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# A Fair Weather Champion?

The European Union at the  
United Nations Human Rights Council

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# Abstract

The EU's Common European Foreign and Security Policy (CFSP), requires its member states to speak with one voice at the multilateral fora where they are active. This includes the United Nations Human Rights Council (UNHRC), which replaced the highly discredited UN Commission on Human Rights in 2006. Given that the EU treaty establishes that human rights constitutes a 'founding principle' for the European integration project, this could seem as a piece of cake. However, human rights politics is *a lot* of politics.

This essay attempts to show how the UNHRC as the main global forum for human rights politics, along with the structure of the CFSP and internal differences among EU's member states, hamper the EU's ambitions to construct and execute a human rights policy that is common and successful in this specific forum.

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*Linde Lindkvist – Lund, 8 January 2008*

# Contents

- Abstract.....2
- Acknowledgments.....3
- Contents.....4
- Abbreviations.....6
- 1 Introduction.....7
  - 1.1 Disposition.....8
  - 1.2 Delimitations.....8
  - 1.3 Theory.....9
    - 1.3.1 Concepts.....11
  - 1.4 Method.....12
- 2 The European Union and Human Rights.....13
  - 2.1 Common European Values?.....14
  - 2.2 Human Rights as a Foreign Policy Objective.....15
- 3 En Route to the United Nations Human Rights Council.....17
  - 3.1 Establishing the Council.....19
    - 3.1.1 Equitable Geographical distribution.....21
    - 3.1.2 Special Sessions.....22
    - 3.1.3 Universal Periodic Review.....22
  - 3.2 The first 18 months of the Council.....23
- 4 Direct and Indirect Human Rights Issues – and the Difficulties of Acting in the Human Rights Council.....26
  - 4.1 Humanitarian Law – A Human Rights and Humanitarian Affairs Council?.....28
  - 4.2 Respect for and freedom of religion and belief.....32
  - 4.3 Conclusion – The Council’s Agenda as Structure.....35

5 The EU States Together at the Human Rights Council.....37

5.1 EU Coordination.....37

    5.1.1 The role of the Presidency.....40

5.2 EU in the First Five Special Sessions.....41

    5.2.1 The Special Sessions on the situation in the Middle East.....41

    5.2.2 The Special Sessions on Darfur and Burma/Myanmar.....44

5.3 Conclusion – Being Active *and* Reactive.....45

6 Conclusions.....47

# Abbreviations

CFSP	Common Foreign and Security Policy
COHOM	Council of the European Union's Working Group on Human Rights
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Communities
ECOSOC	United Nations Economic and Social Council
EEC	European Economic Community
ENP	European Neighbourhood Policy
EPC	European Political Cooperation
EU	European Union
HRC	United Nations Human Rights Council
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
NGO	Non Governmental Organisation
OIC	Organisation of Islamic Conference
OPT	Occupied Palestinian Territories
TEU	Treaty of the European Union
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Council
UPR	Universal Periodic Review
WEOG	Western European and Others Group (Regional group in the UN)

# 1 Introduction

It was not until well after the end of the cold war that human rights officially became a cornerstone in the European integration project that we now know as the European Union. Nonetheless, ever since then it has been considered being a part of what constitutes basic European values.

As a part of creating the European Union, the treaty of Maastricht of 1992 also laid out the foundation for its second pillar, the Common Foreign and Security Policy. Its objectives are *inter alia* to ‘safeguard common values’ and to ‘develop and consolidate (...) respect for human rights and fundamental freedoms’.<sup>1</sup> Given the self-perception of a commonality in terms of values, agreeing upon a common stance in human rights issues could appear as a relatively uncomplicated task. Yet, is it that simple? Is there a Common European Human Rights Policy? Can this be found in a specific international human rights forum, such as the newly established United Nations Human Rights Council?

In June 2006, the United Nations Commission on Human Rights was replaced as a part of the wider UN reform by the Human Rights Council. With a different composition and a Universal Periodic Review of every UN member’s human rights records, it was to amend its highly discredited predecessor. Unlike the Commission, which had been placed underneath the Economic and Social Council (ECOSOC), the Council was established as a subsidiary body to the General Assembly. Article 4 of the UN Charter provides that membership in the world organisation is only open to ‘peace-loving states’, and thus no ‘peace loving Unions’. Hence, there can be no such thing as EU seat in a UN body. The EU members are represented in their capacity as sovereign states, and not as members of a Union. Nevertheless, “member states shall”, according to the EU Treaty, “coordinate their action in international organisations and at international conferences”.<sup>2</sup>

This essay will try to establish...

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<sup>1</sup> TEU article 11

<sup>2</sup> TEU article 19

## **To what extent are the EU members generating a demarcated human rights policy that is successful at the United Nations Human Rights Council?**

- \* How does the Council's structure and agenda, along with the consensus based CFSP, affect the EU states in terms of being active or reactive at the Council?
- \* What are the challenges that the EU faces in advocating its external human rights objectives through the Council?
- \* What are the requirements for the EU's endeavours to be successful in shaping the outcome of the Human Rights Council?

### 1.1 Disposition

Chapter 2 concerns the relation between European Union vis-à-vis human rights. This part shows that the EU's commitment to human rights as a 'founding principle' is a quite recent innovation, and that the same goes for the attempts to create a coherent external human rights policy. Chapter 3 will give a background to the Human Rights Council and the bumpy road to its establishment. This part concludes by showing that despite the EU's claimed commitment to promoting human rights world-wide, it was unable to take the lead on the process of the UN reform which led to the Council's establishment. Chapter 4 takes a look at the agenda of the Human Rights Council, and intends to demonstrate how blurry the limits are to how states interpret the Council's mandate. This creates a structure in which acting fruitfully at the Council requires flexibility and a very broad political approach. EU has, despite an outspoken legal understanding of the concept of human rights, contributed to this development – but would gain influence from a more constrained agenda. Chapter 5 is concerned with how the EU policies in the Council are shaped and shows how much better the EU performs in an active, rather than in a reactive mode.

### 1.2 Delimitations

It is not the ambition of this study to make a comprehensive assessment of the EU's human rights policies, since that would require a much broader approach, which would cover a wide



range of mechanisms in all three pillars of the EU.<sup>3</sup> A lot has been left out which could be said about the development of human rights as an objective for its Common Foreign Policy,<sup>4</sup> and its previous efforts in the Commission on Human Rights.<sup>5</sup> Not to mention the Common Foreign and Security Policy at large.<sup>6</sup> Neither, does this study provide a comprehensive assessment of the United Nations Human Rights Council's first 18 months of operation, or a qualified prospect of its future. Rather, it attempts to show how the UNHRC as the main global forum for human rights politics and the structure of the CFSP provides challenges to the EU's ambitions to construct and execute a human rights policy that is coherent and successful in this specific forum.

### 1.3 Theory

The theoretical approach that will serve as the basis for the analysis of the ambitions and capabilities of the European Union as an actor in the United Nations Human Rights Council is three-fold.

Firstly, there is the problem of studying EU as an actor in a multilateral forum. The EU is also a multilateral organisation – yet, it is hardly fruitful to see it as an equal partner to the UN. Rather, it acts through its 27 member states in the different UN bodies, partly with the objective to serve specific common interests and partly to advance the cause of multilateralism itself.<sup>7</sup>

One of the shortcomings of traditional International Relations Theory in this case is that it takes the character of the state as an actor for granted, and applying it directly to a study of the international role of the European Union would overlook the complexity of how the EU's common policies are shaped.<sup>8</sup> The approach used here tries to integrate agency and structure. Robert Kissack writes that:

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<sup>3</sup> See for instance Philip Alston (ed.), *The Eu and Human Rights* (Oxford University Press, 1999).

<sup>4</sup> Andrew Clapham, 'The Eu and Human Rights', in Philip Alston (ed.), (Oxford University Press, 1999). and Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003).

<sup>5</sup> Karen E. Smith, 'Speaking with One Voice? European Union Co-Ordination on Human Rights Issues at the United Nations\*', *Journal of Common Market Studies*, 44/1 (2006), 113-37. and Martine Fouwels, 'The European Union's Common Foreign and Security Policy and Human Rights', *Netherlands Quarterly of Human Rights*, 15/3 (1997), 291-324.

<sup>6</sup> Maria Strömviik, *To Act as a Union. Explaining the Development of the Eu's Collective Foreign Policy. Ph D. Thesis* (Lund University: Department of Political Science, 2005).

<sup>7</sup> Robert Kissack, 'Theoretical Approaches to the Study of the Eu as an Actor in the Multilateral System', *FORNET Working Group 1: Theories and Approaches to the CFSP - London School of Economics*, /7-8 November (2003).

