



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



**HUMAN RIGHTS
MAINSTREAMING
IN EU'S
EXTERNAL
RELATIONS**

HUMAN RIGHTS



EUROPEAN PARLIAMENT

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

DIRECTORATE B

POLICY DEPARTMENT

STUDY

HUMAN RIGHTS MAINSTREAMING IN EU'S EXTERNAL RELATIONS

Abstract

This study investigates the current status of human rights mainstreaming in EU external relations. It tracks the evolution of the concept of human rights mainstreaming taking into account similarities and differences between the UN and the EU, and reviews the relevant policy commitments and potential tools for human rights mainstreaming that have been put in place by the EU since 2001. The current status and impact of human rights mainstreaming is then examined with reference to three specific external relations policy areas, i.e. the CFSP/ESDP, development cooperation and trade, and migration and asylum policy. Two cases – one thematic related to human rights defenders and one regional concerning human rights policy vis-à-vis the Western Balkans – are focused upon in order to analyse the intersection of different sectors and policy areas. The study argues in favour of a stronger centralised structure to ensure effective human rights mainstreaming; including the possibility of establishing the position of an EU Human Rights Commissioner. The authors also urge the European Union to re-design the European Instrument for Democracy and Human Rights for a better mainstreaming effect and to promote human rights based approaches to programming in the other financial instruments (most importantly regarding neighbourhood and development instruments).

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EXECUTIVE SUMMARY

The study investigates the current status of human rights mainstreaming in EU external relations. The study takes its point of departure in a general survey of the concept of mainstreaming, building in part on experience generated within a UN context and taking into account similarities and differences between the UN and the EU. This is followed in Chapter 1 by a review of the relevant policy commitments and potential tools for human rights mainstreaming that have been put in place by the EU since 2001. The current status and impact of human rights mainstreaming is then examined in Chapter 3 with reference to three specific external relations policy areas, i.e. the CFSP/ESDP, development cooperation and trade, and migration and asylum policy. Two cases – one thematic related to human rights defenders and one regional concerning human rights policy vis-à-vis the Western Balkans – are investigated in Chapter 4 in order to test the way in which human rights are mainstreamed at the intersection of different sectors and policy areas. In Chapter 5 considerations are presented on how the European Parliament can further contribute to enhancing the cause of human rights mainstreaming in EU external relations, and in conclusion a series of specific recommendations are presented in Chapter VI for the overall enhancement of EU human rights mainstreaming.

1. On the concept of mainstreaming human rights - introductory analysis

Based partly on general theoretical considerations and partly on the experience of the United Nations, the initial chapter outlines the concept and purpose of human rights mainstreaming and identifies a range of different measures that may contribute to achieving this objective. It is seen as crucially important that mainstreaming is approached in a systematic fashion rather than merely through a series of well-intended ad hoc efforts. Various obstacles to mainstreaming are also identified, and in conclusion of the chapter the specificity of the challenge as it presents itself to a quasi-federal organisation like the EU is discussed.

Main findings

- Mainstreaming human rights can be understood as a strategic process of incorporating human rights considerations into processes and structures that are not explicitly mandated to deal with human rights. The goals are achieved when human rights provide a methodological framework for the entire work of the organization; i.e. when the organization does not only undertake some activities beneficial for human rights but also applies human rights methodology while performing its core tasks.
- To effectively mainstream human rights means to adopt a *dual approach* whereby targeted human rights activities and dedicated institutional structures also at the same time help to develop and reinforce the ability of other branches and actors in the organisation to advance human rights in and through their own work. Ideally, many different branches of the organisation should come to see human rights, not merely as an externally imposed set of obligations, but as a useful tool and framework

within which to achieve their own policy objectives in an effective and sustainable manner.

- Mainstreaming requires the articulation of a comprehensive strategy, characterised by: a high level policy commitment; clearly defined short-term, mid-term and long-term objectives; the elaboration of human rights based approaches to programming; standardised analytical procedures related, e.g., to *ex ante* and *ex post* impact evaluations; standardised monitoring and reporting procedures; and extensive intra-institutional human rights training and capacity building initiatives. This requires the allocation of adequate of resources and operational means and may entail certain changes in the bureaucratic and institutional infrastructure.
- It is to be expected that mainstreaming initiatives may be met with resistance within the organisation concerned on account of: lack of understanding; reluctance to change established practices; and a widespread perception that attention to human rights problems might be awkward and could hamper the pursuit of other legitimate objectives. The critical/constructive engagement with such perceptions must be seen as a natural part of a mainstreaming commitment.
- In seeking to adapt lessons on human rights mainstreaming from the UN to the EU, it is important to keep in mind that the EU is a qualitatively different type of organisation. As a federal, "state-like" entity dedicated to represent the interests of its citizens and people living within its territory, the EU is legitimately engaged in a broad range of policy areas and in the pursuit of particular interests related, e.g., to trade, industry, labour, social affairs, security, energy, environment, and relations with third countries. For such a (quasi-)federal entity, a commitment to mainstreaming human rights is in fact *a commitment to ensuring a basic degree of consistency across all relevant policy areas*. This must be understood in a realistic manner. The point is not for human rights to always take centre stage, and they should not supplant or impede other policy objectives. But they should always be given consideration and should, in a balanced manner, shape the work in all policy areas so as to consistently project the Union's underlying normative and moral commitments.

2. Human rights in external relations: legal basis, policies and instruments

The chapter reviews the legal basis and EU policy commitments as well as specific programming tools relevant to the mainstreaming of human rights. It is found that considerable progress has been made in this area since 2001. Different actors within the EU institutions are taking important steps in the direction of improved human rights mainstreaming, yet it appears that many such efforts still display a certain *ad hoc* character and that an overall coordinated strategy to realise the EU policy commitments is somewhat lacking.

Main findings

- Since its inception the European Union has been expressly dedicated to the promotion of peace and liberty. In the treaties of Maastricht, Amsterdam and Nice, this has been taken up in the form of an increasingly emphatic commitment to values

of human rights and democracy, which should guide both internal affairs within the Union and its external relations. The Treaty of Lisbon, if adopted, will further reinforce this commitment by raising the Charter of Fundamental Rights to primary law. It should be noted that the Union's commitment to human rights has from the outset been integrally related to a vision of a world characterised by stability, human security, and economic prosperity.

- The first formal EU commitment to human rights mainstreaming is found in the 2001 Commission “Communication on the European Union’s role in promoting human rights and democratisation in third countries” and in the 2001 Council conclusions which endorse this communication, including the commitment to mainstreaming, and assign the task of elaborating an implementation strategy to the COHOM.
- Since 2001, a number of documents, including communications, recommendations, conclusions, manuals and reports, generated by the main EU institutions have contributed to defining the terms and scope of mainstreaming human rights across different sectors of external relations. The primary emphasis has been on the CFSP and, since 2006, the ESDP, but the EU institutions have also regularly addressed the need to adopt a human rights based approach in typical first and third pillar policies taking into account their external dimensions. These include development co-operation, justice and home affairs, migration, education and culture.
- The EU currently has at its disposal a number of tools to promote mainstreaming, some of which are general tools and other ad hoc human rights tools. These include, among others, the human rights dialogues and guidelines, human rights clauses, special incentive arrangements for sustainable development and good governance (GSP+), and the European Initiative for Democracy and Human Rights (EIDHR).
- In terms of institutional infrastructure, the Council plays a major role as promoter of mainstreaming human rights in external relations, both through the COHOM and the Council Secretariat. It presents its main actions and accomplishments each year in the “EU Annual Report on Human Rights”. The Commission is actively involved in the implementation of mainstreaming commitments, notably through its cooperation with and targeted advice provided to country desks and EC delegations as well as involvement in the articulation of regional policy approaches. It is extensively involved in intra-institutional human rights awareness raising and staff training. The European Parliament contributes to mainstreaming, e.g., through the participation of MEPs in electoral missions, through its delegations, and by drawing attention to pertinent human rights priorities and challenges in its public hearings, resolutions, and own initiative reports (including the “Annual Report on Human Rights in the World”).
- Despite these important accomplishments, some limitations have been observed in the way in which human rights mainstreaming has been conceived and implemented. First, economic, social and cultural rights do not seem to be sufficiently taken into account in the policy. Second, concerns repeatedly arise concerning a certain lack of consistency between internal and external EU policies. Third, concern has been expressed that efforts towards mainstreaming have taken away resources from actions specifically targeting human rights, thus risking to compromise the intended

“synergy” approach. Fourth, implementation has often tended to be more sporadic than systematic. Fifth, problems of consistency and coherence have occasionally emerged in the initiatives undertaken by the EU and its member states in multilateral diplomatic arenas. Sixth, there is scope for a better implementation of mainstreaming into ESDP operations and a more strategic and coordinated use of the EIDHR. Overall, it may be provisionally concluded that the EU has made considerable progress in the area of human rights mainstreaming but has still not fully embedded the relevant policies and instruments within the context of a comprehensive systematic approach.

3. Analysis of EU human rights mainstreaming in specific policy areas

In this chapter, the implications and possible impact of human rights mainstreaming are evaluated in relation to three important policy areas: the CFSP/ESDP, development cooperation and trade, and migration and asylum policy.

Main findings

3.1 Mainstreaming human rights and gender in the areas of CFSP and ESDP

Due to the partial secrecy that characterises this policy area, and in particular ESDP missions, the evaluation of the impact of mainstreaming efforts remains difficult. However, a first assessment can be done, which will eventually require further analysis and research:

- The 2006 COHOM paper on mainstreaming human rights across the CFSP and other policies, followed by concrete proposals and useful tools, has set the stage for the mainstreaming of human rights in a number of sectors and initiatives related to these policies. The appointment of the Personal Representative of the SG/HR for the CFSP on Human Rights has also significantly contributed to raising human rights concerns and issues within this policy area.
- So far, only 8 out of 22 Joint Actions by the Council establishing ESDP missions explicitly mention human rights.
- Various human rights and gender related components have been included in ESDP operations. Human rights monitors played a central role in the Aceh Monitoring Mission (AMM), and human rights focal points were associated also to missions in Congo and Kosovo. Gender issues have become even more prominent in ESDP missions, notably with the occasional appointment of full time officers.
- Still more needs to be done in terms of implementation. A more structural approach and systematic inclusion of human rights in all ESDP operations is required. The training of ESDP personnel could be improved. As member states are primarily responsible for this, the development of a standardised approach or common guidelines (similar to what the UN has done for its operations) could help to ensure consistency and uniformity across missions over time.

3.2 Mainstreaming human rights in EU development cooperation policies and trade policies

- The EU Treaty explicitly links this policy area with the objective of respecting human rights, and the EU has embraced the perspective of implementing a human rights based approach to development. Yet, there is a clear need for a more consistent and coherent use of human rights to frame policies and initiatives in this area.
- Within co-operation agreements, increased attention has been paid by the EU to the political dimension of the relation between the EU and third countries, in particular in the case of ACP countries.
- With respect to the implementation of the human rights clauses, some concern has been raised, especially by NGOs, about possible double standards in the application of the clauses. It has been noted that the majority of sanctions activated under the clause have concerned ACP countries.
- The GSP+ system is recognised as a potentially useful tool for mainstreaming human rights into development cooperation and trade policies; new applications in recent or currently on-going cases may help to further establish this.

3.3 Mainstreaming human rights in internal policies: cooperation with third countries in the field of migration (and asylum)

This sub-chapter begins with a general summary review of EU migration/immigration policy, and then turns to an examination of human rights mainstreaming in the context of regional cooperation with, respectively, ACP countries and Southern neighbourhood countries. In conclusion the use of available financial instruments for the promotion of human rights mainstreaming in this area is examined.

- The 1999 Tampere Council Conclusions and following statements by the Commission show that human rights concerns have been deliberately incorporated into the Union's immigration policy. However, one needs to be aware of a tension between the respect of human rights within immigration and asylum policies and the Union's interest in securing a safe environment for potential migrants and refugees in their home countries so as to make it less attractive for them to seek to pass the EU borders. This tension largely affects the way in which the policy is discussed and defined in relations with third countries.
- With respect to regional co-operation with ACP countries, the Cotonou agreement provides a strong legal basis for the mainstreaming of human rights into migration policies – with the important proviso that it does not provide for human rights protection of irregular migrants except in the context of return policies. A review of three regional conferences (Rabat 2006, Tripoli 2006, and Paris 2008) devoted to cooperation in the field of migration demonstrates a clear progression in sensitivity to the key human rights concerns related to (legal and illegal) migration, yet the ensuing commitments remain relatively weak – notably in the absence of ratification by EU member states of the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families – and it is observed that statements adopted

in this policy area are not consistently matched by concrete implementation measures.

- With respect to regional processes involving Southern neighbourhood countries (i.e. the Barcelona process and the Union for the Mediterranean), which mark a clear priority for the EU in terms of immigration control, it is found that human rights considerations have not featured prominently and the statements that do acknowledge the need for a rights-based protection of migrants fail to be accompanied by the provision of concrete operational measures. Within the Euromed Migration II project, no systematic mechanism has been put in place to secure that human rights will be consistently taken up and no focal points on the human rights of migrants have been appointed. Furthermore, NGOs have no access to the meetings held in the context of the project. Overall, the picture is one of inadequate mainstreaming.
- Bilateral association agreements with Southern neighbourhood countries all contain a human rights clause and all country action plans for the region have both a chapter related to human rights and democracy promotion and a chapter dedicated to cooperation in the field of migration and asylum. To render instruments operational, the EU and the partner countries have in most cases established a subcommittee on human rights as well as a working group on migration and social affairs. It is, however, not clear to what extent their efforts have been effectively coordinated, and it appears that human rights considerations tend to be restricted to civil and political rights, whereas economic, social and cultural rights issues have been only randomly raised. Overall, bilateral cooperation seems to suffer from the same limitations as regional forms of cooperation: migrant and refugee protection is not always adequately mainstreamed and EU efforts in this direction seem limited by concerns related to the protection of borders.
- EU financial instruments dedicated to supporting civil society organisations do provide opportunities for human rights mainstreaming, yet in some respects exclude migrant protection for reasons that are not fully clear. Financial instruments dedicated to bilateral cooperation with the third countries in question do not consistently reinforce human rights priorities, including the protection of migrants, in part for lack of human resources and in part because budgetary support is given without effective means of monitoring whether thematic priorities are being honoured.
- Finally, the question of the interaction between the different Commission services involved in co-operation projects and the staff involved needs to be considered: it may be difficult for people monitoring the human rights situation of the country in DG RELEX to interact with local staff in the delegation and JLS colleagues. This is valid also for the AIDCO structure. Currently, only one person within the Human Rights Unit of DG RELEX is responsible for migrant rights: considering that this person has other responsibilities – and the overall complexity of the issue – more staff should be devoted to this task.

4. Cross-cutting cases

Two cases are examined to evaluate how different efforts of mainstreaming may or may not come together to contribute to the promotion of human rights in external relations. One case is thematic and deals with human rights defenders; the other is regional and concerns EU action in relation to the Western Balkans region.

Main findings

4.1 Thematic case: support to human rights defenders as an element of mainstreaming

EU action on human rights defenders (HRDs), which also directly involves Member States, shows significant positive outcomes while at the same time leaving room for improvement. The case is centred on the implementation of the EU Guidelines on HRDs, which has been considered a best practice within the debate on the implementation of guidelines at large. It furthermore looks also at the use of some relevant financial instruments, including the EIDHR.

- The guidelines on HRDs have been initially adopted in 2004 and revised in 2008. There is broad agreement that the text of the guidelines has been improved in view of a first assessment and with the contribution of NGOs acting in the field. All human rights have been more comprehensively taken into account and questions of mainstreaming has been explicitly included.
- There is evidence of several successful interventions of the EU and Member States. Actions in support of HRDs are becoming established practice and new important initiatives are being implemented – such as “Shelter Cities” – in cooperation with NGOs like Front Line.
- Some shortcomings, however, have been observed, including: the lack of consensus among Member States on some HRD cases due to the underlying politics involved; still limited awareness of HRD issues among Commission delegation staff; the need to do more in relation to the protection of women HRDs; not all delegations have a focal point on HRDs. Generally, more financial resources could be allocated to HRDs, notably through the EIDHR, and there is a need to better follow up on cases involving HRDs and ultimately secure continuity in the way in which cases of HRDs are dealt with.

4.2 Regional case: EU human rights conditionality and the Western Balkans

Overall, human rights have been well implemented in the context of the EU – Western Balkans relations. The analysis of the case considers these relations in the context of the Stabilisation and Association Processes (SAP) and, within it, the Stabilisation and Association Agreements (SAAs) signed between the EU and a number of countries of the region, each of them with different prospects of acquiring EU membership in the next years. The functioning of conditionality clauses (within the OBNOVA regulation) and of pre-accession financial instruments (IPA) are formally considered and related to the overall question of mainstreaming human rights.

- Several financial tools reinforce to the promotion of human rights in the countries involved. Human rights are clearly an integrated element of IPA. Civil society actors have access to EIDHR funding and, within IPA, funds for civil society development are made available to NGOs.
- Violation of human rights as defined primarily and comprehensively by the UN Universal Declaration of Human Rights would normally constitute a breach of the essential element of the SAAs signed between the EU and some Balkan countries.
- Review mechanisms established in conjunction with the SAP have contributed to generating a situation whereby political (human rights) conditionality derives its significance not primarily through negative measures taken subsequent to an actual violation of relevant EU criteria. What, in practice, seems to be of much more relevance is the 'anticipatory effect' of conditionality, combined with the incentives offered by the EU in case of compliance. This marks an important positive example of human rights mainstreaming.
- The role of the EP in the whole process appears largely limited to that of an observer. In cases of negative measures imposed by the EU, the Parliament is to be informed but only after the fact, even in cases involving agreements for which the assent of the EP was mandatory. In order for the Parliament to exercise more democratic control over the process, the three main EU institutions should enter into a more structured inter-institutional human rights dialogue.

5. Focus on the role of the European Parliament in promoting human rights mainstreaming

Based on the findings of the previous chapters, and in particular the case of human rights mainstreaming in CFSP, the chapter seeks to identify ways in which the EP could reinforce its involvement in and contribution to the overall mainstreaming of human rights in EU external relations.

Main findings

- The European Parliament is an essential part of the Common Foreign and Security Policy architecture of the EU and has various means at its disposal to promote human rights mainstreaming, in part through its basic democratic control function, yet its effectiveness in this regard often depends on timely access to information that for various reasons may be restricted. (To gain more ready access to such information the Parliament would in turn have to ensure effective confidentiality measures.)
- In many of its resolutions and own initiative reports, the EP has demonstrated a strong commitment to human rights mainstreaming in EU external relations. This is particularly true of the Annual Report on Human Rights in the World in recent years (except in the draft 2008 report). Particular attention has been paid by the EP to the implementation of the EU human rights guidelines. Another relevant action in support of human rights mainstreaming was the strong support manifested by the EP to the appointment of a PR on human rights of the EU Representative for the CFSP.

- New possibilities will eventually emerge for the EP to increase its influence and participation in the CFSP as provided by the Lisbon Treaty.
- Some recommendations are made to the EP in order to foster the mainstreaming of human rights into external relations. These include: to keep on raising the question of mainstreaming in documents, opinions and debates that relate to the CFSP; to call for the mainstreaming of human rights into all external EU policies, including the external aspects of the internal EU policies; to highlight the importance of mainstreaming during the annual debate on progress in implementing the CFSP; and to liaise more effectively with other EU bodies in creating human rights guidelines, handbooks, standards, focal points, checklists, and advisor positions in ESDP missions.

6. Recommendations - towards a comprehensive and strategic approach to human rights mainstreaming

Four sets of recommendations – relating to institutional framework, mainstreaming on the basis of human rights instruments, mainstreaming on the basis of financial instruments, and measures to enhance policy consistency – are provided in view of implementing a comprehensive strategy that reinforces the mainstreaming of human rights across external relations policies. These recommendations draw on the ‘theory’ of mainstreaming as defined at the outset of the study and the ‘practice’ emerging in the analysis of the policies and cases presented. They should be taken as an encouragement towards a balanced approach to the implementation of mainstreaming.

Institutional framework

- As human rights mainstreaming implicates a multitude of actors and activities, working in different contexts and at different levels, a strong centralised structure is needed to ensure effective coordination and provide guidance to the institution as a whole. One way of attaining this objective would be to establish the position of an EU Human Rights Commissioner. Alternatively, the Human Rights Unit under DG RELEX should be significantly reinforced and possibly upgraded to the status of a full directorate.
- The Commission should establish human rights units and focal points on human rights at each appropriate level, from DGs to Delegations.
- The position of the SR of the SG/HR for the CFSP on Human Rights should be enhanced in view of giving this position more visibility and a greater role to play in the mainstreaming process.
- The implementation of measures outlined in key policy documents, including the Council Secretariat papers of 2006 on mainstreaming human rights into CFSP and ESPD, should be evaluated. The EP should make an explicit request to the Council in this respect.

Mainstreaming on the basis of human rights instruments

- Human rights clauses should be integrated in all types of agreements, including sectoral agreements.

- Human rights and political dialogues should be maintained and reinforced, and participation should be extended to officials of various ministries and DGs affected by the issues at stake (e.g. interior, justice, development, etc.). Clear priorities should be established so that discussions of pressing human rights issues could become more focused.
- The outcome of such mainstreaming efforts should be explicitly discussed and evaluated in the EU annual report on human rights.
- EU human rights guidelines should be reinforced and their use and impact regularly evaluated. They should be used to identify issues relevant for dialogues and to target the implementation of financial instruments such as the EIDHR and thematic programmes.

Mainstreaming on the basis of financial instruments

- The EIDHR should be deliberately designed to allow for a better mainstreaming of human rights within the different sectors of activities.
- Geographic financial instruments (ENPI, DCI, etc) should as far as possible seek to define, establish and reinforce human rights-based approaches to programming. This will typically entail *ex ante* and *ex post* human rights impact assessments as well as standardised monitoring and reporting procedures.
- Thematic financial instruments – like that on migration – should be fully mainstreamed.
- An *ex ante* impact assessment should be introduced by the Commission to sectoral policies – such as migration and the fight against terrorism – which are apt to have an unintended negative impact on the protection of human rights.
- Projects financed through the EIDHR should ideally contribute to reinforce the human rights dimension of projects and policies supported by other financial instruments.

Measures to enhance policy consistency

- While many EU official documents support mainstreaming and a human rights based approach to external relations policies, in many cases operational measures are missing and should be specified.
- Economic, social and cultural rights should be more thoroughly incorporated into the mainstreaming framework to ensure that concerns related to all human rights are taken up at the moment of designing, implementing and evaluating policies and initiatives undertaken in the field of external relations.
- Human rights mainstreaming should be aligned and coordinated with similar efforts taking place in the realms, notably, of gender, children's rights, and environment.
- A formal reference to human rights should be made whenever the EU adopts legislation or takes important policy decisions related to its external relations. This step would mirror similar requirements established by the Commission in internal policies with respect to making reference to the EU Charter of Fundamental Rights.

This, overall, would contribute to aligning internal and external policies towards common and unified human rights standards.

END OF THE SUMMARY

1 ON THE CONCEPT OF MAINSTREAMING HUMAN RIGHTS – INTRODUCTORY ANALYSIS¹

This chapter introduces the idea of mainstreaming human rights and – building on more than a decade of experiences with the mainstreaming of human rights in the United Nations (UN) system – identifies key features of and challenges in mainstreaming human rights in international organisations.

What is mainstreaming human rights?

There is no universally agreed definition of the notion of mainstreaming. In the ordinary meaning of the word, mainstreaming means that ideas, issues or concepts are brought from the fringe to the centre ('mainstream') of debate, society, culture, policy, institutions, etc. The term can convey a more specific meaning, and the process of mainstreaming can also be used to achieve a pre-defined goal. Mainstreaming a gender perspective, e.g., has been defined by the UN as "the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality".²

Mainstreaming human rights may be defined as a strategic process of deliberately incorporating human rights considerations into processes or organisations which are not explicitly mandated to deal with human rights. More specifically, mainstreaming is a process of integrating human rights within policies and managerial structures, methodologically supported by a human rights-based approach in programming and operational activities. Thus, in a qualitative sense, it is different from a sum of human related activities undertaken by various actors. Its goals are achieved when human rights provide an important context and methodological framework for the entire work of the organization; when the organization does not only undertake some activities beneficial for human rights but also applies human rights methodology while performing its core tasks. In other words, the goals of mainstreaming are achieved when human rights standards and methodology become part of the institutional culture of the organization. In practical terms, this means that the organization in question bases its programmes, policies and activities on international and regional human rights law, i.e. the applicable human rights norms, standards and principles; and that it operates in a way which fosters those norms, standards and principles.

Mainstreaming vs. specialisation

To mainstream human rights (or other policy priorities) means to steer a middle course between two extremes: *compartmentalising* the subject matter in question by treating it as the exclusive domain of a particular branch of the organisation or '*spreading it thin*' by

¹ This chapter is based primarily on contributions by Gerd Oberleitner, Zdzisław Kedzia and George Ulrich.

² United Nations Economic and Social Council (1997), "Report of the Economic and Social Council for 1997", Chapter 4, para.4.

diffusing it throughout all branches of the organisation without sufficient focus and definition of the activities. What is required in contrast to both of these unsatisfactory options is the creation of a *synergy effect* between dedicated human rights structures and programmes, on the one hand, and a general commitment to promote and protect human rights in and through all actions of the organisation, on the other hand. Expressed differently, to effectively mainstream human rights means to adopt a *dual approach* whereby targeted human rights activities and dedicated institutional structures also at the same time help to develop and reinforce the ability of other branches and actors in the organisation to advance human rights in and through their own work.

To obtain this goal requires the articulation of a comprehensive strategy. As such, the mainstreaming of human rights is not an ad-hoc response to specific temporary demands from within or outside an organisation or a by-product of organisational change, but requires the definition of over-arching goals and the allocation of resources and operational means and the adoption of a time-frame to achieve pre-defined short-term, mid-term and long-term objectives. While mainstreaming is first and foremost geared towards allowing an organisation to reorient itself along the lines of human rights, and as such poses a challenge to the organisation itself, it will necessarily affect the organisation's member states, partners and donors of cooperation projects (governments, NGOs, inter-governmental organisations, local communities and other stakeholders and beneficiaries).³

Adopting a human rights-based approach to programming

A key feature of mainstreaming human rights is the implementation of what has become known a 'rights-based approach' to programming. This has notably been taken up by the UN in the area of international development cooperation, but may apply to other policy areas as well (e.g. peace keeping and security) In the understanding of the UN Office of the High Commissioner for Human Rights (OHCHR), "[a] rights-based approach to development is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. Essentially, a rights-based approach integrates the norms, standards and principles of the international human rights system into the plans, policies and processes of development".⁴ The principles of accountability, empowerment, participation, and non-discrimination, as well as the focus on vulnerable groups underlay this concept.

At the Inter-Agency Workshop on a human rights-based approach in the context of UN reform, held from 3 to 5 May 2003, the participating agencies agreed upon a common understanding of the human rights-based approach that includes the following principles:

1. All programmes of development cooperation, policies and technical assistance should further the realisation of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.

³ See Frankovits, A. (2005) "The Human Rights Based Approach and the United Nations System", Paris, UNESCO, p. 33.

⁴ United Nations Office of the High Commissioner for Human Rights, Human Rights in Development, <http://www.unhcr.ch/development/approaches-04.html>.

2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights.⁵

On the use of indicators and benchmarks

The development of analytical tools to measure the impact or success of mainstreaming human rights is only at an early stage. Generally, little substantive work has been done in creating reliable benchmarks or indicators, both quantitative and qualitative, for measuring the realization of human rights, despite the interest which the topic has attracted.⁶ There is disagreement on the value of developing such indicators, for which a methodological and conceptual structure has yet to be developed, and there are suggestions to use existing development indicators rather than creating specific human rights indicators.⁷

The UNDP Human Development Report 2000 has made the case for the use of indicators as tools for making better policies and monitoring progress; identifying unintended impacts of laws, policies and practices; identifying the actors which have an impact on the realization of rights; assessing whether they fulfil their obligations; giving early warning of potential violations and allowing for preventive action; enhancing social consensus on difficult decisions in the face of resource constraints; exposing neglected or neglected issues; and assisting states to recognise when national and international policy adjustments are required.⁸ Objections to human rights indicators include disagreements over the interpretation of human rights norms; the difficulties of measuring protective measures as opposed to promotional ones; and process assessment (of conduct and commitment) versus results-oriented assessment.⁹

In the area of the right to health, the UN Special Rapporteur on the Right to Health has sought to develop a conceptual framework for human rights indicators which may serve as guidance and blueprint for further work.¹⁰ The Rapporteur's methodology (which is not

⁵ United Nations (2003) "Common Understanding on a Human Rights-Based Approach to Development".

⁶ See Department for International Development (2005) "Summary Report of Material Collated Regarding Practical Guidance to Implementing Rights-Based Approaches, Human Rights Analyses for Poverty Reduction and Human Rights Benchmarks from Development Actors and other Relevant Communities". For an overview of attempts to introduce benchmarks and indicators see Malhotra, R., Fasel, N., 2005.

⁷ See on this debate Frankovits, 2006:77.

⁸ United Nations Development Programme (2000) "Human Development Report 2000 - Human Rights and Human Development", p.89.

⁹ Sano, 2005:10-11.

¹⁰ See the Reports of Paul Hunt, Special Rapporteur of the Commission on Human Rights on the right of everyone to enjoy the highest attainable standard of physical and mental health, at United

meant to measure the results of mainstreaming human rights but seeks to assess states' performance in relation to human rights treaty law) is based on the understanding that a human rights indicator may correspond with, but is qualitatively different from any other type of indicator, and that an indicator should relate to and assess structural questions, process and outcome separately.¹¹ Structural indicators address whether or not key structures, systems and mechanisms exist in relation to a particular problem. Process indicators measure effort rather than outcome and establish the degree to which activities which are necessary to achieve certain objectives are carried out, and how they progress over time. Outcome indicators measure the results achieved by policies.

