THE HUMAN RIGHTS POLICY OF THE EUROPEAN UNION

BETWEEN AMBITION AND AMBIVALENCE

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ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS
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AIV

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Contents

Foreword

December 2010 the Advisory Council on International Affairs (AIV) received a request for advice from the Minister of Foreign Affairs on the effectiveness of European human rights policy. In his letter the Minister states that, in addition to forceful action by individual states, an effective, tailor-made European Union human rights policy is needed to counterbalance the various pressures besetting human rights compliance in the international arena.

The request describes human rights as not only anchored in the Union's external policy but also one of the EU's chief objectives internally. Various instruments have been developed for the implementation of external human rights policy, but according to the Minister the main challenge is to achieve coherence between internal and external policy. There is also progress to be made in boosting the visibility and efficacy of the policy. The Treaty of Lisbon offers opportunities for pursuing these goals. According to the request for advice it is not yet clear to what extent the projected institutional changes will lead to a more effective EU human rights policy in the foreseeable future. The request does cite the promise made by the High Representative for Foreign Affairs and Security Policy, Catherine Ashton, to present an EU human rights strategy in 2011 as a major step in the right direction.

As part of the process of determining the Dutch government's position on an EU human rights strategy, the AIV was asked to address the following question:

In the wake of the entry into force of the Treaty of Lisbon, how can the EU's human rights policy be made more effective, more coherent and more visible?

More specifically the Minister asked the following questions:

1. How can the Union's participation in international human rights forums like the UN, the Council of Europe and the OSCE be strengthened, without concerted action leading to diminished political impact or dilution of voting power?

2. How can the effectiveness of the Union's many human rights instruments be enhanced so that they become integral to its external policy, and how can they be better tailored to specific situations?

3. How can the coherence between internal and external human rights policy be enhanced?

4. How can the EU raise the profile of its interventions in support of human rights?

The resultant advisory report was prepared by a joint committee, chaired by Professor R. Fernhout (until 14 March 2011) and Professor K.C.J.M. Arts (from 14 March 2011 onward). The committee comprised the following individuals: Professor M.G.W. den Boer, Professor C. Flinterman, Professor J.E. Goldschmidt, R. Herrmann, T.P. Hofstee, Ms C.F. Meindersma, Professor W.M.F. Thomassen, Ms H.M. Verrijn Stuart and Professor J.W. de Zwaan. Professor R.A. Lawson also contributed to the text as an external corresponding member. The executive secretary is Ms A.M.C. Wester, who was assisted by the trainees Ms M.A.C. Lucassen, Ms D. Zevulun and Ms S. de Jong. Ms J.A. Alberda (DMH/MR), Ms K. Burbach (DIE/IN) and I. van der Steen (DJZ/

IR) acted as civil service liaison officers. The committee met five times between January and June 2011. In addition, a number of members of the committee paid a visit to Brussels on 17 and 18 March. In Annexe II a list of names can be found of the people who were willing to share their views on the subject of the report. The AIV is deeply grateful to them. The AIV would also like to thank the staff of the Netherlands' Permanent Representation to the EU in Brussels – particularly T. Peters and Ms E.H.M. Sietses – for their help in organising the trip to Brussels.

In drawing up the report the AIV decided to include an introductory chapter addressing the underlying context of the Minister's questions. This is followed by a chapter on the historical background of the Union's current human rights policy. Chapter III explores human rights in the EU's external policy, while chapter IV examines the connection between the Union's internal and external human rights policy. The final chapter presents a number of conclusions and recommendations.

Before proceeding to the body of the report, the AIV would like to make a number of general remarks on the request for advice and its approach to the Minister's questions. The request focuses on the EU's external human rights policy, but it also asks about ways of promoting coherence between the external and internal human rights policies. The central theme of this report are the Minister's questions, and thus the EU's external policy, but where relevant, the report also looks at internal EU human rights policy, given that these two elements are inextricably linked. The above question about the coherence between the two elements can only be answered thoroughly if sufficient attention is also given to internal human rights policy.

The request for advice suggests that the EU's current human rights policy is in need of improvement or reinforcement. Without wanting to contradict this assertion, the AIV would observe that at present there is no available tool for measuring the effectiveness of the Union's human rights policy. Nevertheless, wherever possible, the report will devote attention to the influence and results attributable to EU interventions in the field of human rights, for example in multilateral forums such as the UN Human Rights Council. In a more general sense, however, the AIV has chosen to concentrate on the three core prerequisites for pursuing a good and effective human rights policy: coherence, consistence and credibility. In practice, it is exceptionally difficult to meet these conditions in the area of foreign policy, particular when it comes to human rights. Recently, this difficulty was highlighted once again by events in a number of states in North Africa and the Middle East.[1]

As is apparent from the request for advice, the terminology used in this area can sometimes vary within the European context. The term 'human rights' tends to appear in discussions of external policy. In other cases – especially those relating

1 See 'Het gezag van Ashton lijdt onder "Egypte". Kritiek buitenlandcoördinator EU omdat Brussel nog steeds niet met één mond praat' (Ashton's authority suffers from events in Egypt: Criticism levelled at EU's foreign policy coordinator because Brussels does not yet speak with one voice), *NRC Handelsblad*, 5-6 February 2011.

to internal policy – there seems to be a preference for 'fundamental rights'.[2] In principle, the AIV regards this distinction as unfortunate, as it suggests an undesirable dichotomy, creating the impression that 'human rights' apply mainly to 'others' outside the EU while 'fundamental rights' refer mainly to individuals in the EU member states. Wherever possible in this report, the AIV uses the internationally accepted term 'human rights', only resorting to 'fundamental rights' when there is no other choice.

This advisory report was adopted by the AIV on 1 July 2011.

2 The term 'fundamental rights' comes from the old case law of the Court of Justice of the European Community (see the judgments in Stork (1959), Internationale Handelsgesellschaft (1969) and Nold (1974)). These cases involved legal persons and issues like property rights. In this context the Court used the term 'fundamental rights', perhaps because it was conceptually difficult to speak about human rights in this context. This terminology has remained in use, and it also appears in the Treaty of Lisbon. A distinction is occasionally made between the two terms in order to emphasise the statutory nature of fundamental rights and accentuate the difference between 'moral' human rights and constitutional fundamental rights. For more on this subject, see Samantha Besson, 'The European Union and Human Rights; Towards a Post-National Human Rights Institution?' *Human Rights Law Review* 6:2 (2006), pp. 323-360, p. 324, n. 3.

I Context

In view of the recent entry into force of the Treaty of Lisbon and the present debate in the Netherlands on the importance of European cooperation, the Advisory Council on International Affairs (AIV) considers that this is a particularly appropriate moment to examine the effectiveness of EU human rights policy. Both these subjects – the Treaty of Lisbon and the debate in the Netherlands – will be dealt with later in this chapter. First, however, the AIV will consider the changing global context in which the EU's human rights policy should be formulated.

I.1 Global context

Naturally, the effectiveness of EU policy in the field of human rights is determined in part by the global context. Ideally, the policy should be geared to changes that take place at global level.

Over the years human rights have come to play a greater role in international relations. This has been due in part to the ever stronger and more comprehensive normative human rights framework created at both global and regional level. By ratifying regional and UN human rights treaties, the great majority of states in the world have voluntarily undertaken to observe obligations in the human rights field. Human rights treaties have also created various formal monitoring procedures. Treaty obligations are legally enforced wherever necessary, opportune and possible. In a broader sense, this development has also created a general basis for states to hold each other accountable for the observance of human rights, for example by establishing a clear role for human rights in foreign policy and international cooperation. In other words, human rights have gradually evolved into a legitimate concern of the international community, as recorded in the final declaration of the UN World Conference on Human Rights in 1993.[3]

The process by which all of this came about was difficult and the results occasionally proved fragile. Nonetheless, the process created a context within which it was logical for the European Union to develop an external human rights policy from the mid-1970s onwards. Since then, however, the context has changed radically[4] and the EU is increasingly facing sharp criticism of its human rights policy. Recently, the European Council on Foreign Relations (ECFR) analysed the shifts in the global balance of power with which the EU is currently confronted and advised on how the Union could best adjust its human rights policy.[5]

In general, the ECFR notes that in the period after 1989, when the EU committed itself to putting human rights and democracy at the centre of its external policy, its efforts were 'aligned with the global tide'. Immediately after the end of the Cold War, the way seemed to

3 Paragraph 4 of the Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993, describes the promotion and protection of all human rights as 'a legitimate concern of the international community'.

4 See also AIV, 'The Human Rights Policy of the Dutch Government: Identifying Constants in a Changing World', advisory report no. 73, The Hague, February 2011.

5 Susi Dennison and Anthony Dworkin, *Towards an EU Human Rights Strategy for a Post-Western World*, European Council on Foreign Relations, London, September 2010, see: <http://www.ecfr.eu>.

have opened for a liberal international order in which the model of democratic capitalism was viewed as a legitimate 'goal of development'. Against this background, the EU was able to promote democracy and human rights in neighbouring countries through the process of enlargement. At global level it proved possible to launch an institution such as the International Criminal Court.

Over twenty years later, however, the economic and political position of the West has, according to the ECFR, been greatly weakened. One factor has been the financial and economic crisis that has struck at the heart of the Western economic system, while leaving many emerging economies relatively unscathed. Another is the waning international status of the West, partly due to the controversial and difficult nature of the military operations in Iraq and Afghanistan.

At the same time, the economic success and growing assertiveness of countries with authoritarian regimes such as China have shed a new light on the supposed connection between liberal democracy and social and economic development. China and other states have undermined the West's traditional dominance in the fields of development aid and trade agreements by increasingly offering loans, investment or trade agreements to developing countries. Unlike the aid provided by the EU, this assistance is not usually dependent on any commitment by the recipient countries to comply with broader normative obligations in respect of human rights, democracy or good governance.

An additional factor, according to the ECFR, is that although a number of important emerging democracies such as Brazil, India and South Africa have made formal commitments to respect human rights, they are also in practice strong proponents of the principle of non-intervention in internal affairs. These countries are suspicious of what they regard as the 'Western agenda' of overriding national sovereignty in defence of human rights.

These global shifts oblige the EU to review its human rights policy. The ECFR recommends that if the EU is to remain relevant it should:
- operate more flexibly and be less defensive;
- be amenable to cooperation with new partners;
- identify achievable goals in each situation; and
- do more to address the tangible needs of people in different situations and cultures.

As regards the last point, there are similarities with the AIV's 2008 advisory report on the Universality of Human Rights: Principles, Practice and Prospects.[6] This gives pride of place to the concept of universality as a central value. At the same time, the AIV noted that in order to be successful Dutch human rights policy must be based on an acknowledgement of cultural diversity, on a process-oriented dialogue and on support for grassroots initiatives. In so far as the EU is concerned, the AIV would note that there is naturally a substantial common normative framework, as laid down in the Treaty of Lisbon.

The AIV broadly endorses the ECFR's analysis and will also take it into account, where possible, in this report. The EU's human rights policy – and particularly its external component – is not created in a vacuum. How the EU relates to the rest of the world and vice versa should always be an important point of reference.

6 AIV, 'Universality of Human Rights: Principles, Practice and Prospects', advisory report no. 63, The Hague, November 2008.

I.2 The Treaty of Lisbon

The request for advice states that the Lisbon Treaty provides 'means' to make progress in the area of external human rights policy, especially in making it more forceful and coherent and raising its profile. This section examines the main new elements from the Treaty of Lisbon in so far as human rights are concerned, in both the internal and the external policy of the Union. In the next chapter these elements will be viewed in their historical context. One of the matters considered will be the gradual incorporation of human rights elements into the European legal order in the second half of the twentieth century.

The Treaty of Lisbon was signed in December 2007 and entered into force on 1 December 2009.[7] On the subject of human rights policy the Treaty contains three guiding provisions. Although these are not entirely new,[8] the AIV wishes to mention them here in view of their central importance. According to article 2 of the Treaty on European Union, the EU is founded on the values of:

> '... respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'

Article 3 (1) describes the general aim of the EU as follows:

> 'The Union's aim is to promote peace, its values and the well-being of its peoples.'

And article 21 (1), first paragraph, states that:

> 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'

In addition, the Treaty of Lisbon contains the following important new elements:

- The Charter of Fundamental Rights, which was solemnly proclaimed by heads of government in Nice in 2000, becomes legally binding as it is accorded the same legal value as the EU Treaties, without being incorporated in full in the text.[9] The Charter brings together diverse human rights provisions, which were previously found in a number of different places. These include both civil and political rights and social and economic rights. Article 51 of the Charter provides that the Charter does not establish any new power or task for the bodies of the European Union, but is intended to oblige these

7 The Treaty of Lisbon comprises the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as well as a number of Protocols.

8 Provisions similar to those of articles 2 and 21 (1) had already been included in, for example, articles 6 and 11 of the Treaty of Amsterdam.

9 Article 6 (1) TEU.

bodies to act within the limits of the Charter. The Charter does not apply to the member states when acting *outside* the scope of Union law.[10]

- The EU is to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).[11] This accession can be regarded as complementing the EU's own internal legislation. The situation can to some extent be compared to that of member states which have their own constitutions and constitutional review and at the same time submit to external review by organisations such as the European Court of Human Rights (ECtHR) in Strasbourg. It should be noted that the primary task of the Court of Justice of the European Union (CJEU) does not lie in the field of human rights. The complementarity provided by the EU's accession to the ECHR may therefore have a relatively large added value. In addition, this accession can increase still further the coherence and consistency between the two courts and promote legal certainty within the EU in a broad sense, since both member states and EU institutions will in future be bound by the same obligations resulting from the ECHR.[12]

- In the area of justice and home affairs, the former article 35 TEU (former Third Pillar cooperation) and article 68 of the EC Treaty (Title IV of the EC Treaty) have been repealed. The CJEU obtains full jurisdiction in the field of justice and home affairs, with one exception. This concerns the legal validity or proportionality of operations of the police or other authorities responsible for law enforcement in a member state and the exercise (by the member states) of their responsibilities for the maintenance of law and order and the safeguarding of internal security. A transitional regime applies for a period of five years. This relates to the validity of former Third Pillar instruments (police cooperation and judicial cooperation in criminal matters) which cannot be contested during this period.[13] As regards the administration of justice by the CJEU two changes have also been made in relation to preliminary ruling procedures.[14] The provisions on justice and home affairs have been combined in the Treaty of Lisbon under Part 3, Title V, of the Treaty on the Functioning of the European Union (TFEU) entitled 'Area of freedom, security and justice'.

10 See Kirsten Shoraka, '*A Background to the Establishment of Human and Rights in the Law and Policies of the European Union*', Human Rights and Minority Rights in the European Union, New York, Routledge 2010, pp. 11-66, p. 48.

11 Article 6 (2) TEU.

12 Shoraka, *supra* n. 10, p. 51.

13 Article 10 of Protocol No. 36 provides that as a transitional measure the powers of the EU Court of Justice will remain the same with respect to acts involving police cooperation and judicial cooperation in criminal matters adopted before the entry into force of the Treaty of Lisbon. This transitional measure will cease to have effect five years after the date of entry into force of the Treaty of Lisbon. As a result of this transitional measure, the Commission cannot institute proceedings against member states that are in breach of their obligations under the Third Pillar instruments during the 5-year period. In this period the powers of the Court of Justice in respect of such instruments will be the same as when article 35 TEU was in force.

14 First, it has been provided that the CJEU should act with a minimum of delay if a request for a preliminary ruling relates to the case of a person in custody (article 267, fourth paragraph, TFEU). Second, the urgent procedure for references for a preliminary ruling relating to the area of freedom, security and justice now has a legal basis at treaty level (article 23a of Protocol 3 on the Statute of the Court of Justice of the European Union).

This Title also includes immigration, asylum and civil law.[15] As the policy fields covered by Title V have important human rights aspects, the full jurisdiction of the CJEU in these fields also has implications for the EU's (internal) human rights policy.

- Elements that are not specifically applicable to human rights but to external action of the EU in a broad sense concern a number of new institutional provisions which should increase the coherence of external policy. An important measure in this connection is the appointment of a High Representative for Foreign Affairs and Security Policy (HR) and Vice President of the Commission to coordinate the external action of the Union.[16] The High Representative is assisted by the European External Action Service (EEAS), which is currently being established.[17]

- The Common Foreign and Security Policy (CFSP) falls outside the jurisdiction of the CJEU, with only a few exceptions. Under article 275 TFEU, the CJEU has jurisdiction to rule on 'proceedings reviewing the legality of decisions providing for restrictive measures against natural or legal persons' adopted by the Council on the basis of CFSP provisions. The CJEU has accordingly obtained jurisdiction over cases involving the rights of persons suspected of terrorism and of natural or legal persons affected by EU sanctions.

- Another provision that is not specifically related to the human rights policy but does have implications for it (e.g. as regards the power to conclude treaties) is article 47 TEU, under which the EU has legal personality.

Through various institutional reforms the Treaty of Lisbon therefore creates the basic conditions for a coherent and effective *external* policy of the EU. Naturally, this will allow more effective action in foreign policy fields relevant to human rights. However, the most specific – and far- reaching – innovations in the Treaty of Lisbon are in the field of the EU's *internal* human rights policy, in particular as a result of the legally binding nature of the Charter and the EU's accession to the ECHR. This finding is significant in relation to, for example, the coherence between the EU's external and internal human rights policy, which is a topic that will be considered at length in chapter IV of this advisory report.

I.3 The Netherlands and European cooperation

In the AIV's view, the request for advice must be seen in the context of the debate in the Netherlands about further integration and cooperation in Europe. Two opposing trends are discernible. First, there has been a degree of Euroscepticism in the Netherlands since the start of this century. The Dutch 'no' vote in the referendum on the proposed Treaty Establishing a Constitution for Europe in 2005 is often cited as the culmination of this trend.

15 The Court of Justice had jurisdiction in matters relating to the external borders, migration and asylum even before the Treaty of Lisbon.

16 Article 18 TEU.

17 Article 27 (3) TEU.

But various analyses[18] have shown that there is a more persistent and widespread sense of unease about further European integration, which is a process that many Dutch citizens (and members of parliament) feel is increasingly beyond their control, but is now intruding ever more into almost every aspect of people's lives. A 2006 study shows that there is a distinct feeling among the Dutch electorate that matters affecting them are being decided without their involvement.[19]

This unease is reflected in a growing emphasis on Dutch national interests, in other words a 'What's in it for us?' mentality. The Dutch emphasis in Brussels on the position of the Netherlands as a net contributor to the EU budget during the negotiations on the 2006-2013 Financial Perspective, which is now being continued, should be seen partly against this background. Another manifestation of this unease is concern about 'over-regulation' and unwanted intervention by 'Brussels', and a strong desire to maintain the country's own national competences in a variety of fields. For example, following the 'no' vote in the 2005 referendum, the Netherlands put great emphasis in Brussels on the subsidiarity principle in fields such as social security, pensions and health care.[20] The present government has indicated both in the coalition agreement and the parliamentary support agreement[21] that it intends to reassess a number of European directives on asylum and migration and, where possible, modify them through renegotiation. In practice, the actual scope for renegotiation will probably prove to be limited as the directives concerned do not stand alone but form part of the human rights acquis as recorded in existing treaties, including the Treaty of Lisbon and the Charter of Fundamental Rights included in it.[22]

The public debate since the end of 2010 on the scope of the case law of the European Court of Human Rights (ECtHR) is also part of this trend. The criticism sparked by a number of specific cases (particularly on immigration and asylum), namely that the ECtHR is going

18 See, for example, Peter van Grinsven, Mendeltje van Keulen, Jan Rood, '*Over verkiezingen, politisering en het Nederlands Europa-beleid*' (On elections, politicisation and the Dutch policy on Europe), Clingendael CESP Paper, The Hague, November 2006; '*De Europese Grondwet: Postreferendum opiniepeiling in Nederland*' (The European Constitution, Post-referendum opinion poll in the Netherlands), Flash Eurobarometer 172, June 2005; René Cuperus, '*Why the Dutch voted No. An Anatomy of the new Euroscepticism in the old Europe*', Progressive Politics 4, no. 2 (Summer 2005): pp. 92-101.

19 See Van Grinsven et al., ibid., p. 9. This prompted the question, according to the authors, of the extent to which it would be possible to strengthen public involvement through the politicisation of Europe on the basis of national politics. The authors argue that the main conclusion after the 'no' vote was that 'the problem [is] not so much in the *content* but in the *manner* in which this would be achieved.'

20 Letter from the Minister of Foreign Affairs and the Minister for European Affairs. House of Representatives, 2006-2007 session, 21 501-20, no. 344. The letter refers on page 6 to 'our national welfare schemes and the quality of public provision'.

21 *Vrijheid en Verantwoordelijkheid* (Freedom and Responsibility), VVD-CDA coalition agreement, pp. 21-27; VVD-PVV-CDA parliamentary support agreement, 2010, pp. 4-10.

