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**EU Human Rights Policy
in the UN Human Rights Council**

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**Europa-Kolleg Hamburg
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EU Human Rights Policy in the UN Human Rights Council

Kajetan Pradetto*

Abstract

This paper deals with the EU's human rights policy in the United Nations Human Rights Council. Three questions will be tackled: Why is the EU obliged to promote human rights externally? How does the EU implement this obligation institutionally and instrumentally in its external human rights policy and which competences do EU institutions have in this field? How effective is the EU's human right policy in the UN Human Rights Council?

The EU promotes human rights both internally and externally in order to respect its own values and also in order to strengthen its own identity. For reasons of credibility there should be coherence between the EU's internal and its external human rights policies. In order to implement the obligation to promote human rights in its foreign policy, The EU has in the first pillar basically the possibility to include human rights clauses in agreements with third countries. In the second pillar, the EU has basically the five instruments set out in Article 12 TEU: general guidelines, common strategies, joint actions, common positions and systematic cooperation between member states. Systematic cooperation is the instrument used by the EU in the UN Human Rights Council. Since this policy is consequently situated within the second pillar (CFSP), the Council, respectively the member states are the dominant actors. At the Council level, the coordination between the EU member states takes place at the Council Working Group on Human Rights. Based on an analysis of the EU's action during the fourth UPR session, the tenth special session and the tenth regular session, the EU's human rights policy in the UNHRC proves to be quite effective and consistent in practice. However, the EU needs more credibility, inter-alia through a self-critical view on its own human rights record, in order to contribute to overcoming the problem of bloc-mentality in the UNHRC.

key words: EU Human Rights Policy, United Nations Human Rights Council, CFSP, Systematic Cooperation, EU Competencies

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List of abbreviations

ACP states	African, Caribbean and Pacific Group of States
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
COHOM	Council Working Group on Human Rights
DG	Directorate-General
DPRK	Democratic People's Republic of Korea
DRC	Democratic Republic of Congo
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECSC	European Coal and Steel Community
EEC	European Economic Community
EP	European Parliament
ESDP	European Security and Defense Policy
EU	European Union
GRULAC	Group of Latin American and Caribbean Countries
HoMs	Heads of Missions
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
MFN	Most Favoured Nation
NAM	Non Aligned Movement
NGO	Non-Governmental Organization
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of the Islamic Conference
OSCE	Organization for Security and Co-operation in Europe
SEA	Single European Act
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCHR	United Nations Commission on Human Rights

UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
USA	United States of America
WTO	World Trade Organization

1. Introduction

Human rights have gained momentum in the EU in recent years. The Charter of Fundamental Rights and its incorporation first into the Constitutional Treaty and then into the Lisbon Treaty as well as the upcoming accession of the EU to the European Convention on Human Rights in case of the ratification of the Lisbon Treaty are essential milestones in the long development of the EU's human rights protection. In spite of the fact that this development is mainly directed towards enhancing the protection of fundamental rights¹ *within* the EU, the Union aims at the same time at promoting human rights in the *outside* world. Many analysts agree that currently the EU's external human rights policy is even "more meaningful than the internal one"². Regardless which of the human rights policies is more meaningful, it is both legally and normatively logical that a coherence between both levels should exist. Therefore, the EU is obliged to promote human rights both internally and externally.

This thesis will focus on the external dimension of the EU's human rights policy and more precisely on the EU's human rights policy in the United Nations Human Rights Council. The main objective is to analyze and to evaluate the legal foundations as well as the implementation of this policy. Achievements and deficiencies shall be revealed.

The EU's human rights policy in the UNHRC shall be examined in more depth for three reasons. First, as will be shown later, the EU's policy in international organisations is a very important part of its external human rights policy. Second, the UNHRC is *the* crucial UN-Human Rights body and serves therefore as a good example for the EU's human rights policy in international organisations. The third reason is more of a practical nature: the author of the thesis did an internship (10 weeks) at the Permanent Mission of Germany at the UN in Geneva, worked in the field of human rights and got therefore a vivid insight into the EU's work in the UNHRC as well as into the UNHRC's mechanisms.

Two main underlying problems shall be tackled in this paper: First, possible deficiencies in the EU's set of instruments could be an obstacle for the effective promotion of human rights to which the EU is bound in its external relations.³ Therefore, it is crucial to analyze how effective the EU's instruments are in the light of this objective. The effectivity of the EU's human rights policy shall be specifically examined in the UNHRC which serves as an

¹ Following the use of the terminology of 'human rights' and 'fundamental rights' as interchangeable by the European Institutions and by most analysts, they will be treated in the following as synonymous unless specified otherwise.

² Eeckhout, *External Relations of the European Union: legal and constitutional foundations*, p. 466. See also: Alston/Weiler, in: Alston: *The EU and Human Rights*, p. 7.

³ See: Art. 11 TEU.

example for the EU's instrument of systematic cooperation⁴ and more specifically the coordination in international organisations⁵. Second, the often existing confusion concerning the competences of EU institutions and the distinction between human rights policy within the first pillar (EC) and human rights policy within the second pillar (CFSP) has to be clarified.

Therefore, the thesis shall deal with three main questions: First, why is the EU obliged to promote human rights externally? Second, how does the EU implement this obligation institutionally and instrumentally in its external human rights policy and which competences do EU institutions have in this field? Third, how effective is the EU's human right policy in the UN Human Rights Council?

In order to find answers to these questions and in order to tackle the afore mentioned problems, this paper will proceed in the following three steps of analysis:

First, it will be explained, why the promotion and protection of human rights is a major and binding objective of the EU both internally and externally (chapter 2). The historical background and major developments in this context will be illustrated. Furthermore, it will be explained why coherence between the EU's internal and the EU's external human rights policies should exist.

Second, it will be analyzed how the EU implements institutionally and instrumentally the obligation to promote human rights externally (chapter 3). In particular, it will be analyzed which instruments the EU has both in the first and in the second pillar for the external promotion of human rights. Furthermore, it will be examined which competences the major EU institutions have in both pillars and how the institutions structure themselves in order to promote human rights.

Third, the analysis will focus on the EU's human rights policy in the UN Human Rights Council (chapter 4). It shall be examined how the EU's human rights policy based on the legal foundations works in practice and how effective it is. Therefore, a brief overview about the UNHRC and its legal basis will be given. Based on three recent events in the UNHRC, namely the fourth Universal Periodic Review session, the tenth special session and the tenth regular session, the EU's human rights policy in the UNHRC will be examined in practice.

⁴ Art. 12 dash 5 TEU.

⁵ Art. 19 TEU.

2. Promotion and protection of human rights as a major objective of the EU

The promotion and protection of human rights is both internally and externally a major objective of the EU. The high ranking of human rights on the EU's agenda can be observed in several EU-documents. The European Commission described in a communication in 2001 that the protection of human rights, "together with the promotion of pluralistic democracy and effective guarantees for the rule of law and the fight against poverty, are among the European Union's essential objectives"⁶. In 2002, the European Parliament called the protection of the universality and indivisibility of human rights – including civil, political, economic, social and cultural rights – "one of the main objectives of the European Union"⁷. Also, the Council has underlined several times the high priority of human rights, e.g. in its "Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment" stating that "respect for human rights features among the key objectives of the EU's common foreign and security policy"⁸.

2.1 Historical background and major developments

Following this clear commitment proclaimed by the three major EU-institutions – the Commission, the EP and the Council – one might think that the high priority of human rights on the EU's agenda is naturally existent since the very creation of the EU (at the beginning EC). However, the current position of human rights is rather the result of a "lengthy historical, legal and political process"⁹ with crucial milestones which will be described in the following. Since the external dimension of the EU's human rights policy can only be understood in the light of the internal dimension, both dimensions will be highlighted.

2.1.1 Internal human rights policy

In the beginning of the integration process, the founding treaties did not provide any provisions on the protection of human rights. At this early stage of integration, the Community focused on economic matters, especially the free movement of goods, persons,

⁶ Commission Communication on the European Union's Role in promoting human rights and democratisation in third countries, COM 2001, 252 final, p. 3.

⁷ EP (Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy), Report on the European Union's role in promoting human rights and democratisation in third countries (COM(2001)252). Rapporteur: Rosa M. Díez González, Doc. A5-0084/2002, p. 7.

⁸ Council, Guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment (2008), p. 1.

⁹ Cuadrat-Grzybowska, in: Brosig (ed.), Human Rights in Europe, A Fragmented Regime?, p. 68.

services and capital. This economic focus is underlined for instance in Article 2 of the Treaty establishing the European Coal and Steel Community:

“The mission of the European Coal and Steel Community is to contribute to economic expansion, the development of employment and the improvement of the standard of living in the participating countries through the institution, in harmony with the general economy of the member States, of a common market (...).”

Therefore, it can be concluded: “Es war nicht vorgesehen, durch die Gemeinschaftsverträge dem einzelnen Bürger Rechte einzuräumen oder Pflichten aufzuerlegen”¹⁰. However, very soon it became clear that the integration process, which was originally intended to be economic in scope, could affect fundamental rights of the member states’ citizens. The freedom of movement within a single market clearly raised the possibility of human rights protected in different member states coming into contact.

Therefore, it was the European Court of Justice which made the first step towards protection of human rights at the EC-level by changing its approach from the early years of refusing to review EC secondary law and decisions of the Commission in the light of fundamental rights. This was for instance the case in “*Stork*”¹¹ in 1959. The applicant pleaded that the decision of the High Authority in question was in view of Articles 2 and 12 of the German constitution void. However, the ECJ stated that the High Authority only had to consider provisions under Community law “*without regard for their validity under national law*”¹². Therefore, it is correct to conclude: “Damit machte [der EUGH] auch deutlich, dass es aus seiner Sicht keine für die Gemeinschaft länderübergreifend geltenden Grund- und Menschenrechtsnormen gäbe, an die sie gebunden wäre”¹³. However, approximately ten years later, the “*Stauder*” case marked the turning point in the ECJ’s jurisprudence. In its judgement the Court stated for the first time that fundamental human rights are “*enshrined in the general principles of Community law and protected by the Court*”¹⁴. 1970, in “*Internationale Handelsgesellschaft*” the ECJ reaffirmed the „*Stauder*“-judgement stating that „*the protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within*

¹⁰ Winkler, in: Schwarze (ed.), Schriftenreihe Europäisches Recht, Politik und Wirtschaft, Vol. 239, p. 23.

¹¹ ECJ, C-1/58, Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community, [1959] ECR 17.

¹² ECJ, C-1/58, Friedrich Stork & Cie v. High Authority of the European Coal and Steel Community, [1959] ECR 17, para 8 (summary).

¹³ Alvaro/Zorn, Die Situation der Grund- und Menschenrechte innerhalb der EU, eine Analyse der rechtlichen und politischen Hintergründe, p. 15.

¹⁴ ECJ, C-29/69, Erich Stauder v. City of Ulm – Sozialamt, [1969] ECR 419, at 425, para 2 (summary).

the framework of the structure and objectives of the community”¹⁵. In the “*Nold*” case the Court extended the source of inspiration from the constitutional traditions common to the member states to “*international treaties for the protection of human rights, on which the member states have collaborated or of which they are signatories*”¹⁶. More specifically, in “*Rutili*”¹⁷ the Court referred directly to several articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4. November 1950 and to the protocols of the Convention. “The Court therefore pragmatically decided to subordinate the validity of EC legislative acts to their compliance with fundamental rights.”¹⁸

It falls exactly in this period of paying greater attention towards the protection of human rights by the ECJ that the German Constitutional Court (Bundesverfassungsgericht) in a way “encouraged” the ECJ to further strengthen its human rights jurisprudence. In its famous “*Solange I*” decision the Bundesverfassungsgericht stated that it would review secondary EC law in the light of fundamental rights guaranteed by the German Constitution, as long as there was no human rights catalogue, passed through the European Parliament which was adequate to the fundamental rights catalogue of the German Constitution.¹⁹ Not least in response to this judgement the ECJ established in the 1970s in a great number of judgements particular rights within the EC law system.²⁰

At the same time, the European Commission, the European Parliament and the Council of Ministers adopted a joint declaration on the protection of fundamental rights in 1977 in which they confirmed the “prime importance” they attach to the protection of fundamental rights as derived from the national constitutions and of the member states and from the ECHR.²¹ In the following years, especially the European Parliament pushed for highlighting the centrality of human rights. In 1984, the EP adopted the first draft treaty establishing the European Union. This document, also known as the ‘Spinelli draft’, already contained specific provisions on fundamental rights among others claiming that within a period of five years the EU “shall

¹⁵ ECJ, C-11/70, Internationale Handelsgesellschaft mbh v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, [1970] 1125, para 2 (summary).

¹⁶ ECJ, C-4/73, J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, [1974] ECR 491, para 2 (summary).

¹⁷ ECJ, C-36/75, Roland Rutili v. Ministre de l’intérieur, [1975] ECR 1219.

¹⁸ Kunoy/Dawes, Common Market Law Review 2009, p. 77.

¹⁹ BverfGE 37, 271, of 1974.

²⁰ Since this analysis shall not specifically deal with the ECJ’s jurisprudence with regard to the protection of human rights, this subject will not be further explored. For a useful list of cases in this context see: Cuadrat-Grzybowska, in: Brosig (ed.), Human Rights in Europe, A Fragmented Regime?, p. 68. See also: Craig/de Burca, EU Law, Text, Cases, and Materials, esp. pp. 379-427.

²¹ Joint Declaration by the European Parliament, the Council and the Commission of 27 April 1977 concerning the protection of fundamental rights and the European Convention for the protection of human rights and fundamental freedoms, OJ C103.

adopt its own declaration on fundamental rights”²². Although the Spinelli draft was too ambitious to be realised, it influenced the preamble of the Single European Act which for the first time in primary law introduced the obligation to promote human rights on the basis of the national constitutions of the member states, the ECHR and the European Social Charter. Moreover, in 1989 the European Parliament adopted a “Resolution adopting the Declaration of fundamental rights and freedoms” in which it called for the protection of both civil and political as well as economic, social and cultural rights.²³

This development led finally, in 1992/93, to the incorporation of provisions on the protection of fundamental rights within the EU in the Treaty establishing the European Union. In the preamble it is stated now: “*Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law*”. Moreover, the ECJ’s jurisprudence was transformed into Article F para 2 (now Art. 6 para 2):

“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.”

The introduction of a citizenship of the Union also conferred additional rights on nationals of member states.²⁴

Five major amendments to the provisions on human rights were made in the Amsterdam treaty, in 1997/99. First, Article 6 (ex Article F) was clarified by stating unequivocally that “*the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States*”²⁵. Second, the Treaty of Amsterdam also amended the preamble to the EU Treaty, confirming the member states’ attachment to fundamental social rights as defined in the European Social Charter of 1961 and the Community Charter of the Fundamental Social Rights of Workers of 1989. Third, the scope of discrimination was broadened from discrimination based on nationality²⁶ to discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation²⁷. Fourth, the Treaty of Amsterdam

²² Art. 4.3, Draft Treaty establishing the European Union (14 February 1984).

²³ European Parliament, Resolution adopting the Declaration of fundamental rights and freedoms, 12.4.1989, Doc. A2-3/89.

²⁴ Art. 17 – 22 TEC.

²⁵ Art. 6 para 1 TEU.

²⁶ Art. 12 TEC.

²⁷ Art. 13 para 1 TEC.

provided new provisions on equal treatment between men and women.²⁸ Fifth, the possibility that the principles of human rights and fundamental rights may be infringed by a member state was acknowledged and a procedure was laid down, which the Union should follow in dealing with such a member state.²⁹ In 2001/03, the Treaty of Nice supplemented this procedure with a prevention mechanism.

In 2000, the proclamation of a Charter of Fundamental Rights for the EU by the Commission, the European Parliament and the Council was another milestone for the protection of human rights within the EU. In December 2000, the Charter was politically approved by the member states at the Nice European Council summit.³⁰ However, after the non-ratification of the Constitutional Treaty in 2005 the Charter's legal status remains uncertain "and for now it is best considered as an influential form of soft law"³¹.