<sup>8</sup> Brian White, *Understanding European Foreign Policy* (New York: Palgrave, 2001). p. 174

EU-as-actor black-boxes not only the EU but also the ‘the world’ as *the place where the EU acts*. The multilateral system is a complicated structure that mediates between states, and the actions of states are restricted by the procedural norms.<sup>9</sup>

Hence, the intergovernmental character of the CFSP, the internal coordination mechanisms, as well as the structures of the Human Rights Council and its agenda, have to be taken into account if we are to understand why the European Union acts in a certain way, and to assess its capabilities to act differently.

Apart from the limits that the structures of the CFSP and the United Nations pose to EU agency, we also need to consider the EU’s ambitions and agenda in the Human Rights Council. Gunnar Sjöstedt claims that goals, rather than power, are the prerequisite for ‘international actor capability’.<sup>10</sup> On a more abstract level the ambition to ‘promote human rights’ in external affairs is a prerequisite for a common human rights policy,<sup>11</sup> but this study is based on the understanding that having clear ambitions on the outcome of any individual matter before the Human Rights Council is a prerequisite for having the capability to act, and gain influence on its outcome documents.

Thirdly, this essay tries to recognise the differences that the EU states carry in terms of values. ‘Common values’ laid down in article 6(1) of the Treaty of the European Union should be seen as an ambition, rather than an actual reality.<sup>12</sup> The common values are simply not enough common for being easily transformed into clear political stances in any given matter. These differences do not simply follow the inner borders of the EU, but can also differ from different political camps within any of the 27 member states. This poses a limit to the capabilities of the EU to act unrestrained in the UN Human Rights Council.

Since the UNHRC is a brand new institution in international politics, there is a limited material available on its work so far. Hence, there is hardly anything written on the European Union’s endeavours in the body. However, this study owes very much of its findings to the work Karin E. Smith, who has written extensively on the European Union in international relations

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<sup>9</sup> Robert Kissack, 'Theoretical Approaches to the Study of the Eu as an Actor in the Multilateral System', *FORNET Working Group 1: Theories and Approaches to the CFSP - London School of Economics*, /7-8 November (2003).

<sup>10</sup> Gunnar Sjöstedt, *The External Role of the European Community* (Westmead: Saxon House, 1977). quoted in Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003). p. 9

<sup>11</sup> Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003). p. 11

<sup>12</sup> Andrew Williams, *Eu Human Rights Policies: A Study in Irony* (Oxford University Press, 2005).

and its policies on human rights.<sup>13</sup> She has also published an article, where she studies the EU in the Council's predecessor, the United Nations Commission on Human Rights.<sup>14</sup> The contributions of this study is to give a higher emphasis on the limitations posed by the Council's composition and agenda to the EU's ambitions of being a coherent and successful actor, rather than merely 'national interests and the willingness to act independently in the UN'.<sup>15</sup> It also attempts to give solid examples of how the shortcomings of the CFSP in promoting human rights are manifested.

### 1.3.1 *Concepts*

A few concepts need to be introduced from the outset as well, since they are used by the authors definitions – and serve as important tools for the analysing the findings herein. Firstly, there is the difference between *direct* and *indirect* human rights issues. A *direct* human rights issue is here defined as being derived straightly from the international legal standards – most importantly the International Bill on Human Rights. Direct questions could regard violations of individual rights, such as the right to the highest attainable physical and mental health, the right to life, etc. But it could also be thematic discussion on non-discrimination, freedom of religion, freedom of expression, childrens' rights etc, as long as they are directly related to the international standards. An *indirect* human rights issue, could for instance be a violation of “international humanitarian law” in a general sense, the impact of globalisation on the capacity of state authorities, or disrespect for religions.

Secondly, there is the difference between being *Active* and *Reactive* in a multilateral forum, such as the Human Rights Council. Being *Active* here means taking initiatives, for instance by introducing a draft resolution or lobbying for a special session. Being *Reactive* means responding to initiatives taken by others.

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<sup>13</sup> Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003).

<sup>14</sup> Karen E. Smith, 'Speaking with One Voice? European Union Co-Ordination on Human Rights Issues at the United Nations\*', *Journal of Common Market Studies*, 44/1 (2006), 113-37.

<sup>15</sup> *Ibid.* (

## 1.4 Method

This study is mainly based on text-interpretations of communications made by state officials in the United Nations Human Rights Council's plenary. These include oral statements, explanations of vote, draft resolutions and various outcome documents. I have also studied official documents of the European Union in various areas with regards to its human rights policies.

In early December 2007, I visited the Council's sixth regular session at Palais de Nations in Geneva and made a few interviews with state officials currently working at the Council. These were very valuable for the broader picture. But since the sphere of diplomats working at the Council is quite small, they remain anonymous. For this reason I have used their contributions as little as possible in this essay.

Finally, it should be noted that most oral statements from the Sessions of the Council, that are used as references here are only available through the Human Rights Council's Extranet, provided by the Office of the United Nations High Commissioner for Human Rights.<sup>16</sup>

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<sup>16</sup> Office of the United Nations High Commissioner for Human Rights, 'Human Rights Council Extranet', <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 january 2008

## 2 The European Union and Human Rights

Despite being excluded from the Treaty of Rome that established the European Economic Community (EEC) in 1957, Human Rights is today considered a founding principle of the European Union.<sup>17</sup> Devotion to this principle is a pre-requisite for accession to the Union and for maintaining ones membership once acceded.<sup>18</sup>

The character of the European project in its cradle was of course decisive for why 'European Identity' was the only membership criteria set out by the Treaty of Rome.<sup>19</sup> Yet, one can argue that the EEC was not indifferent to violations of Human Rights. Falangist Spain was rejected accession in 1962 and the Greek membership was suspended in 1967 due to the Coup d'état.<sup>20</sup>

Formally, it was not until the mid 1970's before the European Parliament, the European Commission and the EU Council of Ministers accepted an encouragement from the Court of Justice of the European Communities (ECJ), and pledged to respect Human Rights with reference to the constitutions of member states. The Single European Act of 1986 also gave reference to Human Rights in its preamble. However, the Human Rights revolution in the realm of European treaties came with the Treaty of Amsterdam in 1999, which introduced the current wording elevating Human Rights to a founding principle.<sup>21</sup>

A division between the internal and external approach is central in the criticism of the European Union's human rights policies put forward in academic literature. Its central point can easily be derived out of the current Treaty itself. 'To develop and consolidate respect for human rights and fundamental freedoms' is for an instance set out as one of the main objectives of the CFSP in Article 11, but not of the Union at large in Article 2. The founding principles are almost taken for granted as already fulfilled common European values, which need only to be promoted

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<sup>17</sup> Treaty of the European Union article 6(1)

<sup>18</sup> *ibid* article 7 and article 49

<sup>19</sup> Andrew Williams, *Eu Human Rights Policies: A Study in Irony* (Oxford University Press, 2005). p. 47

<sup>20</sup> Ian Barnes and Claire Randerson, 'Eu Enlargement and the Effectiveness of Conditionality: Keeping to the Deal?' *Managerial Law*, 48/4 (2006), 351-65.

<sup>21</sup> Commission of the European Communities, 'The Rising Prominence of Fundamental Rights in the European Union Treaties', (2003).

to the surrounding world. A highly legitimate question is whether or not the EU can convincingly promote human rights globally, if it remains ambiguous to defending these values internally?<sup>22</sup>

The introduction of Article 7 to the treaty, which gives member states the possibility to take measures against a fellow member that proves reluctant to the common values, and the drafting of an EU Charter on Human Rights in 2002, are both apparent attempts to amend the shortcomings that have generated such criticism. So was the establishment of a European Union Agency for Fundamental Rights, in Vienna 2007.<sup>23</sup>

## 2.1 Common European Values?

Apart from the criticism regarding the elevation of human rights to a founding principle, another question that arises at the outset is the one of how common these European values really are? Ian Ward asked himself if the European integration is a study of differentness or sameness. His own answer was: 'By definition it must be the former, by ambition it is surely the latter'.<sup>24</sup>

In theory and practice the member states may very well agree on the importance of human rights, and they might even be contracting parties to the same human rights treaties, especially the European Convention of 1950. But when it comes down to the detailed interpretation of individual rights and their relative importance, the states remain considerably unlike each other.<sup>25</sup> One example of this diversity can be illustrated by the general reservation made by France to Article 27 of the International Covenant on Civil and Political Rights, which provides extended protection to national minorities. This was made with reference to the fact that the French Constitution doesn't recognise the existence of minorities.<sup>26</sup> At the same time, the candidate country Turkey has been criticised during its accession negotiations by the European Commission for not ratifying the European Framework Convention for the Protection of

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<sup>22</sup> See for instance Philip Alston (ed.), *The Eu and Human Rights* (Oxford University Press, 1999).