22 Willem van Genugten and Nicola Jägers, *'Land veroveren gaat niet vanzelf: Over de permanente en inherente spanning tussen internationaal recht en (internationale) politiek*' (Ground is not gained so easily: on the permanent and inherent tension between international law and international politics), Nederlands Juristenblad, vol. 20, 2011, p. 1318.

beyond its remit by creating general norms,[23] seems to be prompted above all by a fear that national jurisdiction is being eroded. Critical analysis and study of the judgments of the ECtHR is in itself a good thing. But if criticism of individual cases is used as a lever for challenging the legitimacy of the ECtHR and the significance of the ECHR in general, this may jeopardise the legal protection afforded within Europe.[24]

The second trend runs counter to Euroscepticism. It is becoming increasingly apparent that if the achievements of more than half a century of European integration are to be safeguarded, cooperation will actually have to be intensified in more, sometimes politically sensitive, fields. The financial and economic crisis has compelled member states to consider adopting uniform and stricter measures on budget discipline, supervision and enforcement.[25] Also significant in this connection is the judgment of the ECtHR of 21 February 2011 in the case of M.S.S. v. Belgium and Greece, in which it held that member states were not entitled to return asylum seekers to Greece as long as that country was guilty of human rights violations in asylum procedures. This judgment has made clear that application of the principle of interstate trust must comply with human rights standards and that the present fragmented European asylum policy, in which member states often endeavour to modify European standards to fit their own national rules, is no longer fit for purpose. In an editorial on the M.S.S. case, *NRC Handelsblad* wrote on 24 January 2011 'Europe is once again faced with the choice: proceed with integration or accept that the whole thing is falling apart.'

The report of the Advisory Council on Government Policy of November 2010 about Dutch foreign policy, which is entitled *Aan het buitenland gehecht* (Attached to the world), frankly notes that for the Netherlands Europe is 'the most dominant arena for cooperation'. The report submits that 'The "new" geopolitics requires a stronger and more united Europe which can act as a state. Without a stronger link from Europe to the rest of the world, the world will just "happen" to us. In a changing geopolitical world, therefore, a stronger Europe is decidedly a Dutch interest. (...) For the Netherlands, the EU is the dominant arena. The long-standing

23 Thierry Baudet, *'Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie'* (The European Court of Human Rights constitutes a serious breach of democracy), *NRC Handelsblad*, 13 November 2010; Tom Zwart, '*Geef dat mensenrechtenhof weerwerk*' (Time for a response to that human rights court), *NRC Handelsblad*, 17 January 2011; Stef Blok and Klaas Dijkhoff, *'Leg het Europees Hof aan banden,'* (Curb the European Court) *Volkskrant*, 7 April 2011.

24 See, for example, Rick Lawson, *'Het mensenrechtenhof beschaaft Hongarije en Griekenland'* (The human rights court is civilising Hungary and Greece), *NRC Handelsblad*, 25 January 2011; Jenny Goldschmidt, *'Houdt Grondwet in ere, heren politici'* (Honour the Constitution please, politicians), *Volkskrant*, 11 April 2011.

25 In June 2010, for example, the European Council agreed that there was an urgent need for closer coordination of economic policy. Above all, it considered it desirable for: i) both the preventive and the corrective arms of the Stability and Growth Pact Pact (SGP) to be strengthened by means of sanctions; ii) the level and evolution of the debt and overall sustainability of government finances to be given a more prominent role in budgetary supervision; iii) all member states to have national budgetary rules and medium-term budgetary frameworks in line with the SGP; and iv) the quality of statistical data to be guaranteed. In October 2010 the European Council tightened up budgetary discipline still further, expanded economic supervision and deepened coordination (doc. 25/1/10 REV 1, p. 1). In December 2010 the European Council decided on a limited Treaty change to allow the establishment of a permanent European stability mechanism (doc. 30/1/10 REV 1, p. 1). On this subject see also AIV, '*De EU en de crisis. Lessen en leringen'* (The EU and the Crisis: lessons learned), advisory report no. 68, The Hague, January 2010.

Dutch aim of a communitisation within the Union was quite justifiable from the perspective of a small power that refused to be dominated by its bigger neighbours. (...) The more recent Dutch ambition to pursue just the reverse was understandable considering the feelings of discontent in the Netherlands. However, this reverse ambition was and is also a denial of everything the Netherlands is: part of the European reality.'[26]

The more pro-European attitude is not limited to a small part of the political establishment or a select part of the Dutch population. Surveys show that support among the Dutch population for European integration is still relatively strong, despite the scepticism. The Eurobarometer of spring 2010[27] showed that 69% of Dutch respondents viewed Dutch membership of the European Union as a good thing. In this respect the Netherlands scores better than the average of EU countries, which is 49%.[28] In addition, 68% of Dutch respondents believe that the Netherlands has benefited from its EU membership (the average figure within the EU member states is 53%).[29]

It would not be within the ambit of this advisory report to analyse the eurosceptic and pro-European approaches at greater length. However, the AIV will bear in mind the existence of both trends, in particular when it comes to making policy recommendations later in this report.

26 *Aan het buitenland gehecht. Over verankering en strategie van Nederlands buitenlands beleid* (Attached to the World: on the anchoring and strategy of Dutch foreign policy), Advisory Council on Government Policy, Amsterdam University Press, Amsterdam 2010, pp. 11, 85 and 98.

27 *Public Opinion in the European Union*, Standard Eurobarometer 73, August 2010.

28 11% of the Dutch respondents stated that in their opinion EU membership was a bad thing (compared with an average of 18% in the EU as a whole) and 19% viewed it as neither good nor bad (compared with an average of 29% in EU countries).

29 25% of the Dutch respondents considered that the Netherlands had not benefited from EU membership (compared with an average of 35% in EU countries).

II The historical perspective

For a proper comprehension of the current state of EU human rights policy, the AIV considers it worthwhile starting its analysis from a historical perspective. It will therefore first outline how over the last 60 years human rights have acquired a place in the legal order and the policy of the European Community/Union. Various points from this historical survey will be analysed in the second part of this chapter. Both the ambition of the EC/EU to conduct an active human rights policy and its ambivalence towards fulfilling this ambition will emerge in the process.

Many historical studies of the Union take the European Coal and Steel Community (ECSC) or the 1957 Treaty of Rome, or both, as their starting point. This is indeed a logical approach since the EU, as we now know it, has its origin in the formation of the ECSC in 1951 under the Treaty of Paris and in the formation of the European Atomic Energy Community (Euratom) and the European Economic Community (EEC), both in 1957. However, the period between the establishment of the ECSC and the acceptance of the Treaty of Rome also deserves consideration, particularly in view of the attempts made at that time to establish a European Political Community (EPC). Although these attempts ultimately came to nothing in 1954, analysis of them gives a fuller picture of the historical perspective from which EU human rights policy must be viewed.[30]

II.1 From the Draft Treaty for a European Political Community to the Treaty of Lisbon

Early 1950s: attempts to establish a European Political Community

1949 saw the founding of the Council of Europe (CoE). And in 1950 the European Convention for the Protection of Human Rights and Fundamental Freedoms was concluded. Over the years the CoE, including the European Court of Human Rights, has evolved into an important and effective forum for the protection of human rights in Europe.

For a long time the process of economic integration within Europe was almost entirely separate from these developments. Some of the founding fathers of the European Union would have preferred otherwise. In 1952 the *Comité d'études pour la constitution europeénne* (CECE), a group of influential lawyers, academics, activists and politicians who wished to promote further European integration, took the first step towards the possible establishment of a European Political Community. Their main goal was to make recommendations for a European constitution. The first of the nine resolutions adopted by the CECE stated that the central aims of such a Community would be to maintain constitutional order, democratic institutions and fundamental freedoms. Section 7 of this resolution provided that member states should respect democratic institutions and fundamental freedoms and that, if a member state failed to do so, the new Community

30 See also Gráinne de Búrca, *'The Road Not Taken: The EU as a Global Human Rights Actor'*, American Journal of International Law, Vol. 105, 2011. The passage about the European Political Community is based partly on this article.

could intervene.[31] In these proposals the European Community would therefore have been assigned a major role in protecting and maintaining human rights *within* the member states. This clearly reflects the experiences of the Second World War and the fear of communism.

After signature of the Draft Treaty establishing a European Defence Community (EDC) by France, West Germany, the Netherlands, Belgium, Luxembourg and Italy, the Consultative Assembly of the CoE requested the six governments concerned to instruct the ECSC to draw up a plan for a European Political Community (EPC). An ad hoc assembly of the ECSC, consisting of 87 politicians from the states concerned, was charged with this task. The draft treaty for the establishment of an EPC was presented to the foreign ministers of the six states on 9 March 1953.

The human rights articles of that draft treaty were clearly influenced by the CECE resolutions. Article 2 provided that the general object of the Community was to protect human rights and fundamental liberties in the member states. Under article 3, the ECHR would form an integral part of the new Community statute. Article 104 provided for the possibility of intervention by the Community in order to maintain the constitutional order and democratic institutions within the territory of a member state.[32] The draft treaty also contained an individual right of complaint to the Court of Justice of the Community in the event of a violation of the ECHR by the Community institutions. This is noteworthy, particularly since a compulsory right of individual complaint has formed part of the ECHR system only since 1998. Article 45 provided for the Court of Justice of the Community to have jurisdiction, but also provided that this jurisdiction would pass to the ECtHR where a case was considered of importance to all parties to the ECHR.

Nothing in the available documentation suggests that there was any disapproval or dissension concerning the establishment and reception of these articles. On the contrary, the foreign ministers of the six member states were prepared to approve the articles concerned subject to only a few minor changes.[33] Clearly, there was widespread support for the establishment of a European Political Community which would be founded on respect for human rights, incorporate provisions from the ECHR and provide for vigorous legal enforcement and within which the Community would be given important powers of supervision and intervention in respect of human rights matters in the member states.

The Treaty of Rome and the silence surrounding human rights in the 1960s

When the Draft Treaty establishing a European Defence Community (EDC) came to nothing in 1954 as a result of the French refusal to ratify,[34] the EPC Treaty too was shelved. The

31 'Should the Community Government establish that, in one Member State, the constitutional order, democratic institutions or man's fundamental liberties have been seriously violated, without the constitutional authorities of this State being able or wishing to re-establish these, the Community may intervene…' section 7 of the first resolution, '*Preamble and General Proposals*' of the CECE, Brussels, November 1952.

32 However, this principle of intervention and the conditions on which it could occur did require the prior unanimous approval of the member states.

33 Gráinne de Búrca, *supra* n. 29, pp. 16-17.

34 This French refusal was mainly prompted by concerns about loss of sovereignty as a result of the EDC Treaty.

Messina Resolution of 1955[35] relaunched the process of European integration by proposing economic integration and the establishment of a common market. In the wake of this resolution the European Economic Community (EEC) was founded in 1957. To limit the possibility of this new project derailing, the Messina mandate was strictly observed.[36]

The absence of human rights provisions in the 1957 treaties must be viewed in this context. When the EEC and Euratom treaties were drafted, the previous vision of a new European system that would have a substantial political role in protecting against human rights violations by or in the member states – or even by the new institutions established by the treaties – was swept aside in favour of a more limited, pragmatic and step-by-step approach to the European integration process.

The absence of human rights provisions does not appear to have been the result of a well-considered, substantive decision on the part of the framers of the EEC Treaty that human rights were not relevant or that the CoE would be better able to oversee human rights issues, as is sometimes argued. There is no information that suggests that the monitoring and coordinating mechanisms of the CoE were regarded as a substitute for those of the EC, even in the human rights field.[37] This is apparent, for example, from the fact that even in the initial phase of European integration there continued to be regular calls for the EEC to have its own involvement in human rights and to formulate an explicit human rights dimension.[38]

Even while the EEC Treaty was being drafted a few further attempts were made to provide a place for human rights issues. For example, there was a German proposal (by analogy with article 3 of the EDC Treaty) to make a *Verfassungsvorbehalt.* In essence, the proposal was that the new Community could not take measures that would infringe nationally protected human rights and liberties. However, this proposal was rejected because of the supposed risk that such a clause might mean that Community legislation was subject to that of the member states and that the objectives of the Community could thus be undermined.[39] Precisely the same subject was put back on the agenda a few years later by German companies which considered that nationally protected rights and liberties formed a ground for limiting the legislative activities of the Commission. In the Stork case (1959)[40] the Court

35 This resolution was adopted by the foreign ministers of the ECSC countries during a meeting in Messina on 1 and 2 June 1955.

36 See also Paul-Henri Spaak, *The continuing battle: memoirs of a European 1936-1966*, Weidenfeld, London 1971.

37 This is an assumption made by many people. See, for example, Jan Willem Sap, *Het EU-Handvest van de Grondrechten. De opmaat voor de Europese Grondwet* (The EU Charter of Fundamental Rights. The prelude to the European Constitution), Kluwer 2003, p. 11. However, there is no source material to support this. See Graínne de Búrca, *supra* n. 29, p. 20.

38 Graínne de Búrca, *supra* n. 29, p. 21. See, for example, the Bonn Conference and the Fouchet Plan of 1961 (especially draft article 2); the 1968 *Commission Declaration on Completion of the Customs Union*, which called for the member states to work towards a political union; and the 1970 *Davignon Report on Political Union*.

39 Manfred Zuleeg, *Fundamental Rights and the Law of the European Communities*, 8 Common Market Law Review 446 (1971).

40 Judgment 1/58, Stork v. High Authority, 1959 ECR 17.

of Justice held, however, that the High Authority of the ECSC was not competent to determine whether or not its decisions infringed principles of German constitutional law. In the similar case of Geitling (1960),[41] the Court of Justice rejected the relevance of a fundamental right in the German constitution and the argument that Community law could protect such a right independently. From these judgments and the later judgment in the Scarlata case (1965),[42] it became apparent that the Court of Justice could not accept the notion that nationally protected rights could be a ground for limiting the activities of the Commission, nor the idea that human rights could be regarded as general principles of European law.

The 1970s and 1980s: human rights gradually accorded a place

In the following period, the Court of Justice gave considerable impetus to the incorporation of human rights in the European legal order. However, this 'about-turn' did not occur until the late 1960s. The rulings given by the Court of Justice in three cases – Stauder (1969),[43] Internationale Handelsgesellschaft (1970)[44] and Nold (1974)[45] – revealed new thinking on the part of the Court of Justice about human rights. Respect for human rights – inspired by the common constitutional traditions of the member states and international human rights conventions – was now viewed as part of the general principles of Community law. The Court of Justice declared that it was also willing to consider possible violations of these rights by the Community.

The changing attitude of the Court of Justice can be explained by its wish to safeguard the autonomy and supremacy of EC law[46] and avoid a situation in which EC law might eventually be made subordinate to the constitutional law of the member states. This also explains the emphasis the Court of Justice put on the autonomous nature of the rights concerned and on the fact that they could be regarded as of general European origin.

These judgments mark a turning point in the place of human rights in the legal order of the Community. The 'silence' that had started in 1957 was thus broken. The question was not so much *whether* the European Community should be involved in the protection of human rights as exactly what its role should be.

An additional factor was that in the early 1970s the EC, which was primarily focused on establishing a common market and coordinating the economic policy of the member states, began concerning itself to an increasing extent with its external role and how it operated on the world stage. The global oil crisis and the economic problems that this posed to the EC played a part in this. Moreover the first enlargement of the EC occurred in 1973 with the accession of the United Kingdom, Ireland and Denmark.

41 Judgments 36, 37, 38 and 40/59, Geitling v. High Authority, 1960 ECR 423.

42 Judgment 40/64, Scarlata and others v. Commission, 1965 ECR 215, 1966 ECR 314.

43 Judgment 26/69, Stauder v. Stad Ulm, 1969 ECR 419.

44 Judgment 11/70, Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel, 1970 ECR 1125.

45 Judgment 4/73, Nold v. Commission of the European Communities, 1974 ECR 491.

46 This is in keeping with the Costa Enel judgment of 1964: judgment 6/64, Flaminio Costa v. ENEL, 1964 ECR 585.

Against this background, cautious steps were once again taken to move towards European political cooperation in 1970, almost 20 years after the EPC Treaty had come to an ignominious end. This resulted in the adoption by the European Council in 1973 of a Declaration on European Identity in which respect for human rights was said to be a fundamental element of European identity. This declaration was followed by the Joint Declaration on Human Rights of the European Parliament, the Council and the Commission of 1977.[47]

The number of human rights cases heard by the Court of Justice increased in subsequent years. Similarly, the scope and significance of the principle of equality expanded over time. The principle of the equal remuneration of men and women had been included in the EEC Treaty (article 119) from its entry into force. This was due to the need to avoid distortion of competition.[48] Gradually, however, besides discrimination on the grounds of gender and nationality, discrimination on other grounds (particularly race, age, religion and disability) became prohibited in a number of fields that differed from ground to ground. At the same time, the economic function was increasingly pushed into the background and attention focused on the fundamental character of the prohibition of unequal treatment.[49]

A range of legal and political initiatives were undertaken in order to develop still further the EC's role in relation to human rights. Mention may be made in this connection for example of the Single European Act of 1986, the European Parliament Declaration on Fundamental Rights and Freedoms of 1989 and the (non-binding) Community Charter of Fundamental Social Rights of Workers, also of 1989. The European Parliament (EP), which had acquired more influence in the late 1970s and was directly elected by Europe's citizens from 1979 onwards, played an increasingly active role in the human rights field in the 1980s and put increasing pressure on the EC to define its role in this field more clearly, both constitutionally and otherwise.

1992 to date: consolidation of human rights in the legal order and the policy of the EC/EU

However, it was not until 1992, in the Treaty of Maastricht, that human rights were formally recognised as forming part of EC/EU law.[50] 'Maastricht' created the overarching European Union based on a pillar structure. Article F(2) provided that the Union should respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional

47 It was stated in this declaration that the EC Treaties were based on respect for general principles of law and in particular the fundamental rights, as derived from the constitutions of the member states and the ECHR, and that the Community institutions would respect these rights. Although the declaration was not legally binding, it played a role in ensuring that human rights increasingly came to be regarded as a responsibility shared by the EC.

48 See Susanne Burri, *Tijd delen, deeltijd, nationaliteit en gender in Europees- en nationaal rechtelijk perspectief* (Time sharing, part-time work, nationality and gender from the perspective of European and national law). Kluwer, Deventer, 2000, p. 260.

49 See: Janneke H. Gerards, *Rechterlijke toetsing aan het gelijkheidsbeginsel* (Judicial review by reference to the principle of equality), SDU Uitgevers, The Hague 2002, chapter 4, section 1.1.2 Background and significance of the principle of equality in European law, pp. 222-225.

50 Although human rights had been mentioned in the Single European Act of 1986, this was only in the preamble.

traditions common to the member states, as general principles of Community law.[51] Article 130u (2) of the Maastricht Treaty provided that Community policy in the area of development cooperation should 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.[52] In addition, the Maastricht Treaty provided that the objectives of the common foreign and security policy should include developing and consolidating democracy and the rule of law and respect for human rights and fundamental freedoms.[53]

The Maastricht Treaty also introduced the concept of 'citizenship of the Union'.[54] Although the basic intention of the member states in introducing this concept was to codify the acquis concerning the free movement of persons in the field of the internal market, citizenship also acquired significance in the human rights field, in particular with regard to the right included in the ECHR to respect for private and family life.[55]

In December 1993 the European Council accepted the so-called 'Copenhagen criteria' for accession.[56] And in 1997, in the Treaty of Amsterdam, the post of High Representative of the Union for Foreign Affairs and Security Policy was instituted. This Treaty also included an article enabling the EU to pass legislation to prevent discrimination in a number of fields within the competence of the Community (article 13 EC Treaty). The Treaty of Amsterdam

51 The purpose of this article was to consolidate the doctrine hitherto developed by the Court of Justice of the European Communities (CJEC) and to record that human rights, as protected by the ECHR, were an integral part of Community law.

52 This related above all to the successive Lomé Conventions, which regulated the EU's development relationship with the ACP countries (African, Caribbean and Pacific countries – mainly former European colonies).

53 Article J.1(2). As regards the Third Pillar – cooperation in the area of justice and home affairs (which was at this time focused mainly on further integration of the market and, in particular, the free movement of persons) – the Maastricht Treaty provided, among other things, that matters of common interest should be dealt with in compliance with the ECHR and having regard to the protection afforded by member states to persons persecuted on political grounds (article K.2 (1) EU Treaty).

54 See articles 20 and 21 of the Treaty on the Functioning of the EU. Every person holding the nationality of a member state is a citizen of the Union. Citizenship of the Union is additional to and does not replace national citizenship. Citizenship of the Union confers the right to move and reside freely within the territory of the member states.

55 In its case law, the Court of Justice has accorded far-reaching importance to the concept of citizenship. This includes the protection of blood relations in the ascending line who are citizens of a third state and have custody of a minor child having the nationality of a member state of the Union. This protection comprises recognition of a derived right of residence on the one hand and a work permit for non-EU citizens concerned on the other (see for example the CJEU judgment of 8 March 2011 in case C-34/09, Gerardo Ruiz Zambrano v. National Employment Office). In the context of this case law the Court of Justice referred, among other things, to the importance of article 8 ECHR concerning the rights to respect for private and family life.

56 According to these criteria, membership requires that a candidate country must have: (a) stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; (b) the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces; and (c) the willingness to accept the obligations of membership (*acquis communautaire*), including adherence to the aims of political, economic and monetary union.

also introduced a suspension mechanism (article 7 TEU). This made it possible to suspend the rights of a member state if it was found responsible for serious and sustained breaches of human rights. Some years later – following the Haider affair[57] – article 7 was amended in the Treaty of Nice (2001) in such a way as also to cover situations that pose a risk of human rights breaches.