The Rapporteur's 2004 report contains a list of explicit indicators on health and child survival in these three areas, ranging from the adoption of legal norms, the setting up of institutions, the existence of national action plans to data on specific concerns (such as Malaria cases, numbers of various types of water supply installations, immunization figures, nutrition and mortality rates, etc.), each one linked to the responsible governmental organ and to the respective international human rights norm(s), thus creating a matrix of duty bearers, rights holders and international norms, stretched over space and time. Adapting such an approach to the desired results of the mainstreaming of human rights might be a feasible way forward in further research.

Challenges and obstacles

The conceptual and practical challenges of mainstreaming human rights have usually been experienced as demanding.¹² Where mainstreaming human rights goes beyond the rhetorical use of human rights language, it involves considerable conceptual and legal questions and encounters obstacles such as uncertainties on how to integrate international legal norms into policy- and programme-type activities; little understanding of the implications of international human rights law; and doubts about the precise aim of mainstreaming. In addition to such conceptual challenges, the practical consequences of mainstreaming human rights, such as training staff, changing infrastructure and bureaucratic practices, and acquiring human rights expertise in implementing, monitoring and evaluating programmes, can be a hurdle for some organisations.

Prominent and recurring obstacles are the reluctance of staff to take serious the process of mainstreaming, but rather perceiving it is yet another fad imposed by headquarters or policy makers; the lack of understanding of international human rights law and of what a human rights-based approach means; the belief that a human rights-based approach will not yield better results than established approaches, the difficulties in replacing central decision-making with broad consultations in projects; the lack of NGO cooperation partners with human rights expertise; and the insistence of communities on traditions and cultural practices which are contrary to international human rights norms. The critical/constructive

National General Assembly, 2003 and 2004, "The right of everyone to enjoy the highest attainable standard of physical and mental health".

¹¹ United National General Assembly (2004) "The right of everyone to enjoy the highest attainable standard of physical and mental health", para.15 et seq.

¹² With regard to the following issues, see in greater detail Frankovits, 2006:25-71, note 6.

engagement with such perceptions must be seen as a natural part of a mainstreaming commitment.

Such obstacles are only gradually identified and solutions proposed, and there is a scarcity of comparative research on the experiences of different organisations with regard to mainstreaming human rights, as well as a lack of analytical tools to measure the success of mainstreaming human rights (as opposed to the introduction of other organisational changes). As of yet, there is no comparative and comprehensive analysis of the value added of a human rights-based approach or of mainstreaming human rights and no set of appropriate tools to comprehensively evaluate the mainstreaming of human rights.

The UN experience

The process of mainstreaming human rights in the United Nations started in 1997, when UN Secretary-General Kofi Annan asked the UN (in his report 'Renewing the United Nations: A Programme for Reform') "to enhance its human rights programme and fully integrate it into the broad range of the Organization's activities".¹³ The development and humanitarian areas were considered a priority for this process¹⁴ and the Office of the High Commissioner for Human Rights was entrusted with the overall responsibility for driving forward the policy of mainstreaming human rights.¹⁵ Back then, the lack of coherence and co-ordination in human rights matters in the wider UN system were considered major deficiencies of the UN system in the preparation for the fiftieth anniversary of the Universal Declaration on Human Rights in 1998, which necessitated the mainstreaming of human rights.¹⁶

The stage for mainstreaming human rights had been set earlier, when in January 1997 the UN secretariat was reorganised into four executive committees: peace and security, economic and social affairs, humanitarian affairs, and development cooperation. Rather than creating a fifth 'human rights' committee, human rights were considered a cross-cutting issue to be integrated into all of the UN's work.¹⁷ This decision built on the establishment of the Inter-Agency Standing Committee in 1992.¹⁸ The Agency is the primary mechanism for inter-agency coordination of humanitarian assistance.

Subsequently, various UN documents confirmed the importance of mainstreaming human rights. The 2002 report 'Strengthening of the United Nations: An Agenda for Further Change' considered that "the promotion and protection of human rights is a bedrock requirement for the realization of the Charter's vision of a just and peaceful world"¹⁹ and went on to conclude that good progress had been achieved in integrating human rights

¹³ United Nations (1997) "Renewing the United Nations: A Programme for Reform", para.79.

¹⁴ *Ibid.*, para.96.

¹⁵ *Ibid.*, para.79.

¹⁶ See Strohal, 1997: 412, and Sucharipa and Theuermann, 1997:246-254.

¹⁷ United Nations (1997) "Renewing the United Nations: A Programme for Reform", para.28, note 9.

¹⁸ United Nations General Assembly (1992) Resolution 46/182, 1992.

¹⁹ United Nations (2002) "Strengthening of the United Nations: An Agenda for Further Change", para.45.

throughout the United Nations system. Thirty-six actions for reform were identified in the report. 'Action 2'²⁰ and the resulting 'Action 2 Plan of Action and Work Plan', adopted by twenty-one heads of UN departments and agencies, aimed, *inter alia*, to integrate human rights throughout the UN system in its humanitarian, development and peacekeeping work and to apply a human rights approach to programming.²¹

Back in 1997, Kofi Annan had already predicted four challenges in mainstreaming human rights:²² mainstreaming must involve the adoption of a rights-based approach to an institution's activities; it must have operational consequences and lead to the development of specific programmes or projects on human rights; it is an agenda for change and requires the reorientation of existing programmes towards human rights; and it means transcending the UN human rights programme and including human rights in the broader UN policy development.

The 'UN Common Understanding on a Human Rights-Based Approach to Development' of 2003 - agreed at the Stamford Inter-Agency Workshop of 2003 and approved by the UN Development Group (UNDG) – laid down a common approach to the operationalisation of human rights in the different agencies. On the basis of the aforementioned agreement on the core content of the HRBA (i.e. the three core principles cited above), various agencies and programmes are tailoring it to their respective needs. Numerous trainings were organised by OHCHR in cooperation with UNDP and UN Staff College to enable partner organizations, in particular within UNCTs, to benefit from this approach, including in the context of development programming at the country level. Methodological tools have also been produced to that end in the inter-agency framework.²³ In October 2008, an interagency workshop was organised in New York to review the experience with the implementation of the rights-based approach.

The UN Secretary-General's 2005 report 'In Larger Freedom' confirmed all these decisions and stated that "human rights must be incorporated into decision-making and discussion throughout the work of the Organization. The concept of 'mainstreaming' human rights has gained greater attention in recent years, but it has still not been adequately reflected in key policy and resource decisions".²⁴ The 'Outcome Document' of the 2005 World Summit reiterated the states' determination to "support the further mainstreaming of human rights throughout the United Nations' system".²⁵ When the UN Commission on Human Rights was replaced by the Human Rights Council in 2006, the Council was explicitly entrusted with promoting the process of mainstreaming human rights.²⁶

²⁰ *Ibid.*, para.51.

²¹ See <http://www.un.org/events/action2>.

²² See Gallagher, 1999:154-155.

²³ See e.g. United Nations (2007) "Common Learning Package on HRBA (June 2007)", prepared with the support of Action 2.

²⁴ United Nations (2005) "In Larger Freedom", para.144.

²⁵ United Nations General Assembly (2005) Resolution A/RES/60/1, 2005, para.126.

²⁶ United Nations General Assembly (2006) Resolution A/RES/60/251, 2006, para.3.

The responses to the Secretary-General's call of 1997 by UN specialised agencies, programmes and funds differ and their track record in mainstreaming human rights is uneven, with some embracing the idea of mainstreaming human rights and others remaining hesitant.²⁷ The successful practice of the first group of organisations in mainstreaming human rights shows that mainstreaming can be done in a way that is analytically sound, politically viable and operationally possible. The experience of UNDP and UNICEF, in particular, demonstrate that reliance on human rights can provide guidance in policies and operations, enhance precision, ensure coherence, allow to evaluate and analyse progress and setbacks against objective benchmarks, enable monitoring of stakeholders' actions, assess underlying causes as well as consequences of activities, fence of feasible actions from those which are not, select partners and develop partnerships, and engage with governments in a meaningful way.

Policy briefs, guidelines and handbooks which contextualise human rights in the context of the respective organisation's field of competence are a concrete result of mainstreaming human rights, with UNDP's 1998 policy paper remaining a landmark document in this regard.²⁸ In this paper, UNDP stresses the importance of human rights "an important and objective normative tool to address the inherent power issues underlying many of the contemporary development problems".²⁹

UNICEF adopted its strategy on mainstreaming human rights in 1999³⁰ and has since changed from a development institution responsive to emergencies towards a human rights-based institution and implementing agent of the Convention on the Rights of the Child. This meant a fundamental change from 'needs' to 'rights': "UNICEF's focus is no longer limited to meeting the needs of children, but on the recognition and realization of their rights".³¹ UNICEF considers it advantageous to use the Convention on the Rights of the Child because it gives the organisation a tool to assess the meaningfulness of activities undertaken, provides a precise agenda instead of a set of general principles, prevents UNICEF's commitment from becoming fragmented, allows it to set benchmarks and identify suitable measures to achieve them in a given time-frame, and provides an opportunity to promote a self-critical monitoring process.³² UNICEF has pioneered such a regular evaluation of its human rights-based approach and is able to identify best practices and obstacles to integrating human rights in its activities.³³ UNDP and UNICEF are examples of how mainstreaming human rights can inform an organisation about the 'why' and the 'how' of its

²⁷ See in greater detail Oberleitner, 2008:364-390.

²⁸ United Nations Development Programme (1998) "Integrating Human Rights with Sustainable Development". It was followed by United Nations Development Programme (2005) "Human Rights in UNDP. A Practice Note".

²⁹ United Nations Development Programme (1999) "Human Rights in UNDP. A Practice Note", p.8, note 4.

³⁰ Santos Pais, 1999.

³¹ *Ibid.*, pp.5-6.

³² *Ibid.*, p.15.

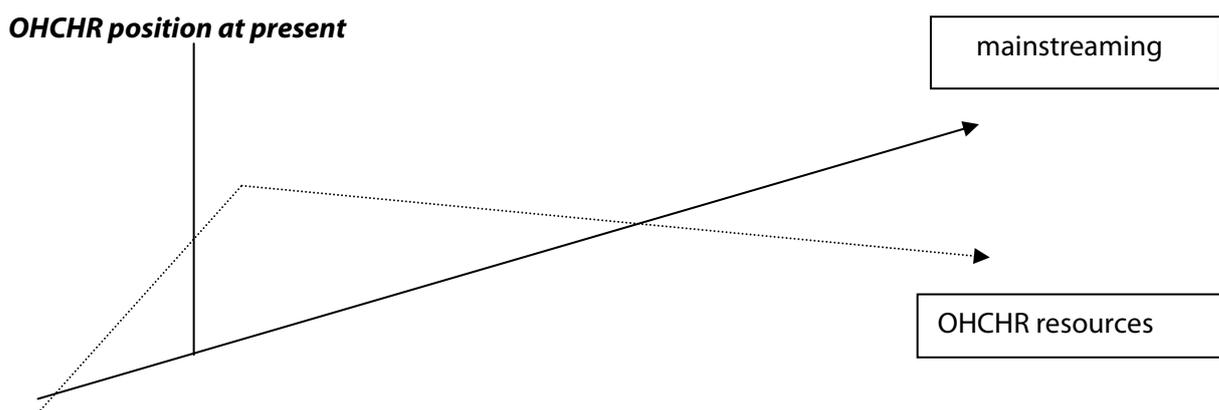
³³ See Frankovits, 2006:38-41, note 6.

activities, i.e. on the reason why specific strategies and policies should be adopted as well as on the ways to implement these strategies and policies.

Interim assessment

Overall, within the UN context, it can be concluded that mainstreaming human rights as a formally proclaimed concept and policy commitment has been in place for more than 10 years. With minimal risk it can be said that this process is irreversible, although from time to time one can note some strong attempts to divert it or slow it down. Of particular interest is the emergence of an encouraging *dual perspective* whereby UN agencies and programmes, on the one hand, contribute to the promotion and protection of human rights through rights centred activities, while, on the other hand, human rights are increasingly perceived as a useful tool to implement the core mandate of a given organization in a more effective and sustainable manner. This synergy approach is strikingly illustrated, e.g., by UNICEF but is becoming increasingly characteristic of several UN agencies, as outlined above.

For the OHCHR, the organisation-wide commitment to human rights mainstreaming has the consequence that the Office must assume the role as a resource centre for the mainstreaming process, disposing over capacities to empower partners and control the quality of human rights input made by partners. To that end, as has been indicated in the OHCHR Plan of Action, the Office must build its thematic expertise and step up work on specific human rights issues. In short/medium term this will require a considerable increase of OHCHR capacities. The 2005 World Summit responded to this need by resolving to double of the Office’s regular budget resources over the next five years.³⁴ In longer term, however, mainstreaming will most probably lead to some decrease of OHCHR capacities directly involved in the delivery of human rights assistance to governments and civil society, since the responsibility for such assistance will be more extensively shared with the empowered partners. But, to arrive at this point, OHCHR needs to increase its own investment in mainstreaming. The graph below illustrates this process:



As it results from this analysis, the mainstreaming of human rights means for OHCHR both responsibility and opportunity. Spearheading this process requires allocation of human and other resources to the development of methodologies and expertise in substantive areas of

³⁴ §124 of the Outcome Document

OHCHR specialization with a view to making them available to partner agencies and programmes in a timely and sustainable manner.

Challenges ahead

Political environment

It is of crucial importance to ensure that the policy line regarding human rights mainstreaming, which was adopted at 2005 World Summit, be followed. To that end, not only positive attitude of the professional structures and staff involved is needed but also determined advocacy in the intergovernmental organs, including governing bodies of the UN agencies and programmes.

UN agencies and programmes

In an ideal world, mainstreaming should firmly place human rights within the institutional culture of UN agencies and programmes. Engagement of partners in human rights should depend on institutional policies and codes of conduct but not on individuals. To that end, however, more is needed than the acceptance of human rights rhetoric what is still often the case. All the partners involved need to explore what sort of contribution to human rights they wish to make and what sort of benefits they expect to derive from mainstreaming human rights for their core work. The understanding of benefits is important because it is the premise that the process of mainstreaming will be sustainable.

From the external perspective, UN agencies and programmes may be expected to:

- a) respect human rights in all their activities, making accountable those in their organizations who may violate these rights,
- b) integrate human rights into their policies by adopting appropriate language in their general policy documents and/or adopting special policy documents on human rights, and apply a rights-based approach in their programming and impact assessment,
- c) undertake human rights activities (e.g. training, institution building, advice, interventions in case of human rights violations within their areas of responsibility) wherever their mandate and potential allows for making a contribution to human rights.

Implications for the EU – what would it mean to mainstream human rights?

As seen from the UN experience, to mainstream human rights requires the articulation of a *comprehensive strategy*, which should be characterised by the definition of over-arching goals, the allocation of resources and operational means, and the adoption of a time-frame to achieve pre-defined short-term, mid-term and long-term objectives.

A strategic approach to mainstreaming by the EU first of all entails a high level policy commitment, both for the organisation as a whole (analogous to what Annan has done for the United Nations) and for the relevant institutions and branches of the organisation. As will be seen in the next chapter, this already exists to a considerable degree.

In structural terms such policy commitments need to be matched by the reinforcement of dedicated human rights units or focal points within the relevant institutions and at the same

time by measures to facilitate cooperation between such units and a broad range of other actors within the organisation with a potential to advance human rights in their daily work.

To effectively mainstream human rights furthermore requires the elaboration of rights-based approaches to programming, e.g. in development cooperation activities, and control mechanisms to ensure that such programming is effectively undertaken. *Ex ante* human rights impact assessments (analogous to what required by the Commission with regard to economic, environmental and social effects of project proposals) could be an effective tool in this regard, as could the inclusion of a human rights reference in standard reporting procedures on project implementation. Another essential vehicle for mainstreaming is internal human rights training and institutional capacity building. It is to be underlined that the European Parliament can have an important role in relation to such impact assessments, through its monitoring function. This, however, requires that the current dialogue established between the Subcommittee on Human Rights with the Commission and Council be expanded to other EP committees, each in its own field of expertise.

In taking stock of the existing EU legal basis, policy commitments and programming instruments (which is the focus of the next chapter), it will be found that the EU has at its disposal an impressive inventory of policies and tools for the promotion and protection of human rights in its external relations. But the central question in the present context is whether such policies and tools in effect function as mainstreaming instruments, i.e. contribute to establishing human rights standards and methodology as central to the institutional culture of the entire organisation.

As outlined above, this involves a complementary approach, whereby targeted investments in human rights do not only stand alone as compartmentalised, worthwhile activities, but rather also, at the same time, reinforce the general capacity of the organisation to promote and protect human rights. Ideally this should further lead to a realisation within other branches of the organisation that the adoption of a human rights-based approach to their work is not only an obligation but also an opportunity, i.e. conducive to attaining their given objectives in a more effective and sustainable manner.

In seeking to adapt lessons on human rights mainstreaming from the UN to the EU, it is important to keep in mind, finally, that the EU is a qualitatively different type of organisation. It is not simply an international organisation where a multitude of sovereign member states come together to negotiate and resolve issues of common concern and through joint agencies and programmes endeavour to advance causes of common interest such as economic development, peace, security and human rights. The EU is in some regards just such an organisation, but it is more than this. In recent decades it has increasingly assumed the character of a federal, 'state-like' entity dedicated to representing the interests of its citizens and people living within its territory. To this end the EU is legitimately engaged in a broad range of policy areas and in the pursuit of particular interests related, e.g., to trade, industry, labour, social affairs, security, energy, environment, relations with third countries, etc. Like a state, the EU passes legislation and engages in international agreements.

For such a (quasi-)federal entity, a commitment to mainstreaming human rights (or analogous objectives such as gender equality and environmental sustainability) is in fact *a commitment to ensuring a basic degree of consistency across all relevant policy areas*. This must

be understood in a realistic manner. The point is not for human rights to always take centre stage, and they should not supplant or impede other policy objectives. But they should always be given consideration, both in the sense that they mark a minimum threshold which cannot be transgressed under any circumstance and in the sense that they embody an underlying normative, moral commitment that should, within reasonable bounds and to the maximum extent possible in the given context, shape all actions of the Union.

2 HUMAN RIGHTS IN EU EXTERNAL RELATIONS: LEGAL BASIS, POLICIES AND INSTRUMENTS³⁵

After introducing and elaborating on the concept of mainstreaming and presenting the UN experience of human rights mainstreaming, this chapter explores the development of human rights mainstreaming within the EU. More specifically, Section A reviews the legal basis for human rights as provided for in the Treaties. Section B examines the overall EU commitments to mainstreaming human rights in external relations, starting with the 2001 Commission communication that officially launched the agenda. Section C looks at the potential tools for mainstreaming, such as human rights dialogues and thematic guidelines, the human rights clauses and the European Initiative for Democracy and Human Rights. Section D describes the institutional organisation put in place by the EU to support mainstreaming. Finally, in Section E a first evaluation is provided of accomplishments and limitations of the EU mainstreaming effort, which sets the general context and framework within which the following analyses of specific policy areas and case studies are to be considered.

2.1 Legal basis

When introducing the legal basis for including human rights in EU external relations one has to consider, first of all, that external relations are predominantly a matter falling within the second pillar, which deals with common foreign and security policy. The European Union promotes respect for human rights – often in conjunction with democracy and the rule of law – at many levels and in many spheres of its external relations. Its instruments of foreign policy (agreements, dialogues, etc.) and financial assistance (including the European Initiative for Democracy and Human Rights) provide a framework for strengthening democracy and human rights in the world.

By now, the pursuit of human rights – often in conjunction with democracy and the rule of law – has become a transversal objective of all of the EU's external activities. From the very beginning, the European integration was based on the wish for peace and freedom. In the preamble of the 1957 Treaty establishing the European Economic Community (EEC) the signatories declared to *“preserve and strengthen peace and liberty, and to call upon the other peoples of Europe who share their ideals to join in their efforts.”* However, the codification of these ideals and its extension to EU's external policies began only in 1993 with the entry into force of the Treaty on European Union (TEU). Article 11 TEU set the development and consolidation of “democracy and the rule of law, and respect for human rights and fundamental freedoms” as an objective of the EU's Common Foreign and Security Policy (CFSP). The Treaty of the European Communities (TEC) stipulates that the Community policy in the sphere of development cooperation must contribute to developing and consolidating democracy and the rule of law, and the respect of human rights and fundamental freedoms³⁶. With the Treaty of Nice – concluded in December 2000 – these ideals gained

³⁵ This chapter is based primarily on contributions by Michele Grigolo and Carmen Marquez Carrasco.

³⁶ Articles 171 and 181 TEC.

weight for the field of economic, financial and technical cooperation with third countries³⁷. Finally, candidate countries have to demonstrate that they effectively ensure the protection of the human rights of their citizens, which is a precondition for opening accession negotiations on the basis of Article 49 TEU.

This development is characterised by an increasing formal commitment by the EU to consolidate human rights within the Union while at the same time providing a comprehensive definition of these rights. The Treaty of Amsterdam defined the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law as common to the Member States, while introducing a mechanism to sanction serious and persistent breaches of human rights by the Member States. Since the Treaty of Maastricht and the Treaty of Nice, Article 6 TEU states that: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". It also stipulates that "[T]he Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law"³⁸.

The Charter of Fundamental Rights of the European Union – proclaimed in Nice in December 2000 and re-affirmed in Strasbourg in December 2007 with minor technical modifications – sets out in a single text, for the first time in the European Union's history, the whole range of civil, political, economic and social rights of European citizens and all persons residing in the EU. The provisions of this Charter are addressed to the institutions of the Union and apply to the Member States when they are implementing Union law. Even considering that the Charter at the present point in time does not have binding legal force, the Commission's action in the field of external relations should be guided by compliance with the rights and principles contained in the Charter.

The Lisbon Treaty, finally, once adopted, will introduce the Charter of Fundamental Rights into primary law and thereby reinforce the premise that the EU is based on values shared by the member states, values which constitute a common heritage that they wish to affirm and promote. Article 2 of the Lisbon Treaty provides that "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail". Article 3 of the Lisbon Treaty states that in its relations with the wider world, the EU shall "uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter". Article 21, (2) & (3) further states that "[T]he Union's action on

³⁷ Article 181 bis TEC.

³⁸ Article 6 TEU.

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 Nation Charter and International law”.

Exploring the reasons and purposes for which human rights have come to assume such a prominent role in external relations, one may note, firstly that the Union has acted upon a strong moral conviction, based on internal consensus and the projection of its ‘internal’ values and principles towards the rest of the world. In the words of Javier Solana, the EU High Representative for CFSP, “The CFSP is more than an instrument. The CFSP relates to European values, to our values, that are represented and projected by our Union of 27 Member States: human rights, the rule of law, international law and effective multilateralism. But the CFSP also helps shape our own internal cooperation among the Member States of the European Union. By working together, by acting together, we define who we are. And so the CFSP is also a means by which the European Union continues to define itself, every day”³⁹.

Yet, it must be clear that the projection of such unified vision is sometimes difficult to achieve. Broadly conceived, the European foreign policy includes not only the activities of the EU but also those of the Member States and other European entities. It requires the coordination of these actors when expressing themselves as a single entity in international relations, and raises problems in mobilising the capabilities which give weight to the idea of a common foreign policy. It has been noted that “The external representation of the European Union is a responsibility shared between Member States, the Council, and the European Commission. The result is a complex tripartite system that has created confusion in third countries and, within the Union, a series of boundary problems involving tasks, responsibilities and functions.”⁴⁰

Secondly, human rights have clearly been considered part of a larger strategy to promote stability, security and prosperity. This dimension of the relation between human rights and external relations is captured by the notion of *human security*. In the words of External Relations Commissioner Benita Ferrero-Waldner, this can be characterised as “an idea of security which places people at the heart of our policies. It means looking at the comprehensive security of people, not the security of states, encompassing both freedom from fear and freedom from want. A world in which people can live in freedom, security and dignity, free from poverty and despair, is still a dream for many. Yet only in a world based on the rule of law and the freedom from fear and want can people develop their individual and collective potential. Respect for human rights is one of the most fundamental and universal values of our world. All of us have a responsibility to promote and protect the rights of our fellow members of the human family, be that at home or elsewhere in the world.”⁴¹

³⁹ Council of the European Union (2009) “EU HR Javier Solana addresses the European Parliament on the EU common, security and defence policy”.

⁴⁰ Aggestam et al., 2008.

⁴¹ Commissioner B. Ferrero-Waldner, foreword from European Commission, External Relations (2007) “Furthering Human Rights and Democracy across the Globe”, p.5.

Thirdly, the EU itself may be subject to extensive human rights obligations, incumbent on it by virtue of international law. The EU can be said to be bound by human rights as part of customary international law but also by the human rights treaties entered into individually by Member States through the principle of succession or substitution. In this perspective, the range of applicable rights includes not only those set out in the European Convention on Human Rights (ECHR) but also UN human rights treaties. Besides, the EU must not merely refrain from violating human rights, but should also, within its spheres of competence, take positive measures to protect and fulfil human rights.

In view of the legal basis for the inclusion of human rights into external relations, one needs to take account of the way in which external relations in fact cross-cut EU competences and actions in other policy spheres. This gives rise to issues regarding the consistency of EU human rights actions in external relations. Article C of the Maastricht Treaty (now Article 3 of the Consolidated Treaties) draws attention to the need for the Union to be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives. Accordingly, "The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers."

In particular, there is the question of the overlapping competences between the first and second pillar in the area of external relations due to multiple legal complexities. The objectives underpinning the CFSP (Article J.1 of the Maastricht Treaty now Title V Art 12) are by no means exclusive to the second pillar, and, indeed, form the basis of many of the Community's day to day activities as well. Consistency is therefore an issue of immediate concern. The TEU introduced provisions to foster coherence in a number of transversal areas, such as economic sanctions and human rights. In these fields, recourse is often sought to measures that combine complementary instruments with different legal bases from the first and second pillar. The same principle applies to EU unilateral measures in cases of a violation of international law by another state. Instruments such as flight bans, the withdrawal of benefits, or the suspension of development cooperation are based on combinations of CFSP and Community provisions, or on single decisions in either framework.

2.2 Overview of commitments to mainstreaming human rights in external relations: a fresh look at an old policy

The idea of mainstreaming human rights in EU external relations began to develop about ten years ago, a bit later than in the UN context and arguably under the influence of the latter. At the time, human rights issues and themes had already been considered within EU external relations, especially through conditionality clauses and within some political dialogues: what was not there was a particular concept – that of mainstreaming – which could reposition the EU external action so as to place human rights more systematically at the core of each strand of activity. Nevertheless, since the first endorsement of human rights mainstreaming in external relations by the Council, this concept has come to occupy an increasingly more important position in the priorities of the EU institutions, beginning with the CFSP and ESDP. This is, in fact, the field in which the Council has most actively promoted

mainstreaming. The EU has been equally concerned with promoting the consistency and coherence between its external relations policy fields and the traditional multilateral fora in which human rights issues are discussed, notably the UN General Assembly, the Commission on Human Rights, and now the UN Human Rights Council. In the process, NGOs have played a significant role by providing their own expertise and information on specific cases of human rights violations. It is also to be underlined that, since its creation, the European Parliament's Subcommittee on Human Rights has engaged itself in monitoring, following up on (and impacting when possible) the EU's actions within the UN Human Rights Council. Other EP committees may similarly also follow-up on specific UN agencies and/or conferences. It is believed that greater exchanges between the EP and the other EU institutions in relation to significant UN events could reinforce the mainstreaming of human rights in multilateral forums.

Year 2001 represents a crucial date for the history of human rights mainstreaming in EU external relations. Before that year, references to the concept and some of its defining features were made by EU institutions but not in an explicit relation to human rights and external relations. In 1995 the Commission would advocate for the "inclusion of respect for democratic principles and human rights in agreements between the community and third countries"⁴² without mentioning mainstreaming. In the same year, the Commission made an explicit reference to mainstreaming but only in relation to gender.⁴³ Later, the 1998 EU human rights declaration (adopted under the Austrian EU presidency on the occasion of the 50th anniversary of the UDHR) provided a more comprehensive indication of the EU agenda for human rights in external relations, highlighting the issue of human rights defenders, recommending the inclusion of human rights concerns in CFSP, development cooperation, EU diplomatic action and dialogues with third countries, and emphasizing the role of the human rights clauses.⁴⁴ In accordance with the priority given to the abolition of the death penalty, in the same year the Union also approved guidelines on the issue. Yet no explicit mention was made of mainstreaming in the declaration.

In 1998 the concept of 'mainstreaming' of human rights, including in external relations, was invoked by experts and academics in the field of human rights, beginning with the *Comité de Sages*⁴⁵ that drafted the report 'Leading by Example'⁴⁶ and notable scholars like Alston and Weiler⁴⁷. They all suggested that, at the turn of the millennium, the EU needed to re-launch both its internal and external human rights policies, make them consistent one with

⁴² European Commission (1995) "Communication on the inclusion of respect for democratic principles and human rights in agreements between the community and third countries".

⁴³ European Commission (1995) "Communication on the external dimension of the EU's human rights policy: from Rome to Maastricht and Beyond".

⁴⁴ European Union (1998) "Declaration of the European Union on the occasion of the 50th anniversary of the Universal Declaration on Human Rights".

⁴⁵ Members of the *Comité* were Antonio Cassese, Catherine Lumière, Peter Leuprecht and Mary Robinson.

⁴⁶ We are referring here to the report as annexed to Alston et al., 1999:921-927.

⁴⁷ Alston and Weiler, 1999.

the other, and set up an adequate institutional framework to remedy the still fragmented human rights policy of the Union. In such a context, mainstreaming was conceived as an organisational principle aiming to integrate and harmonise human rights concerns across specific fields of actions, interventions and programmes. Within this framework specific institutional arrangements to implement mainstreaming should be set up, merging the traditional approach centred on one human rights agency/body with the more articulated, expanded and diversified approach driven by mainstreaming.