<sup>23</sup> Council of the European Union, 'Council Regulation (Ec) No 168/2007, Establishing a European Union Agency for Fundamental Rights', (2007a).

<sup>24</sup> Ian Ward, 'In Search of a European Identity' - Review Article of Derrida, Jacques: 'the Other Heading: Reflections on Today's Europe', *The Modern Law Review*, 57/2 (1994), 315–29.

<sup>25</sup> P. Leino, 'A European Approach to Human Rights? Universality Explored', *Nordic journal of international law*, 71/4 (2002), 455-95. p. 455 - 459

<sup>26</sup> 'The International Covenant on Civil and Political Rights, France - Reservations and Declarations', <[http://www.bayefsky.com/pdf/france\\_t2\\_ccpr.pdf](http://www.bayefsky.com/pdf/france_t2_ccpr.pdf)>, accessed December 5, 2007

National Minorities.<sup>27</sup> But the diversity that exists amongst EU states goes further, including different conceptions of even the most fundamental rights. Consider the right to life for instance. The right to life of the unborn enjoys constitutional protection in Ireland, while no such protection exists in countries such as Finland and the UK. The Netherlands on the other hand has a quite permissive system concerning euthanasia, while this remains illegal in countries like France. And even if the last execution in EU state took place in 1977 (France), two individuals were sentenced to death in Belgium as late as in 1993.<sup>28</sup> Leino concludes that there is “no uniform, common tradition of rights in Europe” and that;

it is hard to see the slogan of Europe being built on common traditions and values as something other than false and as an attempt to push forward something that cannot be willingly achieved.

Thus, it is not self-evident how a common EU stance on the status and protection of minorities, or the ‘right to life’ would appear in its external relations.<sup>29</sup>

## 2.2 Human Rights as a Foreign Policy Objective

The Promotion of Human Rights has gradually been incorporated into the foreign policy aims of European states. The Netherlands and the Scandinavian countries were early in introducing them during the 1970’s. The predecessor to the CFSP, the European Political Cooperation (EPC) reached a major success in this regard back in 1975, when it led the western states in the negotiations that led to the Helsinki Final Act in 1975. As European co-operation developed with the establishment of the CFSP, it also gradually developed to the main instrument for EU member states to promote human rights beyond its borders.

In 2001, the European Commission adopted a communication that sought to clarify the Union’s role in promoting human rights and democracy in third countries. The Union’s aim, according to the communication, is to ‘uphold the universality and indivisibility of human rights - civil, political, economic, social and cultural - as reaffirmed by the 1993 World Conference on Human Rights in Vienna’. It also recognised the Union’s potential impact due to its composition:

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<sup>27</sup> Commission of the European Communities, 'Commission Staff Working Paper - Turkey 2006 Progress Report (Sec(2006) 1390)', (2006a).

<sup>28</sup> The 6<sup>th</sup> protocol to the ECHR entered into force 1999, and abolished the death penalty

<sup>29</sup> P. Leino, 'A European Approach to Human Rights? Universality Explored', *Nordic journal of international law*, 71/4 (2002), 455-95.

Uniquely amongst international actors, all fifteen Member States of the Union are democracies espousing the same Treaty-based principles in their internal and external policies. This gives the EU substantial political and moral weight. Furthermore, as an economic and political player with global diplomatic reach, and with a substantial budget for external assistance, the EU has both influence and leverage, which it can deploy on behalf of democratisation and human rights.<sup>30</sup>

An extensive account for the development of human rights as one of the CFSP's main objectives would require much more space than what is available here. But we can safely conclude that to 'safeguard common values' and 'develop and consolidate (...) respect for human rights and fundamental freedoms' are important cross-pillar objectives of the EU's external relations. This is partly due to demands from the national constituencies of a morally justifiable foreign policy, and partly a result of the attempts to create an identity for the EU as a global player.<sup>31</sup>

The European Union possesses a number of instruments to achieve its ambitions in external affairs. Many of them fall within the first supranational pillar, such as political conditionality in the Enlargement process, the European Neighbourhood Policies, development co-operation, bilateral trade agreements, etc.<sup>32</sup> However, in the Human Rights Council, the EU's endeavours falls within the intergovernmental CFSP, which requires states to reach consensus on all positions – and execute the common policies in their capacity as national states. As you will see, however, there at least an ambition to integrate the supranational and the intergovernmental human rights efforts of the Union.<sup>33</sup>

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<sup>30</sup> Commission of the European Communities, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries (Com(2001) 252 Final)', (2001).

<sup>31</sup> Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003).

<sup>32</sup> For a more comprehensive account I would suggest Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill Academic Publishers, 2003). and Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003).

<sup>33</sup> They're integrated in the EU's annual report on Human Rights - Council of the European Union, 'Eu Annual Report on Human Rights 2007', (2007b).. Reference to the Human Rights Council can also be found in the Israeli Progress report of the ENP. Commission of the European Communities, 'Commission Staff Working Paper - Enp Progress Report Israel, (Sec(2006) 1507/2)', (2006b).



# 3 En Route to the United Nations Human Rights Council

The history of the United Nations Commission on Human Rights dates back to the very early days of the world organisation itself, namely 10 December 1946. It was established as a functional commission of the Economic and Social Council (ECOSOC) under the provisions in Article 68 of the UN Charter. Already on its second birthday did it celebrate its most renowned achievement when its draft text was adopted by the General Assembly as the Universal Declaration on Human Rights. The drafting of the declaration text was originally the sole purpose of the Commission's establishment, which at that time was comprised of but 18 member states – but with very colourful individuals as public figures – most notably the former U.S First Lady, Eleanor Roosevelt.

In 1947, the Commission declared a state of absenteeism, saying that it was unable to address country specific human rights situations. Instead it spent its first 20 years of existence, focusing on developing international legal standards – inter alia two international covenants, which together with Universal Declaration form the International Bill on Human Rights.<sup>34</sup> The Commission also assisted states in implementing them.

With ECOSOC resolutions 1235 (6 June 1967) and 1503 (27 May 1970), the Commission was slowly transformed into the most important political body for human rights in the world. And as the United Nations grew, the Commission followed – finally holding 53 states when it concluded its 62nd and last session in early 2006.<sup>35</sup>

During its 60 years of existence, the Commission made several essential contributions to the international human rights regime. Apart from leading the development of international human rights standards, the above mentioned ECOSOC resolutions created the ground for the Commission's Special Procedures, which have been inherited by the Human Rights Council. These are first and foremost the thematic and country-specific Special Rapporteurs, which are

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<sup>34</sup> International Covenant on Civil and Political Rights (CCPR) and International Covenant on Economic, Social and Cultural Rights (CESCR) from 1966.

<sup>35</sup> Office of the United Nations High Commissioner for Human Rights, 'Brief Historic Overview of the Commission', (xxxx). & Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill Academic Publishers, 2003). pp. 104 - 120

appointed on their personal merits and who act like the 'eyes and ears' of the political body. Even more, it has been considered as the most accessible body within the UN system for NGOs.<sup>36</sup> Each year, the Commission gathered for six intense weeks at the Palais de Nations in Geneva, with roughly 3000 delegates, activists and observers present.

Despite its achievements, it has in the later days been hard to find material on the Commission's work that omits the adjective 'discredited'. The sizeable body of criticism is mainly comprised by accounts of state officials and media in developed countries, indicating a 'north' – 'south' divide.<sup>37</sup> Much criticism was generated following the failed attempt by the United States to gain a seat at the Commission in 2002. One year later, Libya won the trust of presiding it.<sup>38</sup> However, the criticism has also been echoed at several occasions by the then UN Secretary General, Kofi Annan, in the course of commanding the UN reform process.

(...) the Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed, which casts a shadow on the reputation of the United Nations system as a whole.<sup>39</sup>

This wording is found in his report to the General Assembly, 'In Larger Freedom'. It was issued prior to the 2005 World Summit, which eventually decided to recognise Human Rights as one of the three main pillars<sup>40</sup> of the UN, and to initiate negotiations with the prospect of establishing a Human Rights Council that would replace the discredited Commission.<sup>41</sup>

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<sup>36</sup> Yvonne Terlingen, 'The Human Rights Council: A New Era in Un Human Rights Work?' *Ethics & International Affairs*, 21/2 (2007), 167-78. pp. 168 - 169

<sup>37</sup> An example of this criticism can be found in 'Leaders: Fix It or Scrap It; Un Reform', *The Economist*, 378/8460 (2006), 13-13.. Members of the Non-Aligned Movement and the Like-Minded Group claimed that the CHR should not be dismissed that easily. Theodor Rathgeber, 'Reforming the Un Commission on Human Rights – Perspectives for Non-Governmental Organisations', *Friedrich Ebert Stiftung Briefing Paper* (2005).