In 2000, after a relatively short period of negotiation, the member states adopted the EU Charter of Fundamental Rights. The aim was to consolidate the human rights protection already afforded in the EU and make it more transparent by adopting a wide-ranging approach.[58] As the political will to give the Charter binding legal effect was lacking, it initially had only political significance. In 2009, when the Treaty of Lisbon entered into force, it became legally binding.[59] Ultimately, the Charter was not incorporated in its entirety into the Treaty, although a majority of the member states had been in favour of this. A cross-reference in the EU Treaty (in article 6 (1)) provided that the Charter had the same legal status as the Treaties.[60] At the request of the United Kingdom and Poland, however, a Protocol was added giving them the possibility of an opt-out. At a later stage the Czech Republic negotiated an agreement under which it too was covered by the Protocol.[61]
As explained in the previous chapter, the Treaty of Lisbon also contains an obligation for the EU to accede to the ECHR. The debate on this had been initiated in 1979 when the European Commission proposed that the EC should accede to the ECHR.[62] However, as this

57 After an election victory in Austria in 1999 the FPÖ, an extreme right-wing party under the leadership of Jörg Haider, entered into a coalition government with the Christian Democratic ÖVP. This prompted the other EU member states in January 2000 to adopt a policy of isolating Austria diplomatically. The effectiveness of this policy was disputed and it was dropped in September 2000.

58 For information about the negotiations on the Charter see Monica den Boer and Cristina Poleda Polo, '*Negotiating the Charter of Fundamental Rights. Novel Method on the Way to the Nice Treaty*', in Finn Laursen (ed.), *The Treaty of Nice: Actor Preferences, Bargaining and Institutional Choice*, Leiden, Brill Academic Publishers 2006, pp. 503-528.

59 As noted in chapter 1, the Charter is binding on the institutions and bodies of the Union and on the member states, but only when they are implementing the law of the Union.

60 The Charter initially formed part of the European Constitutional Treaty (as Part II). However, after the rejection of the Constitutional Treaty in a consultative referendum in June 2005, the Netherlands objected during the renegotiations to the inclusion of the text of the Charter in the Treaties. This was one of the Dutch proposals to undo as far as possible the 'constitutional' character of the Constitutional Treaty. For an analysis of the negotiation process see Jean-Claude Piris, *The Lisbon Treaty. A Legal and Political Analysis*, Cambridge, Cambridge University Press 2010, pp. 66-67.

61 The European Council decided to grant the request of the Czech Republic during a meeting on 29-30 October 2009. See: Presidency Conclusions of the Brussels European Council (29/30 October 2009), doc. 15265/1/09/REV 1, Annex 1.

62 See Memorandum on Accession of the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Bulletin of the EC-S 2/1979; Commission Communication SEC (90) 2087, November 1990, On Community Accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms and some of its Protocols. However, the CJEC held in 1996 that the EC was not competent to exceed to the ECHR. See Opinion on the Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 2/94, ECR 1996, I-1759.

proposal encountered opposition from the member states and from the Court of Justice of the European Communities (CJEC), it took almost 30 years before the decision to accede to the ECHR was finally taken.

The period of major treaty changes was accompanied by institutional developments, partly encouraged by the European Parliament (EP), whose influence had been greatly boosted in 1999 with the introduction of the codecision procedure when the Treaty of Amsterdam entered into force.[63] The human rights instruments have been extended step-by-step since the late 1990s.[64] For example, the European Council has published an annual report on human rights since 1998/1999. 2002 saw the establishment of a network of independent experts on fundamental rights. In 2007 an Agency for Fundamental Rights[65] was established to replace the European Monitoring Centre on Racism and Xenophobia (which had been founded in 1997 in response to open racism and xenophobia in Europe). In the end, the Agency for Fundamental Rights obtained a more limited mandate than had been initially envisaged, partly through the intervention of the Netherlands.[66] This point will be dealt with in more detail in chapter IV. In 2010 the first EU Commissioner for Justice, Fundamental Rights and Citizenship (Viviane Reding) was appointed.

Similarly, the externally oriented human rights instruments have become better defined in the last 15 years. Human rights and democratisation have been an integral part of political dialogue with non-EU countries since 1996. And since 1995 human rights clauses have been included in the majority of EU cooperation agreements with non-EU countries. Following the entry into force of the Treaty of Nice the office of Personal Representative on Human Rights was established in 2005 to advise the High Representative for Foreign Affairs and Security Policy. There are also now various guidelines on human rights and humanitarian law.[67] Since 2003 the EU's neighbourhood policy, in which the promotion of human rights and democratisation plays an important role, has also continued to evolve, aided by a specific funding instrument available for this purpose since 2006.[68] Human rights policy and activities in non-EU countries were financially supported from 1994 to 2006 through the European Initiative for Democracy and Human Rights. This instrument was replaced in 2007 by the European Instrument for Democracy and Human Rights (EIDHR).

63 The codecision procedure gives the EP the role of co-legislator. The application of the codecision procedure was extended by the Treaty of Amsterdam to such fields as the prohibition of discrimination, the environment, social policy, development cooperation, transport, health and customs cooperation.

64 This was inspired in part by an authoritative report in 1998 published by a *Comité des Sages* (consisting of Antonio Cassese, Catherine Lalumiere, Peter Leuprecht and Mary Robinson). The report was entitled *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000*, Florence 1998, see: <http://www.iue.it/AEL>.

65 See: <http://www.fra.europa.eu>.

66 See: <http://www.europanu.nl/id/vhgaiseklvyo/nieuws/eerste_kamer_maakt_eu_bureau?ctx=vh9xhyko17jn>.

67 These are guidelines for external EU policy on the death penalty (1998), human rights dialogues (2001); torture (2001); children and armed conflicts (2003); human rights defenders (2004); international humanitarian law (2005); rights of the child (2007); violence against women and combating all forms of discrimination against women (2008).

68 This is the European Neighbourhood and Partnership Instrument (ENPI).

Since 1992 the case law of the Court of Justice in Luxembourg in the human rights field has undergone rapid growth. The cases no longer relate mainly to procedural rights or employment matters, but now cover a wide range of subjects varying from criminal law to family reunification, privacy protection and counterterrorism.

All in all, it can be concluded that the protection and promotion of human rights have come to play an ever more central role in the law and policy of the EU. The Union now has a formidable set of legal and institutional instruments with which to shape its role in this field.

II.2 Analysis and findings

Analysis of certain aspects of the historical overview above has led the AIV to draw certain conclusions necessary for a good understanding of the current state of EU human rights policy. These conclusions concern the following subjects: political support in the 1950s for a strong human rights regime, the importance of external factors, the discrepancy in the level of ambition between the internal and external policy, the tension between economic integration and the protection of human rights, and the defensive attitude of the member states.

The political support in the 1950s for a strong human rights regime

Historical reviews of the role of the EC/EU are generally based on the assumption that it has gradually evolved from an economic community in which human rights played no role whatever into a regional organisation which, according to article 2 TEU, is based on '(...) respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.[69] However, this notion requires some qualification.

It is apparent from the historical overview above that political support for a strong, supranational human rights regime most certainly did exist in the early 1950s. The Draft Treaty for the European Political Community of 1953 provided that the Community would have a strong monitoring role in relation to the protection of human rights. The EU human rights system that was envisaged would also have formed an integral whole with the ECHR system, including a formal relationship between the two courts. In addition, the EPC framework of 1953 was both externally and internally oriented.

Not only did the Draft Treaty for the European Political Community therefore contain many human rights elements that have since been included in the constitutional framework of the EU, it was also very ambitious in these respects. Nonetheless, these proposals had the support of the governments of the member states, even though they showed little appetite for supranational political integration in other fields. Although these elements were ultimately not included in the EEC and Euratom Treaties of 1957, this was partly due to a deliberate decision to adopt a pragmatic, step-by-step approach to European integration, in which economic objectives were central.

The 1992 Treaty of Maastricht can to some extent be regarded as a turning point, because the limited treaty framework for economic integration was formally abandoned in favour

69 See, for example, Kirsten Shoraka, *supra* n. 10, chapter 2, *'A background to the establishment of human rights in the law and policies of the European Union'*; and Samantha Besson, *'The European Union and Human Rights: Towards a Post-National Human Rights Institution?'*, Human Rights Law Review 6:2 (2006), pp. 323-360.

of a more open and flexible approach to political and constitutional integration. The idea of a political union, which had been abandoned in 1953, was revived. However, the EU's involvement in the human rights field as formulated since 1992 is more qualified than that set out in the proposals from the 1950s. For example, the member states are monitored to only a limited extent and the EU itself is to a large extent exempt from checks on compliance with international standards, something which will be looked at in greater detail later in this report.

The common notion that human rights only started to play a role in the EU's thinking in the past few decades and that since then a strong human rights framework has gradually evolved that puts the previous development phase of the EC/EU entirely in the shade therefore deserves qualification. Indeed, the contrary is also sometimes argued: 'A look at the regime drawn up in the 1950s (...) allows us to see what it might look like when states are genuinely interested in creating a robust internal machinery for human rights monitoring and protection.'[70]

The importance of external factors

The historical overview also shows that the human rights role envisaged for the EC/EU was often, at least in part, a response to external factors. In the 1950s the member states of the ECSC had only recently experienced the horrors of the Second World War. Fears of a return to national socialism, fascism or some other form of repression were very real. Moreover, the Soviet Union was viewed as a risk, certainly after the communist takeover in Czechoslovakia in 1948. Against the background of these concerns and the fears of possible instability in the region, the passages about human rights in the resolutions of the CECE and in the Draft EPC Treaty are perfectly understandable.

The EC's growing preoccupation with its external profile and its cautious attempts to create a form of political cooperation in the early 1970s took place during the period of the first oil crisis and, in consequence, an economic recession within the EC.

The Treaty of Maastricht in 1992 and its inclusion of human rights for the first time (especially in the external field) cannot be viewed separately from the major geopolitical changes in eastern Europe and elsewhere caused by the fall of the Berlin Wall. Given the risk of growing instability along its eastern borders, the Community needed to be able to take a political stance as well and to confront problems in neighbouring countries.

In the years that followed it became apparent that the 1992 treaty framework was by no means adequate for this purpose. Indeed, in the 1992-1999 period European organisations (not just the EU but the OSCE too) proved unable – and the member states to some extent unwilling – to prevent mass human rights violations in Europe itself, particularly in the Balkans. The establishment of the post of High Representative for Foreign Affairs and Security Policy in the Treaty of Amsterdam in 1997 was the next attempt to give definite shape to the Union's foreign policy and hence its objectives in the field of human rights and democratisation.

In the same year the rights suspension clause was included in the TEU (article 7). This happened during a period in which the EU was preparing for a large-scale enlargement on its eastern borders. At that time there was also concern about potential instability in the

70 Gráinne de Búrca, *supra* n. 29, p. 49.

newly established democracies of the candidate member states. The tightening up of the provisions of article 7 TEU can therefore be regarded as a reflection of the concern about the possible emergence of extreme right-wing parties in Europe.

The development of the Charter of Fundamental Rights and the Draft Constitution for Europe and the decision to allow the EU to accede to the ECHR can be seen, in part, in the context of the legitimacy crisis and the debate about the democratic deficit in the EU, which had been conducted since the early 1990s.[71] Although this did not concern external factors as described above, the changes in policy and institutional structure were once again reactive and were partially prompted by events that in themselves were outside the specific field of human rights.

Clearly, therefore, the human rights role assigned by the member states to the EU/EC over time did not come about in a vacuum. It is certainly not the case that this role can be principally attributed to the intrinsic value attached by the member states to human rights and democratisation processes. Of equal if not greater importance were the concerns about democratic stability within the EU or on the external borders and fears of a possible relapse into repression and totalitarianism. Other factors were the perceived need to have a greater say in global developments and the wish to increase the internal and external legitimacy of the Union.

Discrepancy in the level of ambition between the internal and external human rights policy

The emphasis of the EC/EU human rights regime that has evolved since the 1960s has been on external policy. For example, the Treaty of Maastricht codified the external dimension of human rights policy (in both the First and the Second Pillars), whereas only a number of general principles in the field of justice and home affairs (the Third Pillar) were included for internal policy.

In 1999 the subject of the difference in the level of ambition between the EU's external and internal policy was raised in an influential article by Philip Alston and J.H.H. Weiler, who wrote on this point:

> 'In relation to its external policies, the irony is that the Union has (...) highlighted the incongruity and indefensibility of combining an active external policy stance with what in some areas comes close to an abdication of internal responsibility.'[72]

This problem still exists today. Whereas human rights are explicitly mentioned in the Treaty on European Union (article 21) as an overall goal of all external relations of the EU, the EU's human rights role in relation to internal policy is limited to the fields in which the EU is competent, in particular anti-discrimination and social inclusion. This is despite the fact that the extent of the EU's competence is certainly no greater externally than internally. In important fields such as freedom, security and justice, and judicial cooperation in civil

71 This debate had been partially fuelled by the collective resignation of the European Commission under President Santer in 1999. This had been prompted by a report of a committee of independent experts on alleged cases of fraud, mismanagement and nepotism in the European Commission.

72 Philip Alston and J.H.H. Weiler, *'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights'*, in Philip Alston and others (eds.), The EU and Human Rights, Oxford, Oxford University Press 1999, p. 7.

and criminal matters, the member states tend to focus mainly on mutual recognition, the mutual coordination and harmonisation of national law and the limitation of transnational obstacles. Their policy on migration concentrates on managing migration flows and on strengthening borders.[73] Similarly, the protection of the rights of EU citizens in relations with non-EU countries, for example in counterterrorism-related agreements (particularly with the United States), is open to criticism.[74]

Although human rights are therefore an important part of what the EU regards as its international identity and the EU endeavours to present itself as a normative force in this field, it plainly has difficulty demonstrating the same commitment internally. The question is whether this will change as a result of the new constitutional framework. This question will be considered in chapter IV. Here the AIV would merely note that the difference in the level of ambition between the EU's internal and external human rights policy is nothing new, and has actually been a constant factor throughout the policy's evolution. This is closely related to two other points that will be dealt with below: the tension between economic integration and human rights protection and the defensive attitude of the member states.

The tension between economic integration and protection of human rights

The relatively 'late' and gradual manner in which human rights ultimately found their way into EU law and policy has caused many people to wonder whether an EU that is primarily intent on economic integration is able to pay adequate attention to the protection and promotion of human rights.

History shows that there is a tension between the two objectives and it is very much the question whether and, if so, when priority is given to considerations involving human rights. This is evident, for example, from the judgment of the CJEC in cases in which both aspects have arisen. Although the Court of Justice has referred increasingly often to human rights in its judgments since the early 1970s, it seldom quashes a decision on the grounds of human rights.[75] For example, the Court of Justice held in its first authoritative case in this field – the Nold case in 1974 – that 'the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected thereunder' and that for this reason 'these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched.'[76]

It is true that the Court of Justice was dealing in this case with rights of ownership, which are also subject to limitations both under national law and under the ECHR. Nonetheless, many observers inferred from this and similar judgments that the Court of Justice set greater store

73 Gráinne de Búrca, *supra* n. 29, p 38.

74 Although human rights provisions are in force in this connection, for example those stipulated by the European Parliament in the SWIFT case (see <http://www.montesquieu-institute.eu/9353000/1/j9vvhfxcd6p0lcl/vigpgo5bo3wc?ctx=vi9bmsk8sprc>), there is nonetheless no reciprocity between the EU and the US and there is a lack of transparency about the importance attached to criteria such as proportionality and subsidiarity.

75 See Kirsten Shoraka, *supra* n. 10, p. 53.

76 Judgment 4/73, Nold v. Commission of the European Communities, 1974 ECR 491, paragraph 14.

by the free market than human rights.[77] They considered that the case law[78] showed that the CJEC favoured a more limited interpretation of human rights than the ECtHR, possibly because the former gave priority to the Community interest whereas the latter was intent on ensuring that the parties to the ECHR fulfilled their treaty obligations. However, more recent judgments[79] show that the CJEU (formerly the CJEC) is indeed prepared to grant a prominent place to human rights.[80] What is interesting is that this trend has become even clearer since the adoption of the Charter of Fundamental Rights.

The tensions apparent in the judgments of the Court of Justice are also reflected in the EU's human rights policy. Externally the EU's role as guardian of human rights has expanded considerably since the 1990s. It is sometimes argued that the original motivation for this role can, in part, be traced back to economic interests. This is said to be true, for example, of the treaties with the ACP countries, the enlargement process, the Copenhagen criteria and the European Instrument for Democracy and Human Rights (EIDHR).[81] Balancing considerations of an economic nature against human rights interests is still a recurrent problem when implementing policy, as will become apparent in the following chapters.

The defensive attitude of the member states

The Treaty of Rome adopted a step-by-step approach to European integration based on certain specific economic objectives. When human rights slowly came back into the picture in the 1960s, it was for a different reason than in the 1950s. No longer was the aim to create a robust human rights regime within which the EC would play a strong monitoring role. As the Stork, Geitling and Scarlata judgments show, human rights were restored to the agenda (mainly by German companies) in order to protect rights conferred by domestic law, limit the competences of the EC and minimise interference in the national policy of the member states.

77 For two surveys of the criticism from the mid-1990s, see for example Rick A. Lawson, *'Confusion and Conflict? Diverging Interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg'*, in Lawson & De Blois (eds.), *The Dynamics of the Protection of Human Rights in Europe* [Essays in Honour of H.G. Schermers, dl. III] (1994), pp. 219-252; J. Weiler & N. Lockhart, *'Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence'*, in *CMLRev*. vol. 32 (1995), pp. 51-94 and pp. 579-627.

78 Judgments 11/70, Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel, 1970 ECR 1125; 4/73, Nold v. Commission of the European Communities, 1974 ECR 491; 44/79, Hauer v. Land Rheinland-Pfalz, 1979 ECR 3727.

79 See, for example, judgments C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Bundesstadt Bonn, 2004 ECR I-9609; C-112/00, Schmidberger v. Austria, 2003 ECR I-56959; joined cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Yussuf Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, 2008 ECR I-6351.

80 For a description of this development and how the judgments of the CJEU relate to those of the ECtHR, see Kirsten Shoraka, *supra* n. 10, pp. 50-62; and Rick A. Lawson, '*Over laserguns, rode sterren en een voorzichtig ontluikende liefde tussen twee dames op leeftijd,*' (About lasers guns, red stars and a slowly burgeoning love between two elderly ladies) in *55 jaar EVRM (special edition of the NJCM-Bulletin*), 2006, pp. 146-162.

81 See Samantha Besson, *supra* n. 67, p. 345.

This background is important in understanding why the internal EU human rights policy has developed so slowly and was not underpinned by a solid treaty basis until the 1990s. Although the constitutional framework has since undergone a major transformation, progress in formulating internal policy remains difficult. The member states still prefer to restrict as far as possible the EU human rights regime insofar as it applies to their own actions.[82]

Two observations should be made here. First, the different member states take different positions on the human rights policy of the EC/EU. For example, when the status of the Charter of Fundamental Rights was under discussion, countries such as Germany and France welcomed its incorporation into the Treaty on European Union. By contrast, the Netherlands, Denmark and Ireland were opposed to this. The candidate member states were mainly in favour of the Charter having binding effect.[83] Even today the views of the member states on the operation of the Charter differ.[84]

Second, the EU's human rights role is not shaped solely by the governments of the member states. Although the governments are important actors, the evolution of the EU human rights regime since the 1960s has been the result of a dialectic tension between different players. On the one hand, civil society organisations, transnational networks and supranational actors such as the European Commission have attempted to strengthen the institutions and mechanisms for the protection of human rights while, on the other, government institutions have often tended to oppose these efforts.

The outcome of the dialectic between the reluctance of the member states and the pressure from civil society organisations and institutions such as the European Commission and the European Parliament can in a way be regarded as a success. Although the EU's role in the human rights field is fragmented and has been hard to formulate, the dialectic has ultimately resulted in a gradually strengthening of the role.

II.3 Conclusion

Contrary to the picture that is often painted, the AIV observes that in the early 1950s there was considerable political support for a strong, supranational human rights regime. However, the step-by-step, pragmatic approach to European integration that was ultimately adopted by a number of European countries initially left no scope for human rights.

The human rights role assigned to the EU/EC over the years can be seen to have been greatly influenced by external factors, such as concern about democratic stability within the EU or on its external borders, the perceived need to have a greater say in global developments and the desire to increase the internal and external legitimacy of the Union.

In addition, the AIV notes a historic imbalance between ambitions formed over time in the internal and external fields. While the EU clearly regards human rights as a major aspect of its international identity and endeavours to present itself as a normative force in this

82 Ibid., p. 346.

83 Monica den Boer and Cristina Poleda Polo, *supra* n. 56.

84 One example of this is Protocol 30, which was added to the Treaty of Lisbon at the request of the United Kingdom and Poland to provide them with an opt-out. The Czech Republic subsequently signed up to the Protocol too.

field, it plainly has difficulty demonstrating the same commitment internally. The roots of this problem can be traced back in part to the tension between economic integration and human rights protection and to the defensive attitude of the member states. Both have been constant factors in the development of the EU's human rights regime since the 1960s.

Clearly, the present period, in which the EU's constitutional framework is becoming ever more sharply defined, cannot simply be seen as a gradual and steady process towards ever stronger protection. Often the tension between different players results in a step-by-step evolution. Measures to strengthen the human rights regime are often accompanied by attempts to weaken it.

Against this historical background it is hardly surprising that the EU's attitude to human rights is often described as ambivalent. In the following chapters the AIV will examine the EU's present external and internal human rights policy and whether and, if so, how ambivalence can be limited within the existing human rights regime.

