.⁷⁰ Post-Lisbon, this responsibility has fallen to the High Representative for FASP and the EEAS through its various delegations. In cases of severe human rights violations, the Council may also decide unanimously to impose diplomatic sanctions, such as withdrawal of EU diplomatic representation and suspension of high-level political contacts.

Although without any formal mandate to conduct bilateral relations with third countries, the European Parliament has also voiced its concern on specific human rights issues on countless occasions and by various means including, in particular, urgency debates in plenary, parliamentary resolutions, third country visits from Parliamentary delegations and the award of the annual Sakharov Prize for Freedom of Thought.

In addition to bilateral human rights diplomacy, the EU also uses multilateral human rights diplomacy to pursue its external human rights policy. While human rights related issues can be, and in many cases have been, touched on in a variety of multilateral fora, the EU has long signalled its commitment to 'effective multilateralism' through the UN as the bedrock of the international system.⁷¹ Human rights violations in specific countries have been addressed by the EU in various UN fora including, in particular, through inter alia statements and participation in the general debate of the UN General Assembly,⁷² through the Social, Humanitarian and Cultural Affairs Committee (Third Committee), and the Commission on Human Rights/Human Rights Council.⁷³ In addition, the EU can take the initiative to call for a special session of the UN Human Rights Council on urgent human rights situations.⁷⁴ Finally, EU Member States also participate in Universal Periodic Review at the Human Rights Council, by both contributing to third country reviews and by being themselves subject to review on the same terms.

5.2 UNILATERAL TRADE, TECHNICAL AND FINANCIAL INSTRUMENTS⁷⁵

5.2.1 Generalised System of Preferences

The Generalised System of Preferences (GSP) is a system of preferential trading arrangements developed in the 1970s through which the EU extends preferential access to its markets to developing countries' by offering unilateral and non-reciprocal trade preferences.⁷⁶ Since 1995, the GSP has included a negative conditionality clause, which

⁷⁰ P. Eeckhout, *External Relations of the European Union* (OUP, 2004), p. 474.

⁷¹ European Commission Communication, *The European Union and the United Nations - The Choice of Multilateralism*, COM(2003) 526 final, 10 September 2003, p. 8.

⁷² The EU has had observer status at the UN since 1974 and was granted enhanced speaking rights at the UN General Assembly in 2011 (see Resolution A/RES/65/276).

⁷³ See J. Wouters et al. (eds.), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora* (Palgrave Macmillan, 2012), Part III 'The EU in UN Human Rights Governance', pp. 49-144.

⁷⁴ For example, four of the 19 special sessions convened between June 2006 and August 2012 were called at the initiative of the EU.

⁷⁵ For an enlightening comparative overview of the EU and US instruments which have a bearing on human rights in the areas of trade and development, see European Parliament, Policy Department DG External Policies, *A Comparative Study of EU and US Approaches to Human Rights in External Relations* (November 2014), p. 44 et al.

⁷⁶ See e.g. B. Brandtner and A. Rosas, 'Trade Preferences and Human Rights' in Alston, *op. cit.*, p. 716.

provides for the temporary withdrawal of GSP preferences in whole or in part for products originating in a country that practises any form of slavery or forced labour, or a country that exports goods made by prison labour. Positive human rights conditionality was incorporated into the GSP in 2005 by means of a special incentive scheme, which tied additional preferences to recognition of labour rights.⁷⁷

The entire GSP has been reformed and simplified several times, most recently by Regulation 978/2012.⁷⁸ However the most significant reform took place in 2005.⁷⁹ As part of this reform, the human rights grounds on which the general benefits provided under GSP could be temporarily withdrawn were expanded far beyond issues related to labour standards to include 'serious and systematic violation' of the principles laid down in a total of 16 international conventions.⁸⁰ While ratification of these conventions is not a necessary condition for states to receive the benefits provided by the general scheme, violation of the rights they recognise is grounds for their withdrawal.⁸¹ At the same time, the GSP+ scheme was launched on 1 July 2005. The scheme provides benefits in the form of duty free access to EU markets for imported goods from countries with 'poorly diversified' economies that are 'therefore dependent and vulnerable' and that accept the main international conventions relating to social rights, environmental protection and good governance, including human rights. These benefits can also be withdrawn in case of violations.