<sup>38</sup> Yvonne Terlingen, 'The Human Rights Council: A New Era in Un Human Rights Work?' *Ethics & International Affairs*, 21/2 (2007), 167-78.

<sup>39</sup> United Nations General Assembly, 'In Larger Freedom: Towards Development, Security and Human Rights for All - Report of the Secretary-General to the General Assembly (a/59/2005)', (2005a). paragraph 182

<sup>40</sup> Peace & Security and Development being the other two

<sup>41</sup> United Nations General Assembly, '2005 World Summit Outcome Un Doc. A/60/L.1', /15 September (2005b). paragraph 157

### 3.1 Establishing the Council

The negotiating process that led to the establishment of the Human Rights Council in replacement of the Commission on Human Rights was concluded on 15 March 2006. The General Assembly then adopted resolution 60/251 by an overwhelming majority of 170 votes in favour, 4 against and 3 abstentions. Traces of the already mentioned trigger factors to the reform can be found in the preamble to the resolution. Firstly, it acknowledges that ‘peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being’. Secondly, it recognises ‘the work undertaken by the Commission on Human Rights and the need to preserve and build on its achievements and *to redress its shortcomings*’.<sup>42</sup>

The negotiations leading up to the establishment were tough, which could be illustrated by the tussle for the size of the membership and the possible criteria for it. Back in 2004, Kofi Annan called together a ‘High-level Panel on Threats, Challenges and Change’ that would make recommendations on how to strengthen the UN system. The High-Level Panel recommended the Secretary General to call for the establishment of a charter based Human Rights Council standing on equal footing as the Security Council. It also suggested that the new body should be expanded to universal membership, which would get rid of the politicised question of who is on the Council or not. Another of the main arguments raised for having a larger Council was that it would be counter productive for its worldwide status, if the new body was to be an exclusive club for a few states with a narrow definition of the concept of human rights.<sup>43</sup>

Even so, the United States favoured a standing ‘action-oriented’ body, with a limited membership of ideally 20 states. According to the American stance, states would have to secure a two-thirds vote in the General Assembly in order to be elected, and they also favoured an exclusion of states presently under sanctions from the UN Security Council.<sup>44</sup> The United States were in excellent company. Kofi Annan’s report, ‘In Larger Freedom’, proposed ‘a smaller

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<sup>42</sup> {, #85} [emphasis added].

<sup>43</sup> Yvonne Terlingen, ‘The Human Rights Council: A New Era in Un Human Rights Work?’ *Ethics & International Affairs*, 21/2 (2007), 167-78., Nazila Ghanea, ‘I. From Un Commission on Human Rights to Un Human Rights Council: One Step Forwards or Two Steps Sideways?’ *International and Comparative Law Quarterly*, 55/3 (2006), 695-705.

<sup>44</sup> R. Nicholas Burns, ‘On United Nations Reform - Testimony as Prepared before the Senate Foreign Relations Committee’, (2005).

standing Human Rights Council' instead of the suggestion put forward by his own appointed High-Level Panel.<sup>45</sup>

A Council of 20 states would perhaps have been beneficial for its legitimacy in some parts of the world, if the seats in some way or another were distributed on the basis of certain human rights merits.<sup>46</sup> On the other hand, it is more likely that seats would have been given to countries on the basis of relative power in their regional groups. And for some reasons, the more influential states in the regional groups are not the most fervent defenders of the aims that the Council seeks to advance. Some commentators also noted that tensions are actually more down to disagreements between states on human rights rather than the size of the membership.<sup>47</sup>

Anyhow, we ended up with slightly shrunken Council with 47 seats, with an elevated status as a subsidiary body of the General Assembly. In practice, there are no special criteria for membership, except obtaining the support of a majority in the General Assembly.<sup>48</sup> An elected state faces the possibility of losing its seat in case it is deemed responsible for grave violations of human rights by two-thirds of the General Assembly. No state can serve for more than two consecutive three-year terms.

The United States, Israel, the Marshall Islands and Palau voted against the resolution. In an explanation of vote, the US ambassador John Bolton regretted the missed historic opportunity and criticised the General Assembly for settling with 'the best we could do' instead of 'all we could do' – but also indicated that United States 'will work cooperatively (..) to make the Council as strong and effective as it can be'.<sup>49</sup>

The EU supported the process of UN Reform, but it was unable to take the lead. It could not find a common stance on Security Council Reform and disarmament – now in the negotiations on the Human Rights Council, it was again unable to act powerfully.<sup>50</sup> As C.S.R

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<sup>45</sup> United Nations General Assembly, 'In Larger Freedom: Towards Development, Security and Human Rights for All - Report of the Secretary-General to the General Assembly (a/59/2005)', (2005a). paragraph 183

<sup>46</sup> 'Leaders: Fix It or Scrap It; Un Reform', *The Economist*, 378/8460 (2006), 13-13.

<sup>47</sup> Walter Kälin and Cecilia Jimenez, 'Reform of the Un Commission on Human Rights - Study Commissioned by the Swiss Ministry of Foreign Affairs (Political Division Iv)', *Institute of Public Law, University of Bern (Switzerland)* (2003).

<sup>48</sup> However, states should consider the human rights records when deciding to support a candidate state or not. GA Res 60/251

<sup>49</sup> John Bolton, 'U.S. Explanation of Vote on the Human Rights Council Draft Resolution - Statement in the General Assembly N.Y.C', *U.S. Department of State* (2006).

<sup>50</sup> Karen E. Smith and K.V. Laatikainen, 'Introduction – the European Union at the United Nations: Leader, Partner or Failure?' , in Karen E. Smith and K.V. Laatikainen (eds.), *The European Union at the United Nations: Intersecting Multilateralisms*. (Palgrave, 2006). p. 22

Murthy notes, and as is quite symptomatic, the European Union ‘struck a more moderate tone on HRC issues’ in the UN reform process, compared to the United States of course, but also to states like Switzerland and Norway.<sup>51</sup> In a similar manner as the United States, the EU wanted a two-thirds majority vote in the General Assembly as a criterion for membership. As for the size of the membership, the EU officially was in favour of having a body of ‘comparable size or smaller than the CHR’.<sup>52</sup> But this was in no way a self-evident position. There were even internal voices that favoured a continuation of the Commission’s mandate, given the mumbled commitment to human rights on a world wide basis, which hardly would produce an improved UN body. Others were in favour of making the new Council a universal body, in which all UN member states are represented.<sup>53</sup> Given that human rights is seen as a ‘founding principle’ of the European Union, it must be considered as a disappointment that it was unable to take the lead and generate a consensus among the members of the General Assembly.

### 3.1.1 *Equitable Geographical distribution*

There are three major differences between the Human Rights Council and its predecessor. Above all, there is the reduced number of seats and the new ‘equitable geographical distribution’, which has altered the balance between the regional groups. In the former Commission the states of the African and Asian Groups had about the same number of votes (27) as the states of the Latin American, Western European and Others (WEOG) and Eastern European Groups together (26). In the new Council the Asian and African states have a comfortable majority of 26 out of 47 votes.<sup>54</sup> A considerable amount of regional solidarity has also developed, which has given rise to somewhat of a stalemate.<sup>55</sup> As you will see, this has certainly affected the agenda and has lessened the possibilities for the EU to act effectively. However, this distribution is by no doubt a fairer reflection of the General Assembly, and it is hard for the European states to come up with tenable arguments for a change in this aspect. Some Latin American and African countries also

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<sup>51</sup> C. S. R. Murthy, 'New Phase in Un Reforms: Establishment of the Peacebuilding Commission and Human Rights Council', *International Studies*, 44/1 (2007), 39-56.

<sup>52</sup> Eu Presidency, 'Statement by the United Kingdom on Behalf of the European Union - Human Rights Council: Status, Size, Composition and Membership ', *Informal Meeting of the General Assembly Plenary, Follow up to the World Summit* (2005).

<sup>53</sup> Interview with EU Diplomat, 11 december 2007

<sup>54</sup> Yvonne Terlingen, 'The Human Rights Council: A New Era in Un Human Rights Work?' *Ethics & International Affairs*, 21/2 (2007), 167-78.