III Human rights in the EU's external relations

Following the gradual consolidation of the legal basis for the EU's external human rights policy, an extensive set of instruments has been created since the 1990s to give substance to the EU's role in this field.

According to the Annual Report of the Council of May 2010 entitled 'Human rights and democracy in the world; report on EU action, July 2008 to December 2009' a commitment to human rights and democracy is at the heart of the EU.[85] This chapter analyses how the EU implements this commitment in its external policy. The AIV will take into account what is stated on this subject in the government's policy memorandum 'Responsible for Freedom: Human Rights in Foreign Policy' of 5 April 2011: 'It is very much in the Netherlands' interests for the EU's human rights foreign policy to be a success. Working to support human rights through the EU not only gives the Netherlands' human rights policy more impact, it also raises efficiency. A good allocation of tasks within the EU prevents duplication of effort, and allows countries and EU institutions to specialise in specific areas.'[86]

It is immediately apparent from this passage why the member states have increasingly conducted their human rights policy through the EU in recent years. The benefits can best be summarised as 'advantages of scale'.[87] The advantage of collective as opposed to unilateral action is that member states are able to conduct foreign policy at less cost (both financial and political) and with fewer risks. Moreover, the EU is in a better position than the member states individually to conduct, say, political/human rights dialogues on a regular basis with a wide range of non-EU countries. The influence of the 27 member states together is much greater than that of the individual states separately. For example, sanctions have much greater impact if imposed by the EU rather than by an individual member state.

As against these advantages of scale, there is the disadvantage that conducting a human rights policy through the EU may result in the positions of the member states being diluted to the level of minimum consensus. This applies in particular to action in the context of the Common Foreign and Security Policy (CFSP), where decision-making often requires unanimity and a single member state can therefore block or greatly weaken a decision.

In a general sense, the AIV would note that the responsibilities of the Union differ from those of the member states. In the external field too, the Union may act only if competence has been expressly conferred on it in the policy field concerned.[88] As noted in chapter II, the member states have in the past been reluctant to grant the Union too much policy leeway, let alone competences, in the human rights field. Where the Union is not competent, the member states may nonetheless decide to coordinate their positions, as often happens,

85 Council of the European Union, 'Human rights and democracy in the world; report on EU action: July 2008 to December 2009', Brussels, 11 May 2010, doc. 8363/1/10 REV 1, p. 9.

86 Government policy memorandum '*Responsible for Freedom: Human Rights in Foreign Policy*', 5 April 2011, published at <http://www.rijksoverheid.nl>, p. 16.

87 See also Kirsten Shoraka, *supra* n. 10, p. 70.

88 See article 5 (1) TEU.

for example, at the UN (this is frequently described as 'EU action', whereas it is actually coordinated action on the part of the EU member states).

This chapter deals first of all with the instruments available to the EU in conducting its external human rights policy. It will then go on to consider the organisation and capacity of the institutions concerned and how the policy is implemented in practice. This will be followed by an analysis of the main conditions for an effective human rights policy. Finally, the actions of the EU in a multilateral context will be examined.

III.1 The instruments

The EU has a wide range of instruments for external human rights policy. Preventive and supporting instruments available to the Union include guidelines, human rights clauses, dialogues and consultations, financial support and trade instruments. More reactive instruments include declarations, démarches, sanctions and CFSP missions. These instruments are briefly described in the box below.

Preventive/supporting instruments

Guidelines: These are designed to support third countries in implementing their obligations in relation to international human rights and humanitarian law. They contain an overview of specific actions that can be taken both by the EU and by the member states, first at the level of Brussels and the national capitals and second at the level of the delegations and missions in the country concerned. In total there are eight human rights guidelines, which were partially revised in 2008/2009. They cover the following subjects: EU policy towards third countries on the death penalty (1998), human rights dialogues (2001), torture (2001), children and armed conflicts (2003), human rights defenders (2004); compliance with international humanitarian law (2005); rights of the child (2007), and violence against women and combating all forms of discrimination against women (2008).

Human rights clauses: Since 1995 most EU agreements with non-EU countries have contained a human rights clause stipulating that respect for human rights and democracy are essential elements of the agreement. If one of the parties fails to observe these provisions, the agreement may be suspended or even completely terminated. In practice, this seldom happens. Although usually these clauses are, formally speaking, reciprocal, they are applied in practice only to the non-EU countries and not to the EU. The conditions under which an agreement may be suspended and the procedures to be followed are described most clearly in the Cotonou Agreement, the framework agreement for international cooperation concluded in 2000 between the EU and a large group of countries in Africa, the Caribbean and the Pacific (the ACP countries).[89] At present, the EU is party to over 50 international agreements containing

89 Article 96 provides specifically for the possibility of taking measures if a party breaches an essential element of the agreement such as respect for human rights, democratic principles and the rule of law. It also lays down a procedure to be followed for this purpose.

a human rights clause,[90] and 120 countries have accepted such a clause.[91]

Dialogues and consultations: Human rights dialogues and consultations are conducted periodically with non-EU countries in order to discuss the local human rights situation. The role of the cooperation with the EU is also discussed in this connection. Dialogues are conducted with most developing countries and regional organisations. The EU holds human rights 'consultations' (rather than dialogues) with like-minded countries (such as the United States, New Zealand and Japan) as well as with the Russian Federation and candidate member states. Dialogues routinely form part of an association, partnership or cooperation agreement, but may also be conducted independently of them. In total, the EU holds some 40 dialogues and consultations.

Financial support: The EU has various ways of providing financial support for human rights activities. The main means of funding is through the European Instrument for Democracy and Human Rights (EIDHR). This is used to finance independent national civil society organisations in non-EU countries to combat human rights violations.[92] In total, this involves around 150 million euros a year. The funds are used for the most part to promote civil and political rights, but an increasing amount of assistance is also provided to advance economic, social and cultural rights. It should be noted that under the EU budget the great majority of funds for external policy are allocated to the geographical instruments. These instruments, too, generally allow scope for supporting human rights activities. An important example is the European Development Fund (EDF), which is the main basis for providing assistance under the Cotonou Agreement. Formally speaking, this falls outside the EU budget, is managed by the Commission and contains a large part of the development funds disbursed through the EU for the ACP countries. EDF funds can be used, for example, for promoting human rights and democratisation in ACP countries.

Trade instruments: The EU can offer developing countries extra trade benefits in the form of reduced import tariffs if they have ratified the core UN conventions on human rights and labour rights. This system is known as the Generalised System of Preferences Plus (GSP+). If necessary, GSP+ status can be suspended. This happened to Sri Lanka in 2010 because of problems involving compliance with three UN human rights conventions: the International Covenant on Civil and Political Rights, the UN Convention against Torture and the Convention on the Rights of the Child.[93] The GSP+ system thus adopts a carrot and stick approach.

90 Wolfgang Benedek, *'EU Action on Human and Fundamental Rights in 2009',* European Yearbook on Human Rights, edited by Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl and Manfred Nowak, Vienna/ Graz, Neuer Wissenschaftlicher Verlag 2010, pp. 87-108, on p. 98.

91 European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter (2010/2202 (INI)), par. 114.

92 It is interesting to note in this connection that the Wall Street Journal has criticised the fact that funds are also given to organisations that are challenging the death penalty in the United Sates. See *'Europe Hectors America: One reason it's hard to take Europe seriously'*, Wall Street Journal, 9 March 2011, p. 13.

93 EU Council Regulation no. 143/201, 15 February 2010.

Reactive instruments

Declarations and démarches: To express concern about the situation in a given country the EU can make a declaration (public or otherwise). Usually this is done by the High Representative or by the EP. A démarche may also be made, for example, by the head of an EU delegation in the country concerned. Démarches are not always made public.

Sanctions: In the case of serious human rights violations the EU can impose a range of sanctions such as an arms embargo, travel and visa restrictions and the freezing of bank accounts. This may be done, for example, in order to implement a resolution of the UN Security Council, but the EU may also decide this on its own initiative. The EU is making increasing use of this instrument, most recently following situations in a number of countries in North Africa and the Middle East.

Missions under the CFSP: These may be military missions (such as the EUFOR ALTHEA mission in Bosnia and Herzegovina), police missions (such as EUPOL RD Congo) and missions to strengthen the rule of law (such as EUJUST LEX Iraq). Some missions have an explicit mandate relating to human rights, whereas others provide that sufficient attention must in any event be paid to human rights and development of the rule of law.

The member states and NGOs and the European External Action Service (EEAS) generally agree that the current EU human rights instruments are adequate. There seems to be little need for the development of new instruments.[94] However, there is criticism of the lack of coherence in human rights policy. There are no criteria for determining which instruments should be deployed when, and for what purposes.[95] Interviews have revealed a perceived need for establishing stronger priorities (in view of the EEAS's limited capacity), streamlining the existing instruments and coordinating them better with one another, and, as far as possible, establishing a clear division of responsibilities between the different parties involved and, above all, promoting implementation, partly through regular evaluations and the collection and exchange of information about the application of the instruments.

The human rights strategy that the current High Representative, Baroness Catherine Ashton, has announced she will present in the course of 2011 may perhaps help to address these points. The strategy should, in any event, make clear how the Union relates to the global human rights system. As noted in chapter 1, a strong normative framework has been created in recent decades in the form of an extensive system of international treaties, to which the great majority of UN member states have become party. This should also serve as the frame of reference for the EU, even if it is not yet a party to most of these treaties.

The UN Convention on the Rights of Persons with Disabilities recently became the first UN human rights instrument to be ratified by the EU, and more may possibly follow in the future. The EU would provide very welcome support for the global human rights system if it were to

94 This clearly emerged from the interviews in Brussels on 17 and 18 March 2011.

95 Kirsten Shoraka, *supra* n. 10, p. 71.

confirm that it considers itself bound by the nine core UN human rights treaties[96] and feels committed to the work of the UN Human Rights Council (HRC), including implementation of the Universal Periodic Review (UPR), and to that of the UN treaty bodies.

The High Representative's new human rights strategy could also create a general framework for formulating human rights strategies for each country. The EP has repeatedly requested such a framework and there is support for this among the member states and within the EEAS. These country strategies in the field of human rights should form an integral part of a broad EU strategy for relations with and activities in the relevant country. The human rights strategies for each country could be drawn up jointly by the Working Party on Human Rights (COHOM) and the geographical working groups. Within the EEAS both the human rights department and the geographical departments should be responsible for implementation. For both the EU and the member states the human rights strategies should form the framework for human rights policy and the deployment of instruments in respect of the country concerned.

As regards the financial instruments, the AIV would point to the importance of the negotiations on the new financial perspective (the budget for the period 2013-2020). In this context too the questions of what instruments should be deployed in the field of human rights and democratisation and whether a specific human rights and democratisation instrument such as the EIDHR remains necessary will also arise in the period ahead. In view of the specific characteristics of the EIDHR, which can be deployed at relatively short notice and is used partly for the benefit of independent civil society organisations and partly, for example, to fund election observers, the AIV considers its continuation to be of the utmost importance.[97] It will also be necessary to ensure that sufficient funds are available under the geographical budgets for human rights and democratisation processes. This clearly applies to North Africa and the Middle East (see also the recently published AIV advisory report on this region[98]), but is important to other regions as well.

III.2 The EU players

The High Representative and the EEAS

Within the EU the High Representative for Foreign Affairs and Security Policy, who is also Vice President of the Commission, is responsible for human rights in the EU's external

96 These are the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Rights of the Child, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family, the Convention on the Rights of Persons with Disabilities and the International Convention for the Protection of All Persons from Enforced Disappearance.

97 It should be noted here that accountability for the disbursement of funds from this instrument is not always as good as it could be, but this is to some extent acceptable as working with civil society organisations entails a degree of risk and unpredictability ('Some you win, some you lose', is how one of the interviewees in Brussels put it).

98 AIV, 'Reforms in the Arab region: prospects for democracy and the rule of law', advisory report no. 75, The Hague, May 2011.

relations. The present High Representative, Baroness Catherine Ashton, has referred to human rights as the 'gold standard of foreign policy' and the 'silver thread that runs through all of our external action'.[99] Ashton is assisted by the European External Action Service (EEAS), which has slowly but surely been starting to take shape since December 2009.

The attention paid to human rights and the capacity available for this purpose within the EEAS are matters for concern. Human rights were ultimately assigned to a separate department, but this decision was preceded by considerable debate as to whether a separate department was actually necessary. The position of managing director of global and multilateral issues, under which the department falls, is still vacant. It is of the utmost importance that this post is filled by someone having a knowledge of human rights and humanitarian law. It is also important for human rights expertise to be available in the geographical departments as well. The mainstreaming[100] of human rights within the EEAS as a whole needs specific attention. Human rights specialists should always be involved in drawing up declarations and other documents, as, for example, in response to the recent developments in North Africa and the Middle East. Similarly, it is necessary to ensure that the High Representative's Special Representatives (at present 11 in total, all of whom have a geographical focus) pay systematic attention to human rights and democratisation.

The EP has also proposed that Special Representatives be appointed for a number of thematic human rights fields (human rights defenders, humanitarian law, women's rights and children's rights).[101] The AIV considers that such a proposal should be carefully assessed. Special Representatives could enhance internal coherence, for example through policy formulation and the provision of information to the relevant committees of ambassadors (PSC and COREPER II). They could also raise the EU's external profile by acting as its face in a specific field. On the other hand, this would risk duplicating what is already happening internationally, particularly at the UN. On balance, the AIV considers that it would not be opportune at present to appoint various Special Representatives. However, the appointment of a general Special Representative for Human Rights could be worthwhile and should be seriously considered. This could help to give EU external action in the human rights field greater coherence and consistency and would certainly raise the profile of the Union's involvement in human rights issues.

The EU delegations in third countries should also have sufficient capacity and expertise in the human rights field. Various people interviewed in Brussels expressed concern that insufficient provision had been made for this to date and that delegations in, for example, the North African region have the feeling that human rights and democratisation processes have been 'overlooked'. Not only adequate capacity but also training is important. The AIV therefore vigorously endorses the EP's call for obligatory human rights training for EU staff, including heads of delegations and EEAS directors.[102]

99 Speech by Catherine Ashton, European Union High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, on the Annual Human Rights Report, at the European Parliament, Strasbourg, 15 December 2010, SPEECH/10/757.

100 For a definition of mainstreaming see AIV, 'The United Nations and Human Rights', advisory report no. 38, The Hague, September 2004, pp. 26 ff.

101 European Parliament resolution of 16 December 2010, *supra* n. 89, par. 6.

102 Ibid., par. 5.

The Council

The organs of the Council in which the external human rights policy is dealt with are COHOM, the geographical and thematic working groups, PSC, COREPER II and the Foreign Affairs Council. COHOM, the Human Rights Working Group formed in 1987, deals among other things with country-specific situations and thematic topics, the implementation and updating of guidelines, the course of human rights dialogues and matters that occur in a multilateral context, for example in the UN Human Rights Council.

Unlike many geographical and thematic working groups, COHOM is composed of experts from the national capitals and meets on average once a month in Brussels. This arrangement is generally seen as an obstacle to the effective functioning of the working group. As matters stand, COHOM does not have the time, capacity or resources to consider all relevant human rights matters. Over the years there has been a great increase in the workload, making it necessary to meet more frequently. Moreover, to ensure a coherent policy and integrate human rights into the work of the Council it is important to have closer coordination and cooperation with other working groups[103] and regular contact with the PSC and COREPER ambassadors. As yet there is no consensus among the member states on transforming COHOM into a Brussels-based working group (the United Kingdom and Ireland are among those opposed to this), but it seems only a question of time before this happens. The AIV considers that a decision on this should be taken at the earliest possible opportunity. A positive development is that in the intervening period temporary solutions are being sought, for example by convening informal COHOM meetings and holding meetings with human rights contacts of the Brussels Permanent Representatives or the national capitals. Another improvement is that since January 2011 there has been a permanent COHOM chair, who can also attend PSC meetings.

Another cause for concern that clearly emerged from the interviews in Brussels with NGOs and staff of the EEAS is that the member states are keeping their distance now that the EEAS is being formed. The Treaty of Lisbon has put an end to policy being moved forward by the Presidency. The rotating Council Presidency was often seen as a problem, for which the Treaty of Lisbon would have to provide a solution. However, it appears from those interviewed that matters are not so simple in practice. A strong Presidency could get through a lot of work in six months. The High Representative, with the assistance of the EEAS, has now taken the lead, but capacity is limited (certainly in the formation phase). Cooperation with the member states therefore remains important, both in Brussels and at the missions in third countries. One suggestion was that burden sharing between the EU and the member states could help. Certain member states could play a leading role, for example in matters relating to the death penalty, torture or gender-related violence. Another suggestion was for the establishment of a pool of experts from the member states from which the EEAS could obtain specific expertise that it does not itself possess, for example for specific human rights dialogues. Where human rights dialogues are conducted by the EEAS, representatives of member states should also be present in order to keep abreast of events and ensure that the member states feel bound by the agreements made. As one of the people interviewed in Brussels mentioned, 'Member States have to come back, with their resources and their coordination. Currently we are going backwards'.[104]

103 An example is coordination with the Fundamental Rights Working Group (in particular as regards the human rights aspect of internal policy, for example in the area of justice and home affairs).

104 Nicolas Beger of Amnesty International during an interview on 18 March 2011.

The European Parliament

Within the EP the Subcommittee on Human Rights (DROI) of the Committee on Foreign Affairs (AFET) deals with the EU's external human rights policy. For some decades the EP has been a fervent advocate of strengthening the external action of the EC/EU in the human rights field. The human rights clauses in agreements with third countries are, in part, a consequence of the persistent pressure exerted by the EP.[105] The EP monitors how funds are disbursed under the EIDHR and closely oversees the human rights dialogues. The part played by the EU in the UN Human Rights Council is also actively monitored by the EP.

In addition, the EP commissions a good many external studies[106] and frequently passes resolutions on situations in particular countries or on individual cases (these totalled 38 in 2009). In response to publication of the Council's Annual Report on Human Rights, which includes a section on the work of the EP, the EP adopts an extensive omnibus resolution each year.[107]

Although the EP has always adopted a high profile in human rights matters, external action in this field has hitherto been the responsibility of a subcommittee only. Some members consider that after the next EP elections (in 2014) a fully-fledged EP human rights committee may well be established, particularly since the chairs of the political groups are now playing a more active role in the field of human rights, reflecting the growing importance attached to it. Other members are more guarded about whether this will happen.

For a long time the EP acted mainly as an 'advisory body', which was able, on account of its limited powers, to discuss moral and ethical issues (which were deemed, albeit wrongly, to include human rights) without committing itself to a particular course of action. However, since the EP's powers in various fields have increased, this noncommittal approach is fast disappearing. When the Treaty of Lisbon entered into force the EP also acquired the right to approve treaties with third countries. This means that the EP may possibly be obliged to make choices more regularly than in the past between certain human rights interests and economic, political and trade interests. Where trade treaties are concerned, this is very likely to create tension between the Subcommittee on Human Rights (which oversees human rights clauses) and the Committee on International Trade (INTA). However, it is important for the consideration of human rights and other aspects of foreign policy to take place in a balanced fashion. Only then can the far-reaching powers now possessed by the EP have a positive effect on the place of human rights in the EU's external policy.

Looking at the various players, the AIV concludes that a certain pattern is emerging in how human rights are organised within the different institutions. The EP, the Council and the EU as such – through High Representative Ashton – put human rights and democratisation processes at the centre of their policy. However, it is also evident that the bodies responsible for implementing the policy are not properly equipped for this purpose. Within the EP human rights is dealt with by a *sub*committee. COHOM, the Council's Human Rights Working Group, has only limited capacity and resources to carry out its tasks. And the EEAS too appears

105 Wolfgang Benedek, *supra* n. 88, p. 98.

106 In 2009 these included studies on 'Freedom of Religion and Belief and the Freedom of Expression' and 'Business and Human Rights in EU External Relations'.

107 See, for example, the European Parliament resolution of 16 December 2010, *supra* n. 89.

to have insufficient capacity and expertise in the human rights field to discharge the tasks facing it. The AIV notes this 'institutional weakness' and would point out that it is not conducive to the implementation of human rights policy in practice, which is the subject of the next section.

III.3 Human rights in practice

How are the human rights instruments available to the EU applied in practice and what results can be attributed to them? The latter question in particular is not easy to answer. The Annual Report of the Council[108] provides a good overview of what is being done and its publication is certainly worthwhile, for example in enhancing the visibility of EU external action. However, the report is of a descriptive nature and contains no analysis of the effectiveness of the policies pursued. The European Parliament has requested an evaluation of the effectiveness of all EU instruments[109] and the formulation of specific benchmarks, but for the time being no general evaluations are available. However, a picture does emerge from the literature on specific aspects of human rights policy.