Finally, the question of mainstreaming human rights in EU external relations was explicitly raised and elaborated by the Commission in its 2001 Communication on the EU's role in promoting human rights and democratisation in third countries.⁴⁸ This document paved the way for institutional re-thinking and innovation with regard to how the EU should take account of and actively promote human rights in its external relations, thus placing mainstreaming among the founding principles of the policy together with concepts such as coherence and consistency. Soon thereafter, also in 2001, the Council conclusions embraced the Commission's communication⁴⁹, including the commitment to mainstreaming, and assigned the task of elaborating an implementation strategy to the Working Group on Human Rights (COHOM). In December 2002, the COHOM delivered a report on the implementation of the Council's Conclusions⁵⁰, to which other COHOM monitoring reports followed. In 2006, the COHOM released a paper specifically on mainstreaming human rights across CFSP and other EU policies⁵¹. In September 2006, this was complemented by a paper on mainstreaming human rights into ESDP⁵². In 2008, these and other documents were assembled in a collection of EU instruments relevant to the mainstreaming of human rights and gender in ESDP⁵³. Both the EU and European Parliament annual reports on human rights have in recent years consistently been addressing issues of mainstreaming, thus manifesting a clear institutional interest in the matter. It may be suggested that much as the EP Subcommittee on Human Rights has engaged in a dialogue with the Council in relation to the implementation of the EU guidelines in the field of human rights, a similar dialogue should be pursued in relation to the implementation of the abovementioned documents.

The references to mainstreaming in the above-mentioned documents clearly demonstrate that both the Commission and the Council have a solid understanding of the concept. The

⁴⁸ European Commission (2001) "Communication from the Commission to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries".

⁴⁹ Council of the European Union (2001) "Council conclusions on the European Union's role in promoting human rights and democratisation in third countries".

⁵⁰ Council of the European Union (2002) "Draft Council conclusions on the implementation of the follow-up to the 25 June 2001 Council conclusions on human rights and democratisation in third countries".

⁵¹ Council of the European Union (2006) "Mainstreaming human rights across CFSP and other EU policies".

⁵² Council of the European Union (2006) "Mainstreaming of human rights into ESDP".

⁵³ Council of the European Union (2008) "Mainstreaming Human Rights and Gender into European Security and Defence Policy".

2001 Commission communication argues that “To be effective, respect for human rights and democracy should be an integral, or ‘mainstream’, consideration in all EU external policies. This means including these issues in the planning, design, implementation, and monitoring of policies and programmes, as well as the dialogue pursued with partners both by the Commission and the Council”⁵⁴. With an eye on the legal mandate of the EU, the 2002 COHOM report interprets mainstreaming as “integrating human rights (understood to incorporate the principles of liberty, respect for universal and indivisible human rights, fundamental freedoms and the rule of law) into every aspect of policy decision-making and practice, within the framework of the Treaty competency of the Union’s Institutions”⁵⁵.

As for the specific fields of external relations in which human rights are to be mainstreamed, it is evident that a major emphasis has been put on second pillar actions, and in particular the CFSP, which broadly includes bilateral agreements with third countries and EU diplomatic action in multilateral venues, especially the UN and its human rights-related bodies (including the former Commission on Human Rights and the new Human Rights Council). The Commission communication focuses explicitly on assistance programmes targeting both candidate Member States (at the time) and developing countries, with an emphasis on the African, Caribbean and Pacific (ACP) countries. The 2001 Council conclusions go a step further and embrace ‘a rights-based approach to development’, arguing that democracy is the ‘structural framework’⁵⁶ where the promotion of human rights and the eradication of poverty can be realised. Besides, since 2003 and the launch of the first mission, also the European Security and Defence Policy (ESDP) has been targeted for human rights mainstreaming. Thus the Council established in 2006 that “[t]he protection of human rights should be systematically addressed in all phases of ESDP missions, both during the planning and implementation phase”⁵⁷.

To some extent, there have been also efforts made to pursue human rights mainstreaming in the external dimension of traditional first and third pillar actions. The 2001 Commission communication, for example, also deals (sporadically) with Justice and Home Affairs issues, “including immigration and asylum and the fight against organised crime, social policy, the environment, research, culture and the information society”⁵⁸. Separate paragraphs are devoted to human rights issues related to trade and investment, where the Commission sees “a proliferation of initiatives intended to promote human rights, particularly in

⁵⁴ European Commission (2001) “Communication from the Commission to the Council and the European Parliament - The European Union’s role in promoting human rights and democratisation in third countries”, p.8.

⁵⁵ Council of the European Union (2002) “Draft Council conclusions on the implementation of the follow-up to the 25 June 2001 Council conclusions on human rights and democratisation in third countries”, p.9.

⁵⁶ Council of the European Union (2001) “Council conclusions on the European Union’s role in promoting human rights and democratisation in third countries”, para. 17.

⁵⁷ Council of the European Union (2006) “Mainstreaming of human rights into ESDP”, p.2.

⁵⁸ European Commission (2001) “Communication from the Commission to the Council and the European Parliament - The European Union’s role in promoting human rights and democratisation in third countries”, p.7.

developing countries⁵⁹. The Commission even mentions the question of corporate social responsibility (CSR), and establishes this as an objective of the EIDHR while at the same time openly acknowledging that initiatives in this field generally “might be considered a future priority”⁶⁰. The subsequent Council conclusions embrace the attention paid by the Commission to these sectors, including CSR. With respect to the latter, it argues that “further trade liberalisation can contribute to promote respect for human rights.”⁶¹

2.3 Potential tools for mainstreaming

The tools that the EU has identified as useful to promote human rights are both *general tools* and *ad hoc* human rights instruments. The former category refers to tools serving a general purpose, which can include the promotion of human rights. These are the tools which, technically speaking, are to be mainstreamed. By *ad hoc* tools is meant tools that have an explicit human rights-related purpose. In this case, what is at stake is the extent to which they contribute to generally incorporating human rights into the external relations. The use of most such tools would often but not always fall within the CFSP. It cannot be assumed a priori that these tools necessarily are object of or contribute to the mainstreaming of human rights into external relations: a lot depends on how they are used.

A number of both legal and political instruments exist into which human rights issues can be incorporated. The most important legal tools are: common strategies, which serve as a way to implement the general guidelines for the CFSP defined in the European Council; common positions, which may concern concrete measures Member States aim to implement in accordance with the EU approach to some specific political and human rights issues, and joint actions, which aim at coordinated action by the Member States to attain specific objectives set by the Council. The most common political instruments are: demarches/declarations, which are a formal representation of protest or concerned agreed and issued by Member States; political dialogues, which involve discussions between the EU and third countries; election observation and assistance, which monitors and support electoral processes in third countries; and peace missions.

The mainstreaming of human rights into political dialogues has come under the specific attention of the EU. The 2001 Council conclusions stress that “human rights and democratisation should systematically and at different levels be included in all EU political dialogues and bilateral relations with third countries”. At the same time, they underline that “issues taken up in the dialogues [...] must be consistent with the EU’s overall policy towards the country in question, including EU’s positions in international and regional fora”⁶².

Election observation missions (EOM), be it in the framework of the CFSP or, mostly, in the Community context, are presented by the EU as a vital component of its activities to

⁵⁹ *Ibid.*, p.7.

⁶⁰ *Ibid.*, p.17.

⁶¹ Council of the European Union (2001) “Council conclusions on the European Union’s role in promoting human rights and democratisation in third countries”, para.3.

⁶² *Ibid.*, para.13.

promote human rights. While the overall objective of an EOM is to favour the entrenching of democracy in the country, a specific complementary goal is always to strengthen the respect for human rights. The Commission even considers elections as human rights events⁶³, as they allow the expression of the political will of the people. At the same time, they can be considered as free and fair only in an atmosphere where human rights are respected. The observation of the human rights situation is thus considered as essential to the final position of the EU on the overall long-term election process.

With respect to ad hoc human rights tools, the Council has placed great emphasis on *human rights dialogues*. The Commission identifies two types of human rights dialogues that the EU has entered in so far. One is more structured and formalised, involving countries with which either there is no commercial agreement and/or where the agreements do not contain a human rights clause. These dialogues tend to be of high political significance because of the countries and issues involved in them. They engage senior human rights officials on both sides and their focus is exclusively on human rights. So far, dialogues of this type have been enacted with China and Iran. Besides, there are other type of less structured dialogues going on between the EU and countries belonging to specific regions. These dialogues are held at the local level within the framework of wider commercial agreements already in place, such as the African, Caribbean and Pacific (ACP) countries.⁶⁴

The Council clearly considers dialogues a crucial tool to raise and mainstream human rights issues in external relations. In December 2001, the Council approved the guidelines on human rights dialogues drafted by the COHOM without delay. The guidelines state the need for the EU “to intensify the process of integrating human rights and democratisation objectives (‘mainstreaming’) into all aspects of its external policies” including “all future meetings and discussions with third countries and at all levels, whether ministerial talks, joint committee meetings or formal dialogues led by the Presidency of the Council, the Troika, heads of missions or the Commission. [The EU] will further ensure that the issue of human rights, democracy and the rule of law is included in programming discussions and in country strategy papers”⁶⁵.

At the same time, often under the sponsorship of EU Presidencies the EU has intensified the adoption of guidelines focusing on specific human rights themes, adding to the first guidelines on death penalty approved in 1998. *Thematic guidelines* are supposed to identify issues to be raised and mainstreamed into external relation by all the relevant actors. They concern some of the political priorities identified by the Commission and the Council in terms of human rights. In the new millennium, the EU has adopted guidelines on torture and other forms of ill-treatment (2001), children and armed conflict (2003), human rights defenders (2004), international humanitarian law (2005), the promotion and protection of the rights of the child (2007), and violence against women and girls and discrimination against them (2008).

⁶³ European Commission (2000) “Communication on Election Assistance and Observation”.

⁶⁴ European Commission, (2007) “Furthering Human Rights and Democracy across the Globe”, p.9.

⁶⁵ Council of the European Union (2001) “European Union guidelines on Human Rights dialogues”, para.3.1.

It must be noticed that since their first enactment both the guidelines on human rights dialogues and the thematic guidelines have been reviewed and revised several times. Revisions have been based on reports and feedbacks received by the parties concerned with their implementation, and certainly show the will of the institutions involved to identify pros and cons and eventually adjust implementation based on the practice on the ground⁶⁶. The European Parliament has, on its own initiative, conducted evaluations of the implementation of these guidelines. It may be suggested that a greater involvement of the European Parliament in future reviews by the Council of the implementation of the guidelines could contribute to an even better integrated approach.

Besides the human rights guidelines, there are other tools that have been in use in external relations before the agenda of mainstreaming was elaborated, which this agenda then repositions and aligns to a broader and more systematic human rights strategy in external relations. The human rights component of conditionality clauses – also known as '*human rights clauses*' – are key in this regard. By 2006, such clauses had been included into agreements with 120 countries.

Human rights and democracy clauses

Human rights and democracy clauses have been integrated within agreements covering more than 120 countries. The clause traditionally states that the respect for democratic principles and human rights are an essential element of the agreement.

Human rights clauses are integrated into association and cooperation agreements. They are usually associated with 'non-execution' clauses, possibly leading to the total or partial suspension of the agreement in case of serious breaches of human rights and/or democratic values. Suspension would usually occur as the outcome of a predetermined consultation procedure, whereby the parties first engage in a dialogue. The standard procedure foresees that the party considering that another party has failed to fulfill its obligations shall supply the Association Council (or equivalent forum) with "all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the parties". In case of 'special urgency', the agreement may be suspended without recourse to such a dialogue procedure.

It needs to be underlined that the suspension of an agreement is to be considered as a last resort solution. Indeed, agreements usually specify that priority must be given to measures which 'least disturb' the functioning of the agreement. Furthermore, experience indicates that the EU is usually reluctant to trigger the suspension mechanism. In a working document of the General Secretariat of the Council on political clauses in agreements with third countries⁶⁷, it is clearly stated that "the EU has invoked the clause only on

⁶⁶ For more information, see the EU Human Rights Policy page at <http://ue.eu.int/showPage.aspx?id=822&lang=en>.

⁶⁷ 7008/09 – 27 February 2009.

occasions of significant regression from the status quo, rather than on the basis of dissatisfaction with lack of progress". It remains that since 1995, the EU has invoked such clauses, leading to partial suspension of the agreement, in 15 cases for the ACP countries only.

A generally positive evaluation of these clauses can nevertheless be maintained. Indeed, one may argue that the inclusion of such clause provide the necessary legal basis for the setting up of human rights dialogues with third countries. The existence of such human rights clauses also gives legitimacy to the EU to undertake demarches concerning cases of human rights violations. Last but not least, it may allow for the promotion of an integrated approach whereby human rights are mainstreamed through the different fields of cooperation.

In order to enhance rights-based approaches to sectoral policies, several actors, including the European Parliament, are of the opinion that sectoral agreements also need to include a human rights clause. The European Commission has, however, clearly indicated that it is not "convinced that (sectoral agreements) provide a suitable context to negotiate a human rights clause"⁶⁸. In its reflection paper on political clauses in agreements with third countries⁶⁹, the Council Secretariat indicates that in its opinion, "sector agreements (...) or trade agreements are limited to specific thematic issues and should not require the inclusion of political clauses". In its response to the Parliament, the Commission further specifies the absence of such clauses "does not prevent the Commission from carrying out human rights consultation with the country in question".

One may challenge such arguments. Inclusion of a human rights clause within trade agreements could for example be used to enhance a rights-based approach to trade policies (promotion of CSR, respect for social rights, etc.).

The *European Instrument for Democracy and Human Rights* (EIDHR) could certainly be considered as the financial arm of human rights in external relations⁷⁰. The EIDHR replaced in 2006 the 'European Initiative for Democracy and Human Rights', established under the same acronym in 1994 at the initiative of the European Parliament⁷¹. Within the Commission, the EIDHR is managed by the Directorate General External Relations and implemented by EuropeAid. The added value of the EIDHR as opposed to other forms of financial aid is that it supports primarily at NGOs and civil society agents. Besides, EIDHR funds can be allocated without the agreement of the governments of third countries. Both EIDHRs have supported

⁶⁸ European Commission (2009) Response to the European Parliament's resolution on the human rights and democracy in European Union agreements (internal document – no reference).

⁶⁹ *Ibid.*

⁷⁰ European Parliament and Council of the European Union (2006) "Regulation on establishing a financing instrument for the promotion of democracy and human rights worldwide".

⁷¹ The old EIDHR was regulated by two main pieces of EU legislation: Regulation 975/99 with respect to relations with developing countries, and Regulation 976/99 for what concerned other third countries.

initiatives in Community programmes such as development programs through the European Development Fund, cooperation programmes like PHARE, TACIS and MEDA, and the broad CFSP framework.

According to the EU itself, the EIDHR is the most concrete expression of the Union's intention to integrate the promotion of democracy and human rights into all of its external policies. In its 2001 communication, the Commission identified several priorities for the old EIDHR, such as the promotion of democracy, good governance and the rule of law, the abolitions of the death penalty, the fight against torture and impunity and support to international criminal courts, the fight against racism, xenophobia and discrimination against minorities and indigenous people. The Council conclusions embraced the priorities fixed by the Commission while at the same time adding other 'key issues' such as the "rights of the child, freedom of the media and strengthening of civil society including through human rights education"⁷².

With an annual budget of 140 million Euros, the EIDHR for 2007-2010⁷³ positions these priorities and other actions within five broad objectives which cross-cut different areas of external relations. These objectives are: 1) enhancing respect for human rights in countries where they are most at risk; 2) strengthening the role of civil society in promoting human rights and democratic reform; 3) supporting actions on human rights and democracy issues in areas covered by EU Guidelines; 4) supporting and strengthening the international and regional framework for the protection of human rights, justice, the rule of law and the promotion of democracy; and 5) encouraging reliability and transparency of democratic electoral processes, in particular through EU Election Observation Missions. Strategy papers define the Community's priorities and serve as a basis for annual action programmes. Special measures may be in addition be adopted by the Commission as well as ad hoc measures to allow small grants to human rights defenders responding to urgent protection needs.

In the eyes of the Commission and the Council, it is clear that the different tools that have been identified in this section are meant to reinforce and complement each other in view of diffusing human rights within external relations. For example, with respect to cooperation agreements, the 2001 Commission communication argues that the inclusion of human rights in political dialogues "will give substance to the essential elements clauses and permit both parties to identify the most effective measures needed to build political and economic stability"⁷⁴. By the same token, EIDHR is to complement and integrate assistance programmes and the CFSP. In particular, support to civil society through the EIDHR takes place also within the framework of election observation and as a complement to election assistance.

⁷² Council of the European Union (2001) "Council conclusions on the European Union's role in promoting human rights and democratisation in third countries", para.21.

⁷³ European Commission (2007) "European Instrument for Democracy and Human Rights (EIDHR) Strategy Paper 2007 – 2010".

⁷⁴ European Commission (2001) "Communication from the Commission to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries", p.9.

It should be noted that the legal basis for the EIDHR has been adopted by co-decision with the European Parliament. The Parliament's role in the follow-up of the implementation of the EIDHR by the Commission remains, however, limited. There might thus be scope for a greater involvement of the Parliament in the evaluation of the implementation of this instrument. From a mainstreaming point of view, such involvement should ideally be done by associating the different EP committees.

The European Instrument for Democracy and Human Rights (EIDHR)

The EIDHR should not be seen as a mainstreaming instrument as such, but rather as a human rights and democracy promotion instrument which is addressed to human rights actors and managed by human rights focal points within the Commission. Even so, if used efficiently, this instrument has the potential to reinforce and enhance human rights mainstreaming. Indeed, complementarity between the EIDHR and geographical instruments is clearly foreseen within the legal basis of the EIDHR. One may thus advocate that the EIDHR should be deliberately used to further the mainstreaming of human rights within the different sectors of activities covered by the geographical instruments. Initiatives undertaken in the framework of cooperation between the EU and third country authorities could often benefit from parallel actions undertaken by civil society organisations in relation to the same field, and vice-versa.

EIDHR may similarly contribute to the development of integrated approaches to human rights within the internal structure of the EU, and more particularly of the Commission. For example, the involvement of different services, both in Brussels and at delegation levels, in the design and management of calls for proposals can be a factor contributing to more effective mainstreaming.

The fact that local NGOs are financially supported by the EU also provides an incentive for Commission staff and EU Member States to get involved, should representatives from these organisations suffer from human rights violations. This was, e.g., the case when funds allocated to the Tunisian League for Human Rights were blocked by the authorities in 2003. Even if the EU did not manage to resolve the problem, it was raised at the time at all possible levels. Several Member States as well as Commissioner Chris Patten raised the matter several times with the Tunisian authorities. Generally speaking, however, it must be recognised that such action very much depends on the degree of commitment by staff and by the EC Head of Delegation to the promotion of human rights.

Finally, the Council has been keen to specify that the mainstreaming of human rights into external relations go hand in hand with the mainstreaming of other human rights-related issues. In particular, the 2001 Council conclusions argue that "[t]he EU must apply a gender perspective throughout its human rights and democratisation policy, as well as child rights

perspective wherever relevant⁷⁵. The Commission and the Council have both followed up on this in basically all EU reports and documents on human rights – including the Council compilation on mainstreaming human rights and gender in ESDP.

2.4 Inter-institutional cooperation and division of roles

The EU has been aware of the fact that, in order to mainstream human rights in external relations, it has to forge an adequate institutional design, i.e. one that coordinates actors at different levels and in different fields of action. In this respect, as human rights mainstreaming in external relations has remained very much a CFSP issue, the Council has assumed a leading organising role. The Commission itself refers to the Council's wide prerogatives "in EC and CFSP configurations"⁷⁶ when targeting 'consistency' and the need for a concerted action of all the actors involved in the human rights dimension of external relations, with the Commission sharing responsibility with the Presidency and the Member States. Accordingly, the Council openly addresses "the importance of close co-operation between its competent bodies in order to allow for consistent and coherent decisions on the crosscutting issues of promoting human rights and democratisation"⁷⁷.

Within the Council, the COHOM and the Council Secretariat emerge as the actors providing crucial input to human rights mainstreaming. In particular, the COHOM in a 2002 report assigns to itself the task of raising human rights issues when elaborating EU common positions in UN fora and securing continuity from one presidency to another. The same report identifies the Council Secretariat as responsible for the "mainstreaming of human rights and democratisation in all relevant parts of the CFSP"⁷⁸, with a view to securing consistency in political dialogues. Yet, as such an effort requires considerable resources, the Secretariat is to report to the COHOM concerning its 'human rights capacity' and the extent to which human rights considerations are integrated into its works and plans.

The role of the Commission and Member States in mainstreaming is defined in different documents. The Commission, in its capacity as operational branch of the Union, contributes through the work of its delegations. The abovementioned COHOM report also stresses that the Commission is to provide training, information and guidance to its staff in relation to human rights. Finally, in collaboration with the Secretariat and the Commission, the COHOM is to identify ways of improving mainstreaming. The COHOM also call on heads of missions, Commission delegations and state embassies to become involved at different levels with

⁷⁵ Council of the European Union (2001) "Council conclusions on the European Union's role in promoting human rights and democratisation in third countries", para.21.

⁷⁶ European Commission (2001) "Communication from the Commission to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries", pp.6-7.

⁷⁷ Council of the European Union (2001) "Council conclusions on the European Union's role in promoting human rights and democratisation in third countries", para.5.

⁷⁸ Council of the European Union (2002) "Draft Council conclusions on the implementation of the follow-up to the 25 June 2001 Council conclusions on human rights and democratisation in third countries", p.5.

human rights by maintaining contacts with NGOs, doing surveys on the human rights situations in the country concerned, and reporting on that. In the years that followed, the COHOM has continued to report on the implementation of the 2001 Council Conclusions, keeping track of specific initiatives and measures undertaken in this respect.

More recently, the Personal Representative of the Secretary General/High Representative (PR/HR) on Human Rights in the area of CFSP became directly concerned with mainstreaming human rights in external relation. The Personal Representative is appointed by the European Council in order to foster coherence and continuity in the Union's human rights policy in external relations. So far, two individuals have occupied this position: Michael Matthiessen between 2005 and 2007, and Riina Kionka from 2007 until present. Matthiessen was personally involved in drafting the COHOM's paper on mainstreaming human rights in CFSP. Kionka has promoted the 2008 compilation on the mainstreaming of human rights and gender within the ESDP.

Within this broad framework, the European Parliament (EP) has contributed to the mainstreaming of human rights in external relations in different ways. When discussing mainstreaming, the 2001 Commission communication refers to the 'democratic legitimacy'⁷⁹ of the Parliament and its contribution through its missions to third countries, the contacts it has with human rights organisations and defenders, and participation in EU electoral missions. The Commission provides the Parliament "with regular updates on the activities undertaken and an evaluation of how far its objectives have been achieved"⁸⁰. In the same perspective, the Council views the Parliament's involvement in external relations as indication of the 'openness' of the policy. The 2002 COHOM report states that COHOM itself is to work more closely with the Parliament's Foreign Affairs Committee – and the latter's Human Rights Working Group – which "would allow Parliament's views to feed more effectively into preparatory work on EU positions and resolutions and to human rights' policy more generally"⁸¹. The COHOM is also to provide more developed reactions to EP reports on human rights and human rights resolutions.

Finally, the contribution of NGOs and civil society actors to the mainstreaming of human rights in external relations needs to be highlighted. In fact, the Council openly involves civil society in both the preliminary and final assessments of human rights dialogues⁸². NGOs have also actively promoted human rights guidelines, often in conjunction with EU Presidencies. In some cases, like that of the guidelines on human rights defenders, typical NGOs concerns for securing the protection of activists are explicitly addressed. NGOs, conversely, have tried to influence the agenda of human rights mainstreaming by raising

⁷⁹ European Commission (2001) "Communication from the Commission to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries", p.6.

⁸⁰ *Ibid.*

⁸¹ Council of the European Union (2002) "Draft Council conclusions on the implementation of the follow-up to the 25 June 2001 Council conclusions on human rights and democratisation in third countries", p.10.

⁸² Council of the European Union (2001) "European Union guidelines on Human Rights dialogues", para.7 and 10.

concrete issues and making specific suggestions for its improvement. For example, in 2006 the 8th NGO forum that took place under the Finnish Presidency elaborated on the importance of mainstreaming human rights and democracy across EU policies, with a special emphasis on human rights in external relations. With respect to the latter, the forum report underlines that the consultation of civil and non-governmental organisations “has become an integral element in the Commission’s policy formulation”⁸³. At the same time, NGOs made clear their priorities by addressing issues related to the protection of human rights defenders and especially women, crisis management, counter-terrorism and, more broadly, integrated approaches to promoting human rights and democracy.

2.5 Accomplishments and limitations

At this point, and as an introduction to the analysis of human rights mainstreaming in specific policy areas that will follow, it may be useful to draw attention to accomplishments and limitations of the EU mainstreaming effort during the eight years since the basic agenda was defined. In terms of accomplishments the Union has endorsed a clear commitment to mainstreaming, demonstrating a keen perception of what is at stake. This conceptual clarity is a necessary pre-requisite for a meaningful and effective implementation. In fact, the EU has showed a clear interest in promoting mainstreaming across different policy areas: while an overall emphasis is placed on the CFSP and, more recently, the ESDP, there is evidence of a will to expand into a wide range of areas, including trade and development. The EU possesses the tools – from dialogues and guidelines to the financial means – to foster and implement mainstreaming at different levels and from different perspectives.

The institutional setting that should drive mainstreaming is also provisionally defined. With the Council Secretariat acting as the institutional coordinator of mainstreaming upon instructions of the COHOM, the Council has become the motor of mainstreaming. In this respect, the support of the PR/HR on Human Rights in the field of CFSP has proved precious. The Commission and the Member States are involved to different degrees in the policy, together with the European Parliament and NGOs. In particular the Commission has undertaken concerted efforts towards mainstreaming human rights, which have generally been centred on the interaction between the Human Rights Unit of DG RELEX and officials of the relevant country desks and geographical working parties, as well as initiatives taken at the regional level (e.g. ENP, EU-Africa partnership, and the regional strategy for Central Asia). This interaction is further supported by ad hoc human rights training and raising awareness of human rights issues among the staff involved both in Brussels and at delegations.

As a result of a number of parallel efforts by the different institutions, human rights mainstreaming has in many ways gained momentum. By relaying a regional policy approach within the different schemes, the Commission has established strong human rights priorities in the corresponding action plans, country strategies and mid-term reviews. Already by the end of 2003, the Commission had included human rights in country strategy papers and national indicative programmes, and had conducted 10 staff training in human rights at Headquarters and Commission delegations. The COHOM had approved a model fact sheet.

⁸³ Report on the 8th Annual NGO Forum on Human Rights, 2006, Helsinki, 7-8 December 2006, “Mainstreaming Human Rights in Democracy in European Union Policies”, p.4.

By the end of 2004, training had continued and fact sheets had been prepared. By linking with country desks, delegations and heads of mission, the human rights unit has proactively tried to re-focus political dialogues around human rights issues. In some cases, human rights dialogues have contributed to the mainstreaming of human rights within wider regional strategies, as in the case of Central Asia.

In this respect, what the EU has achieved is considerable. Putting in place mainstreaming is not an easy task for the EU. Eventually, it is more difficult for the EU than the UN, due to the quasi-federal nature of the EU and the complexities and different interplays of competences and functions of actors which characterise the different policies related to external relations, from the CFSP to, potentially, the external dimensions of first and third pillar actions. Overall, the clearest achievements have been made concerning the 'political' dimension of human rights mainstreaming (mainstreaming human rights into political dialogues and the implementation of some thematic human rights guidelines). On the other hand, human rights mainstreaming has seemed to be less satisfactory in specific thematic areas, such as the area of development cooperation, where in fact the UN has so far seemed to have pursued a more consistent human rights-based approach. Starting from this very general assessment, in the following more specific shortcomings and points of ambiguity are identified.

Mainstreaming *all* human rights

There appears to be a tension between the EU commitment to all human rights and the almost exclusive focus on specific sets and issues of human rights, usually related to civil and political rights. This emerges, for example, in the tools for mainstreaming. On the one hand, the EU reaffirms in many instances the principle of indivisibility and interdependence of human rights. It also considers that, within human rights dialogues, the partner country accession to all main human rights treaties, including the covenant on economic, social and cultural rights, should be a matter of discussion. On the other, when discussing, for example, the practical arrangements for human rights dialogues, the Council urges that the countries involved in the dialogues should include in their delegations "representatives of the various institutions and Ministries responsible for human rights matters, such as Justice and Interior Ministries, the police, prison administration, etc."⁸⁴ without, in fact, naming any ministry or body concerned with social and economic policies, or cultural issues. The same priority to civil and political rights is evident also in relation to the EIDHR. Within objective 1, for example, the activities to be supported cover almost exclusively the core 'rights to freedom' of thought, religion, expression, information, association and movement. Also the four areas of activity within objective 2 focus overwhelmingly on rights complementing liberal democratic regimes.

Overall, what seems to lack is a more comprehensive consideration of human rights that includes economic, social and cultural rights. This could explain why the 'socio-economic' dimension of human rights mainstreaming has been less emphasised. The training materials provided by the Commission are heavily focused on the above-mentioned 'political' dimension of mainstreaming, including the human rights guidelines. This is certainly

⁸⁴ Council of the European Union (2001) "European Union guidelines on Human Rights dialogues", para.7

necessary but probably not sufficient. Important steps have been taken in relation to women and children's rights, especially through the adoption of ad hoc toolkits to be used by EU staff: one on gender mainstreaming in development cooperation is already successfully being used, while another on children in development assistance and policy programming was funded under the EIDHR in 2006 and is to be developed by UNICEF. However, while the economic and social rights of women and children are certainly taken into account by the toolkits and can be expected to have an impact at the operational level of development policy, a broader and more systematic attention to the economic and social implications of human rights mainstreaming across policy areas is still missing.