While the rationale underlying the GPS+ scheme may be welcome, there is room for improvement as regards its implementation. The European Parliament has for instance suggested the need for a closer and more transparent monitoring of the GSP+ regime 'including by the use of detailed Human Rights Impacts Assessments, a consistent and fair benchmarking system, and open consultations when the preference is being awarded' and advocated the granting of trade preferences only to those 'countries that have ratified and effectively implemented key international conventions on sustainable development, human rights - particularly child labour - and good governance.'⁸²

5.2.2 Other Trade Related Measures

In addition to the GSP, the EU has also introduced a number of specific trade related human rights measures to regulate, in particular, the trade in arms and the trade in goods which

⁷⁷ European Commission, GSP: The New EU Preferential Market Access System for Developing Countries - Memo 123861, 23 May 2005, p. 1.

⁷⁸ [2012] OJ L 303/1.

⁷⁹ Regulation (EC) 980/2005 Applying a Scheme of Generalised Tariff Preferences [2005] OJ L 169/1, Art. 16(1).

⁸⁰ These are: the International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child; Convention on the Prevention and Punishment of the Crime of Genocide; Convention concerning Minimum Age for Admission to Employment (No 138); Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Labour Practices (No 182); Convention concerning the Abolition of Forced Labour (No 105); Convention concerning Forced or Compulsory Labour (No 29); Convention concerning Equal Remuneration of Men and Women Workers for Work of Equal Value (No 100); Convention concerning Discrimination in Respect of Employment and Occupation (No 111); Convention concerning Freedom of Association and Protection of the Right to Organise (No 87); Convention concerning the Application of the Principles of the Right to Organise and to Bargain (No 98); International Convention on the Suppression and Punishment of the Crime of Apartheid

⁸¹ Art. 16(1) of Council Regulation 980/2005.

⁸² European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), para. 112.

could be used for capital punishment, torture, cruel inhuman and degrading treatment. Since 1998 for example, the EU's voluntary 'Code of Conduct on Arms Exports' has linked the approval of licences for the export of arms on the regularly updated EU 'Common Military List' to respect for human rights.⁸³ This voluntary code was replaced in 2008 with a legally binding Council common position, which codifies the EU rules governing the export of military technology and equipment largely set out in 1998.⁸⁴ In 2000, the Council issued its first regulation governing the export of 'dual-use' products and technologies of both civilian and military application.⁸⁵ In addition, the Council adopted a common position on the control of arms brokering in 2003.⁸⁶ As part of its commitment to the abolition of the death penalty and the prohibition of torture, cruel inhuman and degrading treatment, the EU has also regulated the export of goods that could be used for capital punishment or torture.⁸⁷

The importation of certain categories of goods, the production of which is connected to human rights abuses, is also regulated in some instances. Precious gems including, in particular, 'conflict diamonds' represent a prominent example of the kind of goods targeted. The trade in rough diamonds has been subject to the Kimberly Process certification scheme since 2002, which prohibits the importation of uncertified rough diamonds in line with the provisions of a Council common position implementing the multilateral scheme.⁸⁸

The imposition of trade related 'restrictive measures' in direct response to human rights violations is also possible.⁸⁹ As is the case regarding diplomatic restrictions, trade-related restrictive measures may be imposed on the basis of a binding common position agreed unanimously by the EU Member States.⁹⁰ A range of options exists, including economic and financial sanctions, such as prohibition of loans and credit to state owned enterprises, and military sanctions, such as the imposition of arms embargoes.

In each case, trade related measures applied must respect the international obligations of the EU, in particular, those that apply to import and export restrictions against third countries set out under the General Agreement on Trade and Tariffs (GATT) and those that apply to restriction on the trade in services set out in the General Agreement on Trade in Services (GATS). Article XXI of GATT allows for import and export restrictions which are either applicable to arms and military equipment, or imposed in pursuance of obligations under the UN Charter for the maintenance of international peace and security. Restrictive measures that do not fall under these categories must meet the conditions laid down in Article XX of GATT on general exceptions, or its GATS equivalent Article XIV.⁹¹

⁸³ Council of the EU, *European Union Code of Conduct on Arms Export*, 8675/2/98, 5 June 1998.