The coming into effect of the Lisbon treaty would not only in this respect provide next major milestones which would have been already introduced with the failed Constitutional treaty. It would introduce the Charter of Fundamental Rights into EU primary law and give its provisions therefore binding legal force. Moreover, the Treaty of Lisbon would give the EU legal personality and would therefore from the EU's side enable the Union to accede to the ECHR, which following the ECJ's opinion from 1996 was not possible so far because of the lack of legal personality.³²

In the recent years, there has also been some institutional development in the field of protection of human rights in the EU. In 2002, an EU network of independent experts on fundamental rights has been established by the Commission after a recommendation by the EP.³³ Its main task is to publish annual reports of the state of fundamental rights in the EU and its member states, assessing the application of the rights contained in the Charter of Fundamental Rights. In 2007, a European Union Agency for Fundamental Rights was established by the Council.³⁴ Its mandate covers the collection of information, formulating opinions, highlighting good practices, and publishing reports.

²⁸ Art. 2 and Art. 3 para 2 TEC.

²⁹ Art. 7 TEU.

³⁰ [2000] OJ C364/1.

³¹ Craig/de Burca, *EU Law, Text, Cases, and Materials*, p. 379.

³² ECJ Opinion 2/94 on Accession to the ECHR [1996] ECR I-1759.

³³ http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm.

³⁴ Council Regulation 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights, OJ L53/1.

2.1.2 External human rights policy

For the same reasons as explained in the previous subchapter, in the beginning of the integration process, the founding treaties did not provide any provisions on the promotion of human rights externally.³⁵

In practice, the EU's external human rights policy has its beginning in the late 1970s and the early 1980s when the EEC took ad hoc-measures for the protection of human rights against Uganda in 1977, Equatorial Guinea in 1978, the Central African Republic in 1979/80, and Liberia in 1980. These ad hoc-measures were characterized by a "negative approach", i.e. "nicht die aktive Förderung der Menschenrechte, sondern die reaktive Antwort auf die Missachtung von Menschenrechten (...)"³⁶.

Until the early 1980's the EC did not include any human rights clauses in its treaty relations with third countries. The inherent problem of this lack became increasingly clear in the EC's relations with the ACP-states. Neither in the Yaoundé conventions I and II nor in the two first Lomé conventions human rights clauses were included. The EC realized the problem already in the negotiations for Lomé II, however, "divisions among the Member States, together with strong opposition by a number of ACP States, meant that the final text of the Lomé II Convention contained no reference to human rights at all"³⁷. The problem was exposed not least when fifteen opposition leaders were executed in Surinam in 1982. While the Netherlands suspended its development cooperation treaty with Surinam, the EC could not follow the member state, as the Commission explained:

"The Lomé Convention (...) does not contain a special clause enabling the Commission to unilaterally interrupt the special ties existing under this Convention between the EEC countries and ACP states."³⁸

Therefore, generally the problem existed that "the EEC found itself in the uncomfortable position of being legally committed under those conventions to continue aid, even in the face of grave violations"³⁹.

Due to more favourable political conditions on both sides, in the Lomé III Convention, in 1984, for the first time, at least non-operative human rights clauses were included.⁴⁰ In 1989,

³⁵ See: p. 9 et seq.

³⁶ Bruha/Rau, in: Heselhaus/Nowak (eds.), *Handbuch der Europäischen Grundrechte*, p. 109.

³⁷ Bartels, *Human Rights Conditionality in the EU's International Agreements*, p. 12.

³⁸ Answer of the Commission to a question by Mr. Ien van den, Member of the European Parliament [1984] OJ C148/26.

³⁹ Eeckhout, *External Relations of the European Union: legal and constitutional foundations*, p. 467.

⁴⁰ Lomé III Convention [1986] OJ L86/3 (signed 8 December 1984; in force 1 May 1986). See also: Bartels, *Human Rights Conditionality in the EU's International Agreements*, p. 14.

the Lomé IV Convention being the first development agreement to incorporate a human rights clause as a fundamental part of cooperation brought a further evolution in the field of human rights clauses.⁴¹ Lomé IV marked at the same time the change from the above mentioned “negative approach” to a “positive approach” towards the promotion of human rights:

“Cooperation operations shall thus be conceived in accordance with the positive approach, where respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights.”⁴² In spite of this development of the EU’s external human rights policy there were still major deficiencies: First, neither in Lomé IV nor in any other agreements with third countries there was a clause providing for the suspension of the agreement in the event of human rights violations. Second, and more generally, the inclusion of human rights clauses in treaties with third countries was still a voluntary act by the Community since it was legally not required.⁴³

However, parallel to the evolution in the EU’s treaty relations with third countries, the EU (then EC) also developed its external human rights policy since the late 1970s through major Council declarations and Commission communications leading to legally binding provisions in the Treaty establishing the European Union in 1992/93. Already in 1978, at the Copenhagen European Council meeting, the nine heads of state or government declared “that respect for the maintenance of democracy and human rights in each Member State are essential elements of membership of the European Communities”⁴⁴. In 1985, the SEA not only, as mentioned above, included in the preamble the objective of promoting democracy on the basis of fundamental rights internally, but also externally:

“aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the rule of law and with human rights to which they are attached”.

⁴¹ Art. 5 Lomé IV Convention [1989] OJ L229/1 (signed 15 December 1989; in force 1 March 1990). At the same time the EC was beginning to emphasize the importance of compliance with human rights and democratic principles in agreements with many other third countries, which will not be named here. For more information, see: Bartels, Human Rights Conditionality in the EU’s International Agreements, p. 15 et seq.

⁴² Art. 5 para 1 Lomé IV Convention [1989] OJ L229/1 (signed 15 December 1989; in force 1 March 1990).

⁴³ Meanwhile, the Cotonou Agreement replaced Lomé IV. The Cotonou Agreement was signed in 2000 between the ACP states and the European Community and its Member States. It was concluded for a period of 20 years, entered into force in 2003, and was revised for the first time in 2005. In contrast to the Yaoundé and the Lomé agreements, it includes a consultation procedure in the case of human rights violations and as a last resort the suspension of the agreement (Art. 96 para 2, [2000] OJ L195/46).

⁴⁴ Conclusions of the Session of the European Council, Copenhagen 7 and 8 April 1978, http://aei.pitt.edu/1440/01/Copenhagen_1978.pdf.

For the first time in EC primary law an external human rights policy was shaped. However, the legal commitment to cooperation in foreign policy was still rather weak. The SEA was followed, in 1986, by an important declaration on human rights by the foreign ministers of the EC:

“The twelve seek universal observance of human rights. The protection of human rights is the legitimate and continuous duty of the world community and of nations individually. Expressions of concerns at violations of such rights cannot be considered interference in the domestic affairs of a State. (...) Respect for human rights is an important element in relations between third countries and the Europe of the Twelve.”⁴⁵

This declaration is of such a big importance, because it binds the member states to a set of principles which demand an active or “positive” rather than reactive or “negative” approach.⁴⁶ Moreover, this declaration in contrast to the SEA proclaimed the protection of human rights as “an end in itself, rather than simply a tool for the protection of European interests”⁴⁷.

The greater political focus on human rights could also be observed in the early 1990s when the Commission adopted a communication⁴⁸, which was followed by a Council resolution on human rights, democracy and development⁴⁹. The Commission communication is of importance, especially because it clarified the EC’s use of the positive and negative approaches for the promotion of human rights: “depending on the case, the Community can choose active promotion of human rights or a negative response to serious and systematic violations”, however it “will wherever possible give preference to the positive approach of support and encouragement”⁵⁰. The following Council resolution formulated a common framework for action taken by the Community and the member states, and provided in addition “a vital legal component of the external human rights policy”⁵¹ by giving a specific mandate for the inclusion of human rights clauses in agreements with third countries.

Especially the last two crucial documents led in 1992 to to the formulation of (current) Article 177 (2) in the Maastricht treaty which stated for the first time in primary law that

⁴⁵ Foreign Ministers’ Statement on human rights, in: Clapham, *Human Rights and the European Community: A Critical Overview*, p.164.

⁴⁶ It is interesting to observe that this declaration was made between Lomé III and Lomé IV which in practice brought about exactly the change from the negative to the positive approach.

⁴⁷ Clapham, in: Alston, *The EU and Human Rights*, p. 634.

⁴⁸ Commission Communication on human rights, democracy and development co-operation, SEC(61)91 of 25 March 1991.

⁴⁹ 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, 122-3.

⁵⁰ Commission Communication on human rights, democracy and development co-operation, SEC(61)91 of 25 March 1991, p. 6.

⁵¹ Eeckhout, *External Relations of the European Union: legal and constitutional foundations*, p. 468.

development cooperation “shall 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”. Since then, the EU was legally bound to promote human rights in its development cooperation and in conjunction with Article 181 had “die materielle Berechtigung, in ihren Kooperationsabkommen mit Drittstaaten Menschenrechtsklauseln aufzunehmen”⁵². This fact led in 1995 to the European Council’s decision “to include a human rights clause in all agreements with third states”⁵³.

Another crucial progress of the Maastricht treaty is the establishment of the Common Foreign and Security Policy, the second pillar, which replaced the institutionally weak European Political Cooperation. In contrast to the EPC, the objective of ensuring “the consistency of its external activities as a whole” is clearly set out in Article 3 TEU. One of the major objectives of CFSP is “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms”⁵⁴. Therefore, CFSP introduced a legally binding basis for the EU’s external human rights policy also beyond the context of development cooperation. “Damit war der primärrechtliche Rahmen für eine Berücksichtigung menschenrechtlicher Belange in den Außenbeziehungen der EU im Grundsatz gesteckt”.⁵⁵ In reference to Article 177(2) TEC and Article 11(1) TEU the Commission stated a few years later: “For the first time, Community action in this area is based not on the preamble but on the body of the text. This is one of Maastricht’s greatest innovations.”⁵⁶

Following the coming into effect of the Maastricht treaty, the EU started building a comprehensive human rights policy. However, 1996 became a year of “constitutional question marks”⁵⁷: First, the ECJ stated in the afore mentioned Opinion 2/94 that no treaty provision conferred “on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field”⁵⁸. Second, a paragraph in the ECJ’s judgement in the case *Portugal v. Council* can be read as ruling out that human rights could be a specific field of cooperation.⁵⁹ Partly in response to these two cases and another case⁶⁰

⁵² Zimmermann/Martenczuk, in: Schwarze (ed.), EU-Kommentar, p. 1700.

⁵³ Heinz, in: Brosig, (ed.), Human Rights in Europe, A Fragmented Regime?, p. 190. See: Doc 7255/96, General Affairs Council.

⁵⁴ Art. 11 para 1 TEU.

⁵⁵ Bruha/Rau, in: Heselhaus/Nowak (eds.), Handbuch der Europäischen Grundrechte, p. 110.

⁵⁶ Commission Communication on the European Union and the External Dimension of Human Rights Policy – From Rome to Maastricht and Beyond. COM(95) 567, p. 5. This Communication provides also an important and useful assessment of the new options for action.

⁵⁷ Eeckhout, External Relations of the European Union: legal and constitutional foundations, p. 468.

⁵⁸ ECJ Opinion 2/94 on Accession to the ECHR [1996] ECR I-1759, para 27.

⁵⁹ ECJ C-268/94 Portugal v. Council [1996] ECR I-6177, para 28.

the Council managed, in 1999, to adopt two regulations laying down rules for Community funding of human rights projects in third countries, one relating to “development co-operation operations”⁶¹ based on (current) Article 179 TEC and the other relating to “operations other than those of development co-operation policy”⁶². The second regulation had to be adopted on the basis of Art. 308, because at that time there were no specific treaty provisions on cooperation with developed third countries.

The treaty of Nice⁶³ filled this gap by introducing the formulation of Article 181a TEC and therefore enabling cooperation with developed countries, which is also to contribute to the objective of respecting human rights and fundamental freedoms.⁶⁴ Together, Art. 177(2) and 181a TEC now offer a broader basis for an external human rights policy which can be directed towards all kinds of third countries.

The Lisbon treaty would as already mentioned in the previous subchapter give the EU legal personality which is not only important in the context of accession to the ECHR, but generally strengthens the EU’s negotiation power in its external relations.

2.1.3 Brief summary

So far, it was shown that the current position of human rights is, both internally and externally, indeed the result of a lengthy “historical, legal and political process”⁶⁵ with crucial milestones – beginning with no provisions on the promotion and protection of human rights in the ECSC treaty, continuing with major ECJ judgements and positions adopted by Community institutions on human rights issues, arriving at the legally binding objective of promoting human rights in the current legal framework.

“This process emphasized the legal, political and moral values that make up the European identity, particularly the principles of representative democracy, the rule of law and respect for human rights.”⁶⁶

⁶⁰ ECJ C-106/96 *United Kingdom v. Commission* [1998] ECR I-2729.

⁶¹ Council Regulation 975/1999 [1999] OJ L120/1.

⁶² Council Regulation 976/1999 [1999] OJ L120/8.

⁶³ The Amsterdam treaty did not provide any crucial changes for the EU’s external human rights policy besides the changes which were already described in the former subchapter on the historical development of the EU’s internal human rights policy which of course do also have indirect implications for the external human rights policy.

⁶⁴ Art. 181a para 1 subpara 2 TEC which has the same wording as Art. 177 para 2 TEC.

⁶⁵ Cuadrat-Grzybowska, in: Brosig (ed.), *Human Rights in Europe, A Fragmented Regime?*, p. 68.

⁶⁶ Commission Communication on the European Union and the External Dimension of Human Rights Policy – From Rome to Maastricht and Beyond. COM(95) 567, p. 5.

Although the internal and the external dimension were examined separately they can only be understood together. This is meant in two ways. First, the historical development of both dimensions happened parallelly and is interconnected with each other. Second, there should be coherence between the internal and the external human rights policy. Why this is so, shall be explained in the following subchapter.

2.2 Coherence between the internal and the external human rights policy

In the following, three questions will be tackled. First, why should coherence between internal and external human rights policy exist? Second, how is coherence between these two dimensions legally manifested? Third – in order to summarize and in order to give an answer to the first question raised in the introduction –, why does the EU promote human rights externally?

First, the reason for the need of coherence between internal and external human rights policy can be easily illustrated by imagining two alternatives. The first alternative is that the EU protects human rights internally, but ignores the degree of protection of human rights in the rest of the world and especially with regard to third states with which it has treaty relations. Since human rights are understood as universal rights and values, neither the EU institutions nor member states could defend such a policy before the public. In democratic systems foreign policy is under observation by the media and civil society and has to comply with the values which determine also the internal policy.

The second alternative is that the EU promotes human rights externally while not protecting them enough internally. In this case, it is obvious that the EU would have a very weak position in negotiations with third countries, because it would lose one of its most important strengths – normative power. Therefore, both alternatives illustrate that the EU's internal and external human rights policies need to be coherent for reasons of credibility.⁶⁷

Second, current primary law in fact reflects the need for coherence between internal and external human rights policy. Internally, Article 6 and 7 TEU provide the relevant provisions: “*The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms*”⁶⁸, it “*shall respect fundamental rights*”⁶⁹ and in case of “*a*

⁶⁷ See also: Bruha/Rau, in: Heselhaus/Nowak (eds.), *Handbuch der Europäischen Grundrechte*, p. 108.

⁶⁸ Art. 6 para 1 TEU.

⁶⁹ Art. 6 para 2 TEU.

*serious and persistent breach by a Member State of principles mentioned in Article 6(1)*⁷⁰ the Council “*may decide to suspend certain of the rights (...) of the Member State in question*”⁷¹. Besides that, the ECJ, very early, in its jurisprudence made clear that it would examine, in so far as is had jurisdiction, whether acts of Community institutions did not infringe on fundamental rights.⁷²

Externally, Articles 177(2) and 181a TEC as well as Article 11(1) TEU provide the relevant provisions leading to the fact that, “all EU external policies, be they First or Second Pillar (or Third)”⁷³, shall contribute to the general objective of developing and consolidating democracy and the rule of law, and of respecting human rights and fundamental freedoms. Therefore, it can be concluded: “Heute steht diese Verpflichtung nicht nur für den Einigungsprozess selbst, sie wird auch als außenpolitischer Kompass des gesamten auswärtigen Handelns der EU betont.”⁷⁴

Finally, in order to summarize and to answer the first question raised in the introduction, there are two main reasons for the external promotion of human rights by the EU.

First, as the analysis of the historical development of the EU’s promotion and protection of human rights has shown, human rights are part of the “legal, political and moral values which make up the European identity”⁷⁵. This has been shown especially by the ECJ’s jurisprudence and by positions adopted by Community institutions. Therefore, it is a logical consequence that the EU obliges itself to promote human rights externally if it wants to respect its own values and also to strengthen its own identity.