Consistency between and within internal and external EU policies

Despite being mentioned by the Commission and the Council, the external dimension of policy areas belonging to the first and third pillars have received limited attention in conjunction with EU efforts to mainstream human rights. The European Parliament has identified this as a shortcoming in the EU mainstreaming effort. In its annual reports, the EP has repeatedly called for the consideration of policies such as migration, asylum, counter-terrorism and environment, which all have an important external dimension and are usually object of severe scrutiny by third countries.

In a broad perspective, EU efforts on mainstreaming human rights in its external policies risk to be diluted and compromised by a certain lack of coherence with the internal actions of the EU and its Member States. Arguably, this brings about a loss of credibility on the global scene. For example, the treatment of irregular migration in some Member States seems to go against the human rights value that the EU has striven to integrate in its cooperation policies. Another question is the secret collaboration of some Member States in the US 'war on terror'. Amnesty International underlined in 2008 that *"EU Member States have still not condemned or fully investigated evidence of collusion with the US-led renditions and secret detention programme. To date there are still no assurances that renditions have stopped"*⁸⁵

Combining mainstreaming with targeted human rights actions

While the EU is certainly combining mainstreaming with ad hoc measures in support of human rights, there are indications that some resources may be transferred from targeted human rights-related initiatives towards the implementation of mainstreaming. If not monitored, this could compromise the balance between the two forms of action, which in fact ought to be complementary to one another. It must be realised that the implementation of mainstreaming, especially in its starting phases, requires a major financial investment. The final report from the 2006 NGO forum thus makes clear that *"[w]ithout the right resources – human, financial and political – mainstreaming could result in a watering-down of the commitment to human rights and democracy, particularly in the area of crisis management"*⁸⁶.

Mainstreaming systematically

⁸⁵ Find the letter at the website of the Amnesty International EU Office at http://www.aieu.be/static/documents/2008/AnRep208_coverletterl.pdf.

⁸⁶ Report on the 8th Annual NGO Forum on Human Rights, 2006, Helsinki, 7-8 December 2006, "Mainstreaming Human Rights in Democracy in European Union Policies", p.3.

Even if (parts of) the organisational infrastructure is formally in place and training is being provided by the Commission, mainstreaming human rights in external relations still to a certain extent seems to take place more episodically than systematically. There is evidence that, at the delegation level, different services still sometimes work in a compartmentalised way, with human rights officials being the only ones concerned with the issue (as much as gender officials in the case of gender mainstreaming).

Part of the problem seems to be that it is mainly human rights specialists who are being trained in mainstreaming, while actors and staff not immediately concerned with the issue are not. While one could argue that the human rights staff can then foster a human rights culture within other units and abroad, in delegations and missions, it remains dubious that this is actually happening, not least because the effort required may be disproportionate compared to the actual capacity of the available human rights actors. Mainstreaming might be better achieved by doing a more comprehensive staff training in human rights, so that people working in different areas could help the dedicated human rights actors to identify the relevant issues emerging in their respective policy fields.

Problems of implementation seem also related to the sometimes scarce knowledge that third country nationals working in delegations have of human rights, whereby the training provided by the Commission raises *awareness* of human rights but not a deep *familiarity* with the essential EU commitments and policies. It is only by acquiring such familiarity that the staff can operate towards the inclusion of human rights concerns into the day-to-day work of delegations and, importantly, identify those actions and levels of intervention in which a human rights approach is most needed.

Consistency and coordination in multilateral diplomatic fora

Some concerns have been raised over the diplomatic action of the EU and its Member States in international fora, beginning with the UN. In many regards, the EU has demonstrated its influence and determination on key issues in the UN, such as the moratorium on death penalty in 2007 and the replacement of the UN Commission on Human Rights by the new Human Rights Council (HRC). According to its own assessment, “despite the fact that the EU is a minority in the Council, it has nevertheless established itself as a key/influential actor in all aspects of the Council’s work”⁸⁷. At the same time, criticism has been raised from different viewpoints. With respect to demarche, for example, it has been argued that they may not be the most efficient tool to foster human rights, as they are not only interpreted as patronising by the state which is being criticised but also, importantly, they are often a lowest common denominator on the EU side⁸⁸. This is a continuous risk due to the fact that each of the 27 Member States has a veto right on CFSP issues. Human Rights Watch (HRW) illustrates the

⁸⁷ Council of the European Union (2007) “EU Annual Report on Human Rights 2007”.

⁸⁸ See the blog entry of former UK diplomat Charles Crawford “Why not an EU demarche” of 16 July at <http://charlescrawford.biz/blog.php?single=367>.

problem with reference to the EU policy on Uzbekistan⁸⁹. For similar reasons, the EU did not manage to take effective action on the crisis in the Darfur region⁹⁰.

The latter question raises a fundamental concern about the effectiveness of the EU and Member States action in multilateral fora: the difficulties involved in reaching a common position. The overall EU ability to push forward human rights issues in the UN still too often depends on political will, and human rights are only one among many considerations of the CFSP, with security and economic interests sometimes prevailing over human rights⁹¹. The EU Member States may all agree in principle on the common value of human rights, but may disagree about practical measures in the light of their national interests. With respect to influencing decisions taken in the Human Rights Council, the EU performance also depends on the strength of the Presidency of the moment. What is clear is that an efficient coordination process requires sufficient resources in Geneva and the support of the 26 other delegations. Amnesty International welcomed the establishment in 2005 of the Personal Representative for Human Rights as a first step towards addressing the chronic lack of resources and inadequate staffing for the EU's human rights work at Council level⁹². And yet, translating a general common line into concrete tactics during the HRC sessions also requires some flexibility which the current CFSP set-up does not easily allow. As each of the 27 Member States insists on signing off on each proposed resolution, the quick diplomatic give-and-take needed to build majorities is rendered all but impossible – sometimes to the benefit of less human rights friendly states⁹³. In the end, the energy required to reach internal agreements restricts the EU's influence within the wider UN system⁹⁴.

As a remedy to this problem and to enhance the overall EU effectiveness in multilateral arenas, independent observers and NGOs have made a number of concrete suggestions. Amnesty International has thus called for an urgent adaptation of the EU working method in this area, including through the integration of HRC objectives into regular CFSP meetings with third countries, burden-sharing between Member States, and upgrading its capabilities and resources at diplomatic and institutional levels⁹⁵. The EU should also strive to build better cross-regional partnerships, and use collective and multilateral approaches in its diplomacy at the UN and elsewhere (the European Parliament could use its external contacts to support this). Human Rights Watch contends that the EU *“never did the needed outreach*

⁸⁹ See Human Rights Watch (2007) “European must pull its weight on human rights”.

⁹⁰ Human Rights & Democracy Network (2009) “Manifesto on Human Rights for the new European Parliament, 2009”. The Network includes 38 organisations, among which Amnesty International, Human Rights Watch, the Fédération Internationale des Droits de l’Homme, Save the Children, and Reports sans Frontières.

⁹¹ Cf. Heinz, 2003.

⁹² Amnesty International (2004) “More resources for EU human rights: Amnesty International’s 10-point programme for the Luxembourg Presidency”.

⁹³ Human Rights Watch (2007) “European must pull its weight on human rights”.

⁹⁴ Smith, 2006:113-137.

⁹⁵ Amnesty International (2007) “Annual Report 2006-07: Human Rights and the EU”.

*and lobbying to dissuade swing voters from following their spoiler-led regional blocs rather than their own stated human rights principles*⁹⁶.

Enhancing human rights mainstreaming into ESDP operations

With regard to incorporating human rights into the ESDP, it can be noted in general that important gains have been made in recent years while more still remains to be done. Key documents used in ESDP missions, such as the EU guidelines on the protection of civilians, the EU training concept, and standards of behaviour, now all integrate human rights aspects, in particular gender issues and child protection. The human rights experts of the Council Secretariat are increasingly involved in the planning, review and follow-up to operations. All eleven EU Special Representatives (for example in Bosnia-Herzegovina, Kosovo, Great Lakes region, Middle East, Southern Caucasus) have the promotion of respect for human rights and the rule of law in their mandate. According to Amnesty International⁹⁷, *“the centrality of human rights for conflict prevention and crisis management is clearly understood and acknowledged in the context of the ESDP”*, although much remains to be done to bring it into practice. Efforts are for example still needed to reach greater consistency between peace-building and conflict prevention. According to the Human Rights and Democracy Network⁹⁸, human rights advisors should be more numerous in EU missions and more possibilities for the funding of human rights projects in the framework of peace building and conflict prevention should be found.

Electoral missions

In its 2000 communication, the Commission made a number of recommendations to improve election observation and assistance. This included that all EOM should be conducted and funded under the Community competency and under agreements with third countries and human rights regulations. The Commission also advocated better annual planning, the possibility of case-by-case decisions on the launching of an EOM, the creation of an EU electoral unit, and a special role to be attributed to the European Parliament and MEPs.

Reinforcing the human rights-based approach to development cooperation

While the Commission’s overall commitment to implement a human rights framework in the area of development cooperation is clear – and the Council gave its open consent to the adoption to a human rights-based approach to development and cooperation in its 2001 conclusions - the extent to which this commitment has been translated into practice remains dubious. The lack of a mainstreaming of human rights into development policy seems to reflect the lack of emphasis put by EU policy documents and tools on economic, social and cultural rights. A factor contributing to the resistance to adopting explicit human rights-based approaches to development cooperation may be concerns about charges of conditionality. As a result, there is hardly any systematic reference to and use of human

⁹⁶ Human Rights Watch (2007) “World Report 2007”.

⁹⁷ Amnesty International (2007) “Annual Report 2006-07: Human Rights and the EU”.

⁹⁸ Human Rights & Democracy Network (2009) “Manifesto on Human Rights for the new European Parliament, 2009”.

rights at the programming level in this area. As part of a general commitment to human rights mainstreaming, this clearly is an area that could be further developed.

Issues of strategy and participation in the EIDHR

When discussing implementation, a question emerges also in relation to the use of EIDHR. Although the EIDHR has certainly been one of the most effective tools towards the promotion of human rights in third countries, efforts still need to be made in the implementation aspect. A number of NGOs operating at EU level in the areas of human rights, democracy and conflict prevention have called for a more strategic approach and increased coordination among Member States⁹⁹. Increasingly, EIDHR projects are managed locally by the Commission delegations. In this way, small scale human rights organisations can access effective support for capacity building and implementation of grass-roots projects in their own countries (micro-projects). Nonetheless, criticism has been raised that NGOs and international organisations do not sufficiently take part in EIDHR consultation and evaluation of governance processes.

⁹⁹ Human Rights & Democracy Network (2009) "Manifesto on Human Rights for the new European Parliament, 2009".

3 ANALYSIS OF EU HUMAN RIGHTS MAINSTREAMING IN SPECIFIC POLICY AREAS¹⁰⁰

After taking stock of the legal and policy features of human rights mainstreaming, this chapter introduces some specific areas of external relations in which mainstreaming appears to be particularly relevant. The first two sections explore areas which belong essentially to external relations: the CFSP/ESDP and development cooperation policy. The third section examines the external dimension of the immigration and asylum policies, raising important questions concerning the 'internal' implications of human rights mainstreaming as defined and dealt with in this study.

3.1 Mainstreaming human rights and gender in the areas of CFSP and ESDP

The legal and political background for mainstreaming human rights and gender in the CFSP/ESDP

The Treaty on the European Union (TEU) sets the stage for mainstreaming human rights in the areas of the Common Foreign and Security Policy (CFSP) and the European Security and Defence Policy (ESDP). Article 11.1. TEU lists the objectives of the CFSP and enumerates among others the preservation of peace, the strengthening of international security, the development and consolidation of democracy and the rule of law, as well as the promotion of the respect for human rights and fundamental freedoms.¹⁰¹ Although these goals of the CFSP are defined in a very general manner, the European Council and other actors of the EU are obliged to adhere to them. Therefore, human rights have to be taken into account by the European Council when formulating the principles and general guidelines for the CFSP and the ESDP according to Article 13.1. TEU.

The significance of respecting and promoting human rights in the external relations of the European Union (EU) was underlined in the European Security Strategy¹⁰² (ESS) adopted by the European Council in 2003. The ESS recognised the protection of human rights as one of the best means of strengthening the international order. However, the ESS did not aspire to provide a stringent guidance for incorporating human rights into the decision-making processes and policies of the CFSP or ESDP. Nevertheless, this basic document underlined the political willingness to draw more attention to human rights considerations in the second pillar of the EU. Given the intergovernmental approach of the CFSP and the ESDP such political commitments are of particular relevance.

Measures and methods to mainstream human rights and gender in the CFSP/ESDP

¹⁰⁰ This chapter is based primarily on contributions by Markus Möstl, Wolfgang Benedek, Carmen Marquez Carrasco, Michele Grigolo and Chadi Sidhom.

¹⁰¹ These objectives are in line with the basic commitment to human rights and fundamental freedoms elaborated in Article 6 TEU.

¹⁰² European Council (2003) "A Secure Europe in a Better World: The European Security Strategy".

The CFSP offers a number of different tools to mainstream human rights in the second pillar of the European Union.¹⁰³ For example, human rights issues might be included on the agenda and in speaking notes for political dialogues with third countries. Other CFSP instruments, such as demarches and declarations on individual cases or developments of concern, may be used to raise human rights issues. Furthermore, joint actions, common positions and common strategies as well as mandates for ESDP operations may include references to human rights. Since 2005 the Secretary General/High Representative has a Personal Representative on Human Rights in the area of CFSP, who can "raise issues, or individual cases in their contacts and country visits, meet NGOs/opposition leaders/human rights defenders, lobby and report on human rights in line with mandates."¹⁰⁴ Thus, a basic framework for mainstreaming human rights exists for the CFSP and several measures can be taken in the framework of this policy area in order to give human rights issues a higher profile.

The process of mainstreaming human rights into the CFSP and the ESDP explicitly started in 2006, when the Political and Security Committee (PSC) endorsed a paper on mainstreaming human rights across CFSP and other EU policies.¹⁰⁵ This paper, which was prepared by the Working Group on Human Rights (COHOM), gives initial recommendations on how to mainstream human rights "in order to archive a more informed, credible, coherent, consistent and effective EU human rights policy"¹⁰⁶. The PSC clarified that existing EU tools for raising human rights issues with third countries, such as the human rights guidelines, which have been developed since 1998¹⁰⁷, should serve as a framework for an enhanced protection and promotion of human rights in third countries. The paper also calls on all relevant actors to take specified measures within their competences to give more weight to human rights concerns. For the CFSP, the PSC recommended that existing CFSP instruments, such as the abovementioned political dialogues, demarches, declarations, joint action, common positions and common strategies should serve as tools for mainstreaming human rights into the CFSP. Furthermore, the paper proposes that mandates for ESDP operations should include human rights provisions where applicable. As operations conducted under the ESDP obviously are an area in which human rights concerns are of particular

¹⁰³ Council of the European Union (2006) "Mainstreaming human rights across CFSP and other EU policies", Annex II.

¹⁰⁴ *Ibid.*.

¹⁰⁵ Council of the European Union (2006) "Mainstreaming human rights across CFSP and other EU policies".

¹⁰⁶ Council of the European Union (2006) "Mainstreaming of human rights into ESDP".

¹⁰⁷ According to Seidensticker and Arloth the guidelines on children in armed conflict and the guidelines on women and girls in armed conflict are of particular importance for the ESDP. See Arloth, and Seidensticker, 2007:16. Note that the EU guidelines on human rights have been updated and now comprise a set of seven guidelines: guidelines on the death penalty, guidelines to EU policy towards third countries on torture and other cruel, inhuman or degrading treatment or punishment, guidelines on the human rights dialogues with third countries, guidelines on children in armed conflict, guidelines on human rights defenders, guidelines for the promotion and protection of the rights of the child, and guidelines on violence against women and girls and combating all forms of discrimination against them. See <http://www.consilium.europa.eu/showPage.aspx?id=822&lang=EN>

importance¹⁰⁸, it was also suggested by the PSC that the “protection of human rights should be systematically addressed in all phases of ESDP operations, both during the planning and implementation phase, including by measures ensuring that the necessary human rights expertise is available to operations at headquarter level and in theatre; training of staff; and by including human rights reporting in the operational duties of ESDP missions.” Thus, the overall approach to how human rights should be mainstreamed in the CFSP and the ESDP was made rather clear in existing EU documents. Within the CFSP, the ESDP obviously is an area where major efforts were made to integrate and foster human rights and gender issues. Therefore, the ESDP human rights mainstreaming policy will be analysed in detail in the following.

Soon after the initial framework documents for mainstreaming human rights across the CFSP and ESDP were agreed upon, a number of more concrete proposals followed for the implementation of the ESDP mainstreaming policy. The suggestions comprised, among others, the proposal to develop a list of relevant human rights documents and to organise workshops to assist planners of ESDP operations in human rights issues, to develop a template for key human rights elements to be included in ESDP planning documents, a field manual on human rights, standardised training guidelines for ESDP personnel and the idea to include human rights aspects in ESDP exercises.¹⁰⁹ Furthermore, structural measures were suggested in order to include human rights expertise in operations. Human rights advisors or focal points were suggested to be integrated in preparatory fact finding missions and later to be appointed to assist the operation commander or the head of mission as a general rule for ESDP operations. Generic job descriptions, appropriate reporting procedures on human rights aspects as well as the inclusion of experience gained in the field of human rights in the lessons learned were recommended in order to complement the concrete framework for mainstreaming human rights in the ESDP. These suggestions were supported by both the Committee for Civilian Aspects of Crisis Management (CIVCOM)¹¹⁰ and the European Union Military Committee (EUMC).¹¹¹ CIVCOM stated that “human rights mainstreaming should be viewed as an integral part of the strategic objectives of ESDP missions”.¹¹² In the view of the EUMC the proposed measures to mainstream human rights would in particular add “legitimacy and credibility in the field, but also in the view of a more general public”.¹¹³

¹⁰⁸ The tasks for ESDP operations are enumerated in Art. 17.2. TEU and comprise humanitarian and rescue tasks, peacekeeping tasks, but also tasks of combat forces in crisis management, including peacemaking.

¹⁰⁹ Council of the European Union (2006) “Mainstreaming of human rights into ESDP”.

¹¹⁰ Council of the European Union, Committee for Civilian Aspects of Crisis Management (2006) “CIVCOM Advice on Mainstreaming of Human Rights into ESDP”.

¹¹¹ Council of the European Union, European Union Military Committee (2006) “Military Advice on Mainstreaming of Human Rights into ESDP”.

¹¹² Council of the European Union, Committee for Civilian Aspects of Crisis Management (2006) “CIVCOM Advice on Mainstreaming of Human Rights into ESDP”.

¹¹³ *Ibid.*, p.2.

A further step for implementing the mainstreaming strategy was the elaboration of a list of relevant human rights documents and concepts regarding human rights issues relevant in the context of the ESDP.¹¹⁴ In the foreword to this compilation Javier Solana explains that the lessons learned in previous operations showed that including human rights and gender approaches in all ESDP operations makes them more effective.¹¹⁵ The compilation contains the core documents developed by EU so far with the view to setting more general standards in the field of human rights in ESDP operations and thus can be regarded as stocktaking of relevant human rights documents. Furthermore, this compilation contains sections with EU reference documents on gender issues, children in armed conflict, international humanitarian law, transitional justice standards of behaviour, the protection of civilians and the role of civil society, as well as examples of how the relevant documents have been integrated into the planning or lessons learned documents. Thus, this compilation, which was elaborated during the Presidencies of Germany, Portugal and Slovenia, is intended to serve as a over-arching definition of human rights thinking for operation planners, trainers, and mission personnel.

This conceptual approach for mainstreaming human rights appears to be widely accepted among the relevant actors within the EU. The proposed measures, if implemented, would provide a sound framework in which norms, standards and principles of the international human rights system could be integrated into the plans, policies and processes of the CFSP and ESDP. Thus, it can be ascertained that the theoretical agenda for mainstreaming human rights in the CFSP, and especially in the ESDP, follows the so called rights-based approach.

Structural and operational implications of mainstreaming human rights and gender in the CFSP/ESDP

In order to assess the practical impact of the EU mainstreaming strategy, one has to scrutinise which of the proposed measures to mainstream human rights have been implemented so far. What influence did the strategy of mainstreaming human rights have for CFSP/ESDP programmes, policies, activities, decision making procedures, bureaucracy, staff, work ethics, etc., and to what extent did it go beyond rhetorical use of human rights language? Assessing the actual success of mainstreaming human rights is a challenging task especially for the ESDP, not only because “there is no [...] set of appropriate tools to comprehensively evaluate the mainstreaming of human rights”,¹¹⁶ but also because many relevant documents, such as the concept of operations (CONOPS), the operation plan (OPLAN), the rules of engagement (RoE) and internal reports by EU organs are only partly accessible or not available to the public at all. Therefore, the actual impact of mainstreaming efforts in the field can hardly be assessed comprehensively. Despite these insurmountable limitations, some relevant initiatives and impacts can be identified and they will be reviewed in the following.

¹¹⁴ Council of the European Union, General Secretariat of the Council (2008) “Mainstreaming Human Rights and Gender into European Security and Defence Policy - Compilation of relevant documents”, Brussels.

¹¹⁵ *Ibid.*, p. 5.

¹¹⁶ Cf. Chapter I above.

Structural implications of mainstreaming human rights and gender in the CFSP/ESDP

There are many actors involved in the ESDP decision making procedures and some organs involved in this process are explicitly tasked to deal with human rights issues. Especially the COHOM, the Personal Representative of the Secretary General/High Representative for the CFSP on Human Rights and a number of Directorates-General in the Secretariat deserve mentioning here. Currently, further efforts are made to include human rights experts in other structures, such as in the European Union Military Staff (EUMS) and the EUMC.¹¹⁷ Human rights and gender issues are also taken into consideration in the development of civilian capabilities for ESDP operations. In this line, the current civilian headline goal to be achieved by the end of 2010 regards the further mainstreaming of human rights and gender as an important concern for immediate action.¹¹⁸

Operational implications of mainstreaming human rights and gender in the CFSP/ESDP

Human rights in the mandates of ESDP operations

Many mandates of ESDP operations do not explicitly refer to the promotion or protection of human rights as an objective or aim of the mission. So far, only eight out of twenty-two Joint Actions by the Council of the European Union establishing ESDP operations made an explicit reference to human rights. For example, the Joint Action establishing the rule of law mission in Kosovo clearly states that "EULEX KOSOVO shall: [...] (i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming."¹¹⁹ The AMM was tasked to "[...] monitor the human rights situation and provide assistance in this field in the context of the tasks set out in points [...]".¹²⁰ The police mission in the Democratic Republic of Congo takes "[...] care to promote policies compatible with human rights and international humanitarian law, democratic standards and the principles of good governance, transparency and respect for the rule of law"¹²¹. Simultaneously many ESDP operations implicitly address human rights issues without mentioning human rights in the mandate or the mission statement. The mandate of operation EUFOR Chad/RCA does not refer to human rights explicitly, but the support to humanitarian actions is a main aim of the mission as is the protection of civilians in danger, particularly refugees and displaced persons.¹²² The military operation in Bosnia and Herzegovina (EUFOR-Althea) contributes to

¹¹⁷ Arloth and Seidensticker, 2007:14.

¹¹⁸ Council of the European Union (2007) "Civilian Headline Goal 2010".

¹¹⁹ Council of the European Union (2008) "Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO".

¹²⁰ Council of the European Union (2005) "Council Joint Action 2005/643/CFSP of 9 September 2005 on the European Union Monitoring Mission in Aceh (Indonesia) (Aceh Monitoring Mission — AMM)".

¹²¹ Council of the European Union (2007) "Council Joint Action 2007/405/CFSP of 12 June 2007 on the European Union police mission undertaken in the framework of reform of the security sector (SSR) and its interface with the system of justice in the Democratic Republic of the Congo (EUPOL RD Congo)".

¹²² Council of the European Union (2007) "Council Joint Action 2007/677/CFSP of 15 October 2007 on the European Union military operation in the Republic of Chad and in the Central African Republic (in accordance with the mandate set out in UN Security Council Resolution 1778 (2007))".

the stabilisation process of the country, which has strong implications for the promotion of human rights.¹²³ The EU support to the African Union Mission in Darfur (AMIS)¹²⁴ contributed to the protection of the civilian population and to the efforts aimed at improving security and the humanitarian situation in Darfur.¹²⁵ Obviously, there seems to be a reluctance to include human right language in the mandate of some operations. It should be stressed here that the inclusion of human rights language in the mandates as such does not necessarily alter the overall character of an operation. The activities performed by the mission personnel would have to be in line with the mandate to monitor, protect and promote human rights. However, the explicit inclusion of human rights in the mandate would make the overall legal commitment of the EU to promote human rights through the ESDP more clear and obvious. It would further constitute one of the most visible results of mainstreaming human rights in the CFSP/ESDP with strong implications for the overall perception of an operation by the local population.

Examples of human rights components in ESDP operations

To date various types of human rights and gender components have been incorporated in ESDP operations. Human rights monitors played a central role in the Aceh Monitoring Mission (AMM) as the monitoring of human rights was a primary task of this operation. However, more operations such as for example EUFOR RD Congo, include human rights focal points.¹²⁶ A human rights point of contact has been established for EUJUST LEX¹²⁷ and in EUPOL COPPS human rights experts are part of the mission to serve as a focal point for advice to the mission on all human rights issues and policies in the region.¹²⁸ The private office of the Head of Mission of EULEX Kosovo includes a Human Rights and Gender Office.¹²⁹ So far, no generic job descriptions are available for such human rights expert, which would certainly allow a more detailed assessment of the tasks designated for human rights experts. Nevertheless, some individual job offer descriptions are available and offer some promising insights.¹³⁰ It should be mentioned here that gender issues apparently

¹²³ Council of the European Union (2004) "Council Joint Action 2004/570/CFSP of 12 July 2004 on the European Union military operation in Bosnia and Herzegovina".

¹²⁴ Council of the European Union (2005) "Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan".

¹²⁵ See http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/EN/declarations/97865.pdf.

¹²⁶ Arloth and Seidensticker, 2007:38.

¹²⁷ Arloth and Seidensticker, 2007:48

¹²⁸ EUPOL COPPS, EU Police Co-ordinating Office for Palestinian Police Support (2008) "The European Union's police mission for the Palestinian Territories", p.3.

¹²⁹ See <http://www.eulex-kosovo.eu/home/docs/EULEXOrgChart.pdf>.

¹³⁰ For example a job offer description for the European Union Monitoring Mission (EUMM) in Georgia sets out the main tasks for a human rights field office coordinator. These tasks are: "To coordinate all human rights activities carried out at the field office level in accordance with the policy guidelines on Human Rights applicable in the Mission in close coordination with the political adviser for human rights; provide guidelines to Field Offices on how to follow cases of alleged human rights violations

became a more essential component of ESDP operations as for example EUFOR RD Congo for the first time includes a full time gender advisor.¹³¹

The broad range of different human rights components available for ESDP operations underlines the potential of integrating human rights elements into the ESDP. The EU has developed different means available to address human rights concerns in response to different challenges in ESDP operations and continues to do so. Nevertheless, a more structural approach and the general inclusion of relevant human rights components in all ESDP operations would be necessary to implement the human rights mainstreaming strategy.

Challenges and obstacles of mainstreaming human rights in the CFSP/ESDP

Mainstreaming human rights and gender in the CFSP/ESDP is a demanding task. The high number of actors involved in the processes of CFSP and ESDP and the complex procedures for decision making constitute a core challenge in this respect. Different understandings and 'cultures' of civilian and military bodies involved in the ESDP also complicate the endeavour. However, the main difficulties of mainstreaming do not seem to stem from the conceptual approach to mainstreaming per se, as there seems to be a widespread understanding of the implications of human rights law, accompanied by only few doubts about the benefits of giving consideration to human rights and gender in different aspects of the CFSP/ESDP.

The main challenges of mainstreaming human rights rather seem to lie in the practical implementation. Most prominently, the training of ESDP personnel on human rights and gender issues could certainly be improved. Currently, the Member States are primarily responsible for the training of ESDP personnel in human rights and gender issues. As long as there are no standard training guidelines for general ESDP courses as well as for the induction training for ESDP personnel there will be no real common understanding of and attitude towards human rights among the mission staff coming from different Member States. Furthermore, a standard field manual drawing on manuals by other relevant actors, such as the United Nations, has been planned as a part of the mainstreaming strategy, but has not been implemented so far. Currently only soldier cards including core points on human rights and gender aspects are disseminated among soldiers in some missions.¹³² Soldier cards certainly give guidance for mission personnel, but field manuals would stress the importance of human rights more vigorously. Furthermore, the intended work on the

and give advice on appropriate follow-up actions; assist Field Offices monitors on the use of overt tactics, handling information of human rights violations and guide that appropriate actions are taken; assist in the establishing of working relationships with relevant local and international organizations operating in the AOR of their respective Field Offices, to facilitate the mutual exchange of information, thus allowing effective co-ordination and cooperation between the actors; provide guidelines and templates to Field Offices to produce periodic reports concerning information on human rights violations, and initiate appropriate analyses and action; identify specific training needs and organize training sessions, when deemed appropriate; prepare periodically special reports on Human Rights issues, and carry out any other Human Rights related activity as requested by HoOPS". See <http://www.consilium.europa.eu/uedocs/cmsUpload/Annex1-JobDescriptions.pdf>, p.14.

¹³¹ Arloth and Seidensticker, 2007:38.

¹³² An example of such a soldier card is given by Arloth and Seidensticker, 2007:39.

training for planners as well as on generic key human rights elements to be inserted in the planning and reporting procedures as well as lessons learned processes of ESDP operations constitute practical challenges and could be improved. The same holds true for integrating human rights in ESDP exercises.