When giving examples of countries in which the EU has been successful in influencing developments relating to human rights and democratisation, commentators invariably cite the accession policy. 'Enlargement of the EU is, in itself, a form of EU foreign policy. It puts the EU in a position to shape large parts of the applicant states' domestic and foreign policies.'[110] The EU has made effective use of this means of exerting influence and has been successful in ensuring that not only states such as Spain and Portugal but also and above all a large number of former Eastern Bloc countries have made the transition relatively quickly to a democratic regime underpinned by principles including respect for human rights. This is undoubtedly because, in the context of the enlargement towards the East, the EU made respect for human rights and democratic principles an explicit and basic condition for assistance, trade and – ultimately – accession.[111] On this point Manfred Nowak says, 'The EU is less concerned with protecting human rights within its member states, but has a major input on the human rights situation in candidate countries by applying fairly strict political admission criteria'.[112]

Studies on EU policy in respect of other countries and regions reveal a less rosy picture. For example, Karen Smith concludes from her analysis of EU policy on Burma, Cuba and Zimbabwe that the EU's bilateral relations with these three countries are inconsistent and determined by the minimum consensus. In her view, this shows that the EU member states fail to reach agreement on far-reaching sanctions where these could harm their

108 Council of the European Union, 'Human rights and democracy in the world, etc.', *supra* n. 83.

109 European Parliament resolution of 16 December 2010, *supra* n. 89, par. 10 en 21.

110 Kirsten Shoraka, *supra* n. 10, p. 78.

111 Ulrich Sedelmeier, *'The EU's role as promoter of human rights and democracy. Enlargement policy practice and role formation'*, in O. Elgström, M. Smith (eds), The European Union's Roles in International Politics, New York: Routledge, 2006, pp. 118-135, at p. 121.

112 Manfred Nowak, *'The Development of Human Rights in Europe*', in European Yearbook on Human Rights, edited by Wolfgang Benedek, Florence Benoît-Rohmer, Wolfram Karl and Manfred Nowak, Vienna/Graz, Neuer Wissenschaftlicher Verlag 2010, pp. 31-47, at p. 42.

own interests (either political or economic).[113] Similarly, the EU's multilateral policy for the countries concerned is riddled with inconsistencies. If the EU wishes to fulfil its role as 'proactive cosmopolitan' it will have to tackle these inconsistencies because, according to Smith, 'taking a principled stance and then backtracking on it fundamentally damages the credibility and legitimacy of its role'.

The same conclusion is reached by Stefania Panebianco on the basis of an empirical analysis of the EU's role as 'norm exporter' in the Mediterranean:

> '(...) although the EU tends to consider human rights and democracy (HRD) as distinct elements of its international identity and HRD promotion permeates the EU political rhetoric, the EU's promotion of HRD seems more part of political discourse than a priority of international action. The impact the EU had on Med countries in terms of normative influence remains weaker than might be expected'.[114]

According to the author, the so-called Barcelona process, which is intended to put relations with the Mediterranean countries in a regional framework, has not proved effective in transferring norms and values from the EU to the countries concerned. The Barcelona Declaration, the Euro-Mediterranean Agreements and the political declarations within the Euro-Mediterranean Partnership (EMP) are based on the support of *all* partners for human rights and democratisation. However, there is a substantial discrepancy between the official declarations and the manner in which human rights and democratic principles are applied in practice. Panebianco notes that 'The EU cannot in the long run blindly accept that the leaders of the Med countries adhere to common political documents and treaties and officially plead for democratic institutions which are only formally recognized or partially implemented'. These can be seen to be prescient words in the light of what we now know.[115] She advocates the use of financial instruments to enforce democratic change and the use of monitoring instruments to oversee progress. A top-down strategy is essential for this purpose. Panebianco notes that there is a very marked difference in effectiveness between the accession process and the Barcelona process.

Various conclusions can also be drawn from the application of human rights clauses and human rights dialogues by the EC/EU. For example, human rights clauses are not applied uniformly. Agreements concluded before 1995 with countries such as Canada, China and the ASEAN countries were not 'renegotiated' in order to include the clause. In 1997 the EU signed a less formal declaration with Australia because that country refused to include a human rights clause, and the same scenario occurred in relation to New Zealand.[116]

113 Karen E. Smith, *'The limits of proactive cosmopolitanism. The EU and Burma, Cuba and Zimbabwe'*, in O. Elgström, M. Smith (eds), The European Union's Roles in International Politics, New York: Routledge, 2006, pp. 155-171, at p. 168.

114 Stefania Panebianco, *'The constraints on EU action as a 'norm exporter' in the Mediterranean',* in O. Elgström, M. Smith (eds), The European Union's Roles in International Politics, New York: Routledge, 2006, pp. 136-154, at p. 150.

115 Ibid., p. 151.

116 See Kirsten Shoraka, *supra* n. 10, p. 71 and Karin Arts, *'Development Cooperation and Human Rights: Turbulent Times for EU Policy'* in M. Lister (ed), New Perspectives on European Union Development Cooperation, Oxford: Westview Press, 1999, pp. 7-27, at p. 17.

If a human rights clause is included in an agreement, this often has few if any consequences. Reference was already made above to human rights clauses in partnership agreements with North African countries. These are hardly ever invoked. In general, the implementation of human rights clauses is a problem because it is not always clear when and how they should be invoked. As a result, it is relatively easy to apply them selectively.

It is apparent from both the relevant literature and most of the interviews conducted in Brussels that the Cotonou Agreement has the best drafted and most effective framework for human rights clauses in terms of both content and the procedure for application. Possibly this framework developed jointly by the EU and the ACP countries could therefore be used more for other cooperation agreements. The Lomé IV Convention of 1989 (the 'predecessor' of the Cotonou Agreement) was the first agreement to contain a complete and specific human rights clause. In later treaties this was expanded to become what was termed an 'essential element' of the agreement. Failure to comply with such an element may result in 'appropriate measures', including suspension of the cooperation. Unless there is 'special urgency' such measures may be taken only after the parties concerned have consulted each other in the course of a prescribed procedure.[117] An invitation to engage in consultation must give reasons. The maximum length of such consultations is 60 days. After the conclusion of consultations both parties usually announce their findings via the media, e.g. by means of press releases. Nowadays, the EU normally publishes any invitation to engage in consultation and any Council decision to take 'appropriate measures' in the Official Journal. It often also states in such a decision in what circumstances the 'appropriate measures' will be revoked. Decisions of this kind are automatically reviewed at periodic intervals. The recording by the EU of the main reason for human rights consultations under the Cotonou Agreement and the broad outline of the course of the consultations and any penalty measures imposed make an important contribution to both the transparency and the visibility of the entire process.

Nonetheless, the way in which the Cotonou Agreement works in practice with respect to the human rights clause still leaves much to be desired, as already noted by the EP[118] and many authors.[119] Often too little is still done to provide positive support and thus avoid the adverse effect of human rights clauses. As regards the content of the clauses the EU alienated certain ACP countries during the negotiations/renegotiations of the Cotonou Agreement by exerting great political pressure on them to extend the scope of the human rights provisions in that Agreement to cover (mainly) EU interests and agendas, for example in the fields of migration, weapons of mass destruction and the role of the International Criminal Court. Moreover, human rights clauses have been and continue to be applied selectively in the development cooperation relationship between the EU and the ACP countries. For example, the issue of imposing trade sanctions on Nigeria was never seriously discussed (even in the 1990s at the time of the Sani Abacha regime), although the trade in oil was and still is a very important source of income for Nigeria.

117 Article 96, Cotonou Agreement.

118 European Parliament resolution of 16 December 2010, *supra* n. 89, par. 115.

119 See Kristen Shoraka, supra n. 10, pp. 34-37; and Karin Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention*, The Hague: Kluwer Law International, 2000, and *'Political Dialogue in a "New" Framework'* in O. Babarinde and G. Faber, The European Union and the Developing Countries: The Cotonou Agreement, Leiden, Nijhoff, 2005, pp. 155-175.

More generally, the effectiveness of human rights dialogues is a subject of debate. Hitherto, this effectiveness appears to have been determined by the fact that the candidate states and the ACP countries are '*demandeurs*'. In relations with these countries it is relatively easy for the EU to exert pressure and even make demands, whereas few if any opportunities for this exist in dealings with other countries. For example, the human rights dialogue with China has been conducted for 15 years, but the EP and the NGOs note that there has been little visible progress.[120] The EU dialogue with Russia is also described as disappointing.[121] The AIV would note here that the very fact that it is possible to conduct a dialogue with these countries about matters that were previously considered to come purely within the realm of national sovereignty is in itself valuable. But it should nonetheless be noted that human rights dialogues provide an effective framework mainly where the non-EU country is prepared to make a binding commitment. Where this is not the case, the instrument would probably have greater effect in modified form, for example through the use of specific indicators of actual progress.

Naturally, the above account does not by any means give a complete picture of the results of EU interventions in the human rights field. However, it does show that the effectiveness of various aspects of EU action is open to question and that a range of parties have identified a lack of coherence, consistency and credibility. These three qualities are essential conditions for effective policy. This will be dealt with in the next section.

III.4 Conditions for effectiveness

Coherence

As regards the EU's external human rights policy, the AIV distinguishes between two forms of coherence: first, coherence within the EU policy itself and, second, coherence between the EU's policy and that of the individual member states.

The strength of the EU is that it has a wide range of instruments available to shape its external policy, varying from political dialogue and diplomatic pressure to trade and fisheries agreements and development cooperation. The Union is also an economic and financial player of importance. An overview of its external human rights instruments was given in section 1 of this chapter. It is important for all instruments available to the EU to be deployed coherently so that they can strengthen each other wherever possible.

The basis for a coherent external human rights policy has been laid in the treaties. For example, the umbrella article 21 TEU provides that democracy and human rights are guiding principles for the EU's action on the international scene.[122] And, in the field of trade, article 205 TFEU, which contains guiding principles for the common trade policy, provides that: 'The Union's action on the international scene (...) shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union.' One of the provisions to which it refers is therefore article 21.

120 European Parliament resolution of 16 December 2010, *supra* n. 89, par. 164.

121 Both points emerged in interviews of NGO representatives in Brussels on 18 March 2011. For an analysis of relations between the EU and Russia see AIV, 'Cooperation between the European Union and Russia: a Matter of Mutual Interest', advisory report no. 61, The Hague, July 2008.

122 See chapter I.

Ultimately, however, it is naturally, above all, a matter of preparing and implementing coherent policy in practice. This also means, for example, that the outcome of human rights dialogues must be incorporated into broader political dialogues and into summits with the relevant third countries. It will also be necessary to look more closely at the relationship between economic cooperation and respect for human rights in dealings with third countries.

The last point is connected with the question of conditionality. Demanding respect for human rights as a condition for providing assistance or entering into economic relations is a complex issue,[123] and the AIV considers that it should be dealt with cautiously. A positive approach and establishing a dialogue should always come first. Nonetheless, where a country commits gross or systematic violations of human rights and other instruments have proved ineffective, it can be very important to have the option of imposing economic or other sanctions or suspending aid (or the threatening to do so) as a last resort. In extreme cases relations could be broken off entirely. However, the complexity of the choices that must be made in such cases should not be underestimated. Human rights clauses should be applied rationally and their application should be geared to the specific situation. The AIV considers that at present there are still too many cases in which no use is made of existing human rights clauses. This is unsatisfactory and undermines the credibility of the EU's human rights policy.

Specific expertise is available at the human rights department of the EEAS, but knowledge of human rights matters is also needed in the geographical departments and fields such as trade, development and energy, as argued above. At present human rights are still regarded too much as the domain of a relatively small group of experts. As noted previously, the coherence of EU policy requires the mainstreaming of human rights in the forums of Brussels. Such coherence also requires close cooperation between the organisations in Brussels and the EU delegations in the field and coordination of EU action in Brussels with action at the multilateral missions in New York and Geneva. The results of the Universal Periodic Review carried out in the UN Human Rights Council and of the consideration of country reports by UN treaty committees can be used in decisions on the allocation of EU resources. Conversely, matters arising bilaterally can also be raised in the multilateral system.

The second form of coherence is also important, i.e. the requirement that action taken by the EU should as far as possible be in keeping with that of the EU member states. For example, in a 2001 Communication, the Commission called for '(...) greater consistency and coherence between the European Community, other European Union and Member State activities, to work for a transparent approach to human rights and democratisation, which is coherent and consistent between countries and regions and avoids double standards and makes use of all available instruments.'[124] Various people interviewed in Brussels revealed that the actions of the member states are sometimes contrary to those of the EU or what is expected of the EU and that they sometimes allow the EU to 'do their dirty work' and then adopt a very different tone in their bilateral dealings with the countries concerned. Naturally, this sends a very ambivalent message to third countries and undermines the effectiveness of EU policy. The problem could to some extent be solved by keeping better track of the

123 Lorand Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford, Oxford University Press, 2005.

124 COM, '*The European Union's Role in Promoting Human Rights and Democratisation in Third Countries*', 252 final, 8 May 2001, Annex 2 (Action Points).

bilateral human rights policies of the member states and the activities undertaken by the missions of the member states and the EU delegations in third countries. As far as the AIV is aware, no such overview exists at present. If there is indeed to be a division of responsibilities within the EU, as advocated by the Dutch government (at the start of this chapter), such an overview will be essential and will have to be regularly updated.

Consistency

Consistency involves, above all, the rational use and application of the available instruments. The basic principle should be that there is no uniform solution for all situations and that there are also no miracle cures that will work directly in all cases. However, the EU human rights policy could be based more strongly on the rapid development of international law on human rights, both under treaties and in customary law. On this basis it is now generally accepted that states have a responsibility not only to promote and protect the human rights of their own population but also to contribute to the protection and promotion of the human rights of the populations of other states. This is reflected in the principle of the 'Responsibility to Protect'.[125] Such a principle would make it possible to reduce the number of cases in which double standards are applied or the latest trend is unquestioningly followed. This could help to strengthen the legitimacy and effectiveness of the human rights policy.

If the Responsibility to Protect were emphasised as a major principle of EU human rights policy this could also serve as a basis for defining existing policy instruments more clearly and tightening up their provisions, thereby increasing the chances of consistent policy implementation. The human rights clauses are a good example. They are often drafted in general terms, whereas the clauses could be made more specific and geared to specific countries. The consequences of non-compliance with the clause could also be defined. As noted previously, the Cotonou Agreement could serve as an example. Various people interviewed in Brussels emphasised the importance of making good arrangements before agreements are concluded. Once cooperation agreements are in existence, there is no guarantee that any human rights clause they contain will actually be invoked. However, the likelihood of this could be increased if clear arrangements are made in the preparatory stage.

The need to avoid applying double standards is often mentioned in this connection. As noted previously, the AIV considers that a one-size-fits-all approach cannot work. It therefore favours a customised policy for third countries. The effectiveness of instruments differs from country to country. What may be possible in one country may be impossible or pointless elsewhere. In China, for example, the training of trade union lawyers is an effective instrument. They can in turn help to ensure that China's own laws are enforced. What is the most effective and feasible solution should be assessed on a country-by-country basis. The human rights strategies adopted for a particular country should clearly reflect what instruments have been chosen and what results are expected. It is essential in this connection for the EU to give further consideration to how it can deal most effectively with emerging powers such as China and India, as well as Russia, and the impact these countries have on the rest of the world (see also below). Here too relevant material generated in a UN framework on the basis of agreed texts can play a useful role.

125 For more information see: AIV, 'The Netherlands and the Responsibility to Protect: the responsibility to protect people from mass atrocities', advisory report no. 70, The Hague, June 2010.

Credibility

The effectiveness of the EU's human rights policy depends on the credibility of the action it takes, which in turn depends in part on the coherence of the policy and its consistent application. In the AIV's opinion, the EU could also strengthen its credibility by paying attention to the following points: pursuing a credible policy in relation to countries such as the United States, China, Russia and Israel, being aware of the limitations of the traditional state-to-state approach and external criticism; and being willing to pursue a meaningful dialogue.

If it wishes to be credible elsewhere, the EU must also pursue a credible foreign policy (including human rights policy) in relation to the US, China, Russia and Israel. This policy should be binding on both the EU and the member states. Various critical observations can be made about the existing policy. In the case of Israel there is the recent decision to debate the uprating of the Association Agreement rather than conduct a critical human rights dialogue, for example about Israel's actions in the last Gaza War. As regards the relationship with China, the EU has not succeeded since 1989 in indicating jointly and publicly on what terms the arms embargo against China can be lifted. And, in the case of Russia, the ECtHR has now handed down more than 130 judgments against it (for example in cases involving torture, murder and enforced disappearance) without any move on the part of the EU to make this a visible part of its Russia policy. In the case of the US it is hard to obtain a complete picture of EU policy as a number of human rights démarches remain secret. What is in any event clear is that the situation in Guantánamo Bay and other counterterrorism measures taken by the US warrant a critical stance. It has also become known that in the spring of 2010 Germany and Denmark called internally for the formulation of a clear policy, in particular on human rights in the US, China and Russia. This initiative may possibly serve as a basis for further policy formulation on this subject.

For the sake of its credibility the EU should also recognise that the traditional state-to-state approach has limitations and that influencing policy by levelling criticism from outside is becoming increasingly difficult, partly due to the growing influence and assertiveness of many emerging powers and developing countries. The EU will have to consider how it wishes to deal with this reality. Conducting a dialogue premised on equality appears to have a greater chance of success, but how this relates to the issue of conditionality mentioned above must then be considered as well. Ultimately, achieving anything will often prove difficult if the third country concerned is unwilling to cooperate. The challenge is therefore to convince countries that it is in their interests to cooperate. An alternative to the carrot and stick approach would be to raise matters of importance to the country concerned, such as economic, social and cultural rights. Preparing human rights strategies for each country can help because they can take account of both the specific situation and the problems experienced by the EU delegation in the country concerned. Besides the state-oriented approach the AIV considers it advisable to encourage change from the bottom up. Human rights cannot be promoted without the involvement of independent social actors, including trade unions. They should therefore be supported, for example by the EU. Where necessary and possible, the EU delegations could support the work of independent NGOs, civil society organisations and media in third countries, for example financially. They could also consult these organisations about the strategies to be followed and provide them with relevant information.

In addition, the EU will have to be prepared to conduct a real dialogue on human rights policy with third countries. This could be based, for example, on the UN human rights treaties. Although the EU is admittedly not a party to these treaties (with the exception of the UN Disability Convention), the member states are. This means that it should be possible to

hold the EU accountable (through its member states) for violations and abuses that occur within the EU. Examples are the situation of the Roma people, LGBT rights and the position of migrants. This point emerged clearly from an interview at the Indonesian embassy in Brussels,[126] during which the Indonesian representatives stated that in their view the EU and Indonesia were facing similar problems (fragmentation and the rise of extremism) and could therefore learn from one another. They also raised the question of how the EU deals with its own internal human rights problems. This touched on a sensitive issue, namely to what extent the EU is able – and the member states willing – to raise internal human rights issues. This will be dealt with at length in the next chapter, but it is in any event clear that the credibility of the EU's external human rights policy is closely connected with the manner in which it handles human rights internally. The AIV realises that, in general, the human rights situation in the EU compares favourably with that of some of the countries that wish to hold the EU to account for its own internal human rights problems. Nonetheless, the EU would do well to adopt a more critical attitude to its internal situation and be more receptive to criticism from third countries on this subject.

A concept that is often mentioned together with credibility is visibility. The AIV believes, as many interviewees in Brussels have affirmed, that these two notions are not always compatible. Visibility must be dealt with cautiously since publicity can put lives at risk and because a policy of public confrontation can sometimes be counterproductive. Due care must be exercised when taking decisions of this nature. High Representative Ashton has undertaken to meet human rights defenders, if possible, whenever she goes abroad, but strategies for human rights defenders are not always disclosed because of the possible risk that this might entail for the persons concerned. Although almost every EU human rights dialogue is publicised, not all the details are made known. Although this in itself may be justifiable, it should not lead to a state of affairs where publicity is given only to processes and substantive information is omitted as a matter of course.[127] The visibility of the human rights policy and concrete actions is of key importance not only to the credibility of policy, both inside and outside the EU, but also because of the pressure generated by public statements or activities.

Finally, it should be noted that the effectiveness of EU human rights policy is mainly dependent on the political will of the member states. A complicating factor is that the CFSP (under which many human rights instruments fall) is not supranational in character. As Shoraka notes, 'Despite the fact that all Member States recognise that an effective EU will always exert more power and influence than any of them could individually, there is little appreciation of how irreconcilable the maintenance of national authority in foreign policy is with a common foreign policy.'[128]

126 Interview with staff of the Indonesian embassy in Brussels on 18 March 2011.

127 In the foreword to *World Report 2011: A Facade for Action* Human Rights Watch director Kenneth Roth writes: '(...) the EU seems to have become particularly infatuated with the idea of dialogue and cooperation, with the EU's first High Representative for Foreign Affairs and Security Policy, Catherine Ashton, repeatedly expressing a preference for "quiet diplomacy" regardless of the circumstances.'

128 Kirsten Shoraka, supra n. 10, p. 72.

III.5 EU action in a multilateral context

Much of what has been dealt with in this chapter applies to both the bilateral and multilateral activities of the EU, particularly as regards the conditions for effective policy. Multilateral engagement also presents specific challenges to the EU. This is also the subject of one of the questions on which the advice of the AIV has been sought: 'How can the Union's participation in international human rights forums like the UN, the Council of Europe and the OSCE be strengthened, without concerted action leading to diminished political impact or dilution of voting power?'

In answering this question the AIV will concentrate primarily on the UN, since the issues raised seem especially relevant to that body. With respect to the Union's relationship to the Council of Europe and the OSCE it is more accurate to speak of the EU's *cooperation with* these institutions rather than *participation in* them. Nevertheless, the AIV's observations about the UN can apply mutatis mutandis to the EU's involvement in other multilateral human rights forums.

As pointed out at the start of this chapter, EU member states often coordinate their human rights activities at the UN with each other, as their powers in this area have not been transferred to the EU. Nonetheless, in practice reference is generally made to the 'EU' and 'EU action'. This terminology will therefore be used here by the AIV as well, although, strictly speaking, in most cases what is meant is coordinated action by the EU member states.