<sup>55</sup> Kenneth Roth, 'Filling the Leadership Void: Where Is the European Union?' *Human rights watch world report 2007*, (2007). p. 2

remain possible 'swing votes'. But for some reasons, the EU has generally failed to pull them to its side.<sup>56</sup>

### 3.1.2 *Special Sessions*

The Council is required to convene for at least ten weeks per year, compared to the required six for the Commission.<sup>57</sup> It also has the possibility to hold special sessions on urgent matters if one third of the Council supports such a suggestion. In 1990, this possibility was granted to the Commission, but with a required support from a majority of its members, which resulted in but five special sessions between 1992 and 2000. The Human Rights Council's member states have used this possibility five times within eighteen months.

The first three special sessions dealt with the situation (or rather Israel's actions) in the Middle East, the fourth dealt exclusively with Darfur and the fifth with Burma / Myanmar. These final two special sessions were both results of initiatives taken by the European Union. Hence, the Council is not only the principle forum for deliberating upon human rights issues within the United Nations – it is also a quasi-permanent body, which requires plenty of time and resources from the missions of member states and observers to Geneva.

### 3.1.3 *Universal Periodic Review*

The final major change from the Commission on Human Rights is the introduction of the so-called Universal Periodic Review mechanism (UPR). The whole idea is to let the Council evaluate the human rights records of all member states of the United Nations on a regular basis of every three years. During 2006 and 2007, the Council has sought to settle the design and procedures of this attempt to let states 'name and shame' each other. The mechanism is up and running and the first countries will be scrutinised during 2008.<sup>58</sup>

The eventual success of the Council is to a considerable degree dependent on the outcome of the UPR. It will require the evaluating states to be fair, and seriously weigh their criticism if they are to uphold any legitimacy for the Council. Several commentators have also stressed the

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<sup>56</sup> Ibid. (p. 16)

<sup>57</sup> This was against the ambition of the EU, which, in a unusually lucid manner, had advocated a minimum of twelve weeks per year.

<sup>58</sup> 'Un Human Rights Council Agrees to Details for Reviewing Countries', *UN News Centre* (2007).

importance of not infringing upon the work of the treaty based committees, which are made up by independent experts with the mandate to monitor states efforts in abiding by their commitments under their ratified human rights treaties.<sup>59</sup> An often expressed view among EU states is that the Universal Periodic Review must bring an added value to the work of promoting respect for human rights worldwide, and must not duplicate the work done in the treaty based committees. This could for an instance imply that the Council, rather than pin-pointing individual violations, would take interest in treaties that the examined state has not yet fully ratified and the reasons for such disinclination.<sup>60</sup> Eventually it will all come down to how serious states really are with regards to the protection and promotion of human rights, and the Human Rights Council as the principle global body for this task.

## 3.2 The first 18 months of the Council

First of all, it must be noted that it is way too early to judge the Council in any conclusive manner. The Council's principle concern so far has been its own institution building process, which include the mandates of the Special Procedures, and the modus operandi of the UPR. There are however some tendencies that should be noted, since they are of practical concern to this essay and since they have given the Council some attention this far.

Its initial activities in country-specific issues have not exactly pleased those who carried high hopes for a fresh start. After twelve months it had passed 11 country-specific resolutions, out of which 10 disapproved of Israel's actions in the Middle East in a quite one-sided manner. During the fifth session, the situation in the Occupied Palestinian Territories even became a permanent item on the Council's agenda.<sup>61</sup> Accordingly, commentators who criticised the Commission for being selective have found reasons to use a similar language. Anne Bayefsky, senior fellow at the Hudson Institute called for the United States Congress to pass a bill that would stop funding of 'U.N.'s "human rights" nonsense'.

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<sup>59</sup> Rosalyn Higgins, 'Dispersal and Coalescence in International Human Rights Law', *Lund University: The Anna Lindh Lecture* (Lund University: <http://www.rwi.lu.se/publicseminars/annalindh/al07.shtml>, 2007).

<sup>60</sup> Eu Presidency, 'Permanent Representative of Finland to the United Nations, on Behalf of the European Union - Un Plenary Meeting: Eu Statement on Report of the Human Rights Council', *UN 61st Session; Plenary Meeting, Agenda Item 68: Report of the Human Rights Council, New York*, /10 November (2006).

<sup>61</sup> United Nations General Assembly, 'Report to the General Assembly on Fifth Session of the Human Rights Council, a/Hrc/5/21', (2007d).

The story line is always the same: Arabs are the victims of anti-Semitism, Jew-hatred is off the radar screen; a billion people have been gravely wounded by a few cartoons in a newspaper published some two-thirds the way to the North Pole; freedom of expression is legitimately curtailed for just about every imaginable offense — particularly in Islamic dictatorships.<sup>62</sup>

During the Council's first special session, Archbishop Desmond Tutu, Nobel Peace Prize laureate of 1984, was appointed to head a fact-finding mission to assess the situation of Palestinian victims of the Israeli shelling of Beit Hanoun in Gaza and make recommendations to the Council. The Israeli authorities refused to let them finish their work and Tutu did not finish his report to the Council. This resulted in a total rejection of the Council from the Sudanese government after the decision to dispatch a similar mission to Darfur during its fourth special session. This rejection was backed by several African and Asian states.<sup>63</sup> The Economist magazine raised the question if the new Council could be considered as even worse than its predecessor, but concluded that:

At best, the council is a declamatory body; real power lies with the Security Council in New York. But the mess in the UN's top human-rights agency augurs ill for the reform of the UN as a whole.<sup>64</sup>

At the opening of the Council's third regular session, the High Commissioner for Human Rights, Louise Arbour, delivered a speech on behalf of the Secretary General, in which he recognised the importance of the situation in the Middle East, but called for the Council not to let it monopolize its agenda:

There are surely other situations, besides the one in the Middle East, which would merit scrutiny by a special session of this Council. I would suggest that Darfur is glaring case in point. (...) Do not let yourselves be split along the fault line of north south – between developed and developing countries – as your colleagues have done in some other parts of the system, with results inimical to progress. States that are truly determined to uphold human rights must be prepared to take action even when

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<sup>62</sup> Anne Bayefsky, 'Our Dead Are Our Fault - Why Are We Funding the U.N.'S "Human Rights" Nonsense?' *National Review Online* (2007).

<sup>63</sup> Warren Hoge, 'New Un Human Rights Agency; Same Old Problems', *International Herald Tribune*, 9 March 2007b.

<sup>64</sup> 'International: Great Expectations; Human Rights and the Un', *The Economist*, 382/8521 (2007), 76-76.



that means, as it sometimes will, giving offence to other states within their own region.<sup>65</sup>

Some signs of progress, in terms of balanced outcome documents, were seen as the following two special sessions dealt with Darfur and Burma/Myanmar respectively. These matters are situated on home ground for the countries of the African and Asian regional groups. These sessions even generated outcome documents, however watered down in the case of Darfur, which were adopted with consensus.<sup>66</sup>

Apart from the selectivity in the Council's agenda, and the polarised climate that marks its work, the EU sees the removal of the Special rapporteurs on Belarus and Cuba as major disappointments during the Council's first year.<sup>67</sup> Yet, this was somewhat balanced by the fact that Belarus was blocked from becoming a member of the Council by the elections in the General Assembly in 2007. The EU states convinced Bosnia to run for a place at the Council and initiated heavy lobbying among the members of the General Assembly, which eventually gave Bosnia Belarus's seat.<sup>68</sup>

Amnesty International's representative in Geneva, Peter Splinter, claimed after the Council's first year that "It's going through its adolescence, and it's awfully painful, but we have to get past it and see what we have in the end."<sup>69</sup> As noted before, what will be decisive for the Council's future when it is to be judged by the General Assembly in 2011 is how its members choose to implement the Universal Periodic Review mechanism.

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<sup>65</sup> Secretary-General of the United Nations, 'Message to the Third Session of the Human Rights Council', *Office of the High Commissioner for Human Rights*, /29 November (2006).

<sup>66</sup> S-4/101. Situation of human rights in Darfur - {United Nations General Assembly, 2007 #52}, S-5/1. Situation of human rights in Myanmar - {United Nations General Assembly, 2007 #86}

<sup>67</sup> Council of the European Union, 'Eu Annual Report on Human Rights 2007', (2007b). p. 63

<sup>68</sup> Warren Hoge, 'Belarus Blocked from Un Human Rights Council', *International Herald Tribune*, 18 May 2007a.

<sup>69</sup> Warren Hoge, 'New Un Human Rights Agency; Same Old Problems', *Ibid.* 9 March.