Conclusions

The process of mainstreaming human rights and gender across the CFSP and ESDP has obviously influenced programmes, policies, activities and decision making procedures of the second pillar of the EU. The basic goals of this strategy have been defined and first steps of its implementation have been made. The overall commitment to mainstream human rights in the CFSP and ESDP certainly raises expectations by people caught up in crisis situations. If the EU fails to meet these demands in the operational practice, the expectations of the local population might be disappointed which again might reduce the local support and thus the overall success of an operation.

Mainstreaming human rights and gender at this stage often appears to be a part-time work for EU actors rather than an overarching process. Therefore, further efforts should be made by all actors involved in order to ensure the articulation of a more systematic mainstreaming strategy. The adoption of a concrete timeframe to archive the implementation of the existing mainstreaming commitments would constitute a useful and necessary step in this direction. Such an over-arching timeframe would help to evaluate existing implementation actions and offer the possibility to draw conclusions regarding the effectiveness of individual measures.

Thus, mainstreaming human rights into the CFSP and ESDP is an unfinished endeavour and remains a challenging task. In this vein the report on the implementation of the ESS, issued two and a half years after the EU Member States explicitly had decided to mainstream human rights into the CFSP and ESDP, comes to the conclusion that the EU should continue to mainstreaming human rights issues in ESDP missions.¹³³ It is worth mentioning that this report argues that this should be done through a people-based approach coherent with the concept of human security.

¹³³ Council of the European Union (2008) "Report on the Implementation of the European Security Strategy - Providing Security in a Changing World".

3.2 Mainstreaming human rights in EU development cooperation policies and trade policies

The European Union (Commission and Member States) is the world biggest providers of aid, with around 55% of the global Official Development Assistance (ODA)¹³⁴. The financial support for the EU promotion of human rights within the development framework has clearly increased since the beginning of the 1990s¹³⁵. Beginning with the 'Uganda Guidelines' in 1977, the Community has sought to condition the benefits granted under Lomé Conventions on compliance with human rights and democratic principles. Lomé III contained a preambular reference to human rights, and Lomé IV contained a provision referring to the parties' human rights obligations and providing for financial aid for the promotion of human rights. In 1995 it became official EU policy to include such clauses in *all* new trade and cooperation agreements negotiated with third countries, and in the same year the Community revised the human rights clause in Lomé IV to make human rights, democratic principles and the rule of law an essential element of the agreement and to permit the suspension of the convention (including any trade rights) in the event of human rights violations. These provisions were amended slightly in the Cotonou Agreement, and again in the 2005 revisions to this Agreement, where an increased emphasis was placed on political dialogue prior to adoption of sanctions.

According to article 177(2) of the EC Treaty, the Community development policy "*shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms*". Since the beginning of the new millennium, the European Commission has placed increased focus on "*mainstreaming human rights and democracy in EC assistance programmes*", as expressed in its Communication on 'the European Union's role in promoting Human Rights and Democratisation in third countries' from 2001¹³⁶. The means privileged by the Commission to mainstream human rights into its cooperation policies are Country Strategies Papers, capacity-building and support of the participation of the civil society into the programs design and implementation. They also include impact assessments of projects on human rights, and, most importantly, the taking into account of a country's human rights performance in the allocation of cooperation programs.

The EU has committed itself in the 'European Consensus on Development'¹³⁷ to apply a strengthened approach to mainstreaming cross-cutting issues such as the promotion of

¹³⁴ The EU plans to devote 0.56% of the Member States GDP to development, as a way to reach the EU target of 0.7% by 2015.

¹³⁵ Heinz, 2003.

¹³⁶ European Commission (2001) "Communication from the Commission to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries".

¹³⁷ Council of the European Union, European Parliament and European Commission (2005) "Joint Statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission: The European Consensus on Development".

human rights and democracy, gender, children's rights and the rights of indigenous people in its development cooperation. However, according to some NGOs, the European Consensus on Development "fails to provide a clear and accurate definition of human rights based Development"¹³⁸.

A human rights-based approach to development

Connected to the principle of mainstreaming is the concept of human rights-based approach (HRBA) to development, used and advocated by the UN. A human rights-based approach to development conceives human rights as the both means and the goal of development. Under this approach, development policies are devised to fit into a system of rights and corresponding obligations established by international law. The objective is to promote the sustainability of development work, empower the peoples concerned (rights-holders and duty-bearers), address discriminations, and subject development processes and actors to human rights accountability¹³⁹.

The Council of the European Union has committed to this approach from 2001, in its conclusions 'on the European Union's role in promoting human rights and democratisation in third countries'¹⁴⁰. The EU has since systematically sought to implement human rights in development projects in the framework of bilateral or multilateral (Cotonou Agreement) relations. It has defined development as a comprehensive economic, social, cultural and political process aiming not only at economic growth, but also equitable distribution, enhancement of people's capabilities and widening of their choices¹⁴¹.

However, the practice followed by the Commission in development policy – especially at the delegation level – appears fragmented with regard to the implementation of a human rights-based approach. Some NGOs – Terre des Hommes, Amnesty International, ActionAid, and International Human Rights Network – have criticised that, despite the increased use of the human rights language in the EU developing policies and instruments (like guidelines, regional/country strategy papers), an important number of them still "*do not coherently or consistently reflect the applicable international human rights framework*"¹⁴². More specifically, there is little evidence of any human rights-based approach at the programming level across different sectors, including transport, energy, health, the rule of law, and governance. Even if in some cases the link between these sectors and human rights is not immediately evident, the UN experience shows that human rights implications are frequently present. In the case of transport, for example, the construction of roads in certain countries may have an impact on land and the rights of indigenous people.

¹³⁸ Terre des Hommes, Amnesty International, ActionAid, and International Human Rights Network (2008) "Human Rights-Based Approaches and European Union Development Aid Policies".

¹³⁹ See for example United Nations, OHCHR (2006) "Frequently asked questions on a human rights-based approach to development co-operation".

¹⁴⁰ Council of the European Union (2001) "Council conclusions on the European Union's role in promoting human rights and democratisation in third countries".

¹⁴¹ European Commission (2008) "Programming Guide for Strategy Papers".

¹⁴² Terre des Hommes, Amnesty International, ActionAid, and International Human Rights Network (2008) "Human Rights-Based Approaches and European Union Development Aid Policies".

Suggestions to improve the mainstreaming of human rights into the EU development policy have come from different actors. NGOs have proposed a more systematic scrutiny of the formulation process and content of future development policies, including of the legal accuracy with regards to international human rights law. The European Parliament's inputs into development policy (in particular through its Development Committee and Subcommittee on Human Rights) should also systematically be framed in terms of the principles of the human rights-based approach to development, as a critical element of accountability. The European Community should also work to develop tools to systematically document the full spectrum human rights impact of development aid, and set up more visible responsibilities at different levels to advance the accountability for human rights-based development.

Development tools

Conditionality or double standards?- the human rights clause

Although the Community development policies have existed since 1958, it is not before 1991 that human rights considerations were integrated in its heart. Since 1995, human rights have been systematically included as an 'essential element' of all EU external agreements, including concerning development cooperation. According to this human rights clause, 'appropriate measures' – going until the suspension or termination of the agreement – can be taken in case of serious human rights violations. In 2003, the EU decided that all new agreements must include a clause in which its partners commit themselves to the non-proliferation of weapons of mass destruction. But the EU has also privileged a positive approach favouring political dialogue and incentives whenever possible¹⁴³.

The 2000 Cotonou Agreement represents the framework for the cooperation relations between the European Community and 77 ACP countries (Africa, Caribbean, Pacific). It bases the allocation of a part of the European Development Fund (governance initiative) on the beneficiary countries' commitment to institutional reforms in several governance-related fields, including human rights, democracy and the rule of law. Parties to the agreement undertake, according to article 9(2), to "*promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural*"¹⁴⁴. Article 96 provides for a consultation procedure in case of serious human rights violation. According to the 2005 revised version of the agreement, ACP states have one month to undertake political dialogue with the concerned state before bilateral consultations begin. This has been a way to encourage ACP countries to discuss critical human rights situations between themselves before it be done at the ACP-EC level. The revision of the agreement in 2005 has generally sought to strengthen the political dimension, notably by placing greater emphasis on effective dialogue and results and including a provision on the International Criminal

¹⁴³ European Commission (2001) "Communication from the Commission to the Council and the European Parliament - The European Union's role in promoting human rights and democratisation in third countries".

¹⁴⁴ European Commission (2005) "Partnership Agreement ACP-EC".

Court¹⁴⁵. It has also deepened the participatory approach for the benefit of non-state actors and the local authorities.

The human rights clause is certainly one of the main tools allowing the EU to influence its international partners. One can argue it has been defended seriously by the EU itself, to the point that it impeded the conclusion of some bilateral trade-related agreements with China, New-Zealand and Australia.

At the same time, the use of the human rights clause and, in particular, of the EU power to impose sanctions on third countries has been object of an inter-institutional debate involving the European Parliament and NGOs on the one hand, and the Commission, on the other hand. Broadly speaking, the Parliament is in favour of a stronger, more consistent and clearer use of the human rights clause and related sanctions. In particular, the European Parliament and some NGOs¹⁴⁶ have expressed concerns related to the existence of double standards in the practical use of the human rights clause. Since the beginning of the conditionality policy of the EU, the great majority of sanctions have indeed concerned ACP countries¹⁴⁷. It also appears that the size and the economic importance of the country, or the historical ties with Member States, sometimes prevail over the scale of the human rights violations.

The human rights clause itself, evoking 'appropriate measures', does not specify how sanctions should be applied, nor how the Community should proceed in these cases. The European Parliament has in the past expressed its concerns about the implementation of the suspension mechanism¹⁴⁸, as the general nature of the wording allows the possibility of Member States interests to prevail over human rights requirements. In relation to this issue, the 2006 Agnoletto report on the use of the human rights and democracy clause in EU agreements expressed concern about the absence of any "detailed procedures for 'positive' and 'negative' interventions"¹⁴⁹ and advocated for "a more coherent, effective and

¹⁴⁵ See, for example, the European Commission DG Development web page on the Cotonou Agreement at http://ec.europa.eu/development/geographical/cotonouintro_en.cfm.

¹⁴⁶ See, for example, International Federation of Human Rights (2006) "Random Implementation of Human Rights clauses: Human rights are not adjustable options".

¹⁴⁷ Additionally, with one exception, the measures taken have involved the suspension of financial aid and other cooperation but not trade benefits. The exception concerns the suspension since 2002 of the EU's obligation not to impose any restrictions on any capital payments between residents of the Community and Zimbabwe, which is necessary to allow for a freezing of funds of certain listed members of the Zimbabwe government.

¹⁴⁸ European Parliament (2001) "Resolution on human rights in the world in 2000 and the European Union Human Rights Policy".

¹⁴⁹ European Parliament (2006), "Report on the human rights and democracy clause in European Union agreements", para. N4.

transparent approach¹⁵⁰ to this policy area. Accordingly, the 2006 resolution based on the Agnoletto report called for greater transparency in the implementation of the clause¹⁵¹.

Other flaws in the practical implementation of the human rights clause¹⁵² include the possibility given to third states to negotiate the issues they would accept to discuss in the consultations and opt-out the consideration of individual cases, and the lack of consultation of the civil society.

On the other hand, the Commission tends to consider sanctions as a last resort, and sees them as more effective when they are used as a latent threat rather than when aggressively enacted. The case of Burma, e.g., may be taken as illustration of how strong sanctions may have a counter-productive effect. In this regard, the Commission's opinion on human rights clauses appears to be that they should be intended more as a starting point for a dialogue about human rights (which nevertheless puts the Commission on a stronger negotiating position), rather than as a 'stick' with which to punish human rights violations.

It would appear that there is merit in both sides of the debate concerning human rights clauses and sanctions. An appropriate strategy would therefore be to find ways to effectively and vigorously employ the human rights clauses and sanctions in context specific ways that avoid merely ostracizing and alienating the third countries involved. This is not an easy balance to strike. on the basis of the specific conditions on the ground. Part of the challenge will consist in systematically monitoring the human rights situations in question and setting up concrete mechanisms with evaluations, targets and benchmarks, so as to go beyond mere dialogue. The World Organisation against Torture (OMCT)¹⁵³ has also proposed that the European Parliament should take a lead in organising a system of systematic follow-up meetings with the civil society of the EU and of the third countries having signed the human rights clause.

Trade for least developed countries and human rights

After the abandonment of reciprocity in its relations with the ACP countries and the establishment of the Stabex system, the next major change in the EC's trade and development policy in the early 1970s was its adoption of a GSP programme (Generalised System of Preferences) in 1971. This programme has been renewed regularly since then and in its current form applies from 1 January 2006 to 31 December 2008. It is not available to all developing countries, but only to those that are not both 'high-income' and diversified in their exports, thus excluding Hong Kong, Israel, Singapore, Korea and Taiwan. For administrative reasons, it also excludes countries that obtain at least equivalent treatment under free trade agreements. The possibility of such exclusions was recognised in the UNCTAD Agreed Conclusions.

¹⁵⁰ *ibid.*, para. N7.

¹⁵¹ European Parliament (2006) "Resolution on the human rights and democracy clause in European Union agreements".

¹⁵² As pointed out in International Federation of Human Rights (2006) "Random Implementation of Human Rights clauses: Human rights are not adjustable options".

¹⁵³ World Organisation Against Torture (2002) "The EU and the Human Rights in the World, Convention on the Future of Europe, Third OMCT contribution".

The structure of the GSP regime has also undergone substantial rationalization. Initially, it was administered through annually changing quotas, divided according to both beneficiaries and EU Member States. The complexity and uncertainty that resulted led to a substantial under-utilization of the available preferences. In 1995, quotas were replaced by a set of tariffs, 188 and in subsequent revisions these have been amended and simplified. The current GSP Regulation provides for three 'arrangements': a general arrangement providing for duty reductions, a special incentives arrangement for sustainable development and good governance providing for duty-free entry, and a special arrangement for least developed countries also providing for duty-free entry. There are also a number of mechanisms for withdrawing preferences on certain economic and non-economic grounds.

The current GSP+ (Generalised System of Preferences plus) is a trade instrument which allows special incentive arrangements for sustainable development and good governance. It offers vulnerable developing countries additional tariff reductions (tax-free access of products to the EU market) in exchange for their ratification and implementation of international human rights conventions. The GSP+ regime can be temporarily suspended in case of grave human rights and especially workers rights violations.

3.3 Mainstreaming human rights in internal policies: cooperation with third countries in the field of migration (and asylum)

Cooperation with third countries has, since the Tampere European Council (1999) which laid the cornerstone for a common EU immigration policy, been set as a priority of EU policy in the field of migration. The importance of involving and cooperating with third countries (i.e. transit and destination countries) in border management policies is stressed at several paragraphs of the Council's conclusions¹⁵⁴. The conclusions underline for example the need to develop "in close co-operation with countries of origin and transit, information campaigns on the actual possibilities for legal immigration, and for the prevention of all forms of trafficking in human beings". The conclusions further call for "assistance to countries of origin and transit to be developed in order to promote voluntary return as well as to help the authorities of those countries to strengthen their ability to combat effectively trafficking in human beings and to cope with their readmission obligations towards the Union and the Member States". They also invite the Council "to conclude readmission agreements or to include standard clauses in other agreements between the European Community and relevant third countries or groups of countries".

This 'external dimension' of migration and border management policies has since been growing. In its latest Communication on a common immigration policy for Europe, published in 2008¹⁵⁵, the European Commission clearly underlines that "[m]igration issues should be fully integrated into the Union's development cooperation and other external policies". One can thus say that the Commission is promoting an integrated approach where migration issues would be included throughout other EU policies. In other words, migration issues are to be *mainstreamed* within the different policy fields of the EU, and more specifically within its cooperation with third countries. It is thus worthwhile examining to what extent human rights is being mainstreamed within cooperation policies with third countries in the field of migration, even though such policies are usually associated with internal policies rather than CFSP.

The Tampere conclusions clearly state that "The European Union needs a comprehensive approach to migration addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states, and ensuring respect for human rights, in particular rights of minorities, women and children". In short, the Tampere conclusions do promote a rights-based approach to migration policies. In its 2008 Communication on a common immigration policy for Europe¹⁵⁶, the European Commission underlines the need for the EU to work 'in close tandem' with third countries on opportunities for 'protecting the fundamental rights'. It further underlines the need for the EU and its Member States to "Support third-countries in

¹⁵⁴ European Council (1999) "Tampere – Council Conclusions".

¹⁵⁵ European Commission (2008) "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Common Immigration Policy for Europe : Principles, actions and tools".

¹⁵⁶ *Ibid.*

developing their national legislative framework and establish immigration and asylum systems, with full respect to relevant international conventions”.

One needs, however, to remain sceptical towards what may appear as a virtuous wish to mainstream human rights within migration policies when cooperating with third countries. Indeed, while the mainstreaming of human rights and democracy within CFSP may be seen as guided by moral convictions and international commitments, or by a non-vested interest in promoting stability, security and prosperity, in the case of migration policies the EU has a clear vested interest in securing a safe environment for migrants and refugees in third countries: i.e. ensuring that these persons will be less keen on trying to reach the EU. Also, it is worth noting that the EC Communication does not specify how the protection can be achieved. No operational measures have been identified in order to achieve such goal.

Nonetheless, it remains that, following the Council's conclusions and Commission's working documents, human rights are meant to be mainstreamed throughout migration policies in the framework of cooperation with third countries. The essential question in the present context is thus how, and how well, these conclusions are being implemented.

Rights-based approaches within cooperation policies

It is not possible within the framework of this study to examine all cooperation policies in the field of migration and asylum with third countries. The choice has been made to focus on regional political dialogues relating to cooperation with ACP as well as Southern neighbourhood countries (i.e. two of the priority regions for the EU in the field of cooperation on migration issues).

Regional cooperation with ACP countries

Article 13 of the Cotonou agreement relates to migration issues. It specifies that migration issues will be the subject of in depth dialogue in the framework on the ACP-EU partnership. The article further reaffirms the parties' "obligations and commitments in international law to ensure respect for human rights and to eliminate all forms of discrimination based particularly on, origin, sex, race, language and religion". It further specifies that the parties "agree to consider that a partnership implies, with relation to migration, fair treatment of third country nationals who reside legally on their territories, integration policy aiming at granting them rights and obligations comparable to those of their citizens, enhancing non discrimination in economic, social and cultural life and developing measures against racism and xenophobia". Other parts of this article relate to non-discriminatory treatment toward legal migrant workers; reducing poverty and improving living conditions in ACP countries; and preventing illegal migration. In relation the return of irregular migrants, the article specifies that "[p]arties agree in particular to ensure that the rights and dignity of individuals are respected in any procedure initiated to return illegal immigrants to their countries of origin". Finally, paragraph 5 c) relates to the readmission by each of the states of their nationals who are illegally present on the territory of one or the other of the states.

In addition to article 13, the Cotonou agreement contains a human rights clause (article 9) which states that "Cooperation shall be directed towards sustainable development (...) this entails respect for and promotion of all human rights. Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based

on the rule of law and transparent and accountable governance are an integral part of sustainable development”.

One can thus conclude that the ‘legal basis’ of the EU-ACP cooperation in the field of migration provides the necessary ground for mainstreaming human rights into migration policies. Whether this principle is being concretely implemented on the ground remains to be established. It is also important to underline that the wording of article 13 seems to restrain the mainstreaming of human rights within policies solely relating to the protection of migrants legally present on a territory. Securing the rights of irregular migrants is only mentioned in the framework of return policies. It could, however, be argued that the wording of article 9 allows for the inclusion of a rights-based approach for the protection of all migrants, be they regular or not, if there were a political will to do so.

The EU has held three regional conferences in relation to cooperation in the field of migration with (part of) ACP countries. These conferences were as follows: Euro-African Partnership for Migration and Development (Rabat, 10-11 July 2006); EU-Africa Conference on migration and development (Tripoli, 22-23 November 2006); Second EU-Africa Ministerial conference on migration and development (Paris, 25 November 2008).

The Rabat conclusions identify four main fields of cooperation, namely ‘migration and development’, ‘legal migration’, ‘illegal migration’ and ‘operational police and judicial cooperation and assistance for victims’. It is worthwhile noting that the conclusions make no specific reference to the safeguarding of the human rights of migrants and asylum seekers. None of the operational measures relates to their protection against possible violations (family life, access to health care, education, etc.). There are, however, a few references, under legal migration, in relation to providing potential migrants with information about their rights and duties, to the integration of migrants, and to the fight against discrimination. The paragraphs on ‘assistance for victims’ relate to the fight against human trafficking, more specifically of women and children, and to the facilitation of the reinsertion of victims of such traffics. Also worth noting is the fact that the conclusions are not gender sensitive. No specific mention of the specific protection needs of migrant women is made, except in the framework of human trafficking.

The Tripoli conference conclusions include three main themes: migration and development, illegal migration, and legal migration. The conclusions are, however, not limited to these themes. A whole section (article 5) relates to ‘human rights and the well-being of the individual’. The conclusions are rather focused on the fight against discrimination and racism, although other issues are also covered. It is worth noting that this chapter of the conclusions is gender sensitive. It also makes no distinction between regular and irregular migrants as to the need to allow them access their rights. It has a reference to the role of civil society organisations “in promoting integration and employment and preventing discrimination”. Finally, article 9 of the conclusions is dedicated to refugee protection. It underlines, among other things, the protection needs of refugees, asylum seekers and internally displaced persons. It also has a mention to the specific protection needs of ‘vulnerable’ groups, especially women and unaccompanied children. Compared to the Rabat meeting, one could thus say the Tripoli conclusions integrate a far more elaborate human rights-based approach.

The Paris conference was designed as a follow-up to the Rabat meeting. It does however include a reference to the conclusions of the Tripoli conference in its preamble. A reference to the protection of refugees is also made. The core text is structured following the three main issues already identified in Rabat (legal migration, illegal migration, migration and development). The Paris conclusions make no specific reference to the protection of the human rights of migrants residing in the different countries, be they regular or not. No reference is made to the international framework relating to protection of migrant workers.

The conclusion foresees however (under the 'legal migration' chapter) that the parties shall aim at "ensuring within the framework of regulation of legal migration that migrants benefit, on the one hand, from the rights to which any worker is justly entitled in destination countries and, on the other hand, from the integration policies applied by such countries". The conclusions also specify (under the 'illegal immigration' chapter) that the "fight against irregular migration must be carried on with full respect for fundamental rights and the dignity of the human person, the principles of international law and the relevant international commitments. It must first fully respect, in the framework of mixed migration flows, the status of refugees, the guarantees to which asylum seekers are entitled and the principle of non-refoulement". The positive evolution in comparison with the Rabat declaration needs to be underlined. Indeed, the language relating to the rights of migrants and refugees has been strengthened. One can, however, regret that, unlike other parts of the conclusions, no specific operational measures have been foreseen in relation to the implementation of such commitments. Paragraph 7.3 foresees, however, operational measures in relation to the improvement of the social protection for (regular) migrants as well ensuring the promotion of decent working conditions.

In general one needs to acknowledge the fact that the conclusions seem to progressively integrate more human rights and protection concerns. Nevertheless, even if the language has been reinforced, it remains generally weak. The fact that none of the EU countries has ratified the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families may be an explanation as to why the text has no explicit reference to international protection mechanisms. Also, in the absence of concrete operational measures, the materialisation of such commitments into concrete actions and policy instruments remains uncertain.

Most importantly, as always in the field of migration, there may be some tensions between, on the one hand, the fight against irregular migration and, on the other hand, the implementation of the participants' commitments in relation to the protection of the human rights of migrants and refugees. The text, for example, stresses the need to conclude readmission agreements between the different partners. This policy instrument is denounced by several human rights organisations as potentially putting migrants at risk¹⁵⁷. The risks of readmission agreements have also been underlined in a study commissioned by the European Parliament's Subcommittee on Human Rights¹⁵⁸. One can thus question whether a systematic inclusion of references to the unconditioned need of concluding readmission agreements is compliant with a human rights approach. The same could be

¹⁵⁷ See : MigrEurop (2009) "Open letter on readmission agreements".

¹⁵⁸ Charles, 2007.

said about other parts of the conclusions. For instance, the conclusions clearly state that “[i]t is in the interest of countries of destination, transit and origin not to allow irregular migrants to settle”. Such statement is clearly driven by a political will to combat irregular migration. One could challenge the compatibility of such declaration with international human rights norms (rights of all migrant workers, right to a family life, right to education, protection from torture, etc).

To conclude, one can say that the mainstreaming of a rights-based approach within regional cooperation policies on migration (and asylum) issues with ACP countries has progressed. It remains, however, very limited. The language remains rather general, even though it has been strengthened. The absence of concrete implementation measures may make it more difficult for such commitments to materialise; if implemented, it may prove difficult to assess their efficiency. Many efforts remain to be made to ensure a fully mainstreamed approach. Protection-related language has developed but remains limited to specific situations (legal migrants, refugees, returned persons), while it should be acknowledged that human rights are indivisible and apply to all, regardless of their administrative status. Important policy instruments, such as readmission agreements, are being promoted without conditionality being put as to their compatibility with international human rights standards. The same reasoning is valid for the refusal to settle irregular migrants.

Regional cooperation with Southern neighbourhood countries

Southern neighbourhood countries are members of the former Barcelona Process (launched in 1995), now called Union for the Mediterranean (launched in 2008). North African countries are a clear priority for the EU in migration-related discussions. Indeed, they are both origin and transit countries for migrants and refugees heading to the EU. They also happen to be the ‘last’ countries migrants and refugees would transit before entering the EU.

The Barcelona process originally included three main sectors: Political and security dialogue, Economic and financial partnership, and Social, cultural and human partnership. In 2005, the Barcelona summit added migration as a fourth main sector. The Barcelona declaration did include a reference to the need of promoting human rights and democratic values. This declaration has, however, no legal value. The legal basis for cooperation with these countries is found in the Association Agreements which the EU has bilaterally concluded with each of the countries from this region¹⁵⁹. All such Association Agreements contain a human rights clause. A specific article is also dedicated to cooperation in the field of migration. It is, however, beyond the scope of the present study to enter into a detailed analysis of such articles.

The first Euro-Mediterranean Ministerial Conference on Migration was held in Algarve in October 2007. The conclusions of this conference fell short of expectations in relation to mainstreaming migrant and refugee rights within this regional forum. The conclusions are structured following the usual three chapters the EU has identified as priorities for cooperation in the field of migration: legal migration, fight against illegal migration, and the link between migration and development. It is surprising to note that no single reference,

¹⁵⁹ Libya and Syria have not signed such agreements.

even very general, was made in the core text as to the need to safeguard the rights of migrants in the framework of the Euromed cooperation on migration. Asylum was simply excluded from the agenda due to the alleged strong opposition from Southern countries, mainly Middle Eastern countries. No reference to refugee protection was made, neither in the conclusions nor during the discussions.

The preamble does include some elements related to migrant protection. It, e.g., underlines “the need for ... [a] ... comprehensive and balanced approach to fully respect and protect the rights of migrants and human rights, in particular those of female migrants and children, and to provide effective international protection for those in need, on the basis of the principles enshrined in international law and the specific commitments of each country, based on its adherence to specific instruments or agreements”. The wording of this paragraph deserves to be examined carefully. Indeed, it suggests that the implementation of international protection instruments would be made based on the “specific commitments of each country”. The reason for choosing such wording probably comes from the fact the EU was facing a strong opposition from Middle East countries to have any reference to the Geneva Convention on the status of refugees. It also wanted to avoid having a reference to the International Convention for the protection of all migrant workers and the members of their family¹⁶⁰. It remains however, that the spirit of this paragraph seems not to correspond to the EU's traditional commitment to promoting the full implementation of international human rights instruments and the lifting of reservations. The preamble also has a clear reference to “the importance of family reunification as a way to protect the family and respect family life, according to principles of instruments of international law, and the commitments to promote fair treatment of migrants in the societies of Euro-Mediterranean partners in particular by combating discrimination, racism and xenophobia against migrants and their families”. It needs, however, to be stressed that none these political statement were reproduced in the core text of the conclusions. No operational measures were suggested in relation to them, which is regretful.

The implementation of part of the Ministerial conference's conclusions is the responsibility of the 'Euromed Migration II' project. This project is financed by the European Commission. The purpose of this project is to “strengthen the Euro-Mediterranean cooperation in the management of migration, so as to build up the Mediterranean partners' capacity to provide an effective, targeted and comprehensive solution for the various forms of migration. That includes: setting up mechanisms to promote opportunities for legal migration, support for measures to promote the linkage between migration and development, and the stepping up of activities to stamp out people trafficking and illegal immigration, and to manage mixed flows”¹⁶¹.

Concretely, four working groups composed of high officials from the administrations of the different countries involved were established in the framework of the Euromed Migration II project. The working groups cover the following areas: (a) legislative convergence and the need for reform of migration law and its institutional framework; (b) labour migration; (c)

¹⁶⁰ In one of the initial draft conclusions, Egypt (in charge of coordinating the position of the Arab group) had suggested an inclusion of a reference to this convention.

¹⁶¹ Source: <http://www.euromed-migration.eu>.

institutional responses and national strategies to combat illegal immigration; and (d) remittances by migrants to their countries of origin. Each working group is meant to meet four times. The meetings will then be followed by a regional conference as well as a number of training sessions and field visits involving the participants. In parallel to this, a research on women in migration will be conducted.