EU action in relation to human rights at the UN has been critically examined by various authors in recent years, in particular by the European Council on Foreign Relations (ECFR). Since 2008 the ECFR has published an annual report on the EU's performance, particularly in the Human Rights Council. In general, the picture that emerges from the articles and reports is not very rosy. For example, it is noted that the EU member states tabled fewer resolutions in the Human Rights Council than during the last years of the Commission on Human Rights.[129] The reason given was that the EU member states had not submitted any further country-specific resolutions in order to avoid arousing too much opposition and suffering possible 'defeats'. Moreover, they had chosen more often than in the past to aim for consensus, for example by avoiding language that might cause offence.[130] According to the authors, this was to some extent due to the decision to focus the EU's efforts, in part, on making the Human Rights Council a viable and effective UN body. However, in their view, these efforts to achieve consensus have been made at the expense of the EU's ambitions in the human rights field. Sensitive issues, such as pressing for country-specific resolutions and special sessions, are avoided.[131]

The authors also note that EU member states are having difficulty in influencing the agenda of the Human Rights Council and its results. This is mainly inferred from the quantitative

129 Karen Smith, 'The European Union at the Human Rights Council: speaking with one voice but having little influence', *Journal of European Public Policy*, 17:2, p. 232. The list of country-specific resolutions tabled by the EU during the last years of the Commission on Human Rights but no longer tabled in the Human Rights Council is fairly long. Among the countries to which these resolutions relate are Belarus, Chechnya, Congo, Iran, Iraq, Turkmenistan and Zimbabwe.

130 Ibid., p. 232.

131 Ibid., p. 236.

data, such as the number of times that 'the EU' was outvoted. For example, EU member states were in the minority in 55 of the 70 votes held during the first twelve sessions of the Human Rights Council (i.e. 78.5%). They were also in the minority in the votes held at eight special sessions. Six of these sessions related to human rights violations by Israel and had been convened by the Organisation of the Islamic Conference (OIC). The EU's ability to influence a large number of states is also said to be limited. In general, only a small group of states align themselves with the EU.[132] According to the analyses, the EU is isolated above all in matters put to the vote by the OIC and the African group, mainly on issues relating to the Middle East and blasphemy. The limits of the EU's influence within the Human Rights Council also became apparent during the special sessions on Congo and Sri Lanka.[133]

The ECFR believes that the EU's influence is also on the wane in the General Assembly of the United Nations (UNGA). According to the ECFR, the support received by the EU from other states in human rights issues – known as the 'voting coincidence' – fell from 71% in 1998 to 42% in 2009-2010. The voting coincidence of China and Russia was 69% (for both countries) in 2009-2010.[134] Although the EU is still capable of putting matters on the agenda, other parties are increasingly determining the outcome of the discussions both in New York and in Geneva.[135]

However, the picture outlined above needs to be qualified somewhat. First, it should not be forgotten that the composition of the HRC and relative voting strengths differ from the former CHR.[136] This means that votes sometimes turn out differently and that the EU must in some cases operate more cautiously in order to achieve the desired result. Second, these

132 Ibid., p. 234. These are usually countries such as Canada, Japan, South Korea, Switzerland and Ukraine.

133 Karen Smith, *supra* n. 129, p. 234. When fighting broke out in East Congo in November 2008, a special session was convened at the request of France, acting on behalf of the EU, to discuss human rights matters. The EU tabled a resolution stressing the importance of cooperation with the International Criminal Court and calling on Congo to allow access to special rapporteurs on torture and extrajudicial executions. Under pressure from the African Group, however, the EU withdrew this resolution. Ultimately, the Human Rights Council passed a resolution submitted by the African Group which contained no reference to either the International Criminal Court or the special rapporteurs. In the case of Sri Lanka, the EU member states requested a special session following the defeat of the Tamil Tigers by government forces in the spring of 2009. However, Sri Lanka submitted its own resolution congratulating itself on defeating the rebels. Various EU amendments were rejected as the result of a 'no-action motion'. The resolution ultimately passed was very complimentary about the attitude of the Sri Lankan government. See UN Human Rights Council res. S11/1, Assistance to Sri Lanka in the promotion and protection of human rights, 27 May 2009.

134 Richard Gowan and Franziska Brantner, *The EU and Human Rights at the UN – 2010 review*, ECFR, London, September 2010, p. 3. The US had a voting coincidence of 75% in 1998 but only 40% in 2010. In 1998 the voting coincidence of China was approx. 40% and that of Russia approx. 59%.

135 Richard Gowan and Franziska Brantner, *The EU and Human Rights at the UN – 2009 Review*, ECFR, London, September 2009, p. 7.

136 The representation of the various groups in the Commission on Human Rights (CHR) (total of 53 seats) was as follows: African states: 15; Asian states: 12; East European states: 5; Latin American and Caribbean states: 11; and West European and other states: 10. The representation in the Human Rights Council (HRC) (total of 47 seats) is: African states: 13; Asian states: 13; East European states: 6; Latin-American and Caribbean states: 8; and West European and other states: 7.

analyses are based mainly on quantitative data and thus give an incomplete picture. They do not take into account the nature and importance of the resolutions and votes concerned. Consequently, the EU's engagement and results are not analysed in terms of their content. Third, most of the analyses pay relatively little attention to the *internal* effectiveness of the EU. Analyses show that this internal effectiveness has increased. This is mainly apparent in the HRC, in which EU member states tend to act more as a unit than formerly in the CHR. In many declarations and interventions the EU member states speak with one voice. This is indicative of a high level of coordination between the member states.[137] Through concerted action the EU member states also derive other advantages, particularly the sharing of knowledge and background information. Furthermore, member states that might not have considered certain human rights issues independently are now involved in them.

Nonetheless, the EU undeniably faces a major challenge in wielding its influence and achieving results in the human rights field within the UN. The problem is partly due to the fact that the EU, as a largely supranational organisation, operates in the multilateral context of the UN, which is predominantly intergovernmental in nature. If the EU member states were to consistently speak with one voice, the individual opinions of the 27 member states would be lost, which would not automatically represent a gain in the UN context. In human rights matters (which generally come under the CFSP) the member states are, in principle, free to act in a national capacity. Moreover, they may feel less pressure on them in the UN to act as an EU group.[138] As a result, the member states may actually end up not speaking with one voice. Naturally, however, discord within the EU is taken as a sign of weakness. Striking a balance is no easy matter, but the best course of action would seem to be to coordinate the positions as far as possible but also, where possible and desirable, allow a national voice to be heard (as now also often happens in practice).

Another explanation for the EU's difficulty in operating effectively at the UN lies in the global power shifts outlined in chapter I. The growing confidence and assertiveness of countries such as China, India, Brazil and South Africa as well as other developing countries is a telling factor. The EU will have to devise an adequate response if it wishes to retain any sort of powerbase. This is becoming harder because of increasing polarisation between 'North' and 'South' within the UN system in general and the HRC in particular.[139] The Israeli-Palestinian conflict is a constantly divisive issue on which the developing countries exhibit great solidarity as a group. This polarisation prevents flexible action within and by the UN, although flexibility is precisely what is needed in order to deal efficiently with human rights

137 Karen Smith, *supra* n. 128, p. 229. Smith notes that the EU vote was split in only three cases in the Human Rights Council. This occurred mainly in the case of resolutions on issues related to the Middle East and took place during the following sessions: 1) the third special session on human rights violations during Israeli military attacks in the Occupied Palestinian Territories (France abstained and the other member states voted against); 2) a regular session in March 2009 when a vote was held on a similar subject (some member states abstained and others voted against); 3) the 12th special session in October 2009 on war crimes during the Gaza War in 2009.

138 Karen Smith, *supra* n. 128, p. 224.

139 Ibid., p. 235. The EU is often faced with strong resistance from 'Southern' countries such as Egypt, Pakistan, China, South Africa and Cuba and, to an increasing extent, Russia as well.

crises.[140] Moreover, the polarisation makes it difficult for the EU to convince more moderate countries to side with it because this would fracture the existing relationships. For example, states angling for a permanent seat on the Security Council (including Brazil, India and South Africa) are unlikely to be tempted to jeopardise the support of developing countries by choosing to side with the EU. Forging cross-regional coalitions in which states from different regions act together is therefore hard to achieve.

However, none of this means that the EU is powerless. It can enhance the effectiveness of its own actions at the UN by modifying its approach in various ways. As already noted on many occasions, the EU should ensure that the very labour-intensive and time-consuming process by which the 27 member states coordinate their activities does not occur entirely at the expense of outreach to third countries and other regional groups. This is still too often the case, and the coordination even sometimes seems to become an end in itself rather than a means of achieving the desired result at the UN.

Unlike the US, the EU is not particularly adept at lobbying. An additional point that certainly needs to be addressed is that UN-related human rights issues are hardly ever raised in bilateral relations between the EU and third countries. What happens in Geneva is to a large extent divorced from the external actions of the EU as directed from Brussels.[141] Moreover, the EU lacks a clear strategy for its actions at the UN. COHOM does relatively little to identify multilateral objectives and formulate strategies for achieving them. As a result, the EU's human rights priorities at the UN are not always clear.[142] Such a situation is hardly conducive to the effectiveness of the EU. Greater communication and coordination between Brussels, Geneva, New York and the national capitals could make a major contribution to strategic – and hence probably more effective – action on the part of the EU at the UN. EU initiatives in both the HRC and the UNGA could in this way be supported by stronger bilateral diplomacy, for example in relation to countries such as China and Russia.[143]

In the HRC the EU is often accused of being selective and applying double standards.[144] The Universal Periodic Review (UPR) provides an ideal opportunity to show that the EU member

140 Richard Gowan and Franziska Brantner, *A Global Force for Human Rights? An Audit of European Power at the UN*, ECFR, London, September 2008, p. 31.

141 Karen Smith, *supra* n. 129, p. 235. This has been known for some time. The Commission indicated as long ago as 2003 that the bilateral political dialogues conducted by the EU should also reflect the EU's objectives at the UN. See European Commission, 'The European Union and the United Nations: the choice of multilateralism', COM (2003) 526 final, 10 September.

142 Karen Smith, ibid., p. 237. See also: 'European Parliament Resolution of 14 January 2009 on the development of the Human Rights Council, including the role of the EU', P6_TA (2009) 0021.

143 See: Richard Gowan and Franziska Brantner, *The EU and Human Rights at the UN – 2009 Review*, *supra* n. 134, pp. 7-8.

144 Karen Smith, *supra* n. 129, pp. 235-236. For example, the EU legislation on migration has not only met with opposition among Latin American and African countries but also from the UN organisation itself. In a letter to EU representative Kouchner, Louise Arbour, the High Commissioner for Human Rights, has criticised the EU's 'return' directive and called for compliance with international human rights in EU migration policy. See: Richard Gowan and Franziska Brantner, *A Global Force for Human Rights? An Audit of European Power at the UN*, *supra* n. 139, p. 45.

states are prepared to face criticism, even among themselves. 'Light coordination'[145] of the EU member states during the preparation of the UPR would give them the opportunity to examine internally one another's human rights situation.[146] However, this should not result in a mutual agreement to refrain from asking questions that could necessitate modification of national legislation, as apparently happened in the past (according to the ECFR's analyses).[147]

Finally, given the delicate balance of power described above, the EU will have to invest in building new coalitions. New incentives will have to be created to encourage third parties to display flexibility and enter into coalitions that cut across existing ties. This requires the development of new discussion forums and a willingness to enter into dialogue. Moreover, EU member states will have to show a greater willingness to address their own shortcomings in the human rights field.[148] This last point will be addressed in the next chapter.

III.6 Conclusion

For the EU member states, conducting a human rights policy through the European Union has important advantages of scale. On the other hand, this entails the risk of policy being diluted to the level of minimum consensus.

Over the years the EU has amassed a wide range of instruments for external human rights policy. These run the gamut from the preventive to the supporting to the reactive. Although the present set of instruments is sufficiently extensive, there is a need for clear priorities and more coherence between and systematic employment of the available instruments and for the promotion of implementation, partly through regular evaluations and the exchange of information.

The human rights strategy announced by High Representative Ashton for 2011 could meet this need. It could also provide valuable support to the global human rights system if the EU confirmed that it considered itself to be bound by the UN's core human rights instruments and committed to the work of the HRC, including the implementation of the Universal Periodic Review. In addition to the human rights strategy, the introduction of country-specific strategies in the human rights field would be worthwhile. These strategies could provide a specific framework for the policy and the use of instruments and resources for the country concerned.

Various EU players are active in external human rights policy. The High Representative and the EEAS are the most recent additions to this group and are gradually fleshing out their respective roles. It is important for the EEAS, both in Brussels and at the delegations in third countries, to be given sufficient knowledge and capacity in the field of human rights. The Council could function much more effectively if COHOM were transformed into a Brussels-based working group that met more frequently. By strengthening COHOM's role and increasing the capacity of the EEAS, it might be possible to narrow the gap created by the

145 During the UPR the EU makes use of 'light coordination'. In other words, the presidency does not speak on behalf of all 27 member states, but attempts by means of coordination to ensure concerted action by the member states. See: Richard Gowan and Franziska Brantner, ibid.

146 Ibid., p. 62.

147 Ibid., p. 45.

148 Ibid., p. 58.

discontinuation of the rotating Council Presidency. The European Parliament's opportunities for decisive action on human rights could benefit from the creation of a fully-fledged human rights committee (instead of the subcommittee that now exists), especially given the powers it has acquired with respect to approving agreements (including trade agreements with third countries).

The EU's external human rights policy in practice presents a mixed picture. The integration of human rights and democratisation into accession policy is generally regarded as an example of successful and effective action by the Union. But in its relations with other parts of the world, there is still considerable room for improvement in how human rights policy is put into practice. Selectivity, inconsistency and the failure to implement human rights clauses and procedures systematically are hampering effective action. Despite a number of shortcomings, many have commended the approach to human rights, both substantive and procedural, embodied by the Cotonou Agreement. This could serve as an inspiration and model for other partnerships between the EU and third countries. Experience teaches that human rights dialogues or consultations are mainly effective only if the countries concerned are prepared to commit themselves to human rights. In relations with, for example, China and Russia, the human rights dialogue with the EU has had little result to date, and the question arises of whether other approaches should be considered.

The AIV sees three general conditions for an effective EU human rights policy: coherence, consistency and credibility. Coherence is required both within EU policy itself and between the EU's policy and that of individual member states. There are sufficient treaty safeguards in place to guarantee the internal coherence of EU policy. This is not, however, the case when it comes to the preparation and implementation of the policy. The coherence between the policy of the EU and that of member states should also be enhanced. This can be encouraged in a variety of ways, for example by improving information-sharing practices.

To ensure the consistency of the EU's external human rights policy, it is important to avoid applying unfounded double standards. Nonetheless, to be effective a policy must be customised to some extent, with a focus on the actual conditions in a given country or for a given theme. Using relevant material that has been generated in a UN framework can provide a foundation for such a customised approach. Coherence and consistency are, in turn, prerequisites for credibility. The EU can be credible in its external human rights actions only if it and its member states assume a critical yet constructive stance towards important countries like the US, China, Russia and Israel. Furthermore, the EU needs to acknowledge that there are limits to the traditional state-to-state approach and the scope for influencing policy by criticism. A more promising approach would be to encourage change from the bottom up while engaging in a dialogue premised on equality, in which the EU must also be willing to address human rights problems within its own borders.

Multilateral engagement, particularly in a UN context, presents the EU with specific challenges. These are due in part to the fact that the EU operates within the UN as a largely supranational organisation in an intergovernmental framework. Moreover, the changing international balance of power makes it more complicated for the EU to take decisive action and form cross-regional coalitions. Despite this, the EU can still certainly improve its effectiveness by devoting more time and attention to outreach to third countries, coordination between Brussels, Geneva, New York and the national capitals, better coordination of bilateral and multilateral policy, and building new coalitions.

IV Coherence between the EU's internal and external human rights policy

The EU regards human rights as an important part of its international identity and presents itself as a normative force in this field, as was noted in the previous chapter. At the same time, the question arises of how far the EU manifests an internal commitment to human rights commensurate with its professed commitment to human rights beyond its borders. Civil society organisations are among those highly critical of the human rights situation within the Union, for example as regards the treatment of the Roma and the policies on asylum and migration, sexual orientation, detention and violence against women and children.[149] The Union's credibility in the human rights field has also been called into question by the cooperation of some member states in certain counterterrorism activities.[150] It should be noted for the sake of clarity that the criticism only partly concerns the policy of the EU and its institutions. It is also levelled against the policies pursued by the member states themselves. However, it is hard to see these elements as being disconnected, and they will be regarded by many – certainly by 'the outside world' – as inextricably linked. This will be dealt with below in more detail (see V.1).

The relationship between the EU's internal and external human rights policy has been much discussed. The disconnect between the two is often mentioned as an important factor that undermines the EU's credibility on the international scene. Calls are regularly made for changes in this relationship in order to enable the Union to play a strong and effective role externally. In a leading article, to which reference has already been made, Philip Alston and Joseph Weiler stated as long ago as 1999 that:

> 'At the end of the day, the Union can only achieve the leadership role to which it aspires through the example it sets to its partners and other states. Leading by example should be the *Leitmotiv* of a new European Union human rights policy.'[151]

In the same article the authors referred to an element of schizophrenia within the EU regarding its approach to the internal and external human rights policy. This question is still described as a major problem in more recent literature. For example, Wolfgang Benedek states, 'A central challenge, which will become even more important in the future, is (...) whether the EU will strive to give equal attention to the external dimension of human rights promoted in the world and the internal dimension of the protection of fundamental rights within the European Union.'[152]

This chapter will examine what the lack of coherence between the internal and external human rights policy entails, what the main gaps in the internal human rights policy are, and

149 See Amnesty International, *The EU and human rights: making the impact on people count*, London/Brussels, 2009; and Kristi Severance, *France's expulsion of Roma migrants: a test case for Europe*, Migration Policy Institute (2010), <http://www.migrationinformation.org>.

150 See, for example, Monica den Boer, *'The EU and Counter-Terrorism: Human Rights in the Balance?'*, in URIOS, The Law on Terror, Wolf Legal Publishers 2003, pp. 29-45.

151 Philip Alston and J.H.H. Weiler, *supra* n. 70, p. 7.

152 Wolfgang Benedek, *supra* n. 88, p. 108.

how these problems could be resolved, at least in part. The first part of the chapter deals with the existing situation. The second part considers how the EU's internal human rights policy could be strengthened in such a way as to create greater coherence between it and the (intended) external action.

IV.1 The EU's internal human rights policy: the present position

In order to analyse the problem it is necessary to have a precise definition of what is meant by the 'EU's internal human rights policy'. Broadly speaking, it has two parts. The first consists of the law, policy and actions of the EU and its institutions, bodies and agencies. The second is the human rights policy of the member states. The latter may concern both the implementation of EU law and the observance of human rights by the member states in general. In the AIV's opinion, the policy of the member states, whether in relation to the implementation of EU law or otherwise, should be treated as part of the EU's internal human rights policy, partly because it is regarded as such by the outside world. How third countries view the functioning of the EU is, after all, of great importance to the debate on the relationship between the EU's external and internal actions.

The human rights policy of the EU, its institutions, bodies and agencies

As far as the EU's human rights policy is concerned, it is noteworthy that a distinction exists under the treaties between the external and internal policy. Whereas human rights are explicitly mentioned in the Treaty on European Union (article 21) as an overarching objective of the EU's external relations, they hardly feature in internal EU law or policy. As already noted in chapter II, in important fields such as freedom, security and justice, and judicial cooperation in civil and criminal matters, the member states tend to focus mainly on mutual recognition and the mutual coordination and harmonisation of national law. Their policy on migration concentrates more on controlling migration flows and strengthening borders than on human rights questions.[153] Various critics have pointed out that the negative effect of EU policy on human rights in these fields tends to outweigh the positive.[154]

There is also a discrepancy between the powers which the EU has acquired over time and its accountability in the human rights field. Although the EU has acquired more and more powers from the member states in many policy fields, it is not held responsible, unlike the member states, for the manner in which human rights are dealt with in the exercise of these powers. With the sole exception of the UN Disability Convention, the EU is still not a party to any international human rights treaties. EU policy is therefore not reviewed by regional or international supervisory bodies (such as treaty bodies), as is that of the member states. Nor is the Universal Periodic Review of the UN Human Rights Council applicable to the EU. This creates what can be termed an accountability gap. Whereas the EU – rightly – expects third countries to comply with the international human rights acquis and adopt the recommendations of UN treaty bodies, it has an exceptional position and operates as a virtually autonomous entity with regard to the international human rights system. This is hard to reconcile with the normative global role to which it aspires.

153 See, for example, Jari Pirjola, *'European asylum policy: inclusions and exclusions under the surface of universal human rights language'*, 11 European J. Migration & L. 347 (2009).

154 See, for example, Amnesty International, *Human rights dissolving at the borders? Counterterrorism and EU criminal law*, Amnesty International EU Office, Brussels, 2005; and Catherine Teitgen-Colly, *'The European Union and asylum: an illusion of protection'*, 43 Common Market Law Review 1503, 2006.

It should also be noted in this connection that the Court of Justice of the European Union (CJEU) is very sparing in its references to regional and global human rights instruments, with the exception of the ECHR. For example, in the Kadi case[155] the CJEU held that certain EU decisions implementing resolutions of the Security Council (adopted under Chapter VII of the UN Charter) constituted a breach of rights under the legal order of the European Community. In fact, this judgment was in itself a positive example of legal protection of human rights.