⁸⁴ Council Common Position 2008/944/CFSP defining Common Rules Governing the Control of Exports of Military Technology and Equipment [2008] OJ L 335/99.

⁸⁵ Council Regulation (EC) 1334/2000 setting up a Community Regime for the Control of Exports of Dual-Use Items and Technology [2000] OJ L 159/1.

⁸⁶ Council Common Position 2003/468/CFSP on the Control of Arms Brokering [2003] OJ L 159/79.

⁸⁷ Council Regulation (EC) 1236/2005 concerning the Trade in Certain Goods which could be used for Capital Punishment, Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment [2005] OJ L 200/1.

⁸⁸ Council Regulation EC 2368/2002 implementing the Kimberly Process Certification Scheme for International Trade in Rough Diamonds [2002] OJ L 358/28.

⁸⁹ Council of the EU, *Basic Principles on the Use of Restrictive Measures*, 10198/1/04, 7 June 2004.

⁹⁰ Council of the EU, *Guidelines on the Implementation and Evaluation of Restrictive Measures (Sanctions) in the Framework of the EU Common Foreign and Security Policy*, 15114/05, 2 December 2005.

⁹¹ Article XX GATT sets out the bases on which members can derogate from their obligations under the agreement. Exceptions which could allow derogations on grounds related to human rights include those contained in Article XX(a) regarding measures 'necessary to protect public morals', Article XX(b) regarding

As a result of these limitations, which severely curtail the ability of the EU to act outside the scope of UN Security Council Resolutions in imposing restrictive measures, a clear preference has developed for the use of 'smart sanctions' targeting particular individuals.⁹² This approach allows the EU to apply restrictive measures without stepping outside the boundaries of permissible action under the terms of the GATT and the GATS, while at the same time reducing 'to the maximum extent possible any adverse humanitarian effects or unintended consequences for persons not targeted or neighbouring countries'.⁹³ Smart sanctions imposed by the EU most often combine freezing the assets of targeted individuals, denying access to the EU through visa bans and the imposition of arms embargoes.

5.2.3 Technical and financial assistance instruments

A comprehensive overview of the multiple technical and financial instruments used by the EU to promote its values in its relations with third countries is beyond the scope of the present chapter. However, one EU instrument is deserving of particular attention: the European Instrument for Democracy and Human Rights (EIDHR). Established by Regulation 1889/2006, the EIDHR is the main financial instrument used by the EU to promote democratic principles and human rights within the framework of the EU's development and cooperation policy with third countries.⁹⁴ It is intended to complement all other EU programmes that may include the promotion of democracy and human rights among their objectives. These include, for example, the European Neighbourhood and Partnership Instrument (ENPI)⁹⁵ and the Development Co-operation Instrument (DCI),⁹⁶ which provide EU assistance through bilateral development cooperation in order, inter alia, to finance activities that consolidate and support EU values in certain countries. What makes the EIDHR rather unique is its global scope and the fact that it was the first EU funding stream to channel financial assistance directly to civil society groups without the need for the prior consent of the relevant national authorities in the target state.

In addition to the EIDHR, EU technical and financial instruments specifically aimed at supporting candidate countries in the progressive alignment of their administrative and legal frameworks with EU standards and policies by financing relevant activities are also noteworthy. One may mention, for instance, Regulation 1085/2006, which established a new Instrument for Pre-Accession Assistance (IPA) for the EU's 2007-2013 budgetary period.⁹⁷ Article 2 of the IPA Regulation required that these activities should support a wide range of institution and capacity building measures in all beneficiary countries with the view of strengthening, inter alia, democratic institutions, the rule of law and respect for human rights. As one may have expected, the most recently adopted IPA Regulation continues to provide financial support for political reforms which aim to strengthen democracy and its institutions,

measures necessary to protect human, animal or plant life or health', and Article XX(e) regarding measures 'relating to the products of prison labour'.

⁹² Council of the EU, *Basic Principles on the Use of Restrictive Measures*, op. cit., para. 6.

⁹³ Ibid.

⁹⁴ EC Regulation 1889/2006 has been replaced by EU Regulation 235/2014 establishing a financing instrument for the promotion of democracy and human rights worldwide [2014] OJ L 77/85.

⁹⁵ Regulation (EU) 232/2014 establishing European Neighbourhood Instrument [2014] OJ L 77/27.