Several comments in relation to this project have been made by the Euro-Mediterranean Human Rights Network (EMHRN). Obviously, migrant and refugee protection are not the main priority of the project, as it has not been identified as a subject per se for the working groups. The project's main purpose is to enhance technical dialogue and cooperation between officials from the different countries, along the lines of the abovementioned priorities. It remains, however, that issues related to migrant and refugee protection may be debated within the different working groups, and more specifically the one related to legislative convergence and labour migration. Safeguarding migrants' rights in the framework of policies related to fighting illegal migration could also be raised in the third working group. There is thus an opportunity to mainstream a rights-based approach within the different discussions. The nature of the discussions (closed meetings) is, however, such that it proves difficult to assess to what extent this is being done. Furthermore, it seems that no systematic mechanism has been set up to ensure that human rights will be consistently taken up within the project. No focal point has been appointed on the human rights of migrants. Civil society organisations active in the field of migrant and refugee protection have no access to the meetings.

As for the study on women in migration, it does not have a specific focus on the protection of migrant women, for example against violence. Officials from the European Commission informed the EMHRN that the study was to look at the general situation of migrant women (which suggests that violations of their rights could be covered, depending on the findings of the researches). However, the protection of women's rights was not identified as a priority per se. More generally, one needs to underline that it is the overall project that seems to suffer from a lack of a gender-sensitive approach. Indeed, the study on women in migration is being conducted in parallel to the working groups meetings, but not as a fully integrated part of their activities.

One can thus conclude that migrant and refugee protection is not being adequately mainstreamed within the regional forums of political (or technical) dialogues in relation to cooperation with third countries in the field of migration and asylum. More interaction between the different officials working at different levels and departments (geographical focal point, migration and asylum focal point and human rights focal point) should be encouraged, both at Council and Commission level in order to overcome this situation. The protection of migrants and refugees should be given as much priority as the other aspects of migration policies. Gender mainstreaming also needs to be integrated into the EU's approach to cooperation in the field of migration. It is further recommended that the EU should seek to have *ex ante* evaluation of the possible impact of its cooperation policies in the field of migration on migrant and refugee protection in the region. Human rights units should be more involved in following the external dimension of internal policies. It seems, however, unrealistic that this can be done without an upgrading of the units in terms of capacities and human resources.

Bilateral cooperation with Southern Neighbourhood countries

In addition to the regional process, the EU also has bilateral cooperation programme with the neighbourhood countries. The main legal basis for such bilateral cooperation is provided by the Association Agreements. As noted earlier, such agreement do include a human rights clause as well as specific articles relating to the cooperation in the field of migration. In addition to the Association Agreements, the EU has also negotiated country Action Plans, which have no binding legal value, but which identify a set of common policy objectives, as well as a number of actions, that the EU and its partner country agree to work on. The structure of the Action Plans is quite similar from one country to another, although there may be important variations as to the content of the different chapters. It remains that all Action Plans for this region have both a chapter related to human rights and democracy promotion and a chapter dedicated to cooperation in the field of migration (and asylum).

To make these instruments more operational, the EU has set up a number of working groups in charge of following up on a specific issues. In most cases, the EU has set up a subcommittee on human rights as well as a working group on migration and social affairs. These meetings are not public. NGOs do have informal briefings in relation to the subcommittees on human rights, but not for the WG on migration and social affairs. It therefore remains difficult to assess to what extent issues related to migrant and refugee protection are being raised with the human rights subcommittee, just as it proves difficult to assess the to degree to which issues related to the human rights of migrants and refugees are being raised within the working groups on migration and social affairs.

Given the available information, it appears that the HR subcommittees with countries from this region are predominantly used for discussions in relation to civil and political rights. In some cases, issues relating to social, economical and cultural rights are also raised. Migration and asylum issues may as well be raised, but on a very ad hoc basis. Officials tend to consider that such matters fit more easily into the discussions of the WG on migration and social affairs. This is, however, not always the case. When permanent patterns of violations of the rights a specific category of persons are observed (for example: Palestinian refugees in Lebanon), the matter may well be raised during the meeting of the subcommittees on human rights. Mainstreaming may thus be undertaken, but not in a systematic way. There also seems to be a clustering effect (issue relating to migrant and refugee rights would be raised either in the subcommittee on human rights or in the WG on migration and social affairs), mainly due to lack of capacities and means.

In its latest evaluation reports on the implementation of the European Neighbourhood Policy, published in April 2009, the European Commission has included a set of paragraphs dealing with matters relating to asylum and migration. If compared to former similar reports, one needs to acknowledge that the paragraphs dedicated to migrants and refugees are more human-rights-oriented, which is a welcome step. It is, however, worthwhile noting that, depending on the country, paragraphs relating to the rights of migrants and refugees may not appear in the same chapter. In some cases (Lebanon), they are included under the heading 'Human rights and fundamental rights' in the chapter dedicated to 'Political dialogue and reform'. In other cases (Tunisia, Israel and Morocco), they are included under the chapter dedicated to 'Cooperation on justice freedom and security'. In yet other cases (Egypt & Jordan), they are included in both chapters. Also, it needs to be underlined that, in

several cases (Tunisia, Israel and Morocco), the EC reports mainly focus on the access of refugees to protection, but not so much on migrants' rights (detention, unlawful deportation, ill treatments, etc). It has also been noticed that, when examining refugee issues, the reports seem to mainly focus on the recognition or not by the state of refugee status, but not so much on the access of refugees to their rights (labour market, economical and social rights, etc).

More generally speaking, it appears that bilateral cooperation suffers from the same shortcomings observed in the framework of regional cooperation. Migrant and refugee protection is not always being adequately mainstreamed. There may also be tensions between the EU's own priorities as to the safeguarding its borders and the promotion of a rights-based approach to migration policies. In such cases, migrant and refugee protection tends to be given a lesser priority.

Rights-approaches within financial instruments

Financial instruments dedicated to supporting civil society organisations

The main financial instrument, supporting civil society organisations acting in the field of migration and asylum is the *Thematic programme for the cooperation with third countries in the areas of migration and asylum*¹⁶², formerly AENEAS. This thematic programme is used by the European Union to support projects related to migration and asylum in third countries. Projects are of diverse nature, covering the whole range of migration policies from fighting irregular immigration through better border control management to protecting the rights of migrants and refugees. Projects are selected through call for proposals managed by the European Commission (AIDCO).

The fact that the thematic programmes include migrant and refugee protection amongst its priorities tends to indicate that mainstreaming of human rights is being respected within this programme. By analysing the structure of the 2007-2008 call for proposal, however, it appears that migrant protection is not fully supported. Indeed, the protection of migrants' rights has been excluded from the scope of the call for Middle East and Gulf countries as well as for Latin America. This exclusion seems unjustified, especially when knowing the many violations that migrant workers face in these regions – for instance in the oil industry in Gulf countries, just to mention one example. When questioned about the reasons for such exclusion by civil society organisations, EC officials have replied that it was because there are no major migratory flows coming from these regions toward EU countries. Such argument sounds more related to a utilitarian approach than a rights-based approach, and one may on this account question whether human rights are actually being mainstreamed to the fullest possible degree.

It must be noted that this thematic programme has another important mainstreaming impact. Migration and asylum issues are usually managed by the officials in charge of internal policies (DG JLS), while the promotion of human rights in third countries is traditionally managed by the officials responsible for external relations (DG RELEX). But the

¹⁶² European Commission (2006) "Communication from the Commission to the European Parliament and the Council. Thematic programme for the cooperation with third countries in the areas of migration and asylum", Brussels, 25 January 2006, COM (2006) 26 final.

very existence of projects related to the promotion of the rights of migrants and refugees within this thematic programme has the effect of enhancing the involvement of JLS representatives in a rights-based approach to migratory issues. One may thus conclude that it contributes to 'de-clustering' the two policies, hence providing the necessary conditions for greater mainstreaming.

Other financial instruments may also be used to support projects in the field of migrant and refugee protection. This is for example the case of funds allocated through *ECHO* (humanitarian aid) as well as through the *EIDHR* (minority protection, conflict prevention, racism, discrimination, etc). However, such funds are not related to migration policies. They are thus not being analysed at this stage.

Financial instruments dedicated to bilateral cooperation with third countries

It is not possible in the framework of this study to go through all the different financial instruments which are made available for cooperation with third countries, including the field of migration and asylum, in order to assess whether they integrate a human rights approach. This could in fact be the subject a separate study. It is, however, important to highlight some practices which may diminish the mainstreaming of human rights within cooperation programs with third countries in the field of migration. It happens in some cases that the EU will decide to allocate its financial support to a country through a 'budgetary support', rather than through a predefined cooperation project. This is, e.g., the case in Morocco, where the EU has allocated a total sum of 69 million Euros as budgetary support in the field of border control and the management of migratory flows. In such case, the EU funds are being allocated to the authorities of third countries as general budgetary support to their overall activities. While the activities supported by the budget must in principle relate to the identified thematic priorities, one may nevertheless assume that in such conditions it proves difficult for the EU to actually assess the degree to which these funds have been used to promote a rights approach to the management of migration flows in the country. More generally, unless clear benchmarks are identified and the third country commits itself to providing detailed reports on how the money has been used, one may be sceptical of the EU's real capacity to monitor the use of its funds. In the case of Morocco, several local human rights organisations report that they have not noticed significant improvements in the situation of migrants and refugees in recent years¹⁶³. One may thus question whether the EU funds have served to promote a more rights-based approach to the management of migratory flows in Morocco. It is, however, not possible to provide a clear-cut answer to this question at the present stage.

Another issue which deserves to be examined is the institutional interaction between the different services at Commission level when designing and following up on such cooperation projects. Unless the persons in charge of monitoring the human rights situation in the country at the DG RELEX have the sufficient capacities and resources to interact with their geographical colleagues, the local staff (delegations) and their JLS colleagues, it may

¹⁶³ See : GADEM (2009) "Rapport sur la mise en œuvre par le Maroc de la Convention sur les droits de tous les travailleurs migrants et des membres de leur famille", 07 February 2009, at www.euromed-migrasyl.blogspot.com.

prove difficult for them to ensure the mainstreaming of human rights within the cooperation programs. A similar line of reasoning is also valid in relation to the AIDCO structure.

All in all, it would be advisable that a number of persons be appointed as focal points for the promotion of migrant and refugee rights within the different levels of cooperation with third countries. At the present time there is a staff member within the Human Rights Unit in DG RELEX (B1) who is formally responsible for migrants' rights. However, this issue is added to an already long list of responsibilities, and it is thus questionable whether this person alone will be able to ensure a proper mainstreaming of migrant and refugee rights within the different policy levels, including financial cooperation instruments.

By way of concluding this sub-chapter, it may be useful to briefly consider the possible impact of the future Stockholm Programme, as well as of the Lisbon Treaty (if adopted). The Stockholm Programme will succeed the Hague Programme. One can thus only advocate that it includes a more integrated human rights approach to migration and asylum policies, and more specifically in relation to cooperation with third countries. Proper evaluation mechanisms of the impact of the EU policies in third countries need to be developed. The safeguarding of the rights of migrants and refugees needs to be given priority over the safeguarding of borders. Most importantly, the EU should restrain itself from concluding cooperation programmes with third countries which in any way may have the effect of endangering migrants and refugees.

As for the Treaty of Lisbon, it does not as such contribute to better mainstreaming of human rights within migration and asylum policies. However, if adopted, it will increase the powers of the Parliament in affecting the policies related to legal migration. The fact that the European Parliament will have more powers in the field of migration policies can thus be seen as an opportunity for it to more easily promote an integrated approach. However, one could argue that unless the European Parliament is in itself dedicated to mainstreaming human rights within all sectors, and has the necessary capacities and resources to do so, an increase in its decision-making power cannot be automatically assumed to lead to a more integrated approach to human rights.

4 CROSS-CUTTING CASES¹⁶⁴

This chapter presents two case studies in which the implementation of human rights in external relations and the degree of their mainstreaming will be analysed and assessed. Considering the different perspectives from which the question of the implementation of human rights mainstreaming can be seen, and in view of presenting significant examples, one thematic and one regional case have been selected. The former deals with EU and Member States action in support of human rights defenders. The latter examines the mainstreaming of human rights in the EU's policy vis-à-vis the Western Balkans. These two cases raise different but equally important insights into strengths and weaknesses in the mainstreaming of human rights in external relations, illustrating both successes and more problematic aspects of the EU mainstreaming effort which eventually will be taken up in the general conclusions and recommendations of the study.

4.1 Thematic case: support to human rights defenders as an element of mainstreaming human rights¹⁶⁵

This section considers the extent to which the EU has been able to mainstream the issue of support to human rights defenders (HRDs) across external relations policies. To begin with, it is relevant to stress that the issue of HRDs and the need to protect them is not new: the EU policy that will be examined here intersects that of the UN. Among the relevant statements produced by the UN on the matter, one of the most important is certainly the 1998 Declaration on the Rights and Responsibilities of Human Rights Defenders. The Declaration provides, among other things, a definition of what a human rights defender is and touches upon several questions commonly associated to the work of and risks met by HRDs¹⁶⁶.

In the EU field, the main relevant tool is the 2004 *guidelines on human rights defenders*. Section II.C of this study has already introduced these guidelines placing them together with other thematic guidelines. The main scope of the different sets of guidelines is to coordinate the diplomatic efforts and initiatives of the EU and its member states towards enhancing the respect and protection of human rights in relation to specific issues (death penalty) and subjects (women, children). The genesis of different human rights guidelines is often associated to different EU Presidencies and their will to promote action on issues of human rights that were high on their agenda. In this respect, the importance given by member states to human rights guidelines is testified by the relatively high number of guidelines approved so far. From the viewpoint of member states, one reason of this popularity may lie in the non-binding nature of the guidelines. At the same time, this allows for greater flexibility and openness in the way in which the guidelines are not only interpreted and

¹⁶⁴ This chapter is based primarily on contributions by Michele Grigolo and Christian Pippan.

¹⁶⁵ Part of the information and reflection incorporated into this session has been provided by Front Line during two interviews with the local staff in Brussels on March and May 2009.

¹⁶⁶ The Declaration was adopted on 9 December 1998 on the occasion of the 50th anniversary of the Universal Declaration on Human Rights. See United Nations, General Assembly (1999), "Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms" A/RES/53/144, 8 March 1999.

implemented but also, and more crucially, evaluated and revised according to the specific problems and issues emerging on the ground. Last but not least, NGOs with expertise in the specific fields relevant for the guidelines have often been involved in the drafting, assessment and revision procedures of the different guidelines¹⁶⁷.

However, the guidelines are not the only tool that can be used by the EU in support of HRDs. Important financial support can be provided also by the EIDHR. In fact, the way in which funds are distributed under the EIDHR is particularly likely to meet the needs of HRDs. These funds, as we have seen, target civil society actors and do not require the approval of any third country government to be delivered. Furthermore, specific funds are available under an ad hoc budget line on HRDs. As such, the case of HRDs will give the opportunity of checking the implementation of the EIDHR on at least one specific issue.

Yet, for reasons of time and space in this section our attention will be primarily on the guidelines on HRDs and their implementation. The section will be divided into four parts. First, the history and content of the guidelines will be illustrated, with an emphasis on the revision and amelioration of their content in 2008. Second, an assessment will be made of the impact of the guidelines. Third, attention will be paid to deficiencies in the implementation and suggestions for improvements. In this section, also the question of the use of the EIDHR will be raised. Fourth, some conclusions will be drawn.

4.1.1 The history and content of the guidelines on human rights defenders

The guidelines on HRDs is certainly the tool that has more clearly called the attention of the EU and its member states on the need to support and protect HRDs around the world through diplomatic action in bilateral and multilateral dialogues and arenas. A lot of emphasis has been put by the EU and NGOs like Front Line, Amnesty International and Human Rights Watch on HRDs – and, with respect to their specific conditions, women HRDs - operating in countries and regions where not only the action of HRDs is contrasted and repressed by governments but also HRDs are under threat of being imprisoned, tortured and eventually killed.

The history of the guidelines is similar to that of other guidelines in the sense that they have been promoted and adopted under the auspices of different EU Presidencies over the years. The guidelines were adopted by the Council in 2004 under the Irish Presidency, which wanted to contribute something ‘concrete’ in relation to human rights¹⁶⁸. In the same year, the Dutch Presidency delivered a manual for diplomats to guide them in the implementation of the guidelines. Implementation was later assessed in 2006 under the Austrian Presidency, following which in June 2006 the PSC adopted the draft Council conclusions on the first review of the implementation of the guidelines¹⁶⁹. In 2007, the

¹⁶⁷ For example, UNICEF was actively involved in the drafting process related to the guidelines on children and armed conflicts and those on the protection of the rights of the child.

¹⁶⁸ Council of the European Union (2004) “Ensuring protection – European Union Guidelines on Human Rights Defenders”.

¹⁶⁹ Council of the European Union (2006) “Draft Council conclusions on the first review of the implementation of the EU Guidelines on Human Rights Defenders”.

German Presidency launched the initiative to have local strategies for the implementation of the guidelines by EU missions, leading to the adoption of 50 strategies in different countries¹⁷⁰. Most recently, in 2008, the guidelines were revised under the French Presidency¹⁷¹, while the Slovenian Presidency completed the revision of 21 local strategies. Organisations like Front Line and Amnesty International have been extensively involved in the evaluation of the implementation of the guidelines. In fact, some observations coming from the NGO community were even incorporated into the text of the 2008 revised guidelines.

The text of the guidelines – and, in particular, the 2008 version – has been positively evaluated by the NGO community. The new guidelines have expanded and better detailed what the EU and Member States are requested to do to support and protect HRDs. The guidelines engage EU institutions (in particular the Commission, through its Delegations) and Member States (through their embassies) in a joint and multi-level effort to protect HRDs in third countries. EU missions are to monitor and report on the situation of HRDs and make the appropriate recommendations to the COHOM. A number of measures can be enacted on the basis of the guidelines, including declarations condemning the threats and attacks against HRDs, as well as demarches, public statements, and trial monitoring. EU officials are expected to meet with human rights defenders and raise cases with the local authorities¹⁷².

What is also positive in guidelines is that they recognise the indivisibility and interdependence of human rights in relation to the issue of HRDs. An important question for HRDs is that *all* human rights are mainstreamed into external relations. A reference to a comprehensive definition of human rights was included in the guidelines after their revision: point 11.1 now makes it clear that HRDs who promote economic, social and cultural rights are equally protected by the guidelines. At yet another and more structural level, Front Line notices that defenders are often lawyers, and this fact raises the importance of education in their profile. Without access to adequate education there would probably be fewer human rights defenders, which in turn would impact negatively on the overall protection of human rights in third countries. As such, it becomes all the more important that economic, social and cultural rights are given equal attention within the overall EU effort to mainstream human rights (thus not allowing a major bias in favour of the promotion of civil and political rights).

4.1.2 The impact of the guidelines

Although, as also clarified by the Council in its first evaluation, the exact impact of the guidelines is hard to assess, in some ways they have clearly contributed to improving the situation of HRDs. In fact, their implementation is often considered a success story of the implementation of the human rights guidelines *tout court*. Training is being provided to

¹⁷⁰ As of March 2009, local strategies had been enacted in 62 countries.

¹⁷¹ Find the current version of the HRDs guidelines at <http://ue.eu.int/uedocs/cmsUpload/GuidelinesDefenders.pdf>.

¹⁷² See Front Line (2007) "The EU Guidelines on Human Rights Defenders: What lessons learnt so far?".

both diplomats and HRDs with the involvement of NGOs, and awareness of the guidelines has increased. Front Line has openly recognised that human rights units are keen to implement human rights across sectors although, as Front Line itself recognises, this is not an easy task. The Council has reported that, in terms of outreach and action, contacts between EU missions and HRDs have had a positive impact in terms of “moral support and encouragement”¹⁷³.

Moreover, the guidelines have contributed to some extent to the mainstreaming of human rights in external relations. Mainstreaming is openly addressed in the revised version of the guidelines, as it is recognised that “mainstreaming human rights culture and information on human rights defenders at national, regional and international level” features among the key activities of HRDs (point 4). Furthermore, both the old and new guidelines stipulate that the human rights component of political dialogues shall include HRDs, thus making it clear that HRD issues are part of the overall human rights issues to be mainstreamed. As one moves from the theory to the practice, the guidelines have in fact empowered NGOs to raise issues of HRDs in multiple arenas. By now, for example, Front Line interacts regularly with the EU at different levels and within different contexts, up to the EU Presidency level. The organisation has been invited to participate in COHOM meetings and to interact with geographical working parties. As such, the guidelines have certainly paved the way for a more comprehensive and systematic attention to human rights issues related to HRDs in EU external relations.

Moreover, there is also evidence of efforts undertaken by the Commission and the Council to involve HRDs and related NGOs in human rights dialogues, as provided for in the guidelines and explicitly requested by the European Parliament in the Valenciano report (point 44)¹⁷⁴. NGOs like Front Line have been invited in preparatory meetings and debriefings before and after human rights dialogues between the EU and third countries. It emerges, for example, that as a follow up to the dialogues, Commission Delegations have tried to facilitate meetings between the third country government and national NGOs.

Finally, whether or not due to the guidelines, there has also been an increased attention by the EU and Member States to individual cases of HRDs. Although there remains sometimes scepticism by the EU and Member States about whether some instances raised by NGOs actually concern HRDs, institutions have become more inclined to intervene. Within human rights dialogues, for example, the EU tries to submit a list of individual cases to third country governments. These cases are often signalled by NGOs.¹⁷⁵

¹⁷³ Council of the European Union (2006) “Draft Council Conclusions on the first review of the implementation of the EU Guidelines on Human Rights Defenders”, para.9.

¹⁷⁴ European Parliament (2007) “Report on the functioning of the human rights dialogues and consultations on human rights with third countries”.

¹⁷⁵ Eventually, the EU and Member States can meet problems in supporting HRDs when the third country government considers them as a threat to the security of the state, or as terrorists. The issue is not a minor one: what is at stake is the definition of a HRD and the consideration of the politics often surrounding actions of support to HRDs. For example, in North East India the government applies special laws within a state of emergency when dealing with groups fighting for the independence of the region. In Columbia, HRDs are accused of being part of the *guerrilla*.

Requests have been made also for intervention in support of HRDs through the enactment of emergency mechanisms centred on the relocation of HRDs abroad. The 2008 revised guidelines provide for “measures for swift assistance and protection to human rights defenders in danger in third countries, such as, where appropriate, issuing emergency visas and facilitating temporary shelter in the EU Member States”. It must be clear that the activation of emergency mechanisms is the last resort for HRDs: in fact, relocation is not always necessary and HRDs do not usually want to leave their country. Yet, a quick escape is sometimes the only option when HRDs are under specific threats of losing their lives. In this respect, there is evidence of clear improvements. In particular, EU Member States have tended to become more cooperative and issue visas more rapidly. A map of existing relocation initiatives is being assembled by the Czech Presidency along with NGOs, including Front Line, with a view to promote the ‘shelter cities’ initiative. This initiative aims at securing adequate living conditions to relocated HRDs, and to speed up visa delivery processes.

Explanations concerning the relatively high degree of success in the implementation of the guidelines on HRDs seem to be divergent. While a true commitment by the EU and Member States to the cause of HRDs is to be acknowledged, other and more ‘realist’ types of arguments have been put forward. It has been suggested, for example, that the EU has been keen to intervene in support of HRDs because this often implies acting on individual cases with limited political costs. Overall, interventions on individual cases reinforce the human rights profile of the EU without requiring cumbersome and time-consuming mediation to find a common position.

4.1.3 Improving implementation

And yet, despite these positive aspects, there remain areas for further improvements, especially with regard to the implementation of the guidelines. In some respects, problems of implementation reflect the larger problems of the mainstreaming of human rights into external relations. The politics and priorities of different Member States on human rights – as well as other competing agendas – influence the implementation of the guidelines, at least in some instances. Although Amnesty International has welcomed the development of the HRDs guidelines, at the same time it regretted that “the lack of EU demarches on behalf of HRDs in certain countries appears to reflect a lack of consensus among EU members. Collective action is impossible when individual Member States prioritise other foreign policy interests or have other views regarding the best way to address the situation of HRDs or individual cases”¹⁷⁶. Amnesty has also described the implementation of the EU HRDs guidelines as ‘patchy’. Indeed, more than half of the 28 demarches made in 2006 concerned only five countries (China, Colombia, Iran, Russia and Uzbekistan) and more than half of the statements concerned HRDs in China, Uzbekistan, Myanmar, Iran and Belarus¹⁷⁷.

More input from Brussels is thus needed in order to really push the guidelines, beginning with training staff in Commission Delegations and at the state and capital levels. There is

¹⁷⁶ Amnesty International (2007) “Ensuring protection? The European Union and human rights defenders”.

¹⁷⁷ Front Line (2007) “The EU Guidelines on Human Rights Defenders: What lessons learnt so far?”, p.2.

also a need, in this connection, to secure continuity in the attention paid by staff to issues of HRDs and, in a broader perspective, human rights. The challenge is to change the framework in which Delegations operate. Here, questions of HRDs intersect larger questions of mainstreaming human rights in external relations. Amnesty International estimates that much more could be achieved if a high level political demonstration of the importance placed on the actions in the guidelines were shown, and if more resource and leadership were devoted to training on how the guidelines operate¹⁷⁸. This view is shared by Front Line, which also sees scope for improving the knowledge on HRDs among the actors involved in the implementation of the guidelines. Part of the problem here is that desk offices of Commission Delegations are often held by economists heavily focused on the technical management of development programmes, whose knowledge of issues of – and actions to be taken in relation to – HRDs are limited. In some cases, desk offices think of and/or operate on issues of HRDs having in mind traditional diplomatic actions, while in many cases what is needed may be a phone call or showing up at a trial in which HRDs are involved.

Even when dealing with development cooperation, there is a need to raise general awareness within Delegations about the relation between this policy and questions of HRDs (as also specified in the guidelines). This implies the realisation by the Commission's development staff of the importance of linking project funding with human rights and, in the case of HRDs, take care of the protection of people who implement projects and the impact of the projects on HRDs. Overall, this points to an opportunity to reinforce efforts towards the implementation of a human rights-based approach to development cooperation by the Commission.

There is, furthermore, still a clear need to mainstream gender more thoroughly into EU and Member States overall concerns and actions targeting HRDs. The specific conditions and risks of women HRDs have been raised in several venues but have not yet been adequately taken into account on the ground. An ad hoc campaign was launched in 2006 and NGOs delivered recommendations for gender-specific implementation of the guidelines. Accordingly, the revised guidelines were amended as to provide that "Missions should pay particular attention to the specific risks faced by women human rights defenders" (point 9).

From the viewpoint of the implementation of the guidelines as well as the mainstreaming of HRD issues into the work of delegations, a focal point for HRDs should be established in each delegation. Here, again, one can hardly find consistency across delegations, due in particular to lack of staff. As a remedy to this problem, focal points could, when necessary, be established on a burden-shared basis between EU delegations, Member States embassies, and joint external action services. Focal points should also be established in each EU institution. This step is crucial if the EU and states are to react promptly to emergencies involving human rights defenders. At the same time, focal points are to act as mainstreamer of HRD issues across sectors within delegations and headquarters.

At the operational level, there is the need to enhance transparency in actions targeting human rights defenders. For Front Line, at the moment, this is a major priority. Here, again, the revised guidelines specify that EU missions are to "provide feedback to human rights defenders and/or their families" whenever action is taken on behalf of the EU. In particular,

¹⁷⁸ Amnesty International (2008) "Recommendations to the Czech Presidency of the EU, 2008".

Front Line argues that when a measure is taken the EU should inform the source of the complaint, at least 'informally'¹⁷⁹. The EU could also request the source not to publicise the information. Quite interestingly, Front Line argues that in many cases human rights defenders do not know that they are human rights defenders, as they are often unaware of measures taken for their protection. While there is an obvious need to maintain confidentiality at some points, this cannot go against the fact that defenders need to know what is happening to them. For Front Line, keeping HRDs informed "would reinforce the sense of ownership by HRDs of this political tool, reinforce the HRDs confidence in the international support they obtain, and hence reinforce the HRDs action in this field".¹⁸⁰

Another aspect is securing adequate financial resources to HRDs, which calls into question the impact of EIDHR on the ground. HRDs underline that the main support to their activity coming from EU missions is through funding. And yet, many find it hard to access these funds due to lack of visibility and the defenders' lack of awareness of these funds. The revised guidelines mark an improvement in this regard as they explicitly mention the EIDHR among the tools that provide practical support to HRDs. It is also specified that action has to be undertaken so that HRDs are aware of the availability of funds and of the means of requesting them (point 14). This is intended to remedy the type of situation seen under the 2007 EIDHR programming, where 200.000 Euros were to be spent by Commission delegations – up to 10.000 Euros for individual support – but these amounts remained almost completely untouched. With respect to this question, it appears also necessary to speed up the procedure and simplify the requirements for receiving EIDHR funds - at least in the case of HRDs - as HRDs often need to receive quick and immediate financial support, especially in emergency situations.

Related to the previous issue, the EU needs to keep monitoring interventions in favour of HRDs. For Front Line this is currently a major issue. Following-up on and monitoring cases is crucial in view of securing continuity of EU and Member States interventions. Regular contacts with human rights defenders should be maintained, not least because human rights defenders need to feel that they can count on strong support by the EU and the Member States involved in their case. It would also be useful to establish more venues and procedures to facilitate the exchange of best practices of interventions in favour of HRD. This is, in fact, another way of securing continuity in the way in which cases of human rights defenders are dealt with, with due consideration of the obvious differences between cases.

Conclusions

The case of HRDs shows that human rights guidelines, although they are not a legal tool, can be effective and eventually more effective than binding legal instruments. Through the mutual reinforcing cooperation of EU institutions, individual states and NGOs working in the field, the guidelines have been object of an adequate revision and over the years have provided concrete support to HRDs. On the basis of the guidelines, local strategies have been put in place and patterns of successful interventions have been established on the ground. The guidelines have been a useful tool for mainstreaming human rights in external

¹⁷⁹ Front Line (2007) "The EU Guidelines on Human Rights Defenders: What lessons learnt so far?", p.4.

¹⁸⁰ *Ibid.*, p.4.

relations, beginning with the fact that they empower NGOs to raise issues of HRDs in different arenas and at different levels, up to the EU Presidencies.