The connection between the CJEU and the ECtHR has been described as 'common supranational diplomacy',[156] but is in fact characterised by the maintenance of the autonomy and supremacy of the CJEU in EU cases. Under article 52 (3) of the Charter, the ECHR – in addition to EU law – is a legal source for the CJEU. However, this article leaves open the possibility that the CJEU may apply a broader interpretation than the ECtHR. In turn, the ECtHR defines the EU's own policy freedom by its equivalent protection doctrine. In essence, this doctrine states that where human rights protection within the EU (through the CJEU) can be regarded as equivalent to that of the Council of Europe (through the ECtHR), the ECtHR will hold that it is not competent to pass judgment on that protection.[157] This means that the EU has a special responsibility for ensuring that human rights protection within the Union remains at the required standard. The relationship between the EU and the ECtHR will change after the accession of the EU to the ECHR. This will be dealt with in the second part of this chapter.

The human rights policy of the member states

Various examples of fields in which the observance of human rights within the EU member states is deficient, such as sexual orientation, detention and sexual and other violence against women and children, were given in the introduction. Another example is that by no means all EU member states adequately guarantee the equal treatment of women.[158] Mention can also be made in this connection of the recent case of M.S.S. v, Belgium and Greece, in which the ECtHR held that the treatment of asylum seekers in Greece amounted to inhuman treatment.[159]

However, the member states are extremely reluctant to give the EU a clear role in relation to their own human rights policy. Examples are the controversy concerning France's collective expulsion of Roma in the summer of 2010 and Hungary's reaction in early 2011 to the

155 Joined Cases C-402/05 P & C-415/05 P, Kadi & Al Barakaat v. Council of the European Union and Commission of the European Communities, 3 C.M.L.R. 41, 2008.

156 Laurent Scheeck, *'The supranational diplomacy of the European Courts: a mutually reinforcing relationship?',* in: The ECJ under siege: new constitutional challenges for the ECJ (Giuseppe Martinico and Filippo Fontanelli, eds.), Ecfai University Press, 2009.

157 Bosphorus v. Ireland, ECR 30 June 2005.

158 For example, France ranks 46th in the World Economic Forum's 2010 gender equality report (lower than, say, Jamaica and Kazakhstan), and 82% of French members of parliament are male. See: International Herald Tribune, 1 June 2011.

159 M.S.S. v. Belgium and Greece, ECR 21 January 2011.

criticism from within the EU of a bill to regulate the media.[160] This reluctance is also evident from the treaty framework. Although the definition contained in article 2 TEU is a broad one and article 6 TEU provides for the EU's accession to the ECHR, the fine print is indicative of reservations on the part of the member states concerning the assessment and regulation of their own activities. For example, article 51 of the Charter limits its scope by providing that the charter applies to the member states only when they are implementing Union law.[161]

Article 7 TEU (the 'suspension article') could potentially serve as the basis for a procedure for monitoring the observance of human rights in member states, but hitherto it has not worked like this in practice. Initially, the inclusion of this article in the Treaty of Amsterdam (1992) and its amendment in the Treaty of Nice (2001) gave the impression that the member states had abandoned their opposition to a supervisory role for the EU in the human rights field. After the amendment of article 7, a network of independent experts on fundamental rights was founded on the initiative of the European Parliament in 2002. The network regularly monitored the observance of human rights in the member states and presented annual reports on this subject. However, when the Fundamental Rights Agency was founded in 2007, the network was replaced by a similar network (FRALEX) which was expressly not given the job of producing systematic reports on the human rights policy of the member states.[162] Nor is there any form of judicial review prior to a decision on whether article 7 TEU is applicable and a member state could be held liable for a failure to observe the rights specified in article 2 TEU. Ultimately, therefore, this is a purely political decision taken at the level of heads of government in the European Council without being based on any form of systematic reporting.

The question hence arises as to what extent article 7 is usable in practice. Although the article may have a certain preventive effect, it is unclear precisely how and when it can be invoked. In addition, the relevant procedure has such far-reaching consequences that it must be regarded exclusively as a remedy of last resort. Or, as Arnull puts it, 'The heaviness

160 In August 2010 France began the collective expulsion of Roma migrants who were living in France and had originally come from Romania. This led to a storm of criticism, and EU Commissioner Reding and the European Parliament argued that the expulsions were in breach of EU law. France, however, took the position that this was an internal affair. On 14 December 2010 Commissioner Reding announced that she would bring proceedings against France before the ECtHR on account of the expulsion policy. On 19 October 2010, however, she stated that no further steps would be taken against the French government because France had brought its national legislation into line with European law. On 1 January 2011, at the start of the Hungarian presidency of the EU, a media bill containing limitations on press freedom became law in Hungary. This met with much opposition within the EU on the grounds that it was contrary to EU law. Initially Hungary ignored this criticism, but on 16 February 2011 it agreed to changes to the media bill as proposed by EU Commissioner Kroes. On 7 March the changes were approved by the Hungarian Parliament. However, the European Parliament is still not satisfied with the results. Commissioner Kroes has therefore decided to take a fresh look at the Hungarian media legislation.

161 For the background to article 51 see Gráinne de Búrca, *'The drafting of the EU Charter of Fundamental Rights'*, 26 Eur. L. Rev. 214 (2001).

162 See Gráinne de Búrca, *supra* n. 29, p. 30. However, the Council of Ministers issued a declaration stating that the Council 'may seek the assistance of the Agency as an independent person if it finds it useful during a possible procedure under Article 7 TEU. The Agency will however not carry out systematic and permanent monitoring of Member States for the purposes of Article 7 TEU,' <http://ec.europa.eu/justice_home/fjs/rights/ fsj_rights_agency_en.htm>.

of the procedure prescribed by these provisions and the potentially damaging consequences of invoking them make them weapons of last resort. They will do little to reinforce the protection afforded to individuals in concrete cases.'[163]

The current mandate of the Agency for Fundamental Rights founded in 2007 provides no scope for filling this gap. The mandate is limited to providing assistance and expertise to the relevant EU institutions and the member states in implementing EU law, collecting, publishing and disseminating data and research results, and carrying out relevant analysis and providing advice to the EU and the member states. Article 3 of the Regulation by which the Agency was established also contains a clause similar to that in the Charter and provides that the Agency should confine itself to the implementation of EU law within the EU and the member states.

In conclusion, the AIV notes that charges of a lack of coherence between the EU's internal and external human rights policies are in fact referring to the discrepancy between the levels of ambition shown by EU in the two fields. The EU sets itself apart from many other international players by its open and expressly stated intention to pursue a norm-based foreign policy. However, the EU fails to demonstrate the same level of ambition in its internal policy.

IV.2 A stronger internal human rights policy

Member states sometimes try to refute criticism of the EU's internal human rights policy by pointing out that problems within the EU and in the member states are of a different order of magnitude from the gross or systematic human rights violations that take place elsewhere in the world. However, this is certainly not true of all cases. For example, the case of M.S.S. v. Belgium and Greece involved a breach of one of the core human rights, namely the prohibition of inhuman treatment (article 3 ECHR). But in other cases too the EU should acknowledge the breaches that occur and demonstrate a willingness to look for solutions. It is by no means the case that these solutions must always be sought in sweeping reforms. Much could be achieved if the member states were willing to discuss internal matters in an EU context on the basis of the existing international human rights framework, for example at an annual meeting held for this purpose.

For the human rights policy of the EU and its institutions, acceptance of the Charter of Fundamental Rights and the EU's accession to the ECHR could represent a big step in the right direction. This would provide a partial solution to the problem of the gap in accountability referred to above, as the EU institutions (like the EU member states) could then be held accountable for possible breaches of rights enshrined in the ECHR. The AIV notes here the initiative of the European Commission to develop a human rights impact assessment on the basis of the Charter of Fundamental Rights. This initiative deserves strong support.[164] Another positive development is the European Commission's publication of an annual report on the implementation of the Charter of Fundamental Rights (most

163 Commentary of Anthony Arnull on the (then new) article 7, in: *The European Union and its Court of Justice*, Oxford, Oxford University Press 1999, p. 219.

164 See: *Commission Report on the Practical Operation of the Methodology for a Systematic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights*, COM (2009) 205 final (29 April 2009).

recently on 11 March 2011).[165] This annual report could possibly evolve in the future into a mechanism for monitoring observance by both the EU and the member states of the rights enshrined in the Charter.

Moreover, the AIV recommends that, as argued in relation to its external human rights policy, the EU should explicitly acknowledge that as a supranational organisation it can no longer remain aloof from the existing international human rights system. This is not to say that the EU must immediately embark on new and complicated procedures for accession to international treaties. However, the EU should make clear that it considers itself bound by the UN human rights treaties. It should also seek a way of ensuring that recommendations and guidelines emanating from the UN system, the Council of Europe, the OSCE and other international human rights forums are integrated as fully and systematically as possible into all EU policy fields. The AIV wholeheartedly endorses the call by the EP to this effect.[166]

This also implies, for example, that the EU should further the execution of ECtHR judgments if they affect the EU. It follows that the above-mentioned ECtHR's judgment to the effect that asylum seekers may not be returned to Greece on account of the inhuman conditions there obliges the EU to take action, because this judgment goes to the core of EU asylum policy.

As regards the human rights policy of the EU member states (whether resulting from EU law or otherwise), the AIV notes that article 7 TEU in itself provides a basis for critically monitoring it. The scope of this article is not limited to the application of EC/EU law. This is evident from the wording and has also become clear from the work of the network of independent experts, which was established in 2002 and has documented and evaluated the human rights situation in the member states.

The Achilles heel of the EU's internal human rights policy is that at present no monitoring mechanism exists to document and, where necessary, expose the human rights situation within the member states. Nor does there appear to be any great willingness to establish such a mechanism. The AIV considers that this situation will become unsustainable in due course, particularly since the EU takes it upon itself to judge not only candidate member states but also third countries on their human rights policies.

The AIV therefore recommends that steps be taken to change this situation. As already indicated, a first step could possibly be the establishment of a procedure for regular consultation on the policy of the member states and possibly also the EU institutions. Such consultations could be conducted on the basis of existing documents, such as the recommendations of UN treaty bodies, the results of the UPR and the annual report on the supervision of the execution of judgments of the ECtHR. The Fundamental Rights Commissioner and the Fundamental Rights Working Group could play a role in the preparations for such consultations, and the results could be presented in the form of a report that would be accessible to the outside world as well. This would demonstrate that the EU is also serious about human rights within its own ranks and organisation.

A possible means of carrying out policy evaluation in the field of Justice and Home Affairs (JHA) is provided by the Stockholm Programme, which was adopted by the European Council in December 2009 and records the EU's principles in the area of freedom, security, justice,

165 See <http://www.ec.europa.eu/justice/news/intro/news_intro_eu.htm>.

166 European Parliament resolution of 16 December 2010, *supra* n. 89, par. 24.

asylum and immigration for a five-year period. The Programme includes a passage in which the Commission is invited by the European Council to submit proposals for the evaluation of policies concerning JHA cooperation.[167] The text continues: 'The proposals should, where appropriate, include an evaluation mechanism based on the well-established principle of peer evaluation. Evaluation should be carried out periodically, include an efficient follow-up system, and should facilitate better understanding of national systems in order to identify best practice and obstacles to cooperation.'

Furthermore, it would be desirable in the AIV's opinion to examine whether the mandate of the Agency for Fundamental Rights can be modified in such a way that the Agency can be transformed into a European Human Rights Institute in accordance with the Paris Principles.[168] The Agency should in any event have the right to make recommendations on human rights issues in the member states. Until this is achieved, the Agency can continue drawing attention to human rights problems within the EU and the individual member states through its reports. For example, the report published by the Agency in early 2011 on the situation of migrants in Greece[169] contains much valuable information on a manifest problem currently besetting the Union. The AIV recommends that the Agency should be encouraged to continue publishing such reports in the future.

IV.3 Conclusion

The AIV notes that there is a clear difference in the level of ambition exhibited in the EU's external and internal human rights policy. The latter comprises both the policy of the EU and its institutions and that of the member states (whether or not pursuant to EU law). Although the EU has defined human rights as an overarching goal of its external relations and seeks to project itself as a normative force, its internal ambitions are still relatively modest. This can clearly be seen in the treaty framework, but it is also apparent from the fact that the EU is a virtually autonomous entity with regard to the international human rights system. The member states, for their part, are highly reluctant to grant the EU powers to evaluate national human rights policy.

The AIV believes that this situation is not tenable in the long run. If the EU wishes to judge not only candidate countries but also third countries around the world on their human rights policy, it must also be willing to critically review, and where necessary amend, its own policy. Adoption by the EU of the Charter of Fundamental Rights and accession to the ECHR are steps in the right direction, as they make it possible for EU institutions, too, to be called to account for their actions where they affect the rights enshrined in the Charter and the ECHR. The EU would also be well advised to engage more with the international human rights

167 Doc. 17024/09 JAI 896 of the Council of 2 December 2009, par. 1.2.5 (Evaluation). This passage is seen as a response to an idea originally put forward by former Dutch Minister of Justice Ernst Hirsch Ballin. In the period leading up to the drafting of a new JHA programme for the EU, in parallel with the entry into force of the Lisbon Treaty, he had pressed for the establishment of a rule-of-law monitor, i.e. a mechanism for monitoring the human rights situation within the EU member states.

168 The Paris Principles were adopted by the UN Commission on Human Rights in 1992 (res. 1992/54) and by the UN General Assembly in 1993 (res. 48/143). They relate to the status, mandate and functioning of national human rights institutes.

169 European Agency for Fundamental Rights, *Coping with a fundamental rights emergency, The situation of persons crossing the Greek land border in an irregular manner*, Vienna 2011.

system and do more to integrate recommendations and guidelines from the UN and other international human rights forums into its policy.

A major problem with the existing system, for which no solution has yet been found, is that no mechanism exists to document and discuss the human rights situation within member states themselves. Introducing a regular form of consultation that can be conducted on the basis of existing reports by the UN and other institutions could help solve this problem. The AIV believes that in the long run the mandate of the Agency for Fundamental Rights should be amended in such a way that the Agency can be transformed into a European Human Rights Institute in accordance with the Paris Principles. The Agency should in any event obtain a right to make recommendations on human rights issues in member states.

V Conclusions and recommendations

V.1 General

Recently, a number of significant changes have occurred in the context within which the EU's human rights policy is formulated. At global level, the economic and political status of the West is declining, due in part to the financial and economic crisis of the past few years. At the same time other, newer major players on the world stage, such as China, Brazil, India and South Africa, are becoming more assertive. This tendency can be observed in a number of areas, including these countries' attitudes towards the 'Western' human rights agenda. At the same time, the EU member states themselves are increasingly being confronted with and called to account for the need to prevent human rights violations within the EU and within their own borders.

As explained in Chapter 1, the Treaty of Lisbon, which has been in force since 1 December 2009, created a number of institutional prerequisites for a coherent and effective EU human rights policy. Besides the detailed basis provided for human rights as values that the European Union aspires to (as expressed, for example, in the Charter on Fundamental Rights), these prerequisites include the Union's planned accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR); the appointment of a High Representative of the Union for Foreign Affairs and Security Policy (who is also vice president of the Commission); and the establishment of a European External Action Service (EEAS).

The Netherlands is now witnessing a heated debate about the usefulness and necessity of European cooperation. The AIV differentiates two tendencies within this debate: on the one hand, a certain Euroscepticism, which manifests itself in a growing emphasis on Dutch self-interest and resistance to perceived interference by Brussels. The recent discussion about the role and relevance of the European Court of Human Rights can also be seen in this light. On the other hand, it is becoming increasingly clear that, in order to safeguard and build on the gains of over half a century of European integration, it will be necessary to work together in more areas, including politically sensitive ones. The same applies to the financial and economic issues and to asylum and migration policy.

The shifts in global relationships, the changes within the EU and the Dutch debate on European cooperation make this a particularly appropriate time to examine the effectiveness of EU human rights policy.

Chapter 2 of this report shows that a study of the history of European integration reveals not only an ambition to pursue an active human rights policy, but also a perennial ambivalence about that ambition.

The first proposals for the establishment of a European Political Community, which date back to the early 1950s, envisioned a Community with the aim of protecting human rights and fundamental freedoms in the member states, on the basis of the ECHR as an integral part of the statute of that Community. The draft treaty establishing a European Political Community even gave individuals the right to petition the Court of the European Community to redress violations of the ECHR by Community institutions.

At the time there was broad support for these proposals to establish a European Political

Community where human rights would be a core value for both internal and external policy, the ECHR would be integrated into its statute and robust legal enforcement would be possible. However, when plans for a European Defence Community fell through, these proposals eventually foundered and European integration proceeded for some time in accordance with a much more limited, pragmatic agenda, which focused principally on economic questions.

In the late 1960s and 1970s, a U-turn in this area was heralded by the case law of the European Court of Justice, which would gradually lead to the incorporation of human rights into the European legal order. At that time the question on people's minds was not so much *whether* the European Community should get involved with protecting human rights, but rather what *role* it should play in this regard. The political organs of the Community, such as the European Council, also began to speak out on this issue, for example in the Declaration on European Identity of 1973, which characterised respect for human rights as a fundamental element of that identity. This was followed, in 1977, by the first Joint Declaration on Human Rights by the European Parliament, the Council and the Commission.

Eventually, the Treaty of Maastricht (1992) formally recognised that human rights were part of EC/EU law. Developing and consolidating human rights and fundamental freedoms was elevated to an official policy goal, particularly for externally oriented activities, such as development cooperation and the common foreign and defence policy.

In the period that followed, a number of positive steps were taken with regard to the internal dimensions of EU human rights policy. For example, a mechanism was introduced that made it possible to suspend the rights of a member state if it was found to be responsible for committing serious human rights violations or to be at risk of doing so (article 7 of the Treaties of Amsterdam and Nice). The adoption of the Charter of Fundamental Rights formed the next important step, although it would be some time before the Charter achieved binding legal status; the full text was not incorporated into the Treaty, and a protocol offers an opt-out to a number of member states. Accession to the ECHR had been discussed since 1979 and finally included as an obligation in the Treaty of Lisbon. In 2007 an Agency for Fundamental Rights (FRA) was established, though it lacked a mandate to critically review internal compliance with human rights, either by EU bodies or the individual member states.

Despite the above-mentioned steps, when examining the historical background, it is striking how much the external and internal human rights ambitions of the EC/EU have diverged. Time and again there has been great resistance, especially among member states, to allowing the EC/EU to play a significant role in promoting and enforcing human rights within the Community/Union. Human rights are explicitly mentioned in the Treaty on European Union (TEU) (article 21) as an overarching goal of all the Union's external relations, but when it comes to internal human rights policy, the role of the EU is limited to those areas in which the Union has specific competence (chiefly combating discrimination and social exclusion).

Even though the EU does not have more external than internal competences, since the early 1990s, human rights have gradually been spotlighted more systematically and emphatically in relations with non-EU countries than within the Union itself. Two clear examples of this are the Copenhagen Criteria for the accession of new member states and the human rights clauses in cooperation agreements with non-EU countries, which include the option to suspend or even terminate the partnership in the event of serious human rights violations. Since 1996, human rights and democratisation have also been integrated into political dialogues with non-EU countries. Since 1994 there has been specific financing in place for external human rights policy, which is currently provided by means of the European

Instrument for Democracy and Human Rights. In addition, the present state of the EU's external human rights policy is regularly examined in annual reports by the Council.

The discrepancy between the levels of ambition shown with regard to internal as against external human rights policy is a constant factor in the development of the EU's human rights policy. While the Union clearly regards human rights as a major aspect of its international identity and tries to present itself as a normative force in this area, it plainly has difficulty demonstrating the same commitment internally. Against the historical backdrop outlined above, it is not surprising that the EU's role in the area of human rights is often characterised as ambivalent. The tension between various players and interests has resulted in a stepwise evolution, with mixed results.

With its shortcomings and ambivalences, the EU's current human rights policy sometimes undermines the Union's credibility as an international actor more than it reinforces it. A similar effect can be observed with respect to the EU's aspiration to exercise global normative leadership. As indicated earlier, this is all the more true now that the authority of the West is waning and the assertiveness of emerging powers and developing countries is rising.

In the view of the AIV, this does not, however, mean that the EU should abandon its ambition to play a leading global role in the area of human rights. But the time has come to consistently put into practice the principles enshrined in the Treaty and to use optimally, and where necessary modify, the existing set of instruments. Such an effort should be guided by a sense of realism, a certain modesty and an eye for feasibility.

In the context of this general analysis, the second part of this chapter will answer the government's specific questions.

V.2 The government's questions

General question: In the wake of the entry into force of the Treaty of Lisbon, how can the EU's human rights policy be made more effective, more coherent and more visible?

1. *How can the Union's participation in international human rights forums like the UN, the Council of Europe and the OSCE be strengthened, without concerted action leading to diminished political impact or dilution of voting power?*

In answering this question the AIV concentrated primarily on the UN, since the issues raised seemed especially relevant to that body. With respect to the Union's relationship to the Council of Europe and the OSCE, it is more accurate to speak of the EU's *cooperation with* these institutions, rather than its 'participation in' them. Nevertheless, the AIV's observations about the UN can apply mutatis mutandis to the EU's engagement in other multilateral human rights forums.