Second, once human rights have been recognized as general principles of EU law in its internal dimension, for reasons of credibility there should be coherence between the EU’s internal and external human rights policies.

In conclusion, although the current position of human rights is the result of a lengthy historical, legal and political process, nowadays the legally binding objective of promoting and protecting human rights internally and externally and the high priority of human rights on the EU’s agenda are undisputed.

⁷⁰ Art. 7 para 2 TEU.

⁷¹ Art. 7 para 3 TEU.

⁷² See: p. 10 et seq.

⁷³ Eeckhout, *External Relations of the European Union: legal and constitutional foundations*, p. 472. In this analysis the third pillar will not be examined further, but for further information, see: Bieber/Epiney/Haag, *Die Europäische Union*, p. 320 et seq.

⁷⁴ Tannous, in: Weidenfeld/Wessels (eds.), *Europa von A bis Z*, p. 311.

⁷⁵ Commission Communication on the European Union and the External Dimension of Human Rights Policy – From Rome to Maastricht and Beyond. COM(95) 567, p. 5.

3. Institutional and instrumental implementation of the EU's human rights objectives in its external human rights policy

So far it was explained that the EU is obliged to promote human rights both internally and externally. The following step is to analyze how this obligation is institutionally and instrumentally implemented. In other words, it will be analyzed which instruments the EU has in order to promote human rights in its foreign policy. Therefore, it will be examined first which competences the relevant EU institutions have in this context and, second, a broad overview over the range of the EU's instruments will be given. Third, it will be briefly described how the Council, the Commission and the European Parliament have arranged their own institutions in order to promote and protect human rights.

3.1 Competences of EU institutions in the external human rights policy

Since the EU should be seen as a uniform actor on the international scene, the distinction between the "supranational" first pillar and the "intergovernmental" second (and third) pillar seems nowadays slightly superficial.⁷⁶ Not only in reality the EU is active on all levels, also legally it is the Union which defines and implements the CFSP, i.e. the second pillar.⁷⁷ However, as it will be shown, it is also correct that the EU's competences vary depending on the pillar. Therefore, in the following, first, the EU's competences within the first pillar and then the competences within the second pillar will be described.

3.1.1 Competences within the first pillar

Within the first pillar, the competences of the EU institutions in the external human rights policy can be read in one article, namely Article 300 TEC. This is the case, because the articles providing the four described instruments which the EU has within the first pillar – development cooperation; economic, financial and technical cooperation with third countries; association agreements; trade agreements within the common commercial policy – refer all to Article 300 TEC concerning the negotiation and decision-making procedure.⁷⁸ Article 300

⁷⁶ For further information on this question, see also: Bruha/Rau, in: Heselhaus/Nowak (eds.), *Handbuch der Europäischen Grundrechte*, p. 110. See also: Marquardt, in: Bruha/Nowak, *Die Europäische Union: Innere Verfasstheit und globale Handlungsfähigkeit*, p. 195 et seq.

⁷⁷ Art. 11 para 1 TEU.

⁷⁸ Only Art. 133 para 3 TEC on the common commercial policy provides additional provisions, which are, however, rather similar to those in Art. 300 TEC.

TEC provides a “three-step procedure”: “Mandat, Unterzeichnung, Annahme”⁷⁹ – negotiations, signing, conclusion.

Concerning the negotiation procedure Article 300 TEC provides that

*“[w]here this Treaty provides for the conclusion of agreements between the Community and one or more States or international organisations, the Commission shall make recommendations to the Council, which shall authorise the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it.”*⁸⁰

Therefore, the Commission’s role is very important: as usually in the first pillar it has the right of initiative and in the first place it is the Commission which conducts the negotiations. At this stage the Council’s role is limited. It authorizes the Commission to open the negotiations. The special committees which the Council appoints have a consultative function in the negotiation process. Nonetheless, their influence in this regard should not be underestimated.⁸¹ The European Parliament has no say on the opening of negotiations.

Concerning the signing of an agreement Article 300 provides that

*“(…) the signing (…) and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.”*⁸²

Therefore, the Council has the decisive role for the signing of an agreement. Generally, both for the signing and for the conclusion (third step) the Council shall act by qualified majority except in the case of association agreements where unanimity is required. So far, the EP still has no say except that it “*shall be immediately and fully informed of any decision (…)*”⁸³. However, the signing is not yet the legally binding adoption.

This takes place in the third step, namely the conclusion of an agreement:

“The Council shall conclude agreements after consulting the European Parliament, except for the agreements referred to in Article 133(3) (...). The European Parliament shall deliver its opinion

⁷⁹ Müller-Ibold, in: Lenz/Borchardt, EU- und EG-Vertrag, Kommentar, p. 2567.

⁸⁰ Art. 300 para 1 TEC.

⁸¹ See: Müller-Ibold, in: Lenz/Borchardt, EU- und EG-Vertrag, Kommentar, p. 2567.

⁸² Art. 300 para 2 subpara 1 TEC.

⁸³ Art. 300 para 2 subpara 3 TEC.

within a time limit which the Council may lay down according to the urgency of the matter. In the absence of an opinion within that time limit, the Council may act."⁸⁴

So, in the last step, the Council has again the decisive role of concluding the agreement while the EP generally has only a consultative role. In the field of trade agreements within the CCP the EP has even no say at all, but in practice it is consulted since 1973.⁸⁵ However, in the case of association agreements the assent of the EP has to be obtained before the conclusion.⁸⁶

The role of the ECJ has three components. First, it has to give an opinion as to whether an agreement envisaged is compatible with the TEC, when the EP, the Council, the Commission or a member state ask for it.⁸⁷ Second, since the agreements concluded under Article 300 "*shall be binding on the institutions of the Community and on Member States*"⁸⁸, the ECJ has also jurisdiction in the case of an infringement by them. Third, the decision on the conclusion of an agreement by the Council is as provided in Article 230 TEC generally a reviewable act by the Council. Therefore, the ECJ has the competence to review the legality of the agreement itself.

For the first pillar it can be concluded that in international agreements the Commission has the right of initiative and the competence to conduct negotiations, while the Council has especially the competence of signing and concluding the agreements, and the EP has at best a consultative role with the exception of association agreements where its assent is necessary. The ECJ has jurisprudence on these first pillar instruments.

3.1.2 Competences within the second pillar

In contrast to the first pillar, the second pillar is characterized by a "Council dominance". This can be already derived from the decision-making procedure provided in Article 23 TEU which is the relevant procedure for all CFSP decisions. Nonetheless, it is necessary to take a look into further provisions to determine the competences of the relevant EU institutions.

The European Council, which is an EU and not an EC institution and is composed of the Heads of State or Government of the member states and the President of the Commission,⁸⁹ has in the first place the mandate of providing the Union "*with the necessary impetus for its*

⁸⁴ Art. 300 para 3 subpara 1 TEC.

⁸⁵ See: Müller-Ibold, in: Lenz/Borchardt, EU- und EG-Vertrag, Kommentar, p. 2570.

⁸⁶ In three other cases the assent of the EP is also necessary, see: Art. 300 para 3 subpara 2 TEC.

⁸⁷ Art. 300 para 6 TEC.

⁸⁸ Art. 300 para 7 TEC.

⁸⁹ Art. 4 TEU.

development”⁹⁰: it shall define the principles of and the general guidelines for the CFSP and it shall decide on common strategies.⁹¹ At the same time the European Council has become the supreme decision-making body, as in case that the Council cannot find a consensus it “*may (...) request that the matter be referred to the European Council for decision by unanimity*”⁹².

The Council is the central institution in the CFSP. It “*shall ensure the unity, consistency and effectiveness of action by the Union*”⁹³. It shall define and implement the CFSP on the basis of the general guidelines⁹⁴, it shall adopt joint actions⁹⁵ and common positions⁹⁶. The systematic cooperation takes place within the Council.⁹⁷ The role of the Council can be summarized as follows: “*Der Rat ist (...) Durchführungs-, Regelungsorgan und zugleich Zentrum der GASP.*”⁹⁸

The Commission’s role in the field of the CFSP is much more limited than in the first pillar. It is only generally stated that “[*t*]he Commission shall be fully associated with the work carried out in the common foreign and security policy field”⁹⁹. In contrast to the first pillar, the Commission shares the right of initiative with the member states.¹⁰⁰ Furthermore, it may submit any appropriate proposal relating to the CFSP after the request of the Council.¹⁰¹ The Commission also has a supportive role for the Presidency of the Union.¹⁰² Moreover, and most important for the EU’s policy in the UNHRC, not only the embassies of member states, but also the Commission delegations in third countries, and their representations to international organizations shall take part in the coordination process.¹⁰³

The European Parliament’s role is even more limited in comparison to the first pillar. It has merely a consultative role which consists of four rights. First, it shall be consulted “*on the main aspects and the basic choices*” of the CFSP.¹⁰⁴ Second, the EP “*shall be kept regularly informed by the Presidency and the Commission of the development*” of the CFSP.¹⁰⁵ Third, it

⁹⁰ Art. 4 TEU.

⁹¹ Art. 13 para 1 TEU.

⁹² Art. 23 para 2 subpara 2 TEU.

⁹³ Art. 13 para 3 subpara 3 TEU.

⁹⁴ Art. 13 para 3 subpara 1 TEU.

⁹⁵ Art. 14 para 1 TEU.

⁹⁶ Art. 15 TEU.

⁹⁷ Art. 16 TEU.

⁹⁸ Bitterlich, in: Lenz/Borchardt, EU- und EG-Vertrag, Kommentar, p. 71.

⁹⁹ Art. 27 TEU.

¹⁰⁰ Art. 22 para 1 TEU.

¹⁰¹ Art. 14 para 4 TEU.

¹⁰² Art. 18 para 4 TEU.

¹⁰³ Art. 20 TEU.

¹⁰⁴ Art. 21 para 1 TEU.

¹⁰⁵ Art. 21 para 1 TEU.

“may ask questions of the Council or make recommendations to it”¹⁰⁶. Fourth, the EP “shall hold an annual debate on progress in implementing” the CFSP.¹⁰⁷ Therefore, constitutionally the powers of the EP are very limited. However, in practice the EP could enhance its role, especially through its budgetary powers, interinstitutional arrangements with the Council, cooperation with national parliaments and other soft measures.¹⁰⁸ Also its resolutions and reports have some influence and cannot be merely seen as “virtual parliamentary reality”¹⁰⁹

A special position within the CFSP framework has the High Representative for the CFSP who is at the same time the Secretary General of the Council. He

*“shall assist the Council in matters coming within the scope of the common foreign and security policy, in particular through contributing to the formulation, preparation and implementation of policy decisions, and, when appropriate and acting on behalf of the Council at the request of the Presidency, through conducting political dialogue with third parties.”*¹¹⁰

The High Representative shall be appointed by the Council, acting by a qualified majority.¹¹¹ In 1999, the Council appointed Javier Solana as the first High Representative.

The weakest position in the CFSP in comparison to the first pillar has the ECJ. According to Article 46 TEU the ECJ has no say on the CFSP. However, since Article 47 TEU provides that the TEU shall not affect the TEC, measures taken by the EU within the field of CFSP shall not touch upon the Community’s competences. Since this provision falls within the ECJ’s jurisprudence¹¹² the ECJ can review this matter and has done so.¹¹³

For the second pillar it can be summarized that the CFSP is dominated by the Council while the Commission has a weaker, the EP a much weaker and the ECJ nearly no role in comparison to the first pillar.

¹⁰⁶ Art. 21 para 2 TEU.

¹⁰⁷ Art. 21 para 2 TEU.

¹⁰⁸ For further information, see: Thym, *European Foreign Affairs Review* 2006, pp. 109 – 127. See also: Raube, in: Blockmans, *The European Union and international crisis management: Legal and Policy Analysis*.

¹⁰⁹ Thym, *European Foreign Affairs Review* 2006, p. 120.

¹¹⁰ Art. 26 TEU.

¹¹¹ Art. 207 para 2 TEC.

¹¹² Art. 46(f) TEU.

¹¹³ See for instance: ECJ, C-170/96, *Commission of the European Communities v Council of the European Union*, [1998] ECR I-02763.

3.2 The range of the EU's external human rights policy instruments

The EU possesses a broad and growing range of instruments for the promotion of human rights in its external relations. The term “mainstreaming” signifies that human rights concerns are increasingly integrated into the different dimensions of EU external action. This fact is also mirrored by the enormous increase in budgetary expenditure for the promotion of human rights.¹¹⁴ However, it has often been criticized that within the Union there is no major institution with a clear human rights mandate, e.g. a European Commissioner for human rights.¹¹⁵ In the following, analogue to the EU's competences, first the EU's instruments within the first pillar (EC instruments) and then the second pillar instruments will be described.¹¹⁶

3.2.1 First pillar instruments

Within the first pillar, there are four areas which give the EC the possibility to promote human rights. These areas are economic in nature, therefore it is correct to state:

“Auf der Ebene der Gemeinschaftsverträge ist die EU kompetenziell auf eine Förderung der Menschenrechte in erster Linie als ‘Annex’ ihrer wirtschaftlichen Kooperation mit Drittländern und internationalen Organisationen beschränkt.”¹¹⁷

The first area which provides the EC with instruments for the promotion of human rights is the development cooperation.¹¹⁸ Two major instruments arise from the objective that this Community policy “*shall 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*”¹¹⁹.

¹¹⁴ 1987: 200.000 ECU, 1999: 100.000.000 ECU, see: Heinz, Menschenrechtspolitik in der Europäischen Union. Der (lange) Weg zu einem effektive Menschenrechtsschutz, p. 11.

¹¹⁵ See for example: Clapham, in: Alston, The EU and Human Rights, p. 665 et seq.

¹¹⁶ Certain other instruments in the EU's external human rights policy will not be discussed here, but for reasons of completeness they shall be briefly mentioned: conditions for accession to the EU under Art. 49 TEU and the Copenhagen Criteria; the European Instrument for Democracy and Human Rights (EIDHR) based on Regulation (EC) No 1889/2006 of 29 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide; démarches which are carried out in a confidential manner, jointly by the current and incoming Presidencies as well as the Commission; and public declarations on human rights situations in third countries. For an overview, see: Tannous, in: Weidenfeld/Wessels (eds.), Europa von A bis Z, p. 311.

¹¹⁷ Bruha/Rau, in: Heselhaus/Nowak (eds.), Handbuch der Europäischen Grundrechte, p. 111.

¹¹⁸ Title XX (Art. 177 – 181) TEC.

¹¹⁹ Art. 177 para 2 TEC.

First, the EC has the competence to cooperate with third countries and international organizations and to enter into agreements with them, “*which shall be negotiated and concluded in accordance with Article 300*”¹²⁰. Based on this provision in the light of Article 177(2) TEC the EC can include human rights clauses in its agreements with third parties. It did so for the first time in 1989 in the Lomé IV Convention, however, then on the basis of Article 310 TEC, because Article 177(2) TEC did not exist yet.¹²¹ Even before 1995 the EC had included in more than 30 agreements respect for human rights in the EC member states, ACP cooperation states and other countries. In 1995 the European Council in response to a Commission Communication¹²² decided to include human rights clauses in all future agreements with third countries.¹²³ The standard type of clause is usually stating that human rights and democracy are “essential elements” of an agreement. However, “variations in its exact formulation still exist”¹²⁴. In rare cases this “essential elements clause” is enhanced through the “non-compliance clause” which gives the parties of the treaty the possibility to “take appropriate measures”¹²⁵, e.g. suspending an agreement in whole or in part if a serious breach of its essential provisions, i.e. respect for human rights, occurs.¹²⁶ Meanwhile the “essential elements clause” was included in agreements with more than 120 countries.¹²⁷

Second, the Council is entitled to “*adopt the measures necessary to further the objectives referred to in Article 177. Such measures may take the form of multiannual programmes.*”¹²⁸. The important Council regulation 975/1999 “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

¹²⁰ Art. 181 TEC.

¹²¹ For further information on Art. 310 TEC, see: p. 28 et seq.

¹²² Communication on the inclusion of respect for democratic principles and human rights in agreement between the Community and third countries, COM(95)216 final.

¹²³ Doc 7255/96, General Affairs Council.

¹²⁴ Bultermann, Human Rights in the Treaty Relations of the European Community, *Real Virtues or Virtual Reality?*, p. 160.

¹²⁵ Art. 118 para 2 Europe Agreement with Bulgaria [1994] OJ L358/3.