⁹⁶ Regulation (EU) 233/2014 establishing a financing instrument for development cooperation for the period 2014-2020 [2014] OJ L 77/44.

⁹⁷ Council Regulation (EC) 1085/2006 establishing an Instrument for Pre-Accession Assistance [2006] OJ L 210/82.

the rule of law, the promotion and respect of fundamental rights or to help the fight against corruption or more generally, good governance at all levels.⁹⁸

A transversal look at the set of technical and financial instruments adopted for the period 2007-2013 revealed the first EU efforts at mainstreaming the objective of promoting and consolidating the values of democracy, the rule of law and respect for human rights in its relations with third countries.⁹⁹ Unsurprisingly, the new comprehensive set of EU instruments for financing external action for the period 2014-2020 similarly if not greater reflects the EU's ambition to promote its values and in particular human rights, in all areas of its external action without exception, a logical consequence of the new Article 21 TEU which, as previously noted, provided that EU's action on the international scene must be guided by the values on which the EU is founded. However, by contrast to the previous budgetary period, the next set of EU financial instruments¹⁰⁰ do not contain any explicit reference to the possibility of suspending assistance in cases where a beneficiary country fails to observe the basic principles enunciated in each respective instrument and notably the principles of democracy, rule of law and the respect for human rights. Where previously present, the so-called 'suspension clauses' *negatively* conditioned EU financial assistance to the respect of the EU's values or principles – the two terms being used interchangeably most of the time – and could be triggered whenever a beneficiary country failed to respect them. Remarkably, EU values were nowhere precisely defined or explained and the notion of 'serious and persistent human rights violation' left undefined, which meant that these suspension clauses offered the EU significant political leeway in terms of deciding when a beneficiary country did not satisfactorily observe human rights. This issue will be further discussed below as suspension clauses can be explicitly found in most of the EU's external agreements, where they coexist with 'human rights clauses'.

5.3 BILATERAL EXTERNAL AGREEMENTS

5.3.1 *The Standard Human Rights Clause*

The most widely used form of negative conditionality within EU human rights policy is the 'standard human rights clause', which has been included in all cooperation and association agreements concluded by the EU with third countries since 1995.¹⁰¹ The development and use of the standard human rights clause has been well documented elsewhere.¹⁰² Suffice it to say here that the clause includes two elements.¹⁰³ First, it incorporates respect for democratic principles, the rule of law, and human rights as an essential element of the agreement. Second, it incorporates a non-execution clause, ultimately allowing for the

⁹⁸ See Art. 2 of EU Regulation 231/2014 establishing an Instrument for Pre-accession Assistance (IPA II) [2014] OJ L 77/11.

⁹⁹ All technical and financial instruments adopted in 2006 invariably recall the EU's commitment to the promotion of the values of democracy, the rule of law, respect for human rights and fundamental freedoms. As a result, some questioned the need for a specific financial instrument such as the EIDHR but the European Parliament was keen to retain an instrument that can directly support civil society organisations and operate without host-country consent.

¹⁰⁰ See EU Regulations 231/2014, 232/2014, 233/2014 and 234/2014.

¹⁰¹ A database of all EU agreements containing the human rights clause is available at: <http://ec.europa.eu/world/agreements>.

¹⁰² See e.g. L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (OUP, 2005).

¹⁰³ European Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM(95) 216 final, 23 May 1995.

suspension or termination of an agreement where violation of an essential element represents a material breach of its terms even in the absence of prior consultation.

In practice, however, consultation procedures have been initiated frequently in relation to suspected violations of essential elements of agreements, particularly under the Cotonou Agreement with African, Caribbean and Pacific states. However, the EU has demonstrated a strong preference for keeping agreements operational and suspension or termination is to be understood only as a measure of last resort.¹⁰⁴

In relation to the standard human rights clause, it is also important to note that since the Single European Act came into force in 1987, the assent of the European Parliament has been required to ratify a number of external agreements concluded between the EU and third countries. In the 1990s, the European Parliament used this power to delay ratification of agreements with Algeria, Croatia, Morocco, Pakistan, Russia, Syria and Turkey on the basis of their lack of respect for human rights.¹⁰⁵ In February 2006, the European Parliament resolved to make inclusion of a human rights clause in all bilateral partnership and cooperation agreements a precondition for assent, codifying established practice.¹⁰⁶ Thus, although parliamentary consent was not conceived as a tool to promote compliance with EU values in non-EU countries, it has been used as such by the European Parliament.