Despite this, however, there is room for improving implementation. Broadly speaking, although training is being provided to EU and Member States staff and diplomats, more awareness needs to be raised in relation to the guidelines. In this connection, the special needs of women HRDs need to be more consistently addressed. In particular instances, the implementation of the guidelines still largely depends on the politics at stake and consensus concerning the specific case. Focal points on HRDs have to be appointed more systematically at EU headquarters and missions for the needs of HRDs to be quickly and effectively addressed. Even when successful, EU and state interventions need to be more transparent. Besides, best practices should be more coherently collected and disseminated to create a better knowledge and expertise on how to handle HRD cases in different situations. This too would mark a significant advance in the mainstreaming of human rights.

These conclusions lead us to briefly consider how the findings from the case of HRDs relate to broader issues of human rights mainstreaming in EU external relations as they emerged in the previous chapters. In particular, it appears that, while the framework and tools for implementation are in place – in this case, the guidelines and, with its specific role, the EIDHR – what is more uncertain is a *consistent* and *uniform* implementation. The implementation of the guidelines are a relatively success case but more needs to be done for implementation to become systematic. Concerning the EIDHR, it is clear that the programme needs to be at least partly adjusted in order to meet the specific requirements of HRDs, especially in cases of emergency situations.

4.2 Regional case: EU human rights conditionality and the Western Balkans

The EU and the Western Balkans: A Relationship Defined by Carrots and Sticks

In June 2000, the European Council of Santa Maria da Feira officially confirmed the vocation of all countries of what the EU has termed the 'Western Balkan' as potential candidates for membership in the European Union. This strategic reorientation in the EU's relations with the countries concerned also spurred the Union to reinforce a guiding principle that has characterised its relations with the region ever since the end of the war in Bosnia and Herzegovina and the 1995 Dayton Peace Agreement: The principle of conditionality. Over the years, this principle has evolved into a cornerstone of the EU's Western Balkans policy.

The EU's first strategic policy towards Albania and four of the (then) five successor states to the Former Yugoslavia was the so-called 'Regional Approach'.¹⁸¹ From the outset, financial assistance, trade preferences and contractual relations were made subject to the willingness of the countries concerned to re-establish 'good neighbourly relations' and economic co-operation with one another. Moreover, the Council has left no doubt that any consideration of enhanced bilateral relations would depend "on the willingness of the countries concerned to work towards consolidating peace and to respect human rights, the rights of minorities and democratic principles".¹⁸² The new strategy was soon put into practice. In July 1996, the Council adopted a regulation (generally known at the time under the synonym 'OBNOVA') on assistance to BiH, Croatia, FYROM and Serbia, which expressly identified respect for democratic principles, the rule of law, and human rights and fundamental freedoms as an essential element and precondition for its application.¹⁸³ The regulation reflected what by then had already developed into common Community practice: The inclusion of a 'human rights and democracy clause' into all major Community instruments regulating external assistance; complementing similar clauses embodied in most trade, co-operation and association agreements concluded between the EC and third countries since the early 1990s.¹⁸⁴

The OBNOVA conditionality clause, however, went further than comparable provisions in earlier EC regulations and international agreements by stating that – apart from respect for democracy, the rule of law and human rights – 'specific conditions' defined by the Council

¹⁸¹ The Regional Approach was initially directed at Albania, Bosnia and Herzegovina, Croatia, Macedonia (FYROM), and Serbia (Slovenia was put on a separate and accelerated path towards membership already prior to Dayton). As a result of its special status under UN Security Council Resolution 1244 (1999), Kosovo was accepted by the EU as a further SAP partner at the 2003 EU-Western Balkan Summit in Thessaloniki. With Montenegro's negotiated separation from Serbia in 2006, the total number of SAP countries/territories now stands at seven.

¹⁸² European Council (1996) "Council Conclusions and Declaration on former Yugoslavia".

¹⁸³ Council of the European Union (1996) "Council Regulation (EC) No. 1628/96 of 25 July 1996 relating to aid to Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the former Yugoslav Republic of Macedonia", Art. 2. The OBNOVA regulation was repealed in December 2000 and replaced by the so-called CARDS regulation, which itself was recently replaced by IPA – the new 'Instrument for Pre-Accession' (see below).

¹⁸⁴ See, generally, Riedel and Will, 1999; Pippan, 2002.

for the countries in question would henceforth also be regarded as essential elements of economic and financial EC assistance. What exactly was meant by these 'specific conditions' was clarified by the Council in April 1997 with its 'Conclusions on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of South-East Europe'.¹⁸⁵ To this date, these guidelines define the relationship between the EU and the Western Balkans. In essence, they distinguish conditions which apply to all countries of the region from conditions which apply to individual countries only. They also establish a graduated approach, within which trade preferences, financial assistance and the establishment of contractual relations are subject to different degrees of conditionality. This underscored the EU's desire to differentiate more effectively between the countries concerned in terms of their political and economic development while, at the same time, a coherent strategy towards the region as a whole would remain in place. Hence, while all offers are available to all countries of the region, and while the EU's strategy is meant to function as an incentive (rather than an obstacle) for the countries to meet the relevant criteria, the basic approach to conditionality follows the almost banal principle that the closer a country wants to move towards the EU, the more conditions it has to fulfil.

The political requirements included in the Council Conclusions of 29 April 1997 reflect this approach. The lowest degree of conditionality pertains to the granting of *autonomous trade preferences*, which merely requires a general, yet unspecified respect for fundamental principles of democracy and human rights by the beneficiary country. For a country to additionally benefit from *financial and technical support* under the Community's assistance programs (initially PHARE and OBNOVA, later CARDS and today IPA), reform efforts have to be increased by proving "a credible commitment to democratic reforms and progress in compliance with the generally recognised standards of human and minority rights [...]". *Contractual relations* (today particularly in form of 'Stabilization and Association Agreements'), are in themselves subject to a graduated approach, whereby the start of negotiations requires a lower level of compliance than the conclusion of an agreement. Apart from the conditions already applied to trade preferences and EC financial assistance, a number of further political criteria have to be met by countries wishing to enter into treaty negotiations with the Union, including the holding of free and fair elections at reasonable intervals, the absence of discriminatory treatment and harassment of minorities by public authorities, and the absence of harassment of independent media. Moreover, for the actual conclusion of an agreement between the EU and any of the countries concerned, a state is not only required to comply with the general and country specific conditions set out by the Council but must also prove "substantial progress in the achievement of the objectives of these conditions as well as substantial results in the field of political and economic reforms and a credible commitment to continue on this path."¹⁸⁶

The April 1997 guidelines clearly entail a combination of both positive and negative conditionality. Progressive compliance with the conditions established by the Council is rewarded with intensified bilateral cooperation, including the establishment of contractual rela-

¹⁸⁵ European Council (1997) "Conclusions on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of South-East Europe".

¹⁸⁶ *Ibid.*, section on "Contractual relations".

tions. In case of serious and repeated non-compliance with the conditions underpinning the respective level of cooperation, however, trade preferences may be reduced, Community assistance may be frozen and, where applicable, the conclusion of an agreement may be postponed or its application suspended. In this respect, the EU's strategy towards the Western Balkans is basically in line with its overall approach to political conditionality, which has emerged in the early 1990s as a defining component of EC development cooperation and, in a parallel yet distinctive process, the Community's relations with Central- and Eastern European countries.¹⁸⁷

However, if compared to similar policies in other fields of EU external relations, the application of the conditionality principle vis-à-vis the Western Balkans reveals distinctive features; such as the exceptional broad range of political and economic conditions used, their separation in general and country specific conditions, and the introduction of a graduated approach to compliance. There is also an effort on the part of the EU to translate its broadly framed conditions into operational, verifiable elements. A demonstrative list, annexed to the 1997 Council conclusions, enumerates a number of standards the EU deems essential in any interpretation of democratic principles, human rights, minority rights and principles of market economy.¹⁸⁸ While certainly incomplete and in some ways even arbitrary, such an enumeration nevertheless helps to clarify the normative content of the conditionality criteria commonly used by the EU.

The Stabilisation and Association Process and Human Rights

In 1999, following the war in Kosovo, the EU decided to transform its Regional Approach into a more sophisticated policy framework: the Stabilisation and Association Process (SAP). The SAP specifically aims to assist each of the countries concerned in meeting the relevant EU criteria in order to ultimately accept them as official candidates for membership (a status so far only achieved by Croatia and Macedonia). The program consists of a number of new or modified offers to the Western Balkans, including enhanced trade liberalisation, improved financial and economic assistance, regular political dialogue and, in particular, a new, tailor-

¹⁸⁷ See, with regard to EU development cooperation, Pippin, 2002:49-73. On the evolution of political conditionality within EU-CEEC relations see King, 1996.

¹⁸⁸ The following key elements of EU political conditionality were identified by the Council: "*Democratic principles*: Representative government and accountable executive; government and public authorities to act in a manner consistent with the constitution and the law; separation of powers (government, administration, judiciary); free and fair elections at reasonable intervals by secret ballot. *Human rights, rule of law*: Freedom of expression, including independent media; right of assembly and demonstration; right of association; right to privacy, family, home and correspondence; right to property; effective means of redress against administrative decisions; access to courts and right to fair trial; equality before the law and equal protection by the law; freedom from inhuman or degrading treatment and arbitrary arrest. *Respect for and protection of minorities*: Right to establish and maintain their own educational, cultural and religious institutions, organisations or associations; adequate opportunities for minorities to use their own language before courts and public authorities; adequate protection of refugees and displaced persons returning to areas where they represent an ethnic minority". See European Council (1997) "Conclusions on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of South-East Europe", Annex I.

made category of contractual relations - the Stabilisation and Association Agreements (SAAs). Again, the instruments covered by the SAP are open to all countries of the region on equal terms; their actual availability, however, continues to depend on each country's compliance with the general and country specific conditions set out by the EU. Contrary to initial fears expressed by some countries that a package approach would hold back their integration into EU structures, the so-called 'own merits' (or 'catch up') approach allows each SAP partner to move ahead towards the prospect of accession on its own pace – depending, of course, on its ability and willingness to implement the necessary reforms. Promotion of, and respect for, human rights and the rights of minorities is thereby a central requirement that – albeit to varying degrees – runs through all aspects and components of the SAP.

Trade Concessions

In March 2000, the Lisbon European Council decided that future association agreements with the Western Balkans should be preceded by a regime of asymmetrical trade liberalisation. The EU Council implemented this decision a few months later with the adoption of a regulation that provides for duty and quota free access to the EU market for nearly all Industrial products and most agricultural products from the Western Balkans.¹⁸⁹ The preamble to the Council regulation on exceptional trade measures refers to the political conditions contained in the Council conclusions of 29 April 1997. In its operative part, however, only the readiness to engage in effective economic reforms and enhanced regional cooperation is singled out as a requirement for a countries' entitlement to preferential trade arrangements.¹⁹⁰ Human rights conditionality is thus not explicitly embodied in the text of regulation. By definition, however, exceptional trade preferences which go beyond the Community's general obligations stemming from its membership in the World Trade Organization do not reflect a legally binding commitment on the side of the EU, provided that such preferences are not governed by bilateral agreements.¹⁹¹ Therefore, any subsequent decision to suspend or withdraw such preferences entirely remains at the discretion of the EU (i.e. the Council acting on the basis of a proposal from the Commission). As indicated in the preamble to Regulation No. 2007/2000, such a decision will be based on all requirements set out by the Council in respect of the granting of autonomous trade preferences in its 1997 Conclusions, including the respect for democratic principles and fundamental human rights.

Financial Assistance

In December 2000, the Council adopted CARDS, a (then) new assistance program for the Western Balkans (Community Assistance for Reconstruction, Development and Stabili-

¹⁸⁹ Council of the European Union (2000) "Council Regulation (EC) No. 2007/2000 introducing exceptional trade measures for countries and territories participating in or linked to the Stabilisation and Association process".

¹⁹⁰ In the event of subsequent non-compliance by one of the beneficiary countries, the Council may take appropriate measures, including the suspension or withdrawal of exceptional trade preferences, by a qualified majority vote, on the basis of a proposal from the Commission (Regulation No. 2007/2000, Art. 2).

¹⁹¹ See Brandtner and Rosas 1999:706.

sation), which for the first time established a coherent legal framework for Community assistance to the countries of the region.¹⁹² In 2007, CARDS was replaced by the now relevant 'Instrument for Pre-Accession Assistance' (IPA); a single, unified instrument designed to channel financial support to both candidate and potential candidate countries.¹⁹³ Human rights conditionality (as part of overall political conditionality) is explicitly included in the IPA regulation. Article 21 of the regulation stipulates that:

1. Respect for the principles of democracy, the rule of law and for human rights and minority rights and fundamental freedoms is an essential element for the application of this Regulation and the granting of assistance under it. Community assistance for Albania, Bosnia and Herzegovina, Croatia, the Former Yugoslav Republic of Macedonia, Montenegro and Serbia, including Kosovo, shall also be subject to the conditions defined by the Council in its Conclusions of 29 April 1997, in particular as regards the recipients' undertaking to carry out democratic, economic and institutional reforms.
2. Where a beneficiary country fails to respect these principles or the commitments contained in the relevant Partnership with the EU, or where progress toward fulfilment of the accession criteria is insufficient, the Council, acting by qualified majority on a proposal from the Commission, may take appropriate steps with regard to any assistance granted under this Regulation. The European Parliament shall be fully and immediately informed of any decisions taken in this context.

The provision reflects a particularly comprehensive conditionality regime. Apart from giving expression, in its first paragraph, to the immediate relevance of the 'political' part of the 1993 Copenhagen criteria for the continuation of EU financial support, it also incorporates the entire set of political and economic conditions entailed in the April 1997 Council conclusions on conditionality as additional preconditions for financial assistance to the countries concerned. Notably, however, IPA does not exclusively – and not even primarily – rely on punitive measures to foster human rights and the other political and legal criteria defined by the EU. It generally provides for the possibility of 'positive measures', i.e. the financing of projects and programs aimed at, *inter alia*, the strengthening democratic institutions and the rule of law, as well as "the promotion and the protection of human rights and fundamental freedoms and enhanced respect for minority rights, the promotion of gender equality and non-discrimination".¹⁹⁴ The bulk of EU assistance in the field of human rights is earmarked for institution and capacity-building projects, with governmental authorities and state institutions being the main beneficiaries. This being said, non-

¹⁹² Council of the European Union (2000) "Council Regulation (EC) No. 2666/2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the FRY and the former Yugoslav Republic of Macedonia".

¹⁹³ Council of the European Union (2006) "Council Regulation (EC) No. 1085/2006 on establishing an Instrument for Pre-Accession Assistance". Detailed implementing rules on IPA are laid down in European Commission (2007) "Commission Regulation (EC) No 718/2007 of 12 July 2007 implementing Council regulation (EC) No 1085/2006 on establishing an Instrument for Pre-Accession Assistance (IPA)".

¹⁹⁴ Council of the European Union (2006) "Council Regulation (EC) No. 1085/2006 on establishing an Instrument for Pre-Accession Assistance (IPA)", Article 2(1) lit. (b).

governmental actors (NGOs, social partners, women's and youth associations etc) remain generally eligible to apply for funds under IPA as well as other EC budget lines, particularly the 'European Instrument for Democracy and Human Rights' (EIDHR). Moreover, the Commission has recently established a new facility under IPA to specifically promote civil society development in the Western Balkans. This facility, which the Commission says will substantially increase financial support to civil society organisations in the region, embraces a variety of sectors; including human rights, gender equality, social inclusion, culture, and consumer protection.¹⁹⁵

Assistance under IPA is provided in accordance with the EU's general policy framework for pre-accession, i.e. – in case of the Western Balkans – the 'European Partnerships', Country and Regional Strategy Papers, as well as (at the operational level) multi-annual indicative planning documents established by country. The European Partnerships are autonomous EU documents which are drawn up by the Commission for each SAP partner and approved by the Council. Modelled after the Accession Partnerships, which were launched in the second half of the 1990s as part of the EU's pre-accession strategy for the CEECs, they identify priorities for short and medium-term reforms, serve as a checklist against which to measure progress in the reform process of the relevant countries, and provide guidance for future EU assistance. SAP countries are expected to draw up National Plans for the implementation of these Partnerships, including timetables and details on how they plan to address the relevant short and medium-term priorities. Each Partnership explicitly reminds the country concerned that the priorities included in the respective document "relate to its capacity to meet the criteria defined by the Copenhagen European Council of 1993 and the conditions set by the Stabilisation and Association Process, notably the conditions defined by the Council in its conclusions of 29 April 1997 and 21 and 22 June 1999" – all of which identify the protection of human rights and fundamental freedoms as a top priority.

Stabilisation and Association Agreements

The SAAs are by far the most important and most prestigious instrument of the SAP.¹⁹⁶ Their primary aim is the establishment of a formal association with the Union over a transitional period, during which the country concerned gradually adopts its laws to the core standards and rules of the Single Market. To this end, each SAA entails a binding commitment on the side of the associated state to progressively harmonise its legislation with that of the Community. It goes without saying that this renewed reflection of the EU's legal hegemony in the wider Europe considerably shapes internal political and legal reforms in the Western Balkans. So far, only two agreements – the SAA Macedonia (2004) and SAA Croatia (2005) – have been put into effect and are fully operational.¹⁹⁷ The SAA Albania was signed in May

¹⁹⁵ See European Commission (2008) "Western Balkans: Enhancing the European Perspective", at 10-11.

¹⁹⁶ See Marko and Wilhelm, 2002; Phinnemore, 2003.

¹⁹⁷ For the SAA Macedonia see Council of the European Union and European Commission (2004) Council and Commission Decision of 23 February 2004 concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part"; for the SAA Croatia see Council of the European Union and European Commission (2004) "Council and Commission Decision

2006, followed by Montenegro's SAA in October 2007, Serbia's SAA in April 2008, and Bosnia and Herzegovina's SAA in June 2008. Due to conflicting views among EU Member States as to Kosovo's international status following its unilateral secession from Serbia in February 2008, the opening of SAA negotiations is currently not on the table for Pristina.

As mentioned earlier, treaty negotiations are offered only if the relevant conditionality criteria set out by the Council are reliably met by the prospective treaty partner.¹⁹⁸ Whether this is the case is outlined in annual Progress Reports, in which the Commission reviews each country's compliance with relevant EU criteria and standards.¹⁹⁹ SAAs are 'mixed (association) agreements' in terms of Community law and, therefore, have to be approved both by the Council (by way of a unanimous decision) and all EU Member States (through individual acts of ratification). Moreover, the Council may only conclude a Stabilization and Association Agreement after prior consent of the European Parliament.²⁰⁰

The conclusion of an SAA is generally viewed as a result of the efforts of the treaty partner to fulfil the relevant political and economic criteria and as recognition of the credibility of the country's aspiration to become a candidate for full EU membership.²⁰¹ At the same time, the punitive side to conditionality continues to play an important role and is an integral part of each SAA. (Human rights) conditionality thereby comes in the form of the 'essential element clause', which – as a matter of principle – is used in all new agreements between the Community and (non-EU) member countries of the OSCE:

"Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Helsinki Final Act and the Charter of Paris for a New Europe [...] shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement."²⁰²

By qualifying the criteria mentioned in this clause as 'essential elements' of the contractual relationship, the SAAs adopt the language of Art. 60(3)(b) of the Vienna Convention on the Law of Treaties of 1969, which allows for the unilateral suspension or termination of international agreements in cases of material breach of a treaty, caused, for instance, by the violation of a provision essential to the accomplishment of the treaty's objective or purpose. The essential element clause is complemented by a specific non-compliance clause (the so-called 'Bulgaria clause'), which enables either side to take appropriate measures if it con-

of 13 December 2004 concerning the conclusion of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part", OJ L 26, 28 January 2005, 3.

¹⁹⁸ See European Council (1997) "Conclusions on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of South-East Europe".

¹⁹⁹ The most recent Progress Reports are available at: http://ec.europa.eu/enlargement/how-does-it-work/progress-reports/index_en.htm

²⁰⁰ See Article 300(3) and Article 310 ECT. The Parliament has no say, however, when it comes to Council's principal decision whether and when SAA negotiations are offered to a particular SAP partner.

²⁰¹ See Article 3 SAA Macedonia and Article 3 SAA Croatia respectively.

²⁰² See Article 2 SAA Macedonia and Article 2 SAA Croatia respectively.

siders that the other side has failed to fulfil an obligation under the SAA.²⁰³ The party considering such measures must – except in cases of ‘special urgency’ – first inform the Stabilization and Association Council and allow for a thorough examination of the situation by the treaty body with a view to find a solution acceptable to both parties. According to a joint interpretive declaration annexed to the SAA, however, cases of ‘special urgency’ are triggered by any material breach of the agreement and that such a breach consists, in particular, in a violation of the criteria laid down in the essential element clause. If taken literally, any infringement of democratic principles, human rights, and the rule of law by one party would thus constitute a case of special urgency, entitling the other party to take ‘appropriate measures’ without the need of prior consultations. Save for egregious violations of fundamental human rights and freedoms, however, it is hardly imaginable that the EU would ever immediately resort to negative measures (e.g. the suspension of the treaty in total or in part) without any prior attempt to find an adequate solution in consultations with the alleged violator.

The democratic principles and human rights in question are those embodied in the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948, as well as those proclaimed by the Helsinki Final Act of August 1975 and the Charter of Paris for a New Europe of November 1990, both adopted within the framework of the OSCE. With their reference to the rights and freedoms contained in the UDHR, the Helsinki Final Act and the Charter of Paris, the essential element clause used in the SAAs with the countries of the Western Balkans sets out a considerably high standard. From the time of entry into force of an SAA, this standard is contractually binding to the parties in their bilateral relations, which is a remarkable normative advancement, given the fact that the UDHR as well as the Helsinki Final Act and the Charter of Paris are, as such, legally non-binding instruments. It follows, for example, that under the regime established by the SAAs, a contracting party not only has to respect the well defined canon of international human rights,²⁰⁴ but must also undertake “to build, consolidate and strengthen democracy as the only system of government”²⁰⁵. The creation of or return to a non-democratic form of government by one of the treaty partners is therefore illegal under the SAAs.

²⁰³ See Article 118(2) SAA Macedonia and Article 120(2) SAA Croatia respectively. The “Bulgaria clause” has emerged as the standard clause on non-compliance used in all major international EC agreements concluded since 1995. It derives its name from the 1993 Europe Agreement with Bulgaria, in which it was used for the first time; see European Commission (1995) “Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries”.

²⁰⁴ In interpreting the rights of the UDHR recourse can be made to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (both of 16 December 1966), which, together with the UDHR, are commonly known as the “Universal Bill of Rights”. Similarly, in interpreting the rights mentioned in the 1990 Charter of Paris, subsequent OSCE documents have to be taken into account; e.g. the document of the June 1990 Copenhagen Meeting of the Conference of the Human Dimension of the CSCE and the document of the October 1991 CSCE Meeting in Moscow (both documents can be found at the OSCE website at <http://www.osce.org>).

²⁰⁵ Charter of Paris for a New Europe, Section on Human Rights, Democracy and the Rule of Law, para.1.

Monitoring of EU Human Rights Conditionality vis-à-vis the Western Balkans

Stabilisation and Association Agreements contain no formal commitment on the side of the EU regarding the future accession of its treaty partner. The agreements signed with Croatia and Macedonia confirm in their respective preambles that the country concerned is a potential candidate for membership on the basis of the EU-Treaty (Article 49) and fulfilment of the criteria defined by the Copenhagen European Council in June 1993, "subject to the successful implementation of this Agreement". Whether an agreement has been successfully implemented will be judged by the EU against the backdrop of the Council conclusions of 29 April 1997 and the obligations taken on by the associated country in the agreement itself.²⁰⁶ As a result, the EU's treaty partner remains under close scrutiny of both the Commission and the Council.

In 2001, a special review mechanism was approved by the Council in order to structure the monitoring of the political and economic situation in the Western Balkans in a more systematic and coherent fashion.²⁰⁷ Based on the annual Progress Reports produced by the Commission, it entails a regular assessment of the SAP and its various instruments, compliance by the participating states with EU conditionality, and progress made by each country towards the general objectives of the program. Notably, each report contains a separate section on the protection of human and minority rights in the country covered by it. In principle, the conditionality system so instituted vis-à-vis the Western Balkans enables the EU to systematically scrutinise respect for (*inter alia*) human rights and the rights of minorities by its SAP partners and to exert various forms of external pressure on any violator in case of serious disregard of the rights and standards in question. It must be stressed, however, that political conditionality, as applied within the framework of the SAP, derives its significance not primarily through negative measures taken subsequent to an actual violation of relevant EU criteria. What, in practice, seems to be of much more relevance is the 'anticipatory effect' of conditionality, combined with the incentives offered by the EU in case of compliance. If a country desires to fully profit from the benefits of the SAP, and/or if it wishes to upgrade its status from potential to actual candidate for EU membership, it is well advised to demonstrate compliance with the priorities and requirements defined by the Union.

Concluding Remarks: The Western Balkans, EU Human Rights Conditionality, and the Role of the European Parliament

In sum, one may say that the principle of human rights mainstreaming is fairly well realised and implemented in the context of the EU – Western Balkans relations. Since conditionality, in general, is deemed to be *the* cornerstone of the SAP (the EU's tailor-made pre-accession strategy for the candidate and potential candidate countries of the Western Balkan), respect for human and minority rights (along with other political and economic criteria) forms an integral part of basically all major SAP tools and instruments. According to the Commission,

²⁰⁶ Identical Articles 3 SAA Macedonia and SAA Croatia expressly emphasize "that the conclusion as well as the implementation of the respective agreement comes within the framework of the Council conclusions of 29 April 1997".

²⁰⁷ European Council (2001) "General Affairs Council Conclusions on the Western Balkans".

IPA support in 2008 amounted to 1.4 billion EUR. Of the 840 million EUR earmarked for transition assistance and institution building in national IPA programs, 33 % were foreseen to "enhance governance, encourage administrative and judicial reform, strengthen the rule of law, support the fight against corruption and organised crime, promote human rights, protect minorities, and develop civil society".²⁰⁸ Support for human rights-related projects and programs is thus clearly an essential element of overall IPA assistance. For the European Parliament (EP) – as well as for any other interested observer – it is, however, next to impossible to get a clear picture which and how many projects exactly were funded during a certain period in the area of human and minority rights in any of the countries participating in the SAP. To be sure, apart from its overall budgetary powers on the basis of the EC-Treaty (particularly with regard to 'non-compulsory expenditures', to which external assistance such as IPA generally belongs), the EP is involved at various stages of the planning and monitoring of IPA assistance.²⁰⁹ This, however, does not change the fact that the respective role of the EP is basically reduced to that of a mere observer (or commentator at best), while the show is essentially run by the Commission (supported, as usual, by a committee composed of the representatives of EU Member States).

Although the EP has to be informed *ex ante* about how the Commission intends to use the available funds and is also entitled to receive regular implementation and evaluation reports *ex post*, it has no real say in the actual programming of IPA assistance. Moreover, judging from previous experience, the annual Commission reports usually contain only general overviews, statistics and conclusions. Detailed information regarding EC funded projects in one particular area (such as human rights) is rare and by no means systematic. In addition, EC assistance aimed at strengthening the promotion and protection of human rights, democratic principles and the rule of law in one particular country is mostly based on several budget lines (IPA, EIDHR, regional programs), which makes it even harder for the EP to keep track and obtain a full picture of what is actually done or not done by the Commission in this important sector of EU assistance to the Western Balkans.

Similarly, with respect to 'negative' conditionality in the form of reduction, suspension or withdrawal of EU assistance, the possibilities of the EP to influence the course of action determined in a particular case by the Commission and (ultimately) the Council are strikingly limited. The IPA Regulation, for example, provides that, if a beneficiary country fails to respect human rights and minority rights and fundamental freedoms, the Council (acting by

²⁰⁸ European Commission (2008) "Enlargement Strategy and Main Challenges 2008-2009".

²⁰⁹ According to Article 5 (1) of the IPA Regulation (IPAR), "the Commission shall present annually to the European Parliament and the Council its intentions for the financial allocations to be proposed for the three forthcoming years, in the form of a multi-annual indicative financial framework". Article 13 IPAR provides that "each year the Commission shall send to the European Parliament and the Council a report on the implementation of Community assistance under this Regulation. The report shall contain information on the actions financed during the year and on the findings of monitoring work, and shall give an assessment of the results achieved in the implementation of the assistance". Moreover, "the Commission shall submit to the European Parliament and the Council, by 31 December 2010, a report evaluating the implementation of this Regulation in the first three years, if appropriate with a legislative proposal introducing the necessary modifications to this Regulation" (Article 27 IPAR).

qualified majority on a proposal from the Commission) may take 'appropriate' steps with regard to the assistance granted under the regulation.²¹⁰ The Parliament has to be immediately informed of any decisions taken in this context,²¹¹ but – again – is not empowered to shape those decisions in any way. Moreover, the EP is only informed *ex post facto* and, therefore, is not given the opportunity to at least discuss the case prior to the actions taken by the Commission/Council with a view to adopt relevant recommendations or suggestions.

In terms of active involvement and participation, the situation is only marginally favourable for the EP in the (so far purely hypothetical) case of negative measures taken by the Council on the basis of the contractual conditionality regime enshrined in the Stabilisation and Association Agreements with Western Balkan countries (by way of an 'essential element clause' in combination with the 'Bulgarian' non-compliance clause). According to Article 300(2) ECT, the EP has to be fully and immediately informed of any Council decision to suspend an existing agreement in total or in part. It is obvious that such information again comes after the fact; yet what is even more striking here is that this procedure even applies to agreements for the conclusion of which the assent of Parliament was mandatory (as in case of an SAA on the basis of Articles 300(3) and 310 ECT). Only if the Council intends to terminate an agreement (instead of merely suspending it), the so-called *actus contrarius* doctrine would seem to require the Council to follow in an analogue manner the procedure set out by the ECT for the conclusion of the agreement at stake (which, in case of association agreements, means that the Council would have to seek the prior assent of the EP).