¹²⁶ Since 1992 the EU has made some use of non-compliance clauses mostly by suspending development cooperation. For more details, see: Heinz, *Menschenrechtspolitik in der Europäischen Union. Der (lange) Weg zu einem effektiven Menschenrechtsschutz*, p. 14. For the purpose of this paper this brief overview should suffice. For further information on human rights clauses see: Eeckhout, *External Relations of the European Union: legal and constitutional foundations*, p. 475-481. More detailed: Bultermann, *Human Rights in the Treaty Relations of the European Community, Real Virtues or Virtual Reality?*, esp. Part B, C, D. Also detailed: Bartels, *Human Rights Conditionality in the EU's International Agreements*.

¹²⁷ This number includes human rights clauses in agreements based on development cooperation (Title XX TEC), economic, financial and technical cooperation with third countries (Title XXI TEC) and association agreements (Art. 310 TEC).

¹²⁸ Art. 179 para 1 TEC.

respecting human rights and fundamental freedoms” is for example based on Article 179(1) TEC.¹²⁹

The second area in which the EC has instruments for the promotion of human rights is the economic, financial and technical cooperation with third countries.¹³⁰ This title was added by the Treaty of Nice in response to the debate if Article 179(1) TEC includes measures for the promotion of human rights when the third country is not a developing country. Now, Article 181a TEC clearly provides the same objective – promotion of human rights – and the same instruments for the promotion of human rights in the cooperation with all third countries like the provisions on development cooperation. The seriousness of human rights conditionality in agreements with third countries other than developing countries can be illustrated by the collapse of negotiations with Australia and New Zealand on trade and cooperation agreements, caused by this very point.¹³¹

Third, the EU has the possibility to promote human rights in association agreements. Article 310 TEC provides very generally that

“[t]he Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure”.

Before the Treaty of Maastricht (and Nice) and the existence of Article 177(2) TEC (and Article 181a TEC), human rights conditionality was only based on this provision. An example for this is Article 5 of the Lomé IV Convention.

The fourth area which provides the EC with instruments for the promotion of human rights are trade agreements in the realm of the Common Commercial Policy.¹³² However, for a long time the prevailing opinion was that in this area the EC only has the competence to take negative, but not positive measures: “Die Menschenrechts- und Demokratieklausele kann (...) in ihrer Eigenschaft als eigenständiges Instrument der Menschenrechtspolitik nicht auf Art. 113 [now 133] EGV gestützt werden”¹³³. Following this opinion, Article 133 TEC gives the EC only the possibility to include human rights clauses which provide reasons for the suspension of a trade agreement. In the light of Article 11(1) TEU which provides that CFSP

¹²⁹ Council Regulation 975/1999 of 29 April 1999, OJ L120/1.

¹³⁰ Title XXI TEC.

¹³¹ See: Fierro, *The EU's Approach to Human Rights Conditionality in Practice*, p. 287-302.

¹³² Art. 133 TEC.

¹³³ Hoffmeister, *Menschenrechts- und Demokratieklausele in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft*, p. 407.

shall cover “*all areas of foreign and security policy*” among others with the objective “*to develop and consolidate (...) respect for human rights and fundamental freedoms*” this interpretation of Article 133 TEC seems problematic and was therefore disputed in literature.¹³⁴ On the other hand, under WTO law which prohibits with two exceptions¹³⁵ different treatment of trading partners which are WTO members (MFN principle), the EC faces serious difficulties in including any human rights clauses, and especially those providing positive measures, in trade agreements.¹³⁶

3.2.2 Second pillar instruments¹³⁷

The basic difference between the first and the second pillar is that within the second pillar the EU has a genuine competence to promote human rights which is not, like in the first pillar, transferred through other areas of competence. This can be derived from Article 11(1) TEU which provides that CFSP shall cover “*all areas of foreign and security policy*” in conjunction with the objective “*to develop and consolidate (...) respect for human rights and fundamental freedoms*”¹³⁸. On the other hand, while the EU has a much broader range of foreign policy issues it is entitled to deal with, its competences to act are much more limited than in the first pillar.

Article 12 TEU provides the relevant instruments which the EU can use within the CFSP:

“*The Union shall pursue the objectives set out in Article 11 by:*

- *defining the principles of and general guidelines for the common foreign and security policy,*
- *deciding on common strategies,*
- *adopting joint actions,*
- *adopting common positions,*
- *strengthening systematic cooperation between Member States in the conduct of policy.”*

¹³⁴ For critical comments, see: Bruha/Rau, in: Heselhaus/Nowak (eds.), *Handbuch der Europäischen Grundrechte*, p. 113. See also: Aschenbrenner, *Menschenrechte in den Außenbeziehungen der Europäischen Union: Gemeinschaftspolitik versus GASP*, p. 92 et seq.

¹³⁵ First, the creation of customs unions or free-trade areas and second, preferences for developing countries.

¹³⁶ For a more detailed discussion of this problem, see: Eeckhout, *External Relations of the European Union: legal and constitutional foundations*, p. 481 et seq.

¹³⁷ This subchapter will focus on instruments provided in Art. 12 TEU. Agreements concluded under Art. 24 TEU or ESDP measures (Art. 17 TEU) will not be discussed here.

¹³⁸ Art. 11 para 1 dash 5 TEU. In fact, already Art. 11 para 1 dash 1 provides the objective “to safeguard the common values (...) of the Union” which include respect for human rights. Therefore, Art. 11 para 1 dash 5 can be seen as a clarifying and declaratory article.

The initiative for using one of those instruments lies both in the hand of the member states and in the hand of the Commission.¹³⁹ All of these instruments are decided upon normally by the Council acting unanimously.¹⁴⁰ However, there is the possibility of a “constructive abstention”.¹⁴¹ An exception to the principle of unanimity is that the Council shall act by a qualified majority when adopting joint actions, common positions or taking any other decision on the basis of a common strategy.¹⁴² However, a vote shall not be taken if a member state “declares that, for important and stated reasons of national policy, it intends to oppose the adoption of a decision(...)”¹⁴³. In practice, no decision in the second pillar has ever been adopted by qualified majority.

Although Article 12 and therefore the CFSP instruments came into effect in 1993, the EU did not make much use of them until the late 1990s. This was in general and in the field of human rights the case. This fact provoked criticism, especially from the European Parliament which stated in 1996:

“(...) deplors the fact that, three years after the entry into force of the Treaty on European Union, there are so few joint actions and common positions in comparison with the number of declarations, although the former are the real instruments of the CFSP; (...)”¹⁴⁴

Partly in reaction to this criticism, since then the Council has made more use of these “real instruments” of the CFSP. In the following the usage of the CFSP instruments in the field of human rights will be described briefly in the order given by Article 12 TEU.

Principles and general guidelines for the CFSP shall be defined by the European Council.¹⁴⁵ In the field of human rights, it has developed seven sets of general guidelines¹⁴⁶ on:

- The Death Penalty (1998, updated in 2008)¹⁴⁷
- Torture and other cruel, inhuman or degrading treatment (2001, updated in 2008)¹⁴⁸
- Human rights dialogues with third countries (2001, updated in 2009)¹⁴⁹

¹³⁹ Art. 22 para 1 TEU.

¹⁴⁰ Art. 23 para 1 subpara 1 TEU.

¹⁴¹ Art. 23 para 1 subpara 2 TEU.

¹⁴² Art. 23 para 2 subpara 1 TEU. This article provides also two further exceptions which shall not be named here.

¹⁴³ Art. 23(2) subpara 2 TEU.

¹⁴⁴ European Parliament, Resolution on progress in implementing the common foreign and security policy (January to December 1996) (A4-0193/97).

¹⁴⁵ Art. 13(1) TEU.

¹⁴⁶ In the following only the newest version of the guidelines will be cited.

¹⁴⁷ <http://www.consilium.europa.eu/uedocs/cmsUpload/10015.en08.pdf>.

¹⁴⁸ <http://www.consilium.europa.eu/uedocs/cmsUpload/8590.en08.pdf>.

- Children in armed conflict (2003, updated in 2008)¹⁵⁰
- Human rights defenders (2004, updated in 2008)¹⁵¹
- Promotion and Protection of the rights of the child (2007)¹⁵²
- Violence against women and girls and combating all forms of discrimination against them (2008)¹⁵³.

Based on these guidelines the EU takes the appropriate measures in the respective policies, including joint actions, common positions, but also démarches and other diplomatic methods. All of these guidelines include provisions on the human rights policy in multilateral for a, e.g. the guidelines on torture provide that the EU will

“continue to raise the issue of torture and ill-treatment in multilateral fora, such as the UN (...). The EU will continue to actively support the relevant resolutions at the UN bodies including the General Assembly and the Human Rights Council (...)”¹⁵⁴.

The European Council shall decide on common strategies¹⁵⁵ which shall be implemented by the Council, in particular by adopting joint actions and common positions¹⁵⁶. So far, only three common strategies on Russia and Ukraine in 1999 and on the Mediterranean in 2000 were adopted. All of the three common strategies include major provisions on the promotion of human rights in the countries/regions.¹⁵⁷ However, the common strategies were widely criticized for being ineffective¹⁵⁸ until Javier Solana’s Common Strategies Report “led to the virtual burial of common strategies as an instrument of EU foreign policy”¹⁵⁹.

Joint actions shall be adopted by the Council. Two paragraphs of the long Article 14 summarize their main features:

¹⁴⁹ <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf>. For a long period there existed only a human rights dialogue with China (since 1996). Since 2002 there has been a continuous increase in structured human rights dialogues leading to a number of ten structured human rights dialogues and consultations with Iran, Turkmenistan, Uzbekistan, the African Union, Russia, US, Canada, Japan and New Zealand. See: Council, EU Annual Report on Human Rights 2008, p. 29 et seq.

¹⁵⁰ <http://www.consilium.europa.eu/uedocs/cmsUpload/10019.en08.pdf>.

¹⁵¹ <http://www.consilium.europa.eu/uedocs/cmsUpload/16332-re01.en08.pdf>.

¹⁵² <http://www.consilium.europa.eu/uedocs/cmsUpload/16031.07.pdf>.

¹⁵³ <http://www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf>.

¹⁵⁴ <http://www.consilium.europa.eu/uedocs/cmsUpload/8590.en08.pdf>, p. 10.

¹⁵⁵ Art. 13(2) TEU.

¹⁵⁶ Art 13 (3) TEU.

¹⁵⁷ See for instance: European Council Common Strategy of 11 December 1999 on Ukraine (1999/877/CFSP) figure 10 and especially figure 50.

¹⁵⁸ For harsh criticism, see: Keukeleire/MacNaughtan, *The Foreign Policy of the European Union*, p 155: “Common strategies had failed on nearly all points.” and p. 156: “Most importantly, they failed to offer a strategy”.

¹⁵⁹ Keukeleire/MacNaughtan, *The Foreign Policy of the European Union*, p 155.

*“(...) Joint actions shall address specific situations where operational action by the Union is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.”*¹⁶⁰

*“Joint actions shall commit the Member States in the positions they adopt and in the conduct of their activity.”*¹⁶¹

The rest of the article mainly deals with the member states’ obligations, i.e. consultation and information.

In practice from 2000 on, joint actions have been mainly used for the limited number of CFSP/ESDP actions which are financed through the CFSP budget and which need to be adopted through a legal act. These concern mainly the appointment of EU Special Representatives¹⁶² and the extension of their mandate as well as civilian and military crisis management operations within the ESDP framework.¹⁶³

Although these categories obviously may have human rights implications, they do not focus necessarily on human rights in the first place. Joint actions have been criticized for their limited “added value”¹⁶⁴ meaning that measures taken through a joint action could often be even more effectively taken through first pillar instruments.

Common positions shall be adopted by the Council. They “shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the common positions”¹⁶⁵.

In practice common positions mainly focus on the adoption of sanctions or other restrictive measures which arise as a consequence of UN Security Council resolutions or which are autonomous measures taken by the EU.¹⁶⁶ Such sanctions have to be adopted either on the basis of Article 301 TEC or as “urgent measures” just on the basis of Article 23 TEU. Therefore economic sanctions can be in fact qualified as a CFSP and a Community instrument.

The last instrument mentioned in Article 12 TEU, namely “strengthening systematic cooperation between Member States in the conduct of policy” leads us to the instrument

¹⁶⁰ Art. 14(1) TEU.

¹⁶¹ Art. 14(3) TEU.

¹⁶² See for instance: Council Joint Action 2007/748/CFSP of 19 November 2007 amending and extending the mandate of the European Union Special Representative in Bosnia and Herzegovina, OJ 2007 L 303/38.

¹⁶³ Council, EU Annual Report on Human Rights 2008, p. 9. For a list of EU Special Representatives, see p. 10.

¹⁶⁴ Keukeleire/MacNaughtan, *The Foreign Policy of the European Union*, p. 157.

¹⁶⁵ Art. 15 TEU.

¹⁶⁶ See for instance: Council, Common Position 2008/349/CFSP of 29 April 2008 renewing restrictive measures against Burma/Myanmar, OJ 2008 L 116/57.

which concerns directly the EU's human rights policy in multilateral fora, such as the UNHRC. Some further treaty provisions clarify further the nature of systematic cooperation. Article 16 TEU provides the general objective of such a cooperation:

“Member States shall inform and consult one another within the Council on any matter of foreign and security policy of general interest in order to ensure that the Union's influence is exerted as effectively as possible by means of concerted and convergent action”.

In parallel, member states' embassies and the Commission delegations in third countries and their representations to international organizations *“shall cooperate in ensuring that the common positions and joint actions adopted by the Council are complied with and implemented”*¹⁶⁷ and they *“shall step up cooperation by exchanging information [and] carrying out joint assessments (...)”*¹⁶⁸.

Finally, and most important for the EU's human rights policy in the UNHRC, *“Member States shall coordinate their action in international organisations and at international conferences. They shall uphold the common positions in such fora”*¹⁶⁹. It is important to understand that “common position” is not meant in the sense of Article 15 TEU, but more generally as *“jede im Rahmen der GASP vom Rat entwickelte EU-Position”*¹⁷⁰

In practice, generally it is hard to evaluate the record of systematic cooperation. The objective of such systematic cooperation is to achieve at all political, diplomatic and administrative levels a behaviour that has been labelled the ‘consultation reflex’, meaning that “if something happens in the world, member states automatically first consult each other through the CFSP framework before reacting to events and before taking initiatives of their own”¹⁷¹. This consultation reflex shall lead to the afore mentioned “concerted and convergent action”. Prominent cases, like the split of the EU in the war in Iraq in 2003 or more recently the failure to achieve a common position at the Durban Review Conference in April 2009 leading to a boycott by the Netherlands, Italy, Germany and Poland are often taken as examples for the existence of very profound differences between the member states. However, it has to be kept in mind that there are lots of day-to-day, unspectacular achievements of concerted action which are hard to prove empirically.

¹⁶⁷ Art. 20(1) TEU.

¹⁶⁸ Art. 20(2) TEU.

¹⁶⁹ Art. 19(1) TEU.

¹⁷⁰ Kaufmann-Bühler, in: Grabitz/Hilf, Das Recht der Europäischen Union, Kommentar, p. 2.

¹⁷¹ Keukeleire/MacNaughtan, The Foreign Policy of the European Union, p. 160.

Nonetheless such an analysis will be part of the fourth chapter on the EU's human rights policy in the UNHRC. At this stage it should be only mentioned that in the field of human rights the systematic coordination on the Council level takes place in the Council Working Group on Human Rights (COHOM).¹⁷²

Generally, it can be stated that the analysis of the EU's human rights policy in the UNHRC will support Keukeleire's statement about systematic coordination:

“It is probably one of the most important instruments, as well as one of the most overlooked. It is often ignored by analysts of EU foreign policy because it is less visible than other CFSP instruments and because it does not fit comfortably within the notion of a common policy.”¹⁷³

While this instrument was at the heart of the European Political Cooperation, it remains “the backbone” of the CFSP. This will be illustrated with a focus on the EU's human rights policy in multilateral fora in the fourth chapter.

However, before analysing the EU's human rights policy in the UNHRC, a brief overview over the institutional arrangements in the external human rights policy shall be given.

3.3. Institutional arrangements for the external human rights policy

Before concluding this chapter, a brief overview shall be given about how the Council, the Commission and the EP have arranged their own institutions in order to promote and protect human rights. The relevance for the EU's policy in the UNHRC shall be, if appropriate, already touched upon.