## 4 Direct and Indirect Human Rights Issues – and the Difficulties of Acting in the Human Rights Council

The definition of what comprises a human rights issue is highly disputed. There is of course the International Bill on Human Rights and other internationally applicable legal instruments. Apart from these, however, there are regionally specific treaties; which highlight, introduce or leave out different aspects of a wider concept of rights. As an example, the African Charter on Human and Peoples' Rights and The European Convention on Human Rights are incommensurable in basic features, such as group rights and the duties of individuals. Very notably, there are also the different constitutional arrangements of individual states. These differences are for instance manifested in the numerous reservations made by states to specific articles of the international treaties. The mentioned French general reservation to article 27 of the International Covenant on Civil and Political Rights is just one of several. Given these assorted understandings of what human rights essentially are, their actual different legal status world wide, and perhaps most crucially, their sensitive character; it is not surprising that human rights politics is a lot of politics.<sup>70</sup>

The items on the Human Rights Council's agenda are not per se direct human rights issues - as in directly regarding the provisions of certain international human rights standards. Their connections to the international legal instruments are often indirect or imprecise. Hence, the scope of what is actually discussed at the Council is much wider than what is suggested by its name and by the objectives set out in its founding General Assembly Resolution. This was not brought in by the Council alone, but is instead a continuation from the Commission on Human Rights and the general character of international human rights politics.<sup>71</sup>

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<sup>70</sup> Hence, it is not fruitful to criticise a political human rights body in terms such as 'politicised'. See for instance: Angel Alonso Arroba, 'The New United Nations Human Rights Council: What Has Changed? What Can Change?' *Crossroads*, 6/2 (2006), 66-86.

<sup>71</sup> See for instance: 'Press Conference: H.E. Mr. Jan Eliasson, President of the General Assembly, Will Brief on the Human Rights Council, 15 March', (UN Webcast Archives, 2006). and Warren Hoge, 'New Un Human Rights Agency; Same Old Problems', *International Herald Tribune*, 9 March 2007b.

One view on why states are inclined to widen the range of what is discussed in the Council is that the state parties that comprise it are not per se fervent defenders of human rights in a legal sense. And if you are not, it is fruitless to spend a considerable amount of time on deliberating upon issues, where your own records are at best hazy.<sup>72</sup> The tactic is rather to alter the Council's focus and keep it busy with issues, with which you can ensure that your own position and international profile is coherent with the character of your own government's past performance domestically. The risk that materialises is that of the body becoming an *indirect* Human Rights Council, where legally founded human rights policies become at best insufficient. Recognising that the Human Right Council as a structure is shaped by the scope of its agenda is important for the sake of trying to demarcate EU's endeavours in it.

The Council is severely polarised, and a number of items on the agenda are unwanted from an EU point of view. In these cases the EU states have to walk a knife-edge. They can choose to spend resources on trying to amend resolutions that are out of bounds of what its member states perceive as legitimate human rights discourse, and where there is little common ground across regional groups. Or they can turn their backs to negotiations on such issues, which would be highly discourteous and would most certainly underpin the divisions within the Council.

While this essay is being written, the EU states hold 7 out of 47 seats in the Council. Hence, they have a limited influence on the agenda, and have to engage in discussions they would not initiate themselves. It comes as a second disadvantage if these discussions are widened in scope, since the EU's human rights policy is principally derived from the international treaties.<sup>73</sup> Its performance is accordingly much better in items that are of a direct character. However, this chapter will argue that the widened range of issues before the Council partly could be blamed on the self-styled defenders as well. The limits to what is covered by the Common EU Human Rights Policy are very unclear – especially in country specific matters and in the borderland between Human Rights Law and International Humanitarian Law.

Here, two questions that lie in the borderland of being *direct* or indirect human rights issues before the Council will be presented. The first one is that of International Humanitarian Law, which has been incorporated into all but two country specific resolutions during the Council's first eighteen months of operation. This will reflect the indirect connection to human rights that has characterised the country-specific resolutions so far. The second is a thematic discussion on

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<sup>72</sup> Interview with EU diplomat, in Geneva, 11 Decemeber 2007.

<sup>73</sup> Karen E. Smith, *European Union Foreign Policy in a Changing World* (Cambridge: Polity Press, 2003), chapter 5

the respect for and freedom of religion and belief, which reflects how different the Council's mandate is perceived across the regional groups.

## 4.1 Humanitarian Law – A Human Rights and Humanitarian Affairs Council?

International Humanitarian Law and International Human Rights Law are of a complementary character to each other. They both deal with the protection of individuals in exposed situations and serve a similar objective of reducing human suffering. However, they are different branches of public international law and are valid in different situations. The main dividing line is that, contrary to human rights law, humanitarian law is only valid in times of internal or international conflict and its sole rationale to protect those affected by such a conflict. Conversely, several international human rights instruments hold the opportunity for states to abandon certain undertakings in times of crisis – such as during an armed conflict.<sup>74</sup> Despite the different characters of these legal bodies, and despite the notable actuality that the mandate of the Human Rights Council is restricted to *'promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner'*, the Council did in 13 out of 15 country specific resolutions adopted during its first eighteen months of operation, make reference to Humanitarian Law.<sup>75</sup>

To what degree a violation of humanitarian law could be considered as a violation of human rights law as well, is understood differently amongst states. Yet, most of them show very little reluctance to pass resolutions essentially concerned with humanitarian law in the Council. For instance, the first operative clause of resolution S-2/1, drafted by the Organisation of Islamic Conference and adopted by the Council on 11 August 2006; *'strongly condemns the grave Israeli*

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<sup>74</sup> Manfred Nowak, *Introduction to the International Human Rights Regime* (Brill Academic Publishers, 2003). p. 38, International Committee of the Red Cross, *International Humanitarian Law - Answers to Your Questions* (Second edn.: ICRC, 2004). p. 37

<sup>75</sup> These include follow-up resolutions like Resolution 6/18, which calls for the implementation of earlier resolutions S-1/1 and S-3/1, and thereby indirectly make reference to Humanitarian Law. All but three resolutions were concerned with Israeli violations of Humanitarian Law and Human Rights Law in the Occupied Palestinian Territory, the occupied Syrian Golan and in Lebanon. The other three respectively dealt with the 'situation in Darfur', 'the situation in Burma' and 'Advisory services and technical assistance for Burundi'. The final two of these, were the only resolutions adopted without any references to Humanitarian Law. Resolutions S-1/1, S-2/1, S-3/1, 2/4, 2/3, 3/1, 3/3, 4/2, 6/18 and 6/19.

*violations of human rights and breaches of international humanitarian law in Lebanon*'.<sup>76</sup> Within the group of western states; Canada, as an example, remains inconsistent but clear in this matter, while the EU is consistently vague. As for the resolution dealing with the situation in Lebanon, Canada raised the point of humanitarian law not being a part of the Council's mandate, by stating that:

As the UN's principal body responsible for human rights, this is an opportunity for us to focus specifically on the human rights concern emanating from the conflict, reflecting our mandate and our competence. The armed conflict that is occurring in Israel and Lebanon has resulted in actions that are contrary to international humanitarian law and these should be pursued in other appropriate contexts by the international community.<sup>77</sup>

The European Union, on the other hand, was not against the Council addressing the violations of humanitarian law in this situation, which *inter alia* was implied by the EU presidency in a statement and an explanation of vote during the second special session, which only regarded the conflict in Israel and Lebanon. The reason for why the EU states in the Council decided to vote against the tabled draft resolution was rather its one-sided condemnation of Israel – while not unequivocally condemning the atrocities committed by Hezbollah against Israeli civilians.<sup>78</sup>

There is evidence indicating that humanitarian law is in fact within the scope of the common human rights policy in relation to Israel, which is included as a partner of the European Neighbourhood Policy. In an Action Plan from 2006, the partners agree to 'work together to promote the shared values of democracy, rule of law and respect for human rights and international humanitarian law', as a basis for Israel's further integration with the European Community.<sup>79</sup> The European Commission's progress report in 2006, evaluating the implementation of the Action Plan, declared that an informal working group on human rights had been established which;

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<sup>76</sup> United Nations General Assembly, 'Report of the Human Rights Council on Its Second Special Session, a/Hrc/S-2/2', (2006).

<sup>77</sup> Statement by Ambassador Paul Meyer of Canada to the Second Special Session of the HRC, 11 August 2006. Office of the United Nations High Commissioner for Human Rights, 'Human Rights Council Extranet', <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 January 2008

<sup>78</sup> EU Explanation of Vote to Second Special Session of the HRC, 11 August 2006. *Ibid.* As a rule, the EU has rather abstained from voting, than voting against a resolution such as the one that emerged from the above mentioned session. On the follow ups to the resolutions on the Israeli actions in the Occupied Palestinian Territory, the EU has not even called for vote – claiming that the Council's working procedures are of more importance than the substantive outcome.