5.3.2 *The Model Human Rights Clause*

In addition to the standard clause, the EU has in recent years developed a 'model human rights clause', which was included in an EU partnership and cooperation agreement for the first time in October 2009 with Indonesia.¹⁰⁷ The model clause, which it is intended will be included alongside the standard clause in all such future agreements, commits the Parties to the agreement to cooperation on human rights and is an attempt to ensure that, in addition to allowing for punitive action to be taken against states that are seen to violate human rights by means of the standard clause, the need for positive engagement is also explicitly recognised by both sides. Moreover, by establishing human rights as an issue of common concern, the model clause also specifies human rights as an appropriate topic for discussion within the context of bilateral political dialogue more generally. In line with the 'Guidelines on Human Rights Dialogues' issued by the Council, the model clause thus also represents an effort to mitigate the potential 'ghettoising' effect of dedicated human rights dialogue, which risks restricting the discussion of EU concerns to a single channel.¹⁰⁸

The EU's ongoing attempt to push for the systematic inclusion of a 'human rights clause' in all of its external agreements has met some resistance and raised some criticism. For instance, while there are several examples of negative measures adopted by the EU, in all

¹⁰⁴ T. King, 'The European Union as a Human Rights Actor' in M. O'Flaherty et al. (eds.) *Human Rights Diplomacy: Contemporary Perspectives* (Martinus Nijhoff Publishers, 2011), p. 83.

¹⁰⁵ H. Hazelzet, 'The EU's Human Rights Policy in the UN: An Example of Effective Multilateralism?' in J. Wouters et al. (eds.), *The United Nations and the European Union: An Ever Stronger Partnership* (Asser Press, 2006), p. 185.

¹⁰⁶ European Parliament, Resolution on the Human Rights and Democracy Clause in European Union Agreements, P6 TA(2006)0056, 14 February 2006, point 10.

¹⁰⁷ Council of the EU, Framework Agreement on Comprehensive Partnership and Cooperation between the European Community and its Member States, of the One Part, and the Republic of Indonesia, of the Other Part 14032/09, 21 October 2009, Art. 26.

¹⁰⁸ Council of the EU, European Union Guidelines on Human Rights Dialogues, 14469/01; Council of the EU, EU Guidelines on Human Rights Dialogues with Third Countries: Update, 16526/08.

cases, these measures have been adopted against ACP countries. One partial explanation is that developed countries have objected to signing up to any cooperation agreements that include a human rights clause and in fact, for countries such as China, the suggestion that any new partnership-cooperation agreement with the EU must include such a clause is one of the stumbling blocks preventing any progress on the conclusion of a new treaty to replace the rather antiquated 1985 Economic and Cooperation Agreement. It remains that 'weak third states that have committed grave breaches of human rights are more likely to suffer suspension of aid than states that enjoy a more secure bargaining position within the EU.'¹⁰⁹

The failure of the European Commission and Council to publish a clear set of human rights, rule of law and democracy benchmarks that would clarify the situations and actions that may trigger the application of a human rights clause has also been criticised.¹¹⁰ An improved procedure whereby either party may withdraw from the agreement or take 'appropriate measures' when the other party fails to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law (the agreement's 'essential elements'), or cases where a party is guilty of a serious violation of one of these essential elements, has also been called for.¹¹¹

These concerns are reflected in the EU Action Plan on Human Rights and Democracy. Action 33(a) thus calls for the development of working methods to ensure the best articulation between dialogue, targeted support, incentives and restrictive measures, while Action 33(b) calls for the development of criteria for application of the human rights clause in 2014. Also worth noting is the broader commitment to 'incorporate human rights in all Impact Assessment' for legislative and non-legislative proposals, implementing measures and trade agreements 'that have significant economic, social and environmental impacts, or define future policies.'¹¹² This wide-ranging measure, if fully implemented, has the potential to fundamentally alter the role of human rights in the EU's external relations, by ensuring that human rights concerns are not confined to certain policy areas but can rather inform the EU's overall engagement with third countries. However, this undertaking was not systematically applied to all trade agreements negotiated in the year following announcement of the Strategic Framework.¹¹³ Moreover, it has also been argued that in the absence of an agreed methodology, which would provide a significant role for civil society, such assessments may fail to influence subsequent negotiations in any visible way.