Within the Council the Working Group on Human Rights (COHOM) is the most important institution for the promotion of human rights in the EU's external policy. COHOM was created in 1987 within the framework of EPC in order to coordinate the human rights activities.¹⁷⁴ It has basically five tasks:

1. “Discussion and submission of recommendations to the Political Committee on general guidelines for common reactions to actual or predictable violations of human rights, including options and modalities for reactions;

¹⁷² See: p. 42 et seq.

¹⁷³ Keukeleire/MacNaughtan, *The Foreign Policy of the European Union*, p. 159.

¹⁷⁴ However, the working groups responsible for specific geographical areas also deal with human rights.

2. Co-ordination of positions (...) on human rights issues likely to arise within all relevant international fora (...);¹⁷⁵
3. Collection and evaluation of information on current violations of human rights in various parts of the world and actions undertaken (...) in cases of such violations;
4. Discussion and, where appropriate, submission of recommendations to the Political Committee on i.a. the general aspects of human rights questions as well as on the general aspects of the implementation of the [Union's] human rights policy, including examination of the general balance of the interventions (...) in the field of human rights;
5. Reporting annually to the Political Committee on actions taken (...) in the field of human rights;

Obviously, the second task is of utmost importance for the EU's human rights policy in the UNHRC. It becomes clear that at the Council level, the coordination of the work in the UNHRC takes place in COHOM. In addition it is provided that

“[t]he working group should meet at least twice a year (once before the session of the UN Human Rights Commission¹⁷⁶ and once before the General Assembly). Additional meetings could be called when required. Time schedules for meetings of the UN working group and the human rights working group should be related.”

This provision underlines the special attention which COHOM shall pay to the coordination of the EU's work at the UN and in particular at the UNHRC.

Furthermore, the Council is willing to mainstream human rights in the work of all its committees and working groups.¹⁷⁷ In the light of this fact, the establishment of a position called “Personal Representative of the Secretary General/High Representative on Human Rights in the area of CFSP” in 2004 has to be seen. Since 2007 Mrs Riina Kionka fills this position.¹⁷⁸ Her mandate is in particular to contribute to the mainstreaming of human rights into CFSP and ESDP, but also to participate in human rights dialogues and consultations with third countries and generally to contribute to the implementation of EU human rights and international humanitarian law guidelines as well as EU human rights policy in the UN, the

¹⁷⁵ http://ue.eu.int/uedocs/cmsUpload/COHOM_mandates.pdf, p. 1. See also, p. 4: In 2003, COHOM's mandate was extended by including first pillar issues “so as to have under purview all human rights aspects of the external relations of the EU”.

¹⁷⁶ The UN Human Rights Commission is the predecessor of the UNHRC.

¹⁷⁷ See: Press Release, 2700th Council Meeting, General Affairs and External Relations, Brussels, 12 December 2005, p. 23: “The Council recalls the common responsibility of all its Committees and Working Groups to promote EU human rights policy, including implementation of the guidelines (...)”.

¹⁷⁸ <http://ue.eu.int/showPage.aspx?id=849&lang=de>.

Council of Europe and the OSCE.¹⁷⁹ Therefore, also her work is relevant for the EU's policy in the UNHRC.

Moreover, since 1999 the Council presents an Annual Report on Human Rights. This report is based on the Declaration of the EU on the occasion of the 50th anniversary of the Universal Declaration on Human Rights.¹⁸⁰ It aims at providing an overview of the EU's policies and actions in the field of human rights with the aim to facilitate assessment and evaluation of the effectiveness of the EU's action. The report has a clear external focus: it "aims to cover the EU's actions in the field of human rights vis-à-vis third countries, in multilateral bodies and on certain specific thematic issues"¹⁸¹. In the light of coherence between the internal and the external human rights policy and in the light of credibility towards third countries this focus has been criticized.¹⁸² Concerning the EU's policy in the UNHRC the Annual Report attaches high importance.¹⁸³

As mentioned before, within the Commission there is no Commissioner with an exclusive human rights portfolio.¹⁸⁴ Since 1999 the Directorate-General for External Relations has received the primary responsibility for human rights in its field.¹⁸⁵ More specifically, the Human Rights and Democratisation Unit within the DG External Relations is responsible for human rights questions worldwide and for the coordination within the Commission. It also communicates with the representation of the Commission to the United Nations in Geneva about the EU's policy in the UNHRC. Moreover, since 2000, this Unit presents mostly reviews of the action undertaken by the EU, both within the first and the second pillar, in the field of human rights.¹⁸⁶

The European Parliament has created committees which deal both with the internal protection and with the external promotion of human rights. For the internal dimension the Committee on Civil Liberties, Justice and Home Affairs¹⁸⁷ is the body which monitors respect for human rights. At the external level it is the Committee on Foreign Affairs and more

¹⁷⁹ See also: Council, EU Annual Report on Human Rights 2008, p. 21 et seq.

¹⁸⁰ http://ec.europa.eu/external_relations/human_rights/docs/50th_decl_98_en.pdf, p. 3.

¹⁸¹ Council, EU Annual Report on Human Rights 2008, p. 7.

¹⁸² See for instance: Bultermann, Human Rights in the Treaty Relations of the European Community, p. 62. See also: Clapham, in: Alston, The EU and Human Rights, p. 641 et seq.

¹⁸³ See: Council, EU Annual Report on Human Rights 2008, which has a chapter of eight pages on the UNHRC in comparison to two pages on the UNGA and which names thematically first the UNHRC in its preface (p. 4).

¹⁸⁴ Claims for the creation of such a position have been raised from many sides. See for instance: Clapham, in: Alston, The EU and Human Rights, p. 665.

¹⁸⁵ For a list of other DGs which deal with human rights, see: Bultermann, Human Rights in the Treaty Relations of the European Community, p. 63.

¹⁸⁶ The reviews are published on: http://ec.europa.eu/external_relations/human_rights/review.

¹⁸⁷ http://www.europarl.europa.eu/committees/libe_home_en.htm.

specifically its sub-committee on human rights (DROI) which observes the EU's external human rights policy. This concerns also the EU's human rights policy in the UNHRC. Although the EP has no great competences within the CFSP, it has been active in the field of human rights since its first direct elections in 1979. In particular, it started adopting resolutions on human rights issues very early. In spite of the fact that they are not legally binding, they have some political impact. Especially its annual resolutions on human rights in the world and Community/Union policy on human rights, which it has been adopting since 1983, attract much attention.¹⁸⁸ In these resolutions the EP also deals with the UNHRC and the EU's policy therein.¹⁸⁹ Moreover, since 1996 the EP has been adopting specific resolutions on the UNHRC's predecessor, the UN Commission on Human Rights, and afterwards on the Human Rights Council as well.¹⁹⁰

3.4 Brief summary

So far it has been shown in the first step that the EU is obliged to promote human rights both internally and externally. In the second step it was explained how this obligation is institutionally implemented. In this connection the relevant competences of the EU institutions were explained. It was illustrated that within the first pillar the Commission and the Council have strong competences while the EP's involvement is rather limited. Within the second pillar the Council is dominant while the Commission's and the EP's positions are weaker. In connection to the EU's competences it was shown that the EU has both in the first pillar and in the second pillar some instruments in order to promote human rights in its foreign policy. It became clear that within the first pillar the EU has a very large competence to act which is, however, only connected to a narrow field of competence, namely different kinds of agreements with third countries. Therefore, "fehlt der EG damals wie heute eine globale Kompetenz im Bereich der auswärtigen Beziehungen"¹⁹¹ In contrast, within the second pillar the field of competence is very broad, namely "all areas of foreign and security policy", but the competence to act is rather limited. Finally, it was shown that although no major institution, like a Commissioner, has an exclusive human rights mandate, the Council,

¹⁸⁸ For the most recent one, see: European Parliament resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union's policy on the matter, Doc. P6_TA(2009)0385.

¹⁸⁹ See: European Parliament resolution of 7 May 2009 on the Annual Report on Human Rights in the World 2008 and the European Union's policy on the matter, doc. P6_TA(2009)0385, para 35 et seq.

¹⁹⁰ For the most recent one, see: European Parliament resolution of 14 January 2009 on the development of the UN Human Rights Council, including the role of the EU, doc. P6_TA(2009)0021.

¹⁹¹ Aschenbrenner, *Menschenrechte in den Außenbeziehungen der Europäischen Union: Gemeinschaftspolitik versus GASP*, p. 62.

the Commission and the EP have developed internally institutions, like working groups or committees which deal with human rights, including the EU's policy in the UNHRC.

All of these results are crucial in order to see the EU's human rights policy in the UNHRC in the right context. This policy is the example for the EU's external human rights policy which will be examined in the next chapter.

4. The EU's human rights policy in the UNHRC

The previous chapters have shown where the EU's human rights policy in the UNHRC is situated within the whole human rights policy pursued by the EU.

First of all, promoting human rights in the UNHRC is part of the EU's general obligation to promote human rights. Second, institutionally the EU's human rights policy in the UNHRC is foreign policy in the field of CFSP. Instrumentally it is part of the systematic cooperation¹⁹² which is one of the five CFSP instruments provided by Article 12 TEU. More precisely it concerns the systematic cooperation in multilateral fora¹⁹³. Third, concerning the competences in the EU's policy in the UNHRC it became clear that in the field of CFSP and in particular in the field of systematic cooperation the member states, respectively the Council, are still the dominant actors while the Commission and the EP have rather weak positions. Fourth, following the Council dominance in this field it can be concluded that at the Council level COHOM is the major institution for the coordination of the EU's human rights policy in the UNHRC.

Based on this background, in the following the EU's human rights policy in the UNHRC shall be examined in practice. Therefore, first, the UNHRC's institutional basis will be briefly described. Second, it will be examined in practice how the EU was acting in three recent events at the UNHRC, namely the fourth Universal Periodic Review, the tenth special session and the tenth regular session of the UNHRC.

4.1 The UNHRC – legal basis

The United Nations Human Rights Council was established in 2006 through the General Assembly resolution 60/251. In this resolution it states in the last preambular paragraph:

¹⁹² Art. 12 dash 5 TEU in conjunction with Art. 16 TEU.

¹⁹³ Art. 19 TEU and Art. 20 TEU.

“Reaffirming the commitment to strengthen the United Nations human rights machinery, with the aim of ensuring effective enjoyment by all of all human rights, civil, political, economic, social and cultural rights, including the right to development, and to that end, the resolve to create a Human Rights Council”.¹⁹⁴

The predecessor of the Human Rights Council, the Commission on Human Rights was harshly criticized for its politicization, meaning, inter alia, its willingness “to concern itself with violations of human rights in particular countries while ignoring rights violations in others”¹⁹⁵, and its ineffectiveness in the promotion of human rights. Kofi Annan, former UN Secretary-General, stated that the Commission had a credibility deficit, “which casts a shadow on the reputation of the United Nations system as a whole”¹⁹⁶. Consequently, the UNGA decided in 2006 *“to establish the Human Rights Council, based in Geneva, in replacement of the Commission on Human Rights, as a subsidiary organ of the General Assembly (...)”*¹⁹⁷. Therefore, the UNHRC “enjoys a somewhat higher status in the hierarchy of UN bodies”¹⁹⁸ than the UNCHR which was a subsidiary body of the ECOSOC.

The UNHRC’s mandate is described in the second, third and fifth operative paragraph. It is responsible for promoting universal respect for the protection of all human rights and fundamental freedoms.¹⁹⁹ Furthermore, it should address situations of violations of human rights and it should promote the effective coordination and the mainstreaming of human rights within the UN system.²⁰⁰ More precisely, it shall, inter alia:

- (a) *“Promote human rights education and learning(...);*
- (b) *Serve as a forum for dialogue on thematic issues on all human rights;*
- (c) *Make recommendations to the General Assembly for the further development of international law in the field of human rights;*
- (d) *Promote the full implementation of human rights obligations undertaken by States (...);*
- (e) *Undertake a universal periodic review (...) of the fulfillment by each State of its human rights obligations and commitments (...);*
- (f) *Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;*

¹⁹⁴ A/RES/60/251.

¹⁹⁵ Mertus, *The United Nations and Human Rights, A guide for a new era*, p. 77.

¹⁹⁶ United Nations, General Assembly, Fifty-ninth session, In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, 21 March 2005, A/59/2005, para 182.

¹⁹⁷ A/RES/60/251 OP 1.

¹⁹⁸ Nowak, in: Almqvist, *The Human Rights Council: challenges and opportunities*, p. 23.

¹⁹⁹ A/RES/60/251 OP 2.

²⁰⁰ A/RES/60/251 OP 3.

(g) *Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner (...)*²⁰¹.

Concerning the membership of the UNHRC operative paragraphs seven, eight and nine provide the relevant provisions. The UNHRC consists of forty-seven member states, which are elected directly and individually by secret ballot by the majority of the members of the UNGA.²⁰² The regional distribution of the seats is as follows: group of African states, thirteen; group of Asian states, thirteen; group of Eastern European states, six; group of Latin American and Caribbean states, eight; group of Western European and other states, seven. Therefore, EU member states, currently France, Germany, Italy, Netherlands, Slovakia, Slovenia and United Kingdom²⁰³ (and “like minded countries”²⁰⁴) are a clear minority group in the Human Rights Council. Concerning the period of membership it states that “*the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms*”²⁰⁵. Generally, the membership “*shall be open to all States Members of the United Nations*”²⁰⁶. At the same time, however, it is stated that “*Member States shall take into account the contribution of candidates to the promotion and protection of human rights (...)*”²⁰⁷ when electing members of the UNHRC. Furthermore, members elected to the Council “*shall uphold the highest standards in the promotion and protection of human rights [and] shall fully cooperate with the Council*”²⁰⁸. These provisions have been criticized for their ambiguity, also because “more objective and defined criteria had been proposed, such as demanding from candidate states the ratification of the seven basic human rights treaties”²⁰⁹. Such criteria would have prevented the membership of controversial countries, such as China, Saudi Arabia or Cuba whose membership has been criticized. However, in this context “each EU member state has committed itself not to cast its vote for a candidate that is under sanctions imposed by the Security Council for human rights-related

²⁰¹ A/RES/60/251 OP 5.

²⁰² A/RES/60/251 OP 7.

²⁰³ From 19 June 2009 onwards: Belgium, France, Hungary, Italy, Netherlands, Slovakia, Slovenia and United Kingdom. See: <http://www2.ohchr.org/english/bodies/hrcouncil/membership.htm>.

²⁰⁴ “Like-minded countries” are countries which follow mainly the same objectives and vote in a similar way as the EU. Currently, in the UNHRC this concerns usually: Canada, Switzerland, Bosnia and Herzegovina, Ukraine, Republic of Korea, Japan and sometimes Chile and Mexico.

²⁰⁵ A/RES/60/251 OP 7.

²⁰⁶ A/RES/60/251 OP 8.

²⁰⁷ A/RES/60/251 OP 8.

²⁰⁸ A/RES/60/251 OP 9.

²⁰⁹ Durán, in: Almqvist, *The Human Rights Council: challenges and opportunities*, p. 31.

reasons”²¹⁰. In addition, the UNGA, by a two-thirds majority, may suspend the rights of membership of states which commit gross and systematic violations of human rights.²¹¹

For EU member states which are not members of the UNHRC it is important that in addition to the formal membership of the UNHRC, participation and consultation shall be open to observers,

*“including States that are not members of the Council, the specialized agencies, other intergovernmental organizations and national human rights institutions, as well as non-governmental organizations, (...) while ensuring the most effective contribution of these entities”*²¹².

Concerning the amount of regular sessions per year the resolution provides that the UNHRC *“shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks”*²¹³. Moreover, it *“shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council”*²¹⁴.

UNGA resolution 60/251 was adopted by 170 votes in favour, four votes against (Israel, Marshall Islands, Palau, USA) and three abstentions (Belarus, Iran, Venezuela).²¹⁵ While the USA voted mainly because of the vague criteria concerning the membership against the resolution,²¹⁶ the EU voted in favour of the resolution and stated more positively:

*“Of course, not everything that the European Union aimed for is reflected in the resolution. However, in our view, it represents an improvement over the Commission on Human Rights, and we hope that it will further strengthen the human rights machinery of the United Nations.”*²¹⁷

After the adoption of UNGA resolution 60/251 it took more than one year until the UNHRC could conclude its institution-building phase with the adoption of Human Rights Council resolution 5/1 of 18 June 2007, also called the “Institution-Building Package”. In this resolution more precise and technical information on the work of the UNHRC can be found. Where relevant, in the following chapters it will be referred to this resolution.