Based on the aforementioned considerations, the following serves as a general note: For the European Parliament to assert its overall democratic control over the conduct of EU external relations by the Commission and Council in general, and the EU's external human rights policy in particular, it relies on timely, systematic and comprehensive information (mostly) by the Commission. While primary and secondary Community law does usually not require an active involvement of Parliament in the management of external assistance or the daily implementation of contractual relations, the law does certainly not prohibit the Commission from engaging with the EP in a timelier and more comprehensive manner. Particularly as far as the actual application of EU (human rights) conditionality is concerned, the present reporting system clearly offers ample room for improvement. Moreover, Commission, Council and Parliament should consider entering into a structured and periodic inter-institutional human rights dialogue, within which conceptual as well as strategic and operational issues regarding the promotion of human and minority rights in third countries could be clarified and discussed early on and on a broad basis. Not only would this enhance the transparency of the relevant strategies and approaches underlying EU human rights policies; it would also strengthen the legitimacy of these policies in the eyes of those directly affected by them.

²¹⁰ Council of the European Union (2006) "Council Regulation (EC) No. 1085/2006 on establishing an Instrument for Pre-Accession Assistance", Article 21(2).

²¹¹ *Ibid.*

5 FOCUS ON THE ROLE OF THE EUROPEAN PARLIAMENT IN PROMOTING HUMAN RIGHTS MAINSTREAMING: THE CASE OF CFSP/ESDP²¹²

This section broaches the question how the European Parliament can shape and enhance efforts to mainstream human rights into the CFSP/ESDP. As described in the introductory chapter, mainstreaming is a holistic, strategic process of incorporating human rights considerations into decision-making processes, programmes, policies and activities and into the organs and bureaucratic procedures of international organizations. The success or failure of any specific activity or the impact of any one institutional actor (organ), within the holistic process of mainstreaming is thus difficult to measure. While EU efforts to mainstream human rights in the areas of CFSP/ESDP have been substantial, as was evidenced in section III.A. above, distilling the concrete impact of the European Parliament is complicated due to the intricacies of the multi-layered political processes within the European Union with its different players with diverging political and legal, theoretical and factual impacts.

This section of the study will first analyse the EU's legal framework in light of a possible participatory function of the European Parliament in mainstreaming human rights in CFSP/ESDP. It will then consider whether and how a factual influence of the European Parliament – beyond the legal framework – can be ascertained. A brief analysis of selected relevant legal and policy instruments will prepare the ground for an analysis of future developments. Finally, a number of recommendations will be presented.

Present and future legal framework

According to Article 21 TEU the EU Presidency “shall consult the European Parliament on the main aspects and the basic choices of the common foreign and security policy and shall ensure that the views of the European Parliament are duly taken into consideration.” Article 21 further obliges the Presidency and the Commission to regularly inform the Parliament of “the development of the Union's foreign and security policy”. The European Parliament has the right to “ask questions of the Council or make recommendations to it.” It shall further hold an “annual debate on progress in implementing the common foreign and security policy.”

The European Parliament is thus an essential part of the common foreign and security policy architecture of the EU. In order to express its views, the European Parliament can pass resolutions on topical issues or reports at its own initiative.²¹³ The budgetary control over the ESDP is limited, as military operations are excluded from being financed by the EU budget

²¹² This chapter is based primarily on contributions by Matthias Kettmann and Wolfgang Benedek.

²¹³ See, for instance, the following three reports, which will be referred to again, *infra*: European Parliament (2006) “Report on the human rights and democracy clause in European Union agreements” (also known as Agnoletto report); European Parliament (2008) “Report on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights” (also known as Flautre report); European Parliament (2007) “Report on the functioning of the human rights dialogues and consultations on human rights with third countries” (also known as Veleciano report).

(Article 28 (3) TEU: "expenditure arising from operations having military or defence implications"). This constitutes an increasing problem since civilian and military operations are increasingly being blurred.

Article 36 of the consolidated TEU (Treaty of Lisbon) lays down that the High Representative of the Union for Foreign Affairs and Security Policy is responsible for regularly consulting the European Parliament "on the main aspects and the basic choices of the common foreign and security policy and the common security and defence policy and inform[ing] it of how those policies evolve." Instead of the Presidency as under the present treaties, the High Representative is tasked with "ensur[ing] that the views of the European Parliament are duly taken into consideration." Further, "[s]pecial representatives may be involved in briefing the European Parliament." This personalization is an important step forward as it is likely to increase the quality and quantity of the information flows.

Further, under Article 36 TEU (Lisbon), the European Parliament "may ask questions of the Council or make recommendations to it and to the High Representative. Twice a year it shall hold a debate on progress in implementing the common foreign and security policy, including the common security and defence policy."

The influence of the European Parliament

Under current EU law, the EP can therefore encourage the mainstreaming of human rights in CFSP/ESDP during the consultations, by the Presidency, "on the main aspects and the basic choices". The Parliament needs to ensure that mainstreaming is part of the "views of the European Parliament" that need to be "duly taken into consideration". By asking pertinent questions to the Council and recommending the increased mainstreaming of human rights, and by highlighting the importance of mainstreaming during the annual debate on progress in implementing the common foreign and security policy, the European Parliament can make an important contribution to mainstreaming human rights within the CFSP/ESDP.

Apart from the legal channels, the political impact of a personal commitment to mainstreaming by members of the European Parliament should not be underestimated. By ensuring that European parliamentarians make member of the national legislative organs aware of the importance of human rights mainstreaming, the European Parliament can effectively influence EU policies. After all, the respective national governments, which decide on matters of CFSP/ESDP are directly responsible to their national parliaments.

Since it is difficult to establish a clear, causal links between human rights initiatives by the European Parliament and their reflection in CFSP/ESDP documents and practice, this section on mainstreaming activities by the European Parliament needs to be read in conjunction with the sections on human rights mainstreaming commitments by other EU bodies that also influence CFSP/ESDP policies.

The European Parliament's approach to mainstreaming

The European Parliament has been active in voicing its interest in, and concern regarding, the role of human rights in CFSP/ESDP. In its Annual Report on Human Rights in the World 2007²¹⁴ the Parliament deplores that the EU

“is still far from conducting a coherent and hard-hitting policy to uphold and promote human rights around the world, and stresses the need to conduct such a policy more effectively; considers that substantial progress needs to be made in order to ensure strict compliance with existing EU human rights provisions”²¹⁵.

Specifically, with regard to the CFSP the Parliament notes its belief that

“in order to bring about a significant improvement in the promotion of human rights, steps should be taken to strengthen the EU's common foreign and security policy (CFSP), which is often hampered by the predominance of Member States' national interests, with the aim of ensuring that the promotion of human rights is regarded as a priority, and to ensure that the promotion of human rights as an objective of the CFSP, as outlined in Article 11 of the Treaty on European Union, is strictly implemented”²¹⁶.

Ensuring that the promotion of human rights as an objective of the CFSP is regarded as a priority is the essence of human rights mainstreaming. The importance of mainstreaming is mentioned explicitly in the subsequent paragraph in which the European Parliament

“[c]alls on the Council and the Commission to make greater efforts to improve the ability of the European Union to respond rapidly to breaches of human rights by third countries, not least by mainstreaming human rights policy into all external European Union policies vis-à-vis such countries and systematically addressing human rights issues within the framework of the political dialogue at all levels”²¹⁷.

The European Parliament also reminds the Council, in the third of twelve paragraphs specifically dedicated to the ‘Mainstreaming of human rights’ (para. 133-145),

“of its commitment to mainstream human rights across the CFSP and other EU policies, as outlined in its paper endorsed by the Political and Security Committee on 7 June 2006; calls for further progress with the implementation of the recommendations contained in that paper; reminds the Council in particular of the obligations incumbent on geographical working parties to identify key human rights issues, priorities and strategies as part of their overall planning, and to establish a more systematic exchange with international NGOs and human rights defenders”²¹⁸.

²¹⁴ European Parliament(2008) “Resolution of 8 May 2008 on the Annual Report on Human Rights in the World 2007 and the European Union's policy on the matter”.

²¹⁵ *Ibid.*, para.1.

²¹⁶ *Ibid.*, para.2.

²¹⁷ *Ibid.*, para.3.

²¹⁸ *Ibid.*, para. 135.

The prominent role of human rights mainstreaming in the 2007 report reflects an important policy commitment by the Parliament. This applies, too, to repeating the importance of mainstreaming human rights in reports and resolutions. In a 2007 European Parliament report on human rights dialogues and human rights consultations with third countries²¹⁹ and the pertinent resolution²²⁰, the Parliament stressed

“that the promotion of human rights is a fundamental part of the EU's external policy making; urges the Council and the Commission to systematically include human rights issues in the agenda of the EU's political dialogues and consultations with third countries, and increasingly to *mainstream* human rights into all external EU policies, including the external aspects of the internal EU policies [...] (at 1)”

The resolution also highlights that conducting human rights dialogue or human rights consultations with third countries has to lead to “systematic mainstreaming of human rights in every sphere of EU cooperation with the country concerned” (at 8).

In order to successfully mainstream human rights, coordination is essential. The European Parliament has recognised this and has declared ‘essential’ “to find ways of improving coordination among the different EU institutions (the Council, the Commission, and Parliament) by establishing an inter-institutional dialogue on the political dialogue and the human rights dialogues and consultations” (at 11).

Apart from highlighting the importance of coordination, the European Parliament underlines the relevance of its recommendations and conclusions “especially those concerning human rights” for the work of the Council and Commission (at 103).

The European Parliament has also analysed the role of human rights and democracy clauses in European Union agreements and has, in this context, underscored the inter-linkages between human rights and EU external relations.²²¹ In the subsequent resolution²²² the Parliament highlighted that

“[...] developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms, constitute a global objective of the Common Foreign and Security Policy and must be an integral part of the European Union's external policy” (at B).

Mainstreaming of human rights through the European Parliament can only be ensured if external action is conducted transparently. Consequently, the Parliament called

²¹⁹ European Parliament (2007) “Report on the functioning of the human rights dialogues and consultations on human rights with third countries”.

²²⁰ European Parliament (2007) “Resolution on the functioning of the human rights dialogues and consultations on human rights with third countries”.

²²¹ European Parliament (2006) “Report on the human rights and democracy clause in European Union agreements”.

²²² European Parliament (2006) “Resolution on the human rights and democracy clause in European Union agreements”.

“for greater transparency when implementing the human rights and democracy clause, a keystone in the EU's external policy, and for greater involvement of the European Parliament [...]” (at 2)

and emphasised that it would not give assent to new international agreements not containing a human rights and democracy clause (at 10).

Similarly the European Parliament has analysed the role of EU sanctions as part of the EU's actions and policies in the area of human rights.²²³ In the pertinent resolution²²⁴ the European Parliament argues that recourse to sanctions should be envisaged “in the case of actions by authorities or non-state entities or natural and legal persons which seriously undermine security and human rights” (at 5). Confronted with possible harm deriving from the application of sanctions to the trading interests of the European Union and its citizens, the European Parliament believes that “the application and evaluation of sanctions by the European Union for infringements of human rights must in principle prevail” (at 8).

The European Parliament analyses the sanction regimes as part of an “overall human rights strategy” and refers, in this section (at 19), to other EU human rights instruments, including human rights clauses and their implementation mechanisms. In this regard, the broader perspective of the European Parliament that encompasses the activities of all EU organs and places them within a holistic human rights matrix, can be very useful in human rights mainstreaming in external relations.

The European Parliament further notes the importance of ensuring the Union's credibility, human rights strategy and sanction policy by taking appropriate restrictive measures in the event of a situation marked by persistent human rights violations (at 21). In order to critically and constructively assess human rights mainstreaming in external action, however, the European Parliament needs to be informed. It therefore considers, in para. 72 of the resolutions on the evaluations of EU sanctions, that the

“that the legitimacy of the EU's sanctions policy, which constitutes a key and sensitive element of the CFSP, must be enhanced by involving Parliament at all stages of the procedure, in accordance with Article 21 of the TEU, in particular in the drafting and implementation of sanctions in the form of systematic consultation with, and reports from, the Council and the Commission”.

Further, the Parliament expresses its wish to “involved in overseeing the attainment of benchmarks by those who are subject to sanctions” and “instructs its Subcommittee on Human Rights to structure and supervise work in this area” (at 72).

The Annual Report on Human Rights in the World 2007, already cited above, highlights the performance of the EU “as regards the European Union human rights guidelines”²²⁵ The

²²³ European Parliament (2008) “Report on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights”.

²²⁴ European Parliament (2008) “Resolution on the evaluation of EU sanctions as part of the EU's actions and policies in the area of human rights”, 2008/2031(INI), 4 September 2008.

²²⁵ *Ibid.*, paras.38 et seq.

Parliament calls upon the Commission and Member States' embassies and consulates "to ensure that all their staff are fully aware of the human rights guidelines" (para. 38) and upon the presidency "to find ways to improve coordination and cooperation between the Council's working parties in relation to making demarches in areas of common concern" (para. 40). Pointing to the role of guidelines and the importance of different actors in ensuring the respect for human rights is an integral part of human rights mainstreaming. This becomes clear when analyzing, for example, the Parliament's Annual Report on Human Rights in the World 2005.²²⁶ The Parliament refers to the EU Guidelines on Children and Armed Conflict and expresses its regrets that it was "not involved in the process of evaluation of these Guidelines" (para. 81).

The same report welcomes the fact that the Council and the Commission are making efforts to strengthen the coherence between the EU's human rights policy and other international policies; considers it vital for the pursuit of a credible EU human rights policy that these connections be strengthened; [and] [e]mphasises the importance of the appointment of Michael Matthiessen as the Personal Representative for Human Rights of the EU High Representative for the CFSP, this being an important step forward in the mainstreaming of human rights; welcomes the activities and the personal commitment of the incumbent.²²⁷ By referring to the personalization of mainstreaming, the European Parliament identifies an important development and expresses its unequivocal support.

The Annual Report on Human Rights in the World 2008 has been tabled on 14 April 2009 and is awaiting adoption by the Parliament. In its draft version,²²⁸ a number of arguments made in previous reports on human rights in external relations are reiterated, including the Parliament's conviction that

"in order to effect an improvement in the promotion of human rights, the EU's common foreign and security policy (CFSP) needs to be strengthened, and that it is necessary to ensure that the promotion of human rights as a main objective of the CFSP, as outlined in Article 11 of the Treaty on European Union is strictly implemented" (at 2).

In light of the Parliament's commitment to human rights, which is confirmed by its reports and resolutions, it is surprising, however, that the 2008 draft report seems to signal a reduction of the use of the concept of mainstreaming. While the 2007 report refers to mainstreaming in five different paragraphs (at 80, 90, 127, 132, 135), the 2008 report does so only in three (at 20, 105, 107). Remarkably, the long section entitled 'Mainstreaming of human rights' in the 2007 report (paras. 133-145) has been drastically reduced to only para. 105 of the 2008 report (though it should be acknowledged that most of the content of the subsequent paragraphs remains comparable). It may be recommended that future reports

²²⁶ European Parliament (2006) "Annual Report on Human Rights in the World 2005 and the EU's policy on the matter".

²²⁷ *Ibid.*, paras.86-87.

²²⁸ European Parliament (2009) "Draft report on the Annual Report on Human Rights in the World 2008 and the European Union's policy on the matter" (awaiting EP decision).

should contain more substantial sections on 'Mainstreaming of human rights', as the only paragraph in the 2008 report under this heading refers to developing conditions for the withdrawal of certain trade privileges. It is unfortunate that messages to the Council, such as the one of the 2007 report, reminding the Council "of its commitment to mainstream human rights across the CFSP and other EU policies" (at 135) fail to appear in the 2008 report. The general call "on the EU to mainstream protection of ESC rights into its external relations with third countries, regularly placing them on the agenda of human rights dialogues and consultations with third countries and pressing for implementation of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, especially with a view to the effective functioning of its individual complaint procedure" (at 107) seems both too broad (with regard to the actors called upon) and too limited (including only economic, social and cultural rights).

Though the 2008 report has yet to be adopted, a clearer message on the importance of mainstreaming human rights in external relations would have been preferable. In order to increase the impact of these reports, it would also be important to identify which actors have been reluctant to mainstream human rights within the ambit of their powers.

Future perspectives

With the entry into force of the Treaty of Lisbon, the role of the European Parliament in CFSP/EDSP will become more pronounced. The importance of the High Representative as a clearing house for European Parliament mainstreaming activities will grow. As other parts of this study have shown, human rights have been progressively institutionalised in a number of ESPD missions. Yet, it is difficult to clearly point to a specific European Parliament action to which this development can be traced.

What is important, however, is that the European Parliament continues to highlight the importance of human rights mainstreaming in its reports and resolutions and makes sure that its opinions are made known to the Presidency and the Council (and national legislative bodies).

Recommendations regarding the role of the EP in mainstreaming human rights in the CFSP/ESDP

In order to effectively mainstream human rights in external relations of the EU, the European Parliament should:

- *continue* to call the attention of European policy-makers to the importance of the concept of mainstreaming and challenges to its implementation;
- *continue* to strive for the coherence of EU human rights policy and coordination between EU human rights policy-makers, by way, for example, of an inter-institutional dialogue;
- *continue* to call for the mainstreaming of human rights into all external EU policies, including the external aspects of the internal EU policies;
- *use* all legal means available under current EU law, including formulating its views on CFSP/ESDP in light of the concept of human rights mainstreaming and ensuring that they are taken into consideration;
- *highlight* the importance of mainstreaming during the annual debate on progress in implementing the CFSP;

- *liaise* more effectively with other EU bodies in creating human rights guidelines, handbooks, standards, focal points, checklists and advisor positions in ESDP missions;
- *make use* of the political 'trickle down' effect by formulating recommendations, commissioning studies and organizing thematic hearings on human rights mainstreaming;
- *ensure* that European parliamentarians communicate effectively with members of the national parliaments, which, in turn, exert pressure on national governments and their representatives in the Council to effectively mainstream human rights in CFSP/ESDP policy.
- *ensure* that its Annual Report on Human Rights in the World and the European Union's Policy on the Matter retains a substantial section on 'Mainstreaming of human rights' with a view to sending a clear message to other EU bodies.

6 RECOMMENDATIONS – TOWARDS A COMPREHENSIVE STRATEGIC APPROACH TO HUMAN RIGHTS MAINSTREAMING

The recommendations presented in the following are dedicated to the elaboration of a comprehensive strategic approach to human rights mainstreaming. As established in the present study, a strategic approach to human rights mainstreaming entails a dual approach involving, on the one hand, the reinforcement of dedicated human rights structures and focal points within the relevant institutions, and, on the other hand, the elaboration of measures to facilitate cooperation between such units and a broad range of other actors within the organisation with a potential to advance human rights in their daily work.

To effectively mainstream human rights furthermore requires the elaboration of rights-based approaches to programming, standardised analytical procedures related, e.g., to *ex ante* and *ex post* impact evaluations, standardised monitoring and reporting procedures, and extensive intra-institutional human rights training and capacity building initiatives. Ideally, all of the above measures should be designed to ensure that existing policies and instruments in support of human rights in fact function as mainstreaming instruments, i.e. contribute to establishing human rights standards and methodology as central to the professional work ethic and culture of the entire organisation.

An additional important aspect of mainstreaming has to do with ensuring a basic degree of consistency both within the overall framework of human rights policies and between human rights policies and other policies of the Union.

In the current draft version of the study, recommendations will be elaborated under the following headings:

- Institutional framework
- Mainstreaming on the basis of human rights instruments
- Mainstreaming on the basis of financial instruments
- Measures to enhance policy consistency

While deliberately bold and ambitious, it is nevertheless intended that the recommendations below should be taken in a realistic manner, both in the sense that they should be manageable for the given institutional structures, and in the sense that human rights mainstreaming efforts must be balanced in relation to other legitimate interests and pursuits of the Union. It is acknowledged that the EU has to a large extent already put in place the infrastructure required to support human rights mainstreaming: what follows are suggestions for how to enhance and reinforce what has already been accomplished.

It must be noted, finally, that as the present study is not yet complete, the recommendations presented here are still only partial and tentative; they will be adjusted, if necessary, in the final version of the study. In the final text, more recommendations will specifically be elaborated to address the possible means for the European Parliament to enhance the mainstreaming of human rights in EU external relations.

Institutional framework

- As human rights mainstreaming implicates a multitude of actors and activities, working in many different contexts and at different levels, a strong centralised structure is needed to ensure effective coordination and provide guidance to the institution as a whole. One way of attaining this objective would be to establish the position of an EU Human Rights Commissioner (who could assume the role of Vice President of the European Commission). S/He would be responsible for ensuring that human rights are being mainstreamed across all external policies as well as across the external dimension of internal policies. The HR Commissioner would also be in charge of liaising with the High Representative for CFSP and with the other Commissioners in relation to their respective themes. Presumably, a Commissioner for Human Rights would also assume responsibility also for promoting and safeguarding human rights in EU internal relations (it may be noted that this would have the added advantage of strengthening internal and external policy consistency and hence strengthening the credibility of the Union's human rights profile in external relations.
 - If it is not deemed feasible to establish a position of EU Commissioner for Human Rights, then many of the functions attributed to this position in the following recommendations should, to the extent possible, be taken up by the Human Rights Unit of DG RELEX (which in recent years has already made significant progress in the area of human rights mainstreaming). This would, however, require a significant reinforcement of status and resources, and it might be relevant to consider upgrading the Unit to a full Directorate.
- Each DG, at Commission level, should have a specific unit, with specific regional focal points, responsible for mainstreaming a human rights approach within the policies developed in relation to the specific theme(s) covered by the DG (ENP, Development, Accession, Trade, Migration, Asylum, Terrorism, Justice, etc).
- At the level of the EC Delegations, the Head of Delegation should serve as the local focal point for human rights. Her/His role should be to organise regular coordination meetings with the different Heads of Mission of EU Member States. S/He should report to the EC Human Rights Commissioner, as well as the Commissioner for Foreign Affairs.
- Job positions and requirements concerning heads of units and directors at the Commission level should include specific references to human rights so that a formal human rights responsibility is established for all such positions. This step would allow for the different components of the Commission infrastructure to be alerted and aware of the human rights implications of their work.
- At Council's level, the post of Personal Representative of the Secretary General/High Representative for the CFSF on Human Rights should be enhanced in order to be given more visibility and a greater political role. The position of Head of the Human Rights Unit of the Council Secretariat and that of Personal Representative for Human Rights should be separated; while the post of Personal Representative for Human Rights should be seen as more political, that of Head of the Human Rights Unit refers to a more administrative role within the institution.
- The Council Secretariat working paper of 7 June 2006, endorsed by the PSC, suggests a set of measures to contribute to the mainstreaming human rights across CFSP. The

European Parliament should recommend that the Council conducts an internal evaluation of the implementation of this document. Such evaluation should identify positive steps taken by the Council and Commission toward better mainstreaming, as well as areas where shortcomings were observed, and possibly the reasons behind these shortcomings, in order to work on overcoming any possibly obstacles.

- [In the case the Lisbon Treaty enters into force, the above proposed architecture would generally be maintained. The European External Action Service would need to keep a Human Rights Unit (i.e. the former Council's Human Rights Unit). The EC Heads of Delegation would report to the EC Human Rights Commissioner as well as EU High Representative for Foreign Affairs and CFSP.]

Mainstreaming on the basis of human rights instruments

- Human Rights Clauses should be systematically integrated within all types of agreements, including sectoral agreements. This would help to reinforce the promotion of human rights mainstreaming in areas where human rights considerations have been relatively less prominent and where the EU action may have a crucial impact.
- Human Rights dialogues, and related political dialogues, should be maintained and reinforced. Officials from Ministries/DGs other than the sole ones representing 'foreign affairs' should be involved (i.e. Interior, Justice, Development, etc) depending on the issues addressed. More time should, if possible, be dedicated to such meetings.
 - Currently the agenda of meetings usually cover a long list of item, thus allowing little opportunity for in-depth discussions. The Council and Commission should seek to pursue more focused discussions, possibly by limiting the number of items discussed at each meeting. A proper mainstreaming of human rights within the other working parties (committees, subcommittee, ad hoc groups, etc.) should help in this sense, as it would allow for a better repartition of themes to be discussed within the different forums. The regional human rights focal points, appointed within each DG (see above) need to be actively involved into the preparation of all meetings relating to their sphere of competences.
 - It is however important to avoid clustering of discussions. Proper coordination needs to be ensured. The services assisting the Human Rights Commissioner are thus to organise regular coordination and debriefing meetings, involving the relevant actors within the different organs of EU institutions.
- The results of such mainstreaming efforts must be presented in the EU annual report on human rights. This report should thus serve as vehicle of an annual evaluation of the given EU mainstreaming efforts in the field of human rights and democracy.
- EU guidelines should be reinforced. Evaluation of their use should be conducted annually or bi-annually. Such evaluations should also be included in the EU annual report on human rights, when possible. Results from the evaluations should *inter alia* be used to identify issues to be raised within the different forums for political and human rights dialogue. They should also be used to better target projects which need to be financed, be it via bilateral cooperation (geographic instruments) or other instruments such as the EIDHR and thematic instruments.

- If other human rights guidelines were to be passed and implemented, it would be appropriate to have a set of guidelines devoted to economic, social and cultural rights. Such a step would concretise the Union's commitment to the indivisibility and interdependence of human rights and raise the profile of the socio-economic dimension of mainstreaming.

Mainstreaming on the basis of financial instruments

- The EIDHR should be deliberately designed to allow for a better mainstreaming of human rights within the different sectors of activities.
 - The programming of the EIDHR should take into account the results of the evaluation of the use of the different EU guidelines, the outcome of discussions within the political and human rights forums, and the general EU evaluation of its mainstreaming efforts.
- Geographic financial instruments (ENPI, DCI, etc) should as far as possible seek to define, establish and reinforce human rights-based approaches to programming. The regional human rights focal points appointed within each DG, as well as the services of the EC Human Rights Commissioner, should be fully involved in the programming process.
 - This will typically entail *ex ante* and *ex post* human rights impact assessments as well as standardised monitoring and reporting procedures aimed at highlighting the human rights implications of all programmes and actions.
- Thematic financial instruments (Migration, etc) must be fully mainstreamed. The promotion of the human rights specific to the covered themes, as well as the gender dimension, must feature in all calls for proposals.
- In some of the sectoral policies (e.g. migration, police cooperation, fight against terrorism), as well as in development cooperation generally, it is advised that the Commission seeks to introduce *ex ante* human rights impact assessments, both in order to avoid unintended adverse effects on human rights and in order to reinforce positive measures aimed at the promotion and protection of human rights.
- Further linkages between the different financial instruments need to be forged – in a spirit of complementarity. Initiatives undertaken in the framework of cooperation between the EU and third country authorities can benefit from parallel actions by civil society organisations in relation to the same field, and vice-versa.
- Projects supported by the EIDHR should ideally contribute to supporting or reinforcing the human rights dimension of projects and policies implemented through geographic financial instruments, and may thus contribute to the promotion of mainstreaming of human rights.

Measures to enhance policy consistency

- *Overall need for more consistent implementation:* The research has shown that EU documents (communications, formal conclusions, etc) in several respects do indicate a rights-based approach to sectoral policies. However, there is, in many cases, a lack of operational measures to ensure that general declarations are effectively implemented

through the available policy instruments. There is thus a need to ensure that political declarations are systematically transposed into the operational measures. Benchmarks should also be identified to facilitate the evaluation of the extent to which these operational measures related to mainstreaming human rights have been implemented and have produced the desired effects.

- *Mainstreaming all human rights:* Despite a wide EU commitment to the interdependence and indivisibility of all human rights, mainstreaming in external relations still focuses predominantly on the protection of civil and political rights. For mainstreaming to be comprehensive and more effective, both the group of economic, social and cultural rights and the anti-discrimination/equality measures embedded in UN and European human rights instruments should be given more prominence. A comprehensive approach to the range of human rights that is being mainstreamed would enhance the Union's external human rights profile in more than one respect. The case of human rights defenders, for example, shows how important education is for "having" human rights defenders in the first place. To expand the scope of mainstreaming, it is suggested that EIDHR should have among its priority areas the advancement of such rights as to health and education, seeking in this connection to identify best practices of general relevance to human rights-based programming in development cooperation. A holistic approach to human rights should also be applied to the CFSP, beginning with the monitoring and assessment of how armed conflicts may jeopardise the economic, social and cultural rights of the affected populations.
- *The mainstreaming of human rights must be coordinated with efforts undertaken in related / analogous areas (notably gender and environment).* With respect to external actions, it is important, e.g., that human rights mainstreaming efforts and gender mainstreaming efforts of the EU are effectively aligned in order to capture the multi-dimensional nature of human rights issues and violations in many third countries. The case of women's human rights defenders is a perfect example of this.
- *A formal reference to human rights should be made whenever the EU adopts legislation or takes important policy decisions related to its external relations.* In this respect, the EU would do in its external relations what it is committed to doing internally by incorporating norms and principles stemming from the EU Charter of Fundamental Rights. In 2001, the Prodi Commission circulated an internal memorandum stating that compliance with the Charter "must be an overriding requirement in the Commission's day-to-day business, both in relations with the general public and with those to whom our decisions are addressed, and in our internal rules and procedures". While the overall focus of the memorandum was on internal policies – and arguably so, given that the Charter mainly addresses the rights of EU citizens – it also suggested that the field of external relations must be aligned to the human rights principles which have inspired the Charter. A reference to human rights in all policy measures related to external relations would thus contribute to making the internal and external policies of the Union more consistent one with the other, thus minimising risks of operating (or being perceived to operate) according to double standards in the two arenas.

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Other web resources:

- Blog of former UK diplomat Charles Crawford: <http://charlescrawford.biz/blog.php?single=367>.
- OSCE website: <http://www.osce.org>.

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