¹⁰⁹ A. Ward, 'Framework for Cooperation between the European Union and Third States: A Viable Matrix for Uniform Human Rights Standards?' (1998) *European Foreign Affairs Review* 505, 505-506.

¹¹⁰ European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202(INI)), para. 108.

¹¹¹ For the interesting suggestion to elaborate a catalogue of the types of incidents that might activate suspension as third states and other affected parties would benefit from deeper elaboration of the meaning to be attributed to human rights clauses, see Ward, op. cit., 534-535.

¹¹² Council of the EU, EU Strategic Framework and Action Plan on Human Rights and Democracy 11855/12, 25 June 2012, Action 1.

¹¹³ FIDH, Position Paper: The EU's Strategic Framework and Action Plan – One Year After Its Adoption, Brussels, 24 June 2013, p. 2.

6. CONCLUDING REMARKS

Taking into account the EU's professed aspiration to establish itself as a normatively-oriented 'soft power',¹¹⁴ the Treaty on European Union, as amended by the Lisbon Treaty, further stresses the EU's commitment to put its foundational values, and in particular, respect for human rights, at the very heart of its internal and external policies, with the objective of promoting and upholding them both within and beyond its borders.¹¹⁵ In this endeavour, the EU however continues to be faced with numerous challenges with respect to some of the recurrent goals it has set for itself, and in particular its much repeated mantra to improve the clarity, coherence and effectiveness of its human rights external policy.¹¹⁶

Among the factors that currently undermine the development of an external policy that would meet the goals previously mentioned, one may single out the following:

- the extreme fragmentation of human rights-related powers and functions among EU Institutions and between the EU itself and its Member States;
- the confusing multiplication of new office holders such as the High Representative for Foreign Affairs and Security Policy and the President of the European Council with what one may view as overlapping competences despite multiple references to the importance of the principles of consistency and effectiveness;¹¹⁷
- the continuing prevalence of unanimity within the Council regarding external matters with a tendency for the national governments unwilling to take a strong stance on human rights issues to use EEAS to discreetly undermine the efforts of those prepared to be more robust in this area;
- the absence of clear and strong internal EU powers in the area of human rights and of a Treaty provision providing clearly that respect for human rights is a general and cross-cutting objective of *internal* EU policies whereas the protection of human rights is repeatedly asserted as an overarching objective of EU's *external* action;
- and more generally speaking, the disconnect between its internal and external human rights policies and mechanisms, which may easily lead to accusation of 'double standards' and an inconsistent treatment of third countries.

¹¹⁴ See e.g. this representative speech by C. Ashton, 'A world built on co-operation, sovereignty, democracy and stability', Speech/11/126, 25 February 2011: 'The strength of the EU lies, paradoxically, in its inability to throw its weight around. Its influence flows from the fact that it is disinterested in its support for democracy, development and the rule of law. It can be an honest broker - but backed up by diplomacy, aid and great expertise. ... In short, the EU has soft power with a hard edge – more than the power to set a good example and promote our values.'

¹¹⁵ See Article 3(1) TEU: 'The Union's aim is to promote ... its values ...' and 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values ...'

¹¹⁶ Commission Communication on Human Rights and Democracy at the Heart of EU External Action, op. cit., p. 6. For previous calls on the need to improve the visibility, coherence and effectiveness of EU external action, see Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, op. cit., p. 12; Commission Communication on Europe in the world - some practical proposals for greater coherence, effectiveness and visibility, COM(2006) 278 final, 8 June 2006, p. 5 et seq.

¹¹⁷ See e.g. Art. 13(1) TEU: 'The Union shall have an institutional framework which shall aim to promote its values ... and ensure the consistency, effectiveness and continuity of its policies and actions'; Art. 21(3): 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect.'