²¹⁰ Almqvist, in *Ibid.*; The Human Rights Council: challenges and opportunities, p. 56.

²¹¹ A/RES/60/251 OP 8.

²¹² A/RES/60/251 OP 11.

²¹³ A/RES/60/251 OP 10.

²¹⁴ A/RES/60/251 OP 10.

²¹⁵ General Assembly, Official Records from the 72nd Plenary Meeting of the 60th session, doc. A/60/PV.72, p. 6.

²¹⁶ Statement by Mr. Bolton (USA), see: General Assembly, Official Records from the 72nd Plenary Meeting of the 60th session, doc. A/60/PV.72, p. 6 et seq.

²¹⁷ Statement by Mr. Pfanzelter (Austria on behalf of the EU), General Assembly, Official Records from the 72nd Plenary Meeting of the 60th session, doc. A/60/PV.72, p. 9 et seq.

4.2 The EU's human rights policy in the UNHRC in practice

Having explained both the legal background for the EU's policy in the Human Rights Council and the legal background of the UNHRC itself, including its mandate, its members and its working procedure, in this subchapter the EU's policy in the UNHRC shall be examined in practice. Therefore, the EU's action in three recent events at the Human Rights Council, namely the fourth Universal Periodic Review, the tenth special session and the tenth regular session of the UNHRC will be analyzed.

4.2.1 EU's action during the fourth Universal Periodic Review session

Before analyzing how the EU acted during the fourth UPR session, it will be briefly explained what the UPR is, how it works and how the EU institutions comment on it and the EU's action in it.

The UPR is presented on the UNHRC's homepage as follows:

“The Universal Periodic Review (UPR) is a unique process which involves a review of the human rights records of all 192 UN Member States once every four years. The UPR is a *State-driven process*, under the auspices of the Human Rights Council, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situations in their countries and to fulfil their human rights obligations. As one of the main features of the Council, the UPR is designed to ensure equal treatment for every country when their human rights situations are assessed.”²¹⁸

The UPR is based on the afore mentioned UNGA resolution 60/251, and more specifically on the operative paragraph 5(e). The Institution-Building Package defines further the basis, principles and objectives, periodicity and order, process and modalities, outcome and follow-up of the review.²¹⁹

The UPR shall be based on the UN Charter, the UDHR, Human rights instruments to which a State is party and voluntary pledges and commitments made by states.²²⁰ The main objective is to improve the human rights situation “*on the ground*”²²¹ while the other objectives mentioned, such as the fulfillment of human rights obligations or the sharing of best practices, are subsidiary to this one.²²² Within four years, i.e. in 2011, the human rights record of every

²¹⁸ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx>, italics by the author. For the EU's policy it crucial that the UPR is a state-driven process what will be explained later.

²¹⁹ A/HRC/5/1, chap. I.

²²⁰ A/HRC/5/1, chap. I, para 1.

²²¹ A/HRC/5/1, chap. I, para 4 lit. a.

²²² A/HRC/5/1, chap. I, para 4 lit. b-f.

country shall be reviewed, meaning that “48 States per year during three sessions of the working group of two weeks each” shall be examined.²²³ The review shall be based on three documents per state: a national report prepared by the state under review, a compilation of the information contained in reports of treaty bodies, special procedures and other relevant official UN documents prepared by the OHCHR, and a summary of information provided by NGOs and national human rights institutions prepared by the OHCHR.²²⁴ Concerning the EU member states which are not members of the UNHRC, it is important that also observer states may participate in the review, including the interactive dialogue which has a duration of three hours per state.²²⁵ A group of three rapporteurs (troika) is formed for each review in order to facilitate the report of the working group. Between the review and the adoption of the report there shall be a reasonable time frame.²²⁶ After the adoption of a report it shall be implemented primarily by the state concerned. Four years after the first review a subsequent review shall focus, inter alia, on the implementation of the preceding outcome.

All together, the expectations towards the UPR were very high in the UNHRC’s starting period, as can be derived from the UNHRC’s homepage:

“Currently, no other universal mechanism of this kind exists. The UPR is one of the key elements of the new Council which reminds States of their responsibility to fully respect and implement all human rights and fundamental freedoms.”²²⁷

Similarly, the EU institutions pronounced high expectations in regard to the UPR’s potential.

The European Parliament, generally with a positive outlook, regarded the UPR mechanism in February 2008, i.e. before the first UPR session, “as a potential means of improving the universality of monitoring of human rights commitments and practices throughout the world by subjecting all UN Member States to equal treatment and scrutiny”²²⁸.

However, one year later, after the experience of the first three UPR sessions, especially the European Parliament identified already many problems in the implementation of the UPR and

²²³ A/HRC/5/1, chap. I, para 14.

²²⁴ A/HRC/5/1, chap. I, para 15.

²²⁵ A/HRC/5/1, chap. I, para 18 lit. b and para 22. The amount of only three hours per state was criticized by many diplomats for not being appropriate for a meaningful interactive dialogue.

²²⁶ In practice the report is adopted in the UPR working group two days after the review, and approximately four months later during a regular session of the Human Rights Council the official Outcome Report by the UNHRC itself is adopted.

²²⁷ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx>.

²²⁸ European Parliament resolution of 21 February 2008 on the seventh session of the United Nations Human Rights Council (UNHRC), doc. P6_TA(2008)0065, para 10. See also: para 11-15.

partly pronounced harsh criticism concerning “the use of political alliances to shield certain States from scrutiny rather than to critically assess human rights conditions and protections (...)”²²⁹ and “attempts made by certain UNHRC member states to censor contributions from NGOs”²³⁰.

In comparison to the EP, the Council offers a more positive evaluation of the UPR in its Annual Report on Human Rights from 2008.²³¹ In clear contrast to the EP the Council even states that “[r]egional groups did not act as a block in this instance”²³² The only issue which the Council criticizes as well is the limited role which the UNHRC grants to the NGOs in the interactive dialogue.

On the EU’s action in the UPR so far, both the EP and the Council provide rather positive comments.

The Council underlines that also the European Union did not act as a block: “EU Member States committed themselves to approach the UPR in good faith, without complacency and in an open and responsible manner.”²³³ It also highlights a very important issue which the EU tries to defend against the attempts of other regional groups, namely that the UPR shall not replace country mandates or special sessions on human rights situations in specific countries.

Even more interesting is the European Parliament’s observation. After giving some advisory comments on the EU’s action in 2008 before the start of the UPR²³⁴, the EP stated after the first three UPR sessions, in January 2009:

“[w]elcomes the EU's decision not to make joint interventions in the country reviews but to ensure the complementarity of interventions so that the broad spectrum of issues may be raised; stresses in this respect the EU's attempts to break down the ‘bloc mentality’ at the UNHRC by EU Member States raising questions on each other's record; welcomes the level of engagement of EU Member States in reviews, including those relating to other EU Member States; encourages the EU to build further on

²²⁹ European Parliament resolution of 14 January 2009 on the development of the UN Human Rights Council, including the role of the EU, doc. P6_TA(2009)0021, para 23 which provides in particular a criticism of Tunisia’s review.

²³⁰ European Parliament resolution of 14 January 2009 on the development of the UN Human Rights Council, including the role of the EU, doc. P6_TA(2009)0021, para 27. For further criticism, see: para 22, 25, 26, 28.

²³¹ See: Council, EU Annual Report on Human Rights 2008, p. 127 et seq.

²³² Council, EU Annual Report on Human Rights 2008, p. 127.

²³³ Council, EU Annual Report on Human Rights 2008, p. 127.

²³⁴ See: European Parliament resolution of 21 February 2008 on the seventh session of the United Nations Human Rights Council (UNHRC), doc. P6_TA(2008)0065, para 11-14.

the current model of ‘loose coordination’, and to ensure that all countries and all topics are covered by EU Member States in sufficient depth and that any repetition is avoided”²³⁵.

This statement by the EP tells a lot about the EU’s policy in the UPR: The EU pays tribute to the fact that the UPR is a state-driven process and therefore instead of making use of joint interventions, it chooses the model of “loose coordination”. This approach aims at two objectives: broadest possible coverage of issues and the breaking down of the “bloc mentality” which means that regional blocs instead of cooperating, work against and mistrust each other. This crucial source of politicization was already a major problem of the UNCHR and could not be solved through its replacement by the UNHRC. The still existent bloc mentality, which means in the case of the UNHRC basically the north against the south or developed against developing countries, will be shown later in several examples.

The approach of “loose coordination” shall now be explained and analyzed further based on the EU’s action in the fourth UPR session.

However, first it should be mentioned that the fourth UPR session, held from 2 to 13 February 2009 was a very special one for one reason – the amount of controversial states under review, namely China, Cuba, Russia and Saudi Arabia, at one session.²³⁶ This very fact led to unprecedented negative experiences which will be surely reflected in the EP’s upcoming resolution on the development of the UNHRC or in the next EU’s Annual Report on Human Rights. This shall be also explained in the following.

The EU’s approach of “loose coordination” could also be observed before and during the fourth UPR session. Basically this coordination works as follows: diplomats at the permanent missions to the UN in Geneva under the leadership of the EU presidency (Czech Republic at that time) and with the assistance of the Council Secretariat exchange via e-mail and coordination meetings information about who is going to ask and recommend something and on which issues during the review of a state. The Commission takes part in this coordination, but is rather reserved since the UPR is a state-driven process. This coordination shall lead to the broadest possible coverage of issues being raised by the EU meaning that the EU member states avoid to repeat themselves by covering different thematic issues (and possibly different states under review). However, also the repetition of certain issues is sometimes used

²³⁵ European Parliament resolution of 14 January 2009 on the development of the UN Human Rights Council, including the role of the EU, doc. P6_TA(2009)0021, para 24.

²³⁶ The other states under review during the fourth UPR session were: Cameroon, Djibouti, Mauritius, Nigeria, Senegal, Bangladesh, Jordan, Malaysia, Mexico, Canada, Germany, Azerbaijan.
See: <http://www.ohchr.org/EN/HRBodies/UPR/Documents/uprlist.pdf>.

intentionally in order to emphasize the importance attached to them by the EU as a whole. It has also to be kept in mind that it cannot be expected from one EU member state to touch regularly upon more delicate issues than others. Therefore, a balance in this context is also tried to be found keeping in mind that in the end it is the decision of each member state which issues to raise.

The reviews of China and Cuba can be taken as examples for this approach. During China's review, inter alia, the following issues were raised by the following EU member states:

- religious and ethnic intolerance/protection of minorities (Great Britain, Germany, Czech Republic, Austria, Sweden, Italy, Hungary)
- Tibet (Netherlands, Great Britain, Czech Republic)
- abolishment/reduction of use of the death penalty (Netherlands, Great Britain, Germany, Austria, Italy)
- freedom of expression and media (Great Britain, France, Czech Republic, Sweden and Hungary)
- torture (Great Britain, Germany)
- protection of human rights defenders (Hungary)
- refugees (Netherlands)
- discrimination of women (Portugal)
- child labour (Finland).²³⁷

During Cuba's review, inter alia, the following issues were raised by the following EU member states:

- freedom of expression (Great Britain, France, Slovakia, Italy, Czech Republic, Netherlands)
- arbitrary detention (Great Britain, Austria)
- sexual exploitation (France, Austria)
- situation in prisons (Great Britain, France, Italy, Netherlands)
- independence of judiciary (Austria)
- death penalty (Italy)
- cooperation with special procedures (Great Britain, Slovakia, Italy, Czech Republic)
- human rights defenders (Czech Republic).²³⁸

²³⁷ See: A/HRC/11/25, Report of the Working Group on the Universal Periodic Review, China.

²³⁸ See: A/HRC/11/22, Report of the Working Group on the Universal Periodic Review, Cuba.

These examples show on the one hand that in fact the EU manages to cover a broad range of issues, but at the same time the most pertinent issues, like religious and ethnic intolerance, the death penalty or freedom of expression in the case of China, and freedom of expression and the situation in prisons in the case of Cuba, are touched upon by several EU member states and are thereby given a stronger emphasis. On the other hand, it has to be mentioned that these examples also show the EU's general problem of being a minority group in the UNHRC. While the EU member states raised problematic issues other states used the opportunity to congratulate China and especially Cuba for their human rights record.²³⁹ Therefore a high ranking European diplomat stated after China's UPR: "Beijing can claim that due to the quantitatively overwhelming support from the developing countries it did not lose its face during the UPR"²⁴⁰. Out of 60 states²⁴¹ which made statements during the interactive dialogue with China twelve states came from the EU. In the case of Cuba, out of 60 states only seven EU member states made statements. However, the latter case has to be clarified in order to understand the politicization and the "bloc mentality" which came to light: For every state under review there is a list of speakers on which every state has to inscribe which wishes to make a statement. It is more than a rumour – it is enough to take a look at the list of speakers –, that Cuba had invited friendly states to form a cue two and a half hours before the opening of the speaker's list with the promise to serve coffee.²⁴² With this strategy Cuba wanted to circumvent critical voices, inter alia, from EU member states during its review. Not only this "informal" anecdote, but also China's and Cuba's reactions to recommendations from EU member states are rather frustrating: Cuba rejected many and China nearly all of the EU member states' recommendations.²⁴³ Therefore, both examples show that the "loose coordination" between the EU member states may be very good, in the end, however, it can have a very limited impact if the other side does not want to cooperate.

Since the EP welcomed in the afore mentioned resolution from January 2009 also that EU member states raised questions on each other's record, this issue shall be also briefly

²³⁹ See for instance, Sri Lanka and Cuba's statement during China's review: A/HRC/11/25, Report of the Working Group on the Universal Periodic Review, China, para 39, 36. For Cuba's review, see for instance Nicaragua's and Venezuela's statements: A/HRC/11/22, Report of the Working Group on the Universal Periodic Review, Cuba, para 59, 61.

²⁴⁰ This statement has to be anonymous.

²⁴¹ The fact that 55 further states were not able to make their statements shows on the one hand the outstanding interest for the human rights situation in China and shows on the other hand that three hours may not be enough for an interactive dialogue. See: A/HRC/11/25, Report of the Working Group on the Universal Periodic Review, China, para 26.

²⁴² This was experienced personally by the author.

²⁴³ See: A/HRC/11/22, Report of the Working Group on the Universal Periodic Review, Cuba, para 132. See also: A/HRC/11/25, Report of the Working Group on the Universal Periodic Review, China, para 117.

examined based on Germany's review which was the only review of an EU member state during the fourth UPR session.²⁴⁴ During the interactive dialogue with Germany the following ten EU member states made statements on the following issues:

- Poland: judicial control of the *Jugendamt* (Office for youth)
- France: gender equality, discrimination against homosexuals
- Finland: xenophobia
- UK: migration, violence against women
- Slovenia: education
- Netherlands: migration, discrimination against homosexuals
- Hungary: human trafficking, racism
- Spain: migration
- Italy: racism
- Belgium: fight against terrorism.²⁴⁵

In fact, not only the number, but also the quality of the statements show that EU member states take also the reviews of other EU member states very seriously and engage into a constructive dialogue.

To sum up, the UPR has in fact a great potential to improve the human rights situation on the ground. However, as the examples of China and Cuba have shown, the UPR can also have a very limited impact if the state under review is not willing to cooperate. After 2011, when the second cycle of reviews begins, a more detailed and comprehensive evaluation can be made about the effectivity of one of the UNHRC's key instruments. Concerning the EU's action in the UPR, the approach of "loose coordination" indeed seems to be the right one. It pays tribute to the fact that the UPR is a state-driven process, tries to break down the "block mentality" by asking questions on other member states' record and ensures the coverage of a big variety of issues while avoiding repetition. Therefore, even if some states may not be cooperative, the EU should further follow the approach of "loose coordination".

²⁴⁴ So far the following EU member states were under review: Netherlands, Finland, United Kingdom, Poland, Czech Republic (all first session); France, Romania (both second session); Luxembourg (third session); Germany (fourth session); and Slovakia (fifth session).

²⁴⁵ A/HRC/11/15, Report of the Working Group on the Universal Periodic Review, Germany, para 26, 32, 34, 37, 49, 55, 57, 59, 63, 74.

4.2.2 EU's action during the tenth special session

In this subchapter the EU's action during the "Tenth Special Session on the impact of the global economic and financial crises on the universal realization and effective enjoyment of human rights" shall be examined.²⁴⁶ This recent event, which took place on 20 and 23 February 2009, illustrates very well the classical bloc mentality which still exists in the UNHRC and at the same time tells a lot about the EU's policy in the UN Human Rights Council. Before analyzing the negotiations and drawing conclusions from that on the EU's policy in the UNHRC, the legal basis for special sessions will be explained.