<sup>79</sup> 'Eu-Israel, European Neighbourhood Policy Action Plan', *European Commission* (2005).

provided an opportunity for discussing issues *inter alia* on the enhancement of the rights of minorities, international humanitarian law, relevant international conventions and protocols as well as the newly established UN Human Rights Council.<sup>80</sup>

The fourth special session of the UNHRC was held 12 – 13 December 2006 and dealt exclusively with the situation of human rights in Darfur. The initiative was taken by the European Union, which was able to gain the required support from one third of the Council's members for holding the session. It also introduced a draft resolution on behalf of 42 states (including Canada – suddenly pragmatic to humanitarian law), of which 10 were members of Council.<sup>81</sup>

The draft resolution only held three operative clauses, the first of which gave direct reference to humanitarian law.<sup>82</sup> The approach towards the Darfur conflict, reflected in the draft resolution, is also consistent with the approach articulated in the EU's Annual Report on Human Rights.<sup>83</sup>

The Council Decision which became the outcome document of the special session, was watered down by a number of amendments, for instance changing 'grave concern' to mere 'concern' and excluding the call 'for an immediate end to the ongoing violations of human rights and international humanitarian law and for all parties to ensure that there is no impunity'. But the language was strengthened in the Council's Resolution 4/8, adopted at the fourth regular session in January 2007, which unusually gave solid examples of acts that were to be considered as violations to human rights and humanitarian law, 'including armed attacks on the civilian population and humanitarian workers, widespread destruction of villages, and continued and widespread violence, in particular gender-based violence against women and girls, as well as the lack of accountability of perpetrators of such crimes'.<sup>84</sup>

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<sup>80</sup> Commission of the European Communities, 'Commission Staff Working Paper - Enp Progress Report Israel, (Sec(2006) 1507/2)', (2006b).

<sup>81</sup> United Nations General Assembly, 'Report of the Human Rights Council on Its Fourth Special Session, a/Hrc/S-4/5', (2007a).

<sup>82</sup> Fourth Special Session of the HRC, 12 – 13 December 2006. Draft resolution: The human rights situation in Darfur, submitted by Finland. A/HRC/S-4/L.1

<sup>83</sup> Council of the European Union, 'Eu Annual Report on Human Rights 2006', (2006b). p. 76

<sup>84</sup> United Nations General Assembly, 'Report to the General Assembly on the Fourth Session of the Human Rights Council, a/Hrc/4/123', (2007b).. Resolution 4/8, found on p. 18

From these examples it would be tempting to conclude that abidance by humanitarian law is something that the European Union fully endorses as a legitimate matter for the UNHRC. However, this picture is blurred as one moves beyond the country specific resolutions.

In its sixth session, the last session before this essay was written, the Council adopted – without a vote – resolution 6/1, drafted by Azerbaijan and entitled ‘Protection of cultural rights and property in situations of armed conflict’. The aim of the resolution was to reaffirm how damage to cultural property during armed conflict may impair the enjoyment of cultural rights, in particular of article 15 of the International Covenant on Economic, Social and Cultural Rights.<sup>85</sup> Despite not raising the resolution to a vote, the EU clearly expressed its reluctance to deal with such a matter in this specific forum.

The EU considers that the linkage established in this text between the protection of cultural property and human rights is not sufficiently clear and that the issues addressed therein can best be dealt with by other bodies, such as the International Conference of the Red Cross or UNESCO. We consider that this draft resolution is part of an undesirable proliferation of initiatives brought before this Council which have little connection with this body’s mandate and do not contribute to advance the cause of human rights.<sup>86</sup>

EU’s approach to whether or not humanitarian law should be deliberated upon by the Council is vague. Seemingly, there has to be a clear connection between the lack of respect for a certain provision in the body of humanitarian law, and an equal provision in human rights law. However, where this dividing line is drawn appears to be decided upon on a case-to-case basis. This is remarkable since among the European Union’s guidelines on human rights there is a document referring explicitly to humanitarian law. This document recognises that humanitarian law is implied among the fundamental values mentioned in Article 6(1) of the Treaty of the European Union, yet it only briefly touches upon the connections between humanitarian law and human rights law, which is notable since it is used as a foundation for political decisions in bodies such as the Human Rights Council.

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<sup>85</sup> United Nations General Assembly, 'Draft Report of the Human Rights Council on Its Sixth Session, a/Hrc/6/L.11', (2007c). Resolution 6/1, found on p. 5

<sup>86</sup> The European Union’s Explanation of Vote on the Draft Resolution ‘Protection of Cultural Rights and Properties in the situation of armed conflict. At the Council’s Sixth Regular Session. Office of the United Nations High Commissioner for Human Rights, 'Human Rights Council Extranet', <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 january 2008

Thus while distinct, the two sets of rules may both be applicable to a particular situation and it is therefore sometimes necessary to consider the relationship between them. However, these Guidelines do not deal with human rights law.<sup>87</sup>

This is to serve as an example of how vague the limits to EU's human rights policies are. But whatever the EU approach may be, the fact remains that humanitarian law has been of principle concern to the Human Rights Council during its first year of operation. This could well be legitimate, but it is still not one of the Council's objectives as laid down by the General Assembly in resolution 60/251. As suggested by Walter Kälin in 2004, it would have been a good idea to 'clarify/enlarge the mandate of the Human Rights Council to encompass at least those important aspects of humanitarian affairs that have a direct link with human rights'. Cuttingly, he even suggested that 'The Human Rights and Humanitarian Affairs Council' would have been a more suiting name.<sup>88</sup>

## 4.2 Respect for and freedom of religion and belief

The divisions in the Council primarily lie between the western states and the Arab and African regional groups. There are a few themes in which this polarisation very visibly surface. The most striking example may be the resolutions on Israel, but it runs even more deep, and becomes even more evident in the discussions regarding religious freedom and the role of religions in society.

During the negotiating process that led to the establishment of the Council, one phenomenon that dominated media coverage of world politics, was the reactions in Muslim societies to the caricatures depicting the prophet Mohammed, that originally occurred in the Danish newspaper *Jyllandsposten*. Several state parties of the Arab and African groups pushed for the inclusion of an article in the General Assembly Resolution, which would give the Council

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<sup>87</sup> Commission of the European Communities, 'European Union Guidelines on Promoting Compliance with International Humanitarian Law (2005/C 327/04)', *Official Journal of the European Union* (2005).

<sup>88</sup> Walter Kälin, 'Towards a Un Human Rights Council: Options and Perspectives', *International Council on Human Rights Policy* (2004).



a mandate to act upon such acts of profanity against religions.<sup>89</sup> This did not make it to the operative clauses of 60/251, but in its preamble the General Assembly affirms:

the need for all States to continue international efforts to enhance dialogue and broaden understanding among civilizations, cultures and religions, and emphasizing that States, regional organizations, non-governmental organizations, religious bodies and the media have an important role to play in promoting tolerance, *respect for and freedom of religion and belief*,

This last phrase (italics added) is indeed a persuasive compromise. While for instance the EU states have stressed '*freedom of religion and belief*', the OIC have emphasised '*respect for religion and belief*' as the legitimate approach to the subject. Hence, different states interpret such language as included in the preamble as very different indicators of where the Council should be heading.

At the beginning of the Council's fourth regular session, the Secretary-General of the Organization of the Islamic Conference, Ekmelledin Ihsanoglu, made an intervention where he commented on the founding resolution, and spelled out the OIC's agenda in the UNHRC:

(...) We have learned the lesson from past experience that, in many instances, the calls inherited in such resolutions are rarely heeded. That is why we believe that there is a dire need to fill the judicial vacuum of deficiency in dealing with the question of respect for religions in the United Nations. The deficiency could only be addressed through taking effective and legally binding measures for combating defamation of all religions. With these objectives in mind, we will encourage the Human Rights Council to develop norms to promote dialogue and comprehension among followers of different religions, and possibilities to explore the option of drafting a convention on respect for religions.<sup>90</sup>

During the fourth regular session, Pakistan, acting on behalf of the OIC, introduced a draft resolution on the 'Defamation of Religions'. Its language was strong, but not new. It was based on provisions found in a resolution adopted by the Commission on Human Rights in 2005<sup>91</sup> and a General Assembly Resolution from 2006.<sup>92</sup> The issue had been up for discussions during earlier

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<sup>89</sup> Sara Stenholm, 'Ny Fn-Kommission Ska Bli Effektivare', *Sveriges Radio Ekot* (2006).