In spite of these shortcomings however, there has been some limited progress. Following the entry into force of the Lisbon Treaty, the EU Charter of Fundamental Rights has finally become a legally binding and core element of the Union's legal order,¹¹⁸ and the EU has at last gained the power to seek accession to the ECHR.¹¹⁹ The first Strategic Framework and Action Plan on Human Rights and Democracy were adopted in June 2012 and a new Action Plan has been adopted for the period 2015-2019. If one is to believe the Commission, the 2012-2014 Action Plan can be credited for a number of achievements such as the increased mainstreaming of human rights considerations and the formulation and implementation of a more coherent policy via for instance, the adoption of local human rights country strategies.¹²⁰ In the absence of any hard evidence put forward by the EU institutions, it remains however difficult to pass judgment. One may nevertheless salute the EU's renewed commitment to promote human rights in all areas of its external action without exception and to defend an approach encompassing all human rights, whether civil and political, economic, social and cultural, and which views human rights, democracy and the rule of law as inextricably linked and mutually reinforcing.

Much more however needs to be done to address the 'double standard' critique. Not only are the current discrepancy between accession conditions and membership obligations difficult to justify,¹²¹ the EU further undermines its credibility by its failure to match its strong, external pro-human rights rhetoric with strong action when it comes to dealing with internal human rights problems within the EU itself, and its additional failure to treat third countries as uniformly as possible.

With respect to the EU's failure to effectively police systemic violation of its values internally, suffice it here to mention the situation in Hungary where despite repeated problems on the rule of law and human rights fronts, the EU institutions have failed to agree on the appropriate course of action and instead fought each other as regards their respective competences.¹²² With respect to third countries, there is an unfortunate tendency to only sanction 'weak' third countries when they breach mutually agreed human rights commitments whereas the failure to include legally binding human rights clauses in agreements with 'powerful' countries, or to address recurrent and major human rights problems when it would be politically or economically costly for the EU to do so, have given rise to (well founded) accusations of duplicity.¹²³

¹¹⁸ Technically speaking, however, the Charter only binds national authorities when they act within the scope of Union law, a relatively unclear concept, and the Court of Justice is yet to clarify which of its provisions can be relied upon by individuals in the context of judicial proceedings against other private parties. See generally, X. Groussot, L. Pech and G. Pertursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon', in de Vries, Bernitz and Weatherhill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart, 2013), 97.

¹¹⁹ See Art. 6(2) TEU. In its controversial Opinion 2/13 issued on 18 December 2014, the Court of Justice did however find the draft agreement on EU accession to the ECHR is not compatible with EU Law.

¹²⁰ Joint Communication, Action Plan on Human Rights and Democracy (2015-2019), op. cit., p. 3.

¹²¹ See Editorial Comments, 'Fundamental rights and EU membership: Do as I say, not as I do!', (2012) 49 *Common Market Law Review* 481, 487.

¹²² D. Kochenov and L. Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: A Critical Assessment of the Commission and the Council's Rule of Law Initiatives' (2015) *European Constitutional Law Review* (forthcoming).

¹²³ See Ward, op. cit. and for a more recent and 'ethical' overview of EU's external action, see U. Khaliq, *Ethical Dimensions of the Foreign Policy of the EU: A Legal Analysis* (CUP, 2009).

In an important report published in 1998 and commissioned by the EU on the occasion of the 50th anniversary of the Universal Declaration of Human Rights, it was noted that ‘the EU has devoted a great deal of energy and resources to human rights, both in its internal and its external policies. Yet the fragmented and hesitant nature of many of its initiatives has left the Union with a vast number of individual policies and programmes without a real human rights policy as such.’¹²⁴ Fast-forwarding fifteen years later, a broadly similar diagnosis could be unfortunately rendered. While the need for increased coherence and consistency across all policy areas and reducing the gap between rhetoric and action are widely acknowledged, the EU’s approach remains piecemeal and overly focused on exporting its values globally while internally, national governments of EU Member States continue to appear reluctant to allow the EU to develop a similarly ambitious internal human rights policy and subject themselves to a similar level of human rights monitoring than applicable to non-EU countries. This disconnect naturally undermines the credibility and influence of the EU on the international scene. As many times before, the EU could certainly do with less rhetoric and more consistent and coherent actions and policies. To paraphrase Theodore Roosevelt, if the EU are really to be the world’s role model when it comes to human rights, it must not merely talk; it must act big.

¹²⁴ Comité des Sages, *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (EUI, 1998) para. 7.



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