The legal basis for holding special sessions is the UNGA resolution 60/251 and more specifically its operative paragraph 10. There it is stated that the UNHRC "*shall be able to hold special sessions, when needed, at the request of a member of the Council with the support of one third of the membership of the Council*". This rule is repeated²⁴⁷ and defined further²⁴⁸ in the Institution-Building Package. So far the UNHRC has held eleven special sessions, thereof four on the Occupied Palestinian Territories, one on the Lebanon, one on Darfur, one on Myanmar, one on the Democratic Republic of Congo, one on Sri Lanka²⁴⁹ and one on the impact of the food crisis.²⁵⁰

In the beginning of February 2009, Egypt (on behalf of the African Group) and Brazil came up with the idea of holding a special session on the impact of the economic and financial crises on human rights. This idea led to the creation of two opposing blocs. On the one hand, the developing countries were in favour of the special session while stressing that the crisis was not created by developing countries, but it was them who were the most affected. On the other hand, the EU and like-minded countries were against the holding of the special session.

Since the EU member states as all the other countries were informed about Brazil's and Egypt's upcoming initiative they started coordinating themselves before first open-ended consultations on the text of Brazil's and Egypt's draft resolution were held.²⁵¹ All the EU member states agreed from the beginning on their refusal of the special session for two reasons. First, the EU did not deny that the economic crisis has or may have an impact on

²⁴⁶ <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/10/index.htm>.

²⁴⁷ A/HRC/5/1, chap. VII, rule 6.

²⁴⁸ A/HRC/5/1, chap. VI, subchap. D.

²⁴⁹ The most recent special session has been held on the human rights situation in Sri Lanka with a very unfavourable outcome for the EU, see: <http://www.dw-world.de/dw/article/0,,4284904,00.html>.

²⁵⁰ See: <http://www2.ohchr.org/english/bodies/hrcouncil/>.

²⁵¹ For the legal basis of open-ended consultations, see: A/HRC/5/1, chap. VI para 127.

human rights, but it doubted that the UNHRC is the competent body to find solutions for arising problems: “we may regret it, but we can’t do anything about it”²⁵². Therefore, the EU was fearing that the UNHRC would deal with economic and financial issues which are outside its mandate. Second, the EU was fearing that developing countries may use the financial and economic crises for shifting the responsibility for the protection and realization of human rights from the nation state to the international community.²⁵³ Therefore, the EU member states agreed in the first step on trying to do everything to avoid a special session, inter-alia, by proposing to make a side-event or a panel discussion on this issue.

With this approach the EU went into the first open-ended informal consultations²⁵⁴ on 13 February 2009 where the text of the draft resolution was presented by Brazil and Egypt. The text confirmed the EU’s doubts, because it was touching upon economic and financial issues²⁵⁵ which were outside the UNHRC’s mandate and focused on the responsibility of the international community while leaving out that the protection of human rights is the primary responsibility of states. However, as mentioned before, the EU member states (and like-minded countries) are a minority group in the UNHRC and consequently the support of one third of the UNHRC’s membership for the holding of the special session was easily achieved. Therefore, Brazil and Egypt did not need to care about the EU’s alternative proposals. The power which some developing countries feel because of their numeric advantage could be read in the statement made by a diplomat from Pakistan: “The special session will take place and if you want to remain on the side lines, please do so.”

Since the EU could not prevent the holding of the special session the member states coordinated their positions on the text. In practice that means again, that diplomats at the permanent missions to the UN in Geneva under the leadership of the Czech Presidency and with the assistance of the Council Secretariat exchanged via e-mail and coordination meetings their positions on each paragraph. In contrast to the UPR, the Commission took actively part in this exchange. In general, the positions were rather similar. The common approach was now to try to cross everything out of the text what was outside the mandate of the UNHRC, call for a clear human rights focus and to balance the text by proposing paragraphs on the state responsibility for the protection of human rights.

²⁵² Statement by a diplomat during an EU coordination meeting on the tenth special session, on 12 February 2009.

²⁵³ The tension between state responsibility and the responsibility of the international community is an endless point of discussion between developing and developed countries.

²⁵⁴ See: A/HRC/5/1, chap. VI, para 113 in conjunction with para 120.

²⁵⁵ Brazil, Egypt and other countries argued that economic and financial issues had to be seen from a human rights perspective which could only be provided by the UNHRC.

With this approach the Czech Presidency negotiated on behalf of the EU in the following two open-ended consultations which were held on 16 and 18 February 2009. Since the interests between the EU (and WEOG and some other like-minded countries) and the developing countries were very diverging, it was difficult for Egypt and Brazil, who chaired the negotiations with an obvious will to find a consensus, to bring the interests together.

Finally, in accordance with the provisions of the Institution-Building Package²⁵⁶ Brazil and Egypt communicated a formal request for the holding of the special session which was convened for 20 February 2009. Since the text did not seem to improve much in the view of the EU, a decision had to be failed on how to vote on the draft resolution. Therefore, on 19 February 2009 a Heads of Missions meeting was convened by the Czech Presidency. What could be already supposed before, became very obvious at the HoMs meeting: it would be difficult for the EU to find a common position, respectively to put a uniform vote. For the vote it depends in the end only on the agreement or disagreement between the EU member states which are members of the UNHRC, i.e. France, Germany, Italy, Netherlands, Slovakia, Slovenia and Great Britain. The two major players in this context were Great Britain and Germany. Germany was from the beginning of the negotiations the EU member state with the clearest distaste for the draft resolution and was consequently unless the document did not change dramatically in favour of a no-vote in order to send a strong signal (“we don’t want to be the punching balls of Brazil and Egypt”). In contrast, Great Britain was in the light of the upcoming G20 summit, which was going to take place in April 2009 in London, in favour of a common abstention in order not to have a bad atmosphere at the G20 summit. The other EU member states which are members of the UNHRC were rather vague in their statements at the HoMs meeting, stating that they were still waiting for instructions from their capitals, but that they would be probably rather in favour of a no-vote, but above all in favour of a common EU position. In the end of this HoMs meeting the Czech Presidency suggested to make a last effort by proposing amendments to Egypt and Brazil in order to be able to abstain uniformly. However, Egypt’s and Brazil’s reaction to the proposal made by the EU was that they could accept the EU’s amendments, but only if the EU would vote in favour of the resolution, respectively not call for a vote. On the other hand, this proposal was not acceptable to the EU.

With this very difficult situation the special session started 20 February 2009. While the official part of the special session was already taking place in the plenary, negotiations on the text were continued in side rooms. Especially the President of the Human Rights Council,

²⁵⁶ A/HRC/5/1, chap. VI, para 122.

Martin Ihoeghian Uhomoibhi, wanted the UNHRC to present itself in a united manner on such an important issue and held therefore one-to-one conversations with many diplomats, e.g. three times with the German and the Czech ambassador. In the end, the negotiations took so long that the special session and the vote on the draft resolution had to be postponed to the 23 February 2009.

Before the special session continued on 23 February, the Heads of Missions of the EU member states met again in order to find a common position on the vote. First, Germany reiterated its position that unless a major amendment would be accepted by Brazil and Egypt the EU should vote with a no on the draft resolution. However, in the following all the other EU member states which are members of the UNHRC, not only Great Britain any more, revealed that they would now rather be in favour of a common abstention. Therefore, Germany, which was alone among the seven members of the UNHRC with its position in favour of a no-vote gave in and agreed to a common abstention in order to achieve a united EU vote.

The special session continued on 23 February. When it came to the adoption of the draft resolution, Germany called for a vote on behalf of the EU.²⁵⁷ In the explanation of vote, Germany underlined on behalf of the European Union first of all, that the EU was “fully aware that the current economic and financial crisis may have social consequences in developed and developing countries alike, and thus may affect the enjoyment of number of human rights globally” and that “the EU remains committed to fighting extreme poverty and promoting economic development worldwide”.²⁵⁸ At the same time Germany reiterated the EU’s reasons for not joining a consensus on this resolution:

“We regret that much of the language in the draft resolution focuses on international financial regulations, international trade and development, rather than concerns specific to the mandate of the Human Rights Council.

The EU is unable to accept the implication that the crisis poses a direct threat to the enjoyment of all human rights. The current financial and economic situation must not be a reason to weaken the responsibility of States to respect, protect and fulfill all human rights. On the contrary, we would urge

²⁵⁷ Since the Czech Republic is not a member of the UNHRC, it cannot call for a vote on behalf of the EU (although it has the Presidency). Therefore, in the UNHRC, Germany which is a member of the UNHRC takes over this role.

²⁵⁸ <http://webcast.un.org/ramgen/ondemand/conferences/unhrc/special/10th/hrc090223am2-eng.rm?start=00:01:57&end=00:05:51>.

States to ensure that any measures taken to alleviate the current financial crisis do not erode human rights protection.”²⁵⁹

The outcome of the vote was not surprising, because it mirrored the two blocs which were opposing each other from the beginning: 34 states voted in favour of the resolution while 14 states abstained.²⁶⁰ In addition to the seven EU member states, also Canada, Japan, Republic of Korea, Mexico, Switzerland, Ukraine and Bosnia-Herzegovina abstained. It should be mentioned in this context that most of these states made their vote decision depending on how the EU would vote. This is not an exception and shows the importance of the EU in the UNHRC.

In conclusion, this special session tells a lot about the EU’s policy in the UNHRC and the Human Rights Council itself.

First, it shows that the EU is also able to coordinate its positions under high time pressure. From the first open-ended consultations to the holding of the special session there was only one week. Moreover, at the same time the fourth UPR and other consultations were going on. Therefore, the EU showed at the special session that also under time constraints the coordination works.

Second, the special session shows that the objective of upholding the common positions in international organisations, as provided in Article 19 TEU, is taken very seriously by the member states. All member states were stressing in the coordination meetings that a common position by the EU was of utmost importance for them. Even in this case, where especially Germany and Great Britain had very diverging positions, a common position could be found in the end. On the other hand, the special session showed also that when important national interests are at stake, it may be very difficult for the EU to find a common position in a unanimity-based system.

Third, the special session on the one hand recalls that the bloc-mentality, which was a main feature of the UN Commission on Human Rights, did not disappear through its replacement by the UN Human Rights Council. A statement from 2003 about the UNCHR could similarly describe the situation during the tenth special session: “Die Diskussionen und Entscheidungen werden mehr und mehr entlang dem Nord-Süd-Konflikt und von Regionalgruppenidentitäten

²⁵⁹ Ibid.

²⁶⁰ Two states, Zambia and Gabon, were absent.

getroffen statt anhand einer objektiven Analyse von Menschenrechts-situationen”²⁶¹. On the other hand, the special session shows as well that the EU has difficulties to break up the bloc-mentality. In February 2009, during the presentation of the Human Rights Watch World Report 2009, Kenneth Roth, the executive director of HRW, has criticized the EU for wasting too much power in the inner negotiations which would lead either to bad compromises or to the fact that the EU would not have enough energy left for negotiations with third countries in the UNHRC. Although this criticism may be correct in certain cases, it does not provide any alternative. Since the EU still can only take legitimate decisions by consensus in the field of CFSP, it is obvious that sometimes it may be difficult for the EU to find a common position.

4.2.3 EU’s action during the tenth regular session

As the last empirical case, the EU’s action during the tenth regular session²⁶² shall be examined. The tenth regular session was at the same time the fourth main session and took place from 2 to 27 March 2009. It is probably the most important illustration of how EU policy in the UNHRC works in practice. After briefly explaining the legal basis of regular sessions, the negotiations and the voting on resolutions as well as the EU’s coordination methods during the tenth session will be analyzed in order to draw some conclusions on the EU’s policy in the UNHRC.

The legal basis for holding regular and more precisely main sessions is the UNGA resolution 60/251 and more specifically its operative paragraph 10. There it is stated that the UN Human Rights Council “shall meet regularly throughout the year and schedule no fewer than three sessions per year, including a main session, for a total duration of no less than ten weeks”. This rule is repeated²⁶³ in the Institution-building package which also provides the agenda²⁶⁴ and the framework for the programme of work²⁶⁵ for the sessions.

Besides this official programme of work, informal consultations²⁶⁶ are held during the four week long main session in order to negotiate the draft resolutions which are decided upon

²⁶¹ Heinz, *Menschenrechtspolitik in der Europäischen Union, Der (lange) Weg zu einem effektiven Menschenrechtsschutz*, p. 11.

²⁶² <http://www2.ohchr.org/english/bodies/hrcouncil/10session/>.

²⁶³ A/HRC/5/1, chap. VII, rule 2.

²⁶⁴ A/HRC/5/1, chap. V, subchap. B.

²⁶⁵ A/HRC/5/1, chap. V, subchap. C. For the progr. of work of the 10th session, see: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/PoWMarchsession.pdf>.

²⁶⁶ See: A/HRC/5/1, chap. VI, para 113.

in the end of the session.²⁶⁷ Both the EU member states and the EU as a whole were running draft resolutions at the tenth session. France ran a resolution on enforced disappearances, and on arbitrary detention, the Netherlands and France together on discrimination based on religion, Denmark on torture and other cruel, inhuman or degrading treatment or punishment, Portugal on economic, social and cultural rights, Austria on administration on justice, the EU as a whole on the rights of the child (together with GRULAC), the situation of human rights in the DPRK, Myanmar, Somalia, the DRC, and on studies of the former subcommission. It goes actually without saying that EU member states voted always in favour of and very often co-sponsored each other's initiatives. Out of these twelve resolutions run by the EU or its member states seven were adopted by consensus.²⁶⁸ Four resolutions were adopted by a vote. One resolution was not adopted.

Although the draft resolution on discrimination based on religion by the Netherlands and France had to face attempts by the OIC to change the resolution in the sense of a relativization of the right to freedom of expression, it was adopted after a call for a vote by Pakistan by 22 votes in favour, 1 vote against (South Africa) and 24 abstentions.²⁶⁹

Denmark's resolution on torture faced problems just because of the last operative paragraph which stated very neutrally that the UNHRC "takes note of the report of the Special Rapporteur"²⁷⁰. Although at least taking note of a report of the relevant Special Rapporteur is a standard paragraph in such a resolution, Egypt and other countries had problems with this reference, because one third of the last report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment was about the death penalty which was seen by those states as a breach of his mandate. However, the EU insisted on at least a neutral reference to the Special Rapporteur's report. Therefore, this resolution was adopted after a call for a vote by Egypt by 34 votes in favour and 13 abstentions.²⁷¹

The EU's resolution on the situation of human rights in the DPRK, which was basically about the extension of the mandate of the Special Rapporteur on the situation of human rights in DPRK, faced opposition especially by the DPRK itself which was as in the years before

²⁶⁷ For the adoption of the resolutions at the tenth session, see on the webcast of the UNHRC: <http://www.un.org/webcast/unhrc/archive.asp?go=090326>, <http://www.un.org/webcast/unhrc/archive.asp?go=090327>.

²⁶⁸ See: A/HRC/10/L.11 Draft of the Human Rights Council on its tenth session. The fact that in the following it will not be dealt specifically with the resolutions which were adopted by consensus does not mean that the negotiations on certain resolutions, like the resolutions on the situation of human rights in Myanmar and Somalia, were not difficult.

²⁶⁹ A/HRC/10/L.11, p. 95.

²⁷⁰ A/HRC/10/24, para 18, in: A/HRC/10/L.11, p. 92.

²⁷¹ A/HRC/10/L.11, p. 92.

neither willing to accept the mandate of the Special Rapporteur nor to negotiate about it with the EU.²⁷² The DPRK itself is not a member of the UNHRC, but it was supported by some countries, especially China, Cuba, Egypt, Indonesia, Nigeria and Russia who voted against the resolution. Therefore, the resolution was adopted after a call for a vote by Cuba by 26 votes in favour, 6 votes against and 15 abstentions.²⁷³

The EU's resolution on the publication of reports completed by the Subcommission on the promotion and protection of human rights faced only the opposition by India who did not want one of those reports to be published, because the report on "work and descent" dealt, inter alia, with the discrimination against the last caste of the Dalit ("untouchables"). However, India did not manage to get enough support against the resolution. Therefore, the resolution was adopted by 29 votes in favour, 3 votes against (besides India, also Brazil and Mauritius) and 15 abstentions.