Multilateral engagement, particularly in a UN context, presents specific challenges to the EU. In the view of the AIV, these are in part due to the fact that the EU operates within the UN as a partly supranational organisation in an intergovernmental framework. Moreover, the changing international balance of power complicates decisive action by the EU and the formation of cross-regional coalitions.

Despite this, the EU can still certainly improve its effectiveness. In this connection the AIV would advise the government to urge the EU to devote more time and attention to:

a. consultations with third countries and lobbying activities for EU proposals and standpoints;
b. better coordination between Brussels, Geneva, New York and the individual capitals, in order to devise a more strategic form of engagement in the UN and to more fully harmonise bilateral and multilateral policy;
c. forging new (cross-regional) coalitions.

A more flexible and less defensive stance will probably elicit more support for EU positions among third countries than the current emphasis on consensus, which often means that the EU spends a great deal of energy on internal coordination and less on external consultations, and that sensitive issues, such as country-specific resolutions or the use of particular language, are now wholly avoided by the EU.

In addition, in terms of both internal and external human rights policy, the EU could take more advantage of the solid foundation offered by the normative framework developed within the UN and the results of the UN oversight procedures – such as the Universal Periodic Review of the Human Rights Council (HRC) and the recommendations of UN treaty bodies in response to country reports.

The Union could provide valuable support to the global human rights system if it confirmed that it considered itself to be bound by the UN's nine core human rights instruments and committed to the UN treaty bodies and the work of the HRC, including the implementation of the UPR.

2. *How can the effectiveness of the Union's many human rights instruments be enhanced so that they become integral to its external policy, and how can they be better tailored to specific situations?*

Over the years the EU has amassed a wide range of instruments for external human rights policy. These run the gamut from the preventive to the supporting to the reactive. Based in part on the interviews it conducted in Brussels, the AIV feels that the present set of instruments is sufficiently extensive, though there is a need for clear priorities and more coherence between and systematic employment of the available instruments.

The human rights strategy announced by High Representative Ashton for 2011 could meet this need. Alongside the general human rights strategy, the introduction of specific human rights strategies per country could be advantageous. These strategies could be integrated into a broad EU strategy for relations with, and activities in, the countries in question. COHOM and the geographical working groups could jointly draw up human rights strategies per country. Within the EEAS, both the human rights department and the geographical departments would have to be responsible for implementation. The country strategies would form the framework for the policy and the use of specific instruments for both the EU and the member states.

As to the actual use of the various instruments, the AIV has concluded that the situation in practice is mixed. The integration of human rights and democratisation into accession policy is generally regarded as an example of a successful and effective step on the part of the Union. In its relations with other parts of the world, there is still considerable room for improvement in the way in which human rights policy is put into practice. Selectivity, inconsistency and the non-systematic implementation of human rights clauses and procedures are hampering effective action. Despite a number of shortcomings, many have welcomed the stance on human rights, both substantive and procedural, embodied by the Cotonou Agreement. The AIV believes that this could serve as an inspiration and example to

other partnerships between the EU and third countries.

Experience teaches that human rights dialogues or consultations are mainly effective if the countries concerned hope for favours from the EU and are for that reason prepared to commit themselves to human rights. In relations with, for example, China and Russia, the human rights dialogue with the EU has had little result, and the AIV is moved to ask if the instrument might be more effective if it were modified to include, for example, specific benchmarks.

The AIV sees three general conditions for an effective EU human rights policy: coherence, consistency and credibility. As regards the first condition, coherence is required both within EU policy itself; and between the EU's policy and that of the individual member states. The AIV feels that there are sufficient treaty safeguards in place to guarantee the internal coherence of EU policy. This is not, however, the case when it comes to the preparation and implementation of the policy. The coherence between the policy of the EU and that of the member states should also be enhanced. This can be encouraged in a variety of ways, including by improving information sharing practices and mapping out member states' bilateral human rights policy and the activities undertaken by the member states' missions and EU delegations in third countries. To the AIV's knowledge no such overview exists at present. If we are ever to see a division of labour within the EU, as the Dutch government has been lobbying for, such an overview (with regular updates) will be one of the first requirements.

To ensure the consistency of the EU's external human rights policy, the AIV would strongly advise against applying double standards. Having said that, the AIV does recognise that to be effective, a policy must be customised to some extent, with a focus on the actual conditions in a given country or for a given theme. Using relevant material that has been generated in a UN framework, such as UPR documentation or the concluding observations of UN treaty bodies, can provide a foundation for such a customised approach.

Coherence and consistency are, in turn, prerequisites for credibility. Beyond that, the EU can only be credible in its external human rights actions if it and its member states assume a critical yet constructive stance towards countries like the US, China, Russia and Israel. Furthermore, the AIV believes that the EU needs to acknowledge that there are limits to the traditional state-to-state approach and efforts to influence policy by criticism. A more promising approach would be, on the one hand, to encourage change from the bottom up and contribute to that change by supporting critical human rights organisations and trade unions; and on the other, to engage in a dialogue premised on equality. Preference should be given to a positive approach on this front. If, however, a country is committing gross or systematic human rights violations and no other instruments prove effective, the imposition of economic or other sanctions or the suspension of aid (or the threat of doing so) can be a last resort.

Effectiveness also depends on adequate capacity. Various EU players are active in external human rights policy. The High Representative and the EEAS are the most recent additions to this group; they are gradually becoming acclimatised to their respective roles. The EEAS, both in Brussels and at the delegations in third countries, must be given sufficient knowledge and capacity in the field of human rights. The AIV advises the government to push firmly for such a move. The Council could function much more effectively if COHOM were converted into a Brussels-based working group that met more frequently; this is another change the Netherlands should continue to press for. By broadening COHOM's role and increasing the capacity of the EEAS, it might be possible to narrow the gap created by the

discontinuation of the rotating Council Presidency. The European Parliament's opportunities for decisive action on human rights could benefit from the creation of a full-fledged human rights committee (instead of the subcommittee that now exists), especially given its powers it has acquired with respect to ratifying agreements (including trade agreements with third countries).

3. *How can the coherence between internal and external human rights policy be enhanced?*

As outlined at the start of this chapter, the AIV has observed a clear discrepancy in ambition between the EU's external and internal human rights policy, with the latter referring to both the policy of EU institutions and that of the member states (in implementing EU law and in other respects). The EU has defined human rights as an overarching objective of its external relations and seeks to present itself to the outside world as a normative force; yet its internal ambitions are still relatively modest. This can clearly be seen in the treaty framework, but it is also apparent from the fact that the EU is a virtually autonomous entity with regard to the international human rights system. EU policy is not reviewed by regional or international supervisory bodies (such as treaty bodies), as is that of the member states. The member states, for their part, are highly reluctant to grant the EU powers to evaluate their national human rights policy.

The AIV believes that this situation is not tenable over the long run. If the EU aims to evaluate the humans rights policy of not only candidate countries but also third countries around the world, it must also be willing to critically review, and where necessary amend, its own policy. The EU's adoption of the Charter of Fundamental Rights and its accession to the ECHR and the UN Convention on the Rights of Persons with Disabilities are steps in the right direction: now EU institutions, too, can be called to account for their actions as they affect the rights enshrined in the ECHR (and in the Charter and Convention). Another positive development is the European Commission's publication of an annual report on the implementation of the Charter of Fundamental Rights. In the view of the AIV the EU would also be well advised to adopt a less remote attitude toward the international human rights system and do more to integrate recommendations and guidelines from the UN and other international human rights forums into its policy. The AIV advises the Dutch government to lobby strongly for this position within the EU.

As regards the relationship between the EU and the European Court of Human Rights (ECtHR), the AIV would draw attention to the equivalent protection doctrine of the ECHR, which states, in essence, that in cases where human rights protection within the EU can be regarded as equivalent to that of the Council of Europe, the ECtHR does not regard itself as competent to pass judgment on that protection. The AIV stresses that this doctrine entails a special responsibility to ensure that human rights protection within the EU remains at the required standard.

A problem with the existing system, for which no solution has yet been found, is that no mechanism exists to document and discuss the human rights situation within the Union and the member states themselves. This could be rectified by introducing a regular form of consultation that can be conducted on the basis of existing reports by the UN, the Council of Europe and other institutions. The fundamental rights commissioner and the working group on fundamental rights could help in preparing such a consultation, and its progress could be documented in a publically accessible report. This would be a tangible demonstration that the EU is serious about human rights within its own ranks as well.

The AIV advises the government to support proposals along these lines or consider whether to initiate them itself, in cooperation with a number of likeminded countries. In the long run, the AIV believes that the mandate of the Agency for Fundamental Rights should be amended in such a way that it can be transformed into a European Human Rights Institute in accordance with the Paris Principles.

4. How can the EU raise the profile of its interventions in support of human rights?

A concept that is often mentioned together with credibility of external human rights policy is visibility. The AIV believes, and many interviewees in Brussels have affirmed, that these two notions are not always compatible. Visibility must be dealt with cautiously, since publicity can put lives at risk and because a policy of public confrontation can sometimes be counterproductive. Decisions on this issue must be taken carefully. Yet this should not lead to a state of affairs where publicity is given only to processes and where any specific information is omitted from consideration by default. The visibility of human rights policy and concrete actions is key, not only to ensuring the credibility of policy, both inside and outside the EU, but also because of the pressure generated by public statements or activities. In this connection the AIV believes it would be useful to consider whether to incorporate guidelines or criteria into the EU's human rights strategy to give direction to the EU's 'visibility policy' in the field of human rights.

With a view to increasing the visibility of EU human rights policy, the European Parliament has proposed appointing special representatives on a number of important issues (human rights defenders, humanitarian law, women's rights and children's rights). The AIV, however, believes that this proposal risks duplicating what is already happening internationally (especially in a UN context) and furthering the fragmentation and inconsistency of policy. By contrast, the AIV feels that the appointment of a general Special Representative for Human Rights does have sufficient potential. This could increase the opportunities for coherence and consistency of the EU's external human rights policy, and it would certainly make the Union's involvement in human rights issues more visible. The AIV would therefore advise the government to back any proposals for the appointment of such a representative.

Although the request for advice relates to the visibility of external policy, the AIV wishes to underscore that the visibility of *internal* human rights policy can substantially boost the external credibility of the EU. If, as stated earlier, the EU succeeds in creating a regular consultation on the human rights situation within the Union and the member states and reports on the results in the form of a public, reader-friendly report, this would send a very positive message to third countries that accuse the EU of not applying its tough standards in its own backyard. The AIV recommends that the government work to ensure that the visibility of internal EU human rights policy is also promoted.

5. Conclusion

Finally, the AIV would like to make a few remarks on a question that does not appear in the request for advice but which is directly related to it: in the years ahead, should the Netherlands focus more on pursuing its external human rights objectives via the European Union? The human rights memorandum that the government presented in April 2011 had the following to say on this point:

> 'Effectiveness also means taking a good look, on an issue by issue basis, at what channels we should use to achieve our goals. Our credo is: multilateral where possible, bilateral where necessary. The Lisbon Treaty and the appointment of the High

Representative for Foreign Affairs have placed the EU in a better position than ever before to pursue a strong, coherent human rights policy. The Dutch government intends to use this opportunity to the full, in addition to existing instruments. In communication and dialogue on human rights, it is the result that counts.'[170]

The AIV endorses the advantages of scale associated with taking external action in an EU context that were mentioned above. Further, it is convinced that acting via the EU – including in the area of human rights – can potentially have substantial added value and, in many respects, be more effective than acting bilaterally. The AIV therefore believes that it makes sense, in principle, to take this route, in part because the TEU creates certain obligations in this area.

However, the AIV emphasises that the Netherlands should not only promote human rights via the EU's common foreign policy, but also by means of its own foreign policy. A point to consider in this connection is that, even though the EU treaty framework and existing instruments already offer a solid foundation for pursuing a robust external EU human rights policy, this is very often not put into practice. This has to do with the lack of coherence and consistency within the EU's external policy and a disconnect between the EU's policy and that of the individual member states. In addition, there is a plain discrepancy in ambition between the EU's external and internal human rights policy, a fact that undermines the credibility and legitimacy of the EU as a global human rights actor.

The Netherlands has always considered human rights and the promotion of the international legal order as major pillars of its foreign policy, particularly since the release of the human rights policy document in 1979. In that light the AIV advises the government to continue to focus intently on pursuing human rights policy via the EU, in cases where this is more effective than acting bilaterally. It is only appropriate, however, to entrust 'partners in the European Union' to undertake special efforts on specific issues, as stated in the 2011 human rights memorandum in reference to the 'protection of ethnic minorities, combating racism and promotion of children's rights in foreign policy',[171] if these efforts are also guaranteed and of good quality and if there are clear reasons for them.[172] In this connection it is worth recalling the above recommendation that an overview should be made of the bilateral human rights policy of the member states and the activities undertaken by member states' missions and EU delegations in third countries. A well-documented and regularly updated overview of these issues is a prerequisite for achieving the division of labour desired by the Dutch government.

Given the EU's institutional structure, the CFSP and the foreign policies of each individual member state will continue to co-exist side by side in the years ahead. In the opinion of the AIV, the time is not yet ripe to conclude that acting via the EU is preferable to acting

170 Policy memorandum 'Responsible for Freedom: Human Rights in Foreign Policy', 5 April 2011. Retrievable at <http://www1.minbuza.nl/en/Key_Topics/Human_Rights/Dutch_Human_Rights_Policy>.

171 Ibid., p. 6.

172 In the case of children's rights, for example, there is cause to question this decision, which comes at a time in which the government is supporting, through the Cofinancing System 2010-2015 (MFS II), the activities of a relatively large number of Dutch civil society organisations devoted to protecting children's rights around the world. By no longer undertaking any special efforts of its own in the area of children's rights, with the exception of child labour, which remains a priority, the government risks creating an undesirable dichotomy.

bilaterally in the field of human rights. This could change in the future, if the EU's common action on human rights could be further enhanced. This presupposes, however, that better guarantees will be incorporated into the EU's institutional structure for adequate capacity and expertise in the area of human rights; that external EU human rights policy shows improvements in practice; and that the member states succeed in formulating a convincing internal human rights policy. Giving human rights a central place within both the Union's external and internal policy will also require political will on the part of the member states.

Annexe I

Mr F. Korthals Altes
Chairman of the Advisory Council
on International Affairs
P.O. Box 20061
2500 EB The Hague

Date 26 November 2010
Re Request for advice on the effectiveness of European human rights policy

Dear Mr Korthals Altes,

The universality of human rights is increasingly being questioned at international level, and this entails risks for the observance of the human rights enshrined in international agreements – which already leaves much to be desired. To counter this trend, in addition to forceful action by individual states, an effective, tailor-made European Union human rights policy is crucial.

Human rights are anchored in the external policy of the Union. Not only is the protection of human rights one of the basic objectives of the EU's relations with the wider world, but respect for human rights is one of the values on which the Union itself is founded (see e.g. article 2 and article 3, paragraph 5 of the Treaty on European Union). Several different instruments have been developed to implement the EU's external human rights policy, including démarches, declarations, human rights dialogues, human rights guidelines, the European Instrument for Democracy and Human Rights (EIDHR, a Commission funding instrument), and standard human rights clauses in agreements with third countries. Achieving coherence between internal and external policy remains a major challenge. Greater progress could also be made in raising the profile of EU human rights policy and making it more forceful.

The Treaty of Lisbon provides means of pursuing these goals. The appointment of a High Representative for Foreign Affairs, who is also Vice President of the European Commission, gives the Union a clearer profile to the outside world. The European External Action Service (EEAS) provides important support to this role. The European Parliament will also keep a critical eye on all of the Union's policy areas, ensuring that human rights play an integral role in them all.

It is not yet clear to what extent these institutional changes will lead in the foreseeable future to a more effective EU human rights policy. One major step in the right direction was High Representative Ashton's promise to the European Parliament to present an EU human rights strategy in 2011. In preparation for this strategy, a discussion and evaluation process is taking place under the Belgian Presidency on embedding human rights more firmly in the Union's external policy. This evaluation will be presented to the High Representative together with recommendations by the member states.

As part of the process of determining the Dutch government's position on an EU human rights strategy, we are submitting the following question to the AIV:

In the wake of the entry into force of the Treaty of Lisbon, how can the EU's human rights policy be made more effective, more coherent and more visible?

The following subsidiary questions are relevant to the main question:

1. How can the Union's participation in international human rights forums like the UN, the Council of Europe and the OSCE be strengthened, without concerted action leading to diminished political impact or dilution of voting power?
2. How can the effectiveness of the Union's many human rights instruments be enhanced so that they become integral to its external policy, and how can they be better tailored to specific situations?
3. How can the coherence between internal and external human rights policy be enhanced?
4. How can the EU raise the profile of its interventions in support of human rights?

The fact that third countries, as well as international organisations like the Council of Europe, reproach the EU for applying double standards raises the question of how ambitious and effective the EU can be. Promoting internal and external coherence in human rights policy is vital for its credibility, particularly since the Lisbon Treaty has created an architecture and institutions specifically for that purpose, such as the Commissioner for Justice, Fundamental Rights and Citizenship and the Council Working Party on Fundamental Rights, Citizen's Rights and Free Movement of Persons.

The Minister for European Affairs and International Cooperation and I would appreciate receiving an advisory report from the AIV on the questions outlined above and any related issues.

Yours sincerely,

(signed)

Uri Rosenthal
Minister of Foreign Affairs

Overview of interviewees

Name	Position and Organisation
Ms V. Arnault	Director for Human Rights and Democracy, European External Action Service (EEAS)
J.C. van Baalen	Member of European Parliament, Alliance of Liberals and Democrats for Europe (ALDE)
N.J. Beger	Director, Amnesty International European Institutions Office
M. Berman	Member of European Parliament, Progressive Alliance of Socialists and Democrats (S&D)
J. de Boer	Staff member, EU Enlargement and Western Balkans Division of the Dutch Representation to the EU in Brussels (PV EU)
Ms I. Brands Kehris	Director of the Office of the High Commissioner for National Minorities, Organisation for Security and Cooperation in Europe (OSCE)
W.G.J.M. van de Camp	Member of European Parliament, European People's Party (EPP)
R. van Dijk	Staff member, Africa, Caribbean and Pacific Division, PV EU
Ms A.K. Eneström	Swedish Ambassador to the Political and Security Committee of the EU (PSC)
C. Fernández Arias	Spanish Ambassador to the PSC
Ms S. Hartanti Kustiningsih	Counsellor, Indonesian Embassy in Brussels
Ms M. de Kwaasteniet	Dutch Ambassador to the PSC
R. van Laak	Staff member, PSC and Relex, PV EU
J. Legrand	Staff member, Multilateral Relations Department, EEAS
Ms L. Leicht	Director, Human Rights Watch (Brussels Office)
T. Peters	Head of Development Cooperation Division, PV EU
M. Popowski	Deputy Secretary-General, EEAS

M. Reynolds	Counsellor, Permanent Representation of the United Kingdom to the EU in Brussels
R. Rouwette	Doctoral student at Utrecht University researching the effect of Europeanisation on Dutch foreign human rights policy
B. Scholts	Staff member, Maghreb and Middle East, PV EU
Ms A. Sipilainen	Finnish ambassador to the PSC
O. Skoog	Permanent Chair of the PSC
P. Sukiyantini Mustajab	Counsellor, Indonesian Embassy in Brussels
S. Syarif	First Secretary, Indonesian Embassy in Brussels
G. Thery	International Federation for Human Rights (FIDH)
R. Timans	Staff member, Human Rights and Democracy Division, EEAS

Abbreviations

ACP countries	Countries in Africa, the Caribbean and the Pacific
AFET	Foreign Affairs Committee of the European Parliament
AIV	Advisory Council on International Affairs
ASEAN	Association of Southeast Asian Nations
CECE	Comité d'études pour la constitution europeénne (Committee for the Study of a European Constitution)
CFSP	Common Foreign and Security Policy
CJEC	Court of Justice of the European Communities
CJEU	Court of Justice of the European Union
COE	Council of Europe
COHOM	EU Working Party on Human Rights
COREPER II	Committee of Permanent Representatives to the EU
DROI	Subcommittee (of AFET) on Human Rights
EC	European Community
ECFR	European Council on Foreign Relations
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
EDC	European Defence Community
EDF	European Development Fund
EEAS	European External Action Service
EEC	European Economic Community
EIDHR	European Instrument for Democracy and Human Rights
EMP	European Mediterranean Partnership
ENPI	European Neighbourhood and Partnership Instrument
EP	European Parliament
EPC	European Political Community
EU	European Union
EUFOR ALTHEA	EU Force Althea Mission in Bosnia and Herzegovina
EUJUST LEX	EU's Rule of Law Mission in Iraq
EUPOL RD Congo	EU Police Mission and its justice interface in the Democratic Republic of Congo

Euratom	European Atomic Energy Community
FRALEX	EU Fundamental Rights Agency Legal Experts
GSP+	Generalised System of Preferences Plus
HR	High Representative of the Union for Foreign Affairs and Security Policy
HRC	Human Rights Council
HRD	Human Rights and Democracy
INTA	Committee on International Trade of the European Parliament
JHA	Justice and Home Affairs
LGBT	Lesbian, gay, bisexual and transgender
NGO	Non-Governmental Organisation
OIC	Organization of the Islamic Conference
OSCE	Organization for Security and Cooperation in Europa
PSC	Political and Security Committee of the Council of the EU
PR	Permanent Representation
SGP	Stability and Growth Pact
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNGA	General Assembly of the United Nations
UPR	Universal Periodic Review
WRR	Advisory Council on Government Policy

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