The only resolution by the EU which could not be adopted was the resolution on the situation of human rights in the Democratic Republic of Congo. The EU's intention to create a mandate of a Special Rapporteur on the situation of human rights in the DRC was neither accepted by the DRC itself nor by the whole African Group who argued that the DRC was a country which was too big for only one Special Rapporteur. Therefore, the African Group was in favour of continuing with seven thematic Special Rapporteurs who should deal within their respective mandates with the situation of human rights in the DRC. The African Group also did not accept the compromise proposed by the EU to strengthen the structure between these thematic Special Rapporteurs by creating a "task force" of Special Rapporteurs. This proposal can be seen as a "good move" by the EU, because first, it shows the EU's will of compromise and second, the fact that the African Group did not accept the EU's proposal made clear that the first argument provided by the African Group was only a false pretence for the lack of interest in monitoring and improving the human rights situation in the DRC. Therefore, before the EU's resolution could actually come to its adoption, a much weaker resolution by Egypt (on behalf of the African Group) was adopted after a call for a vote by Germany (on behalf of the EU) by 33 votes in favour and 14 abstentions (EU and like-minded countries).²⁷⁴

Besides analyzing the adoption of resolutions run by the EU or its member states, it is important to examine how the EU member states which are members of the UNHRC voted on

²⁷² By the way, since the DPRK has never accepted the Special Rapporteur, he has never been to the DPRK.

²⁷³ A/HRC/10/L.11, p. 64. This result is an improvement in comparison to the last resolution on the situation of human rights in the DPRK, which was adopted by 22 votes in favour, 7 votes against and 18 abstentions.

²⁷⁴ A/HRC/10/L.11, p. 117.

the remaining 22 draft resolutions which were run by other states or regional groups and if the EU member states always voted uniformly. Out of these 22 resolutions 13 were adopted by consensus²⁷⁵ and nine by a vote (six after a call for a vote by the EU, three after a call for vote by Canada). Out of the nine resolutions which were adopted by a vote, the EU voted in favour of one, against four and abstained on three resolutions. On one resolution the EU could not find a common position.

The EU abstained uniformly on the following resolutions:

- Human rights in the occupied Syrian Golan (run by Pakistan on behalf of the OIC),²⁷⁶
- Follow-up to Council resolution S-9/1 on the grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip (run by Pakistan on behalf of the OIC),²⁷⁷
- Situation of human rights in the Democratic Republic of the Congo and the strengthening of technical cooperation and consultative services.²⁷⁸

The EU voted uniformly against the following resolutions:

- The composition of the staff of the OHCHR (run by Cuba on behalf of the NAM),²⁷⁹
- The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination (run by Cuba on behalf of the NAM),²⁸⁰
- Combating defamation of religions (run by Pakistan on behalf of the OIC),²⁸¹
- Elaboration of complementary standards to the ICERD (run by South Africa on behalf of the African Group).²⁸²

The EU was not able to find a common position on one resolution, namely a resolution run by Pakistan (on behalf of the OIC) on human rights violations emanating from the Israeli military attacks and operations in the Occupied Palestinian Territory.²⁸³ In this case it became clear that on certain issues, like the middle east conflict, the EU may have problems to find a

²⁷⁵ Again, the fact that in the following it will not be dealt specifically with the resolutions which were adopted by consensus does not mean that the negotiations on certain resolutions, like the resolution run by Cuba on the establishment of a new special procedure entitled “Independent Expert in the field of cultural rights”, were not difficult.

²⁷⁶ A/HRC/10/17, adopted by 33 votes in favour, 1 against and 13 abstentions, see: A/HRC/10/L.11, p. 67.

²⁷⁷ A/HRC/10/21, adopted by 33 votes in favour, 1 against and 13 abstentions, see: A/HRC/10/L.11, p. 77 et seq.

²⁷⁸ See: p. 70, A/HRC/10/33, see: A/HRC/10/L.11, p. 117.

²⁷⁹ A/HRC/10/5, adopted by 33 votes in favour, 12 against and 2 abstentions, see: A/HRC/10/L.11, p. 19.

²⁸⁰ A/HRC/10/11, adopted by 32 votes in favour, 12 against and 3 abstentions, see: A/HRC/10/L.11, p. 39.

²⁸¹ A/HRC/10/22, adopted by 23 votes in favour, 11 against and 13 abstentions, see: A/HRC/10/L.11, p. 83.

²⁸² A/HRC/10/30, adopted by 34 votes in favour and 13 against, see: A/HRC/10/L.11, p. 110.

²⁸³ A/HRC/10/19.

common position. While the Netherlands and Italy regarded the resolution as unbalanced and Germany for historical reasons also voted against the resolution, the other EU member states abstained. Therefore the resolution was adopted after a call for a vote by the Netherlands (on behalf of Italy) by 35 votes in favour, 4 votes against (Canada, Germany, Italy, Netherlands) and 8 abstentions (Cameroon, France, Japan, Republic of Korea, Slovakia, Slovenia, Ukraine, Great Britain).²⁸⁴

So far the resolutions run by the EU and the EU's voting pattern on others' resolutions were analyzed. However, it has to be kept in mind that the background of these results is the systematic coordination between the EU member states. During a regular session the EU has every day at least one coordination meeting. There, the EU member states exchange views on draft resolutions and inform each other about the stance of negotiations. Also the Commission participates in these coordination meetings and provides, if necessary the Community's point of view on certain issues. However, the member states are the active players during a regular session. In this context one approach has to be highlighted, namely the approach of burdensharing, because it is crucial for the effective coordination between the EU member states.

Burdensharing means that for all draft resolutions run by third countries, the EU member states distribute among each other the roles of burdensharers.²⁸⁵ A burden-sharer follows very intensively the negotiations and informal consultations on the draft resolution which was distributed to him, informs the other EU member states regularly about the development of the negotiations, asks them for their opinion and on that basis negotiates on behalf of the EU in these consultations. This means in fact that the burdensharer takes over the role of the Presidency for a certain draft resolution. This is necessary, because the member state which actually has the Presidency normally does not have the capacities to negotiate all draft resolutions, e.g. 22 draft resolutions in the case of the tenth regular session. However, it is the Presidency which has most often the role of the burdensharer. In the case of the tenth regular session, the Czech Presidency was the burdensharer for nine draft resolutions, and for two draft resolutions it shared the role of the burdensharer with Belgium. In addition to the Presidency, France, Slovakia, Lithuania, Finland, Germany, Great Britain, Belgium, Sweden and Poland were the burdensharers each for one draft resolution. Spain, Italy and the Netherlands were the burdensharers for two resolutions. This approach is a very efficient and

²⁸⁴ A/HRC/10/L.11, p. 74.

²⁸⁵ They actually do it for the preparation of EU-statements during the official programme of work as well, but this should be left aside in the following.

effective tool in terms of saving resources. Instead of letting every member state do everything a little, every burdensharer puts all his resources and energy into his specific issue. That gives the EU the possibility to negotiate on every draft resolution very intensively and uniformly.

In conclusion, also the regular session tells a lot about the EU's coordination, its results and the UNHRC itself.

First, the approach of burdensharing shows not only how efficient and effective the coordination between the EU member states works and that it lets the EU speak with one voice in negotiations. It is also a proof for the degree of trust between the member states when all of them let one member state negotiate on their behalf. On the other hand, no member state would be able to misuse the role of a burdensharer for national interests without losing much political capital. Moreover, the example of burdensharing during the tenth regular session showed also that still mostly the old member states fill the roles of burdensharers.

Second, it could be illustrated that the EU has a general will to cooperate with third countries in order to find a consensus. This was shown by the example of the resolution on the human rights situation in the DRC where the EU suggested a compromise which was, however, not accepted by the other side. On the other hand, one could argue that the EU is forced to be cooperative, because it is a minority group. Vice-versa one could argue that the developing countries do not need to be so cooperative, because they are in the majority anyway. However, the facts show that in spite of the remaining general bloc-mentality in the UNHRC, all sides are in the majority of the cases cooperative and willing to reach a consensus: Out of all 34 resolutions 20 were adopted by consensus at the tenth regular session which is 58.8 percent. Out of the twelve resolutions run by the EU or its member states seven were adopted by consensus which is approximately 58.3 percent. Out of the 22 resolutions run by the other countries or regional groups 13 were adopted by consensus which is 59.1 percent.²⁸⁶ This shows that at the tenth regular session there has been no significant difference between the EU and other countries in terms of joining consensus on a resolution run by the other side.

Third, in spite of the described will for a consensus, the voting structure has illustrated above all the bloc-mentality which exists in the UNHRC. The members of the UNHRC vote in regional blocs. There are only rare exceptions that the regional groups do not vote uniformly. Out of all 34 resolutions, there was only one split vote within the EU, five split votes in the

²⁸⁶ It would be interesting to analyze this voting pattern broader in a further study by including the voting pattern on all resolutions at all sessions.

GRULAC and seven split votes in the African Group. This shows also that the EU votes most uniformly in comparison with all regional groups. The main reason for this fact is that the EU is not just a regional group as the others but an entity with an institutionalized cooperation with a legal basis in the sphere of CFSP in international organisations.

Fourth, the main problematic issues which the UNHRC deals with and on which it is hard to find a consensus were illustrated, namely country mandates²⁸⁷ (item 4) and the human rights situation in Palestine and other occupied Arab territories (item 7). While the EU is very much in favour of country mandates, the developing countries mostly have problems with them. This tension is rather logical, because country mandates concern only developing countries which feel uncomfortable about being monitored. Therefore, the EU faces increasingly problems in both establishing and extending country mandates. The human rights situation in Palestine and other occupied Arab territories is obviously a very controversial and politicized issue where for instance the OIC and the EU can have hardly similar opinions. Therefore, it has to be acknowledged that on certain issues it is difficult and will be difficult in the future for the UNHRC to build a consensus.

5. Conclusion

Human rights are part of the “legal, political and moral values which make up the European identity”²⁸⁸. Therefore, the EU promotes human rights both internally and externally in order to respect its own values and also in order to strengthen its own identity. For reasons of credibility there should be coherence between the EU’s internal and its external human rights policies. Although the current high ranking of human rights on the EU’s agenda is the result of a lengthy historical, legal and political process, nowadays this high ranking is undisputed as well as the legally binding objective of promoting and protecting human rights internally and externally.

The EU has, both in the first pillar and in the second pillar, instruments in order to implement the obligation to promote human rights in its foreign policy. In the first pillar the EU has basically the possibility to include human rights clauses in four kinds of agreements with third countries: agreements based on development cooperation, agreements based on economic, financial and technical cooperation with third countries, association agreements and trade

²⁸⁷ Country mandates are for instance Special Rapporteurs on the situation of human rights in a specific country.

²⁸⁸ Communication from the Commission to the Council and the European Parliament: The European Union and the External Dimension of Human Rights Policy – From Rome to Maastricht and Beyond. COM(95) 567, p. 5.

agreements. In the second pillar the EU has five instruments which are listed in Article 12 TEU: the EU can define general guidelines on human rights, it can decide on common strategies which have a human rights implication, it can adopt joint actions and common positions on human rights issues, and it can strengthen systematic cooperation between member states in the conduct of their external human rights policies. The last instrument concerns directly the EU's human rights policy in the UN Human Rights Council which is more precisely guided by Article 19 TEU which defines the systematic cooperation in multilateral fora. Since this policy is consequently situated within the second pillar (CFSP), the Council, respectively the member states are the dominant actors while the Commission's and the European Parliament's competences are much weaker than in the EU's external human rights policy within the first pillar. All of those three institutions have established their own subinstitutions which deal specifically with human rights: within the Council, the Working Group on Human Rights (COHOM); within the Commission, the Human Rights and Democratisation Unit within the Directorate-General External Relations; within the European Parliament, the Committee on Foreign Affairs and more specifically its sub-committee on human rights (DROI). Since the EU's policy in the UNHRC is part of the CFSP, and as a consequence of the Council dominance in this field, COHOM is the major institution for the coordination of the EU's human rights policy in the UNHRC at the Council level.²⁸⁹

The EU's human rights policy in the UNHRC has proven to be quite effective in practice. In the Universal Periodic Review mechanism the EU follows the approach of "loose coordination" which is an exchange of information about who is going to ask and recommend something and on which issues during the review of a state. Furthermore, the EU member states raise also questions on each other's record. This approach pays tribute to the fact that the UPR is a state-driven process, which is a good approach to break down the "bloc mentality" in the UNHRC and which enables the EU to cover the broadest possible range of issues while avoiding repetition. However, although the approach is appropriate, its impact depends in the end on the third country's readiness to cooperate.

The EU is also able to coordinate itself under high time pressure during special sessions. It may have difficulties to find common positions when very important national interests are at stake. However, the EU member states take the obligation to speak with one voice in multilateral fora very seriously.

²⁸⁹ The Lisbon treaty would not bring any major changes which are of direct concern for the EU's work in the UNHRC.

During regular sessions the EU follows the approach of burdensharing in order to coordinate itself: For all draft resolutions run by third countries, the EU member states distribute among each other the roles of burdensharers who negotiate on behalf of the EU at informal consultations on the draft resolutions which were distributed to them. This has proven to be a very efficient approach which lets each EU member state focus intensively on a specific issue instead of doing everything but not very well. Most notably, it lets the EU speak with one voice already during the negotiations on a draft resolution and not just when it comes to voting. When it comes to voting with very rare exceptions the EU votes uniformly on resolutions which are adopted at regular sessions. Since the EU is more than just a regional group in the UNHRC (like GRULAC or the African Group) its action is also evidently more coordinated, coherent and consistent.

Therefore, the systematic cooperation in the field of human rights and the coordination between the EU member states at the UNHRC itself lead in fact to an effective and consistent EU policy. However, it has to be asked if this outcome does not have self-defeating impacts on the EU's work in the UNHRC, i.e. if the EU's effective coordination and common position do not perpetuate one of the major problems the UNHRC faces: the bloc-mentality. Since the EU is so well coordinated, it is actually a perfect example of a bloc: The EU negotiates and votes nearly as one entity. This fact, of course, provokes other regional groups to react with a more consistent and coordinated behaviour.

However, since the EU is more than a mere regional group the conclusion resulting from the fact that the EU is a bloc cannot be that the EU should diminish its coordination and that it should not act so consistently. Rather, the EU has to strengthen its efforts in order to persuade the moderate third countries which are members of the UNHRC to join the EU's path. Although the EU faces objective constraints which it cannot change, namely being a minority group in the UNHRC, partly having to deal with states which are neither cooperative nor interested in the promotion of human rights and facing an already existent bloc-mentality, there are more moderate countries, like Chile or Mexico, which could be persuaded to be more cooperative and to join the EU in its promotion of human rights.

For these efforts, it is crucial that the EU applies a more self-critical view on its own human rights record, like it has done for instance during the UPR. Already in 1999, Andrew Clapham stated:

“The success of any EU initiative aimed at strengthening the human rights role of the United Nations will depend on how the EU and its Member States are seen by the rest of the UN membership. Unity

and consistency will not be enough in this context. Only when the EU's human rights policy is coherent and credible will the EU have a chance successfully to enhance the role of the UN and pursue its human rights policy in that forum."²⁹⁰

This remains more than ever correct. Since the USA will be a member of the UNHRC for first time from 19 June 2009 onwards,²⁹¹ it is important that, both the USA and the EU, inter alia through a self-critical view on their own record, prevent an increase in policization in the UNHRC. Although the EU has human rights problems on a high level in comparison with developing countries, it is also criticized for pursuing "counterterrorism measures that violate human rights", for its migration and asylum policies which "remain focused on keeping irregular migrants, including children, out of the EU and removing those who are present rather than ensuring their rights are protected", and for "racist and xenophobic incidents"²⁹². A more self-critical dealing with such problems would enhance the EU's credibility and would enable the EU to contribute to overcoming the bloc-mentality in the UN Human Rights Council – while remaining a bloc, but a bloc legitimized by a more and more accepted and supported human rights policy.

²⁹⁰ Clapham, in: Alston, *The EU and Human Rights*, p. 642.

²⁹¹ For a commentary on this issue, see:

[http://dgvn.de/news.html?&no_cache=1&tx_ttnews\[tt_news\]=218&tx_ttnews\[backPid\]=10&cHash=ef74b4eb42](http://dgvn.de/news.html?&no_cache=1&tx_ttnews[tt_news]=218&tx_ttnews[backPid]=10&cHash=ef74b4eb42).

²⁹² Human Rights Watch, *World Report 2009*, p.359.

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