<sup>90</sup> Ekmelledin Ihsanoglu, 'Statement by the Secretary-General of the Organisation of Islamic Conference - Delivered During the High Level Segment of the Human Rights Council's Fourth Session. ' *UN Human Rights Council* (2007).

<sup>91</sup> CHR res. 2005/3 - "Combating defamation of religions", available at [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-3.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-3.doc)

<sup>92</sup> GA res. 61/164 - "Combating defamation of religions", available at <http://www.un.org/Depts/dhl/resguide/r61.htm>

sessions of the Council as well. One paragraph, where the above mentioned division is felt, emphasised that everyone has the right to freedom of expression, but that it

should be exercised with responsibility and may therefore be subject to limitations as provided by law and necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs.<sup>93</sup>

The resolution was adopted through a vote called for by the European Union, with 24 in favour, 14 against and 9 abstentions. The EU states voted, as customarily in concert, against the resolution. In an explanation afterwards, Germany expressed, on behalf of the EU, a reluctance to deal with such a matter in the Council, thus reiterating the different understandings of the Council's mandate.

The European Union believes that a broader, more balanced and firmly rights-based text would be best suited to address the issues underlying this draft resolution. The European Union does not see the concept of "defamation of religions" as a valid one in a human rights discourse. International human rights law protects primarily individuals in the exercise of their freedom of religion or belief and not the religions as such.

This statement is one way debatable, since, contrary to humanitarian law, respect for religions is at least mentioned in the Council's founding document. Nevertheless, the EU's stance of favouring a 'rights-based text', where emphasis is laid on every individual's freedom of religion and belief, is also a continuation from the Commission on Human Rights, where the EU member states introduced draft resolutions on an annual basis that reiterated the importance of freedom of religion and belief.<sup>94</sup> One point, which could be considered as being a core element of the EU approach to the freedom of religion, is the right for everyone to change religion. The OIC on the other hand stresses that respect should be shown to the legal arrangements of individual states.<sup>95</sup>

During the second part of the sixth regular session, in December 2007, EU introduced a draft resolution on behalf of 71 states entitled 'Elimination of all forms of intolerance and of discrimination based on religion or belief'. It sought to foster the implementation of a declaration

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<sup>93</sup> United Nations General Assembly, 'Report to the General Assembly on the Fourth Session of the Human Rights Council, a/Hrc/4/123', (2007b).. Resolution 4/9, found on p. 19

<sup>94</sup> For instance CHR Resolution 2005/40 - Available at : [http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN\\_4-RES-2005-40.doc](http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-40.doc)

<sup>95</sup> Pakistan (on behalf of the Organisation of Islamic Conference) - Explanation of Vote on Resolution L.15-Rev 1, Human Rights Council's Sixth Session Part 2, 14 december 2007

of the same name that was adopted by the General Assembly in 1981. With simultaneous efforts the EU states managed to get a resolution with a similar language adopted without a vote by the General Assembly's Third Committee only a few weeks prior to the session,<sup>96</sup> thereby putting pressure on the Council, which accordingly adopted it.

These are indicators of a significant endeavour in terms of time, energy and coordination by the EU states. First of all, it is very likely a result of the importance attributed to the question of religion vis à vis human rights by several states – not least manifested by the earlier mentioned resolution on 'Defamation of Religions', forcing the EU states to engage in dialogue on the topic. It is also a topic that has been deliberated upon for a significant amount of time, given the continuation from the Commission on Human Rights. Thus, a lot of internal EU coordination has already been done. Here, it might even be fruitful to speak of something as dangerous as common European values. The common denominator is relatively high – thus allowing EU states to act with a strong unity and leverage in the dialogue with others.

### 4.3 Conclusion – The Council's Agenda as Structure

The agenda of the Human Rights Council during its first eighteen months of operation has first and foremost been concerned with the Council's own institution building process. But when it has dealt with more substantive matters – both country specific and thematically – it has dealt with issues that only indirectly falls within the mandate of the Council. These include, humanitarian law and the attitude towards religions. This requires states to act comprehensively and flexibly.

As this chapter has shown, the limits to what can be considered a common EU human rights policy at the UNHRC are vague, and constantly developing. This is in one sense positive from an EU perspective, since a human rights policy limited by the international instruments is simply insufficient for acting successfully on every item before the Council.

But there are differences in how the EU performs, depending on the character of the question at hand. On a thematic issue where the EU states have a good knowledge of each other through years of coordination, where there is common ground in terms of values and where

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<sup>96</sup> United Nations General Assembly, 'Press Release: Third Committee Approves 11 More Drafts for Assembly Including One More Country Specific Text That Again Draws Heavy Criticism (Ga/Shc/3910)', *Department of Public Information, News and Media Division - New York* (2007e).

there is a direct connection to international legal standards – the EU has a better chance of making use of its leverage, compared to indirect issues – where a more rapid and comprehensive coordination across a number of political fields is required.

# 5 The EU States Together at the Human Rights Council

This chapter seeks to describe *how* the EU states act together in the Human Rights Council. It argues that the Unions accomplishments at the Council depend on if it is actively behind an item on the agenda or reacting to initiatives taken by others. Since the European Union make out but 27 of the United Nations 192 member states, which at this time hold 7 out of 47 seats at the Human Rights Council, it can have but a limited influence on its agenda. Hence, if it wants to be a successful actor, it must be able to work in both an active and a reactive mode.

From the outset the focus will be placed on the practical coordination mechanisms and the role of the rotating EU presidency. The five special sessions held so far by the Council will then serve as examples for how this active / reactive divide appears. These assessments have been made by comparing EU statements made in formal debate with each other, as well as with statements made by countries that tended to vote in similar ways as the EU during these sessions. Most notably they are Canada and Switzerland, who were members of the Council during the studied period, also include statements of observer states that arguably have shared approaches with the European Union to the items on the agenda – for instance Norway and New Zealand.

The conclusion will show that EU should be even more active if it wants to keep its credibility in some camps, but that there is a disinclination towards such a development, given the already polarised Council.

## 5.1 EU Coordination

The amount of time spent on coordinating the work in the Human Rights Council is supposedly un-matched by the European Union in any other multilateral forum where its members are active. There are monthly meetings in Brussels with the Council of the European Union's Working Group on Human Rights (COHOM), where some preparatory work is done ahead of

the sessions.<sup>97</sup> There are also the meetings of the General Affairs and External Relations Council of the EU foreign ministers, which often have an impact on the EU's stance in country specific matters at the UNHRC. But a significant amount of work is still left to the designated officials for human rights at the member states' Permanent Missions in Geneva. In the weeks prior to the sessions, coordination meetings can require several hours per day, and during sessions the EU officials meet every morning for further consultations and alignment.<sup>98</sup> One estimation said that a total of 1000 coordination meetings are held every year for all of the EU's multilateral work in Geneva.<sup>99</sup>

The reasons for this time consumption are two-fold. Firstly, there is the extremely high pressure of reaching a common stance, not least provided by the EU Treaty. Karen E. Smith also presents a more constructivist explanation, speaking of a 'coordination reflex' among diplomats which has developed into a 'consensus reflex' – which means that a settlement that barely reaches beyond the lowest common denominator is gazed at with dissatisfaction. This reflex is due to the socialization process that comes from years of coordination experience from the work at the Commission on Human Rights.<sup>100</sup> Secondly, there is the sensitivity of the human rights politics. 'These issues go to the very heart of the nations', as the president of the General Assembly at that time, Jan Eliasson, stated during the press conference after the founding resolution for the Council was adopted.<sup>101</sup> The common values amongst EU member states are not common enough to shorten down the coordination meetings. And even if they have a common understanding of human rights in theory, it does not automatically generate a political stance in a Council that, as already shown, is occupied with several items with indirect connections to the international legal standards. Hence, the common ground has to be found in a wide range of political fields, a process that may be obstructed by a variety of aspects beside common values – such as conflicting national interests.<sup>102</sup>

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<sup>97</sup> Karen E. Smith, 'Speaking with One Voice? European Union Co-Ordination on Human Rights Issues at the United Nations\*', *Journal of Common Market Studies*, 44/1 (2006), 113-37.

<sup>98</sup> Interview with EU official, Geneva, 11 december 2007

<sup>99</sup> Mary Farrell, 'Eu Representation and Coordination within the United Nations', in Karen E. Smith and K.V. Laatikainen (eds.), *The European Union at the United Nations: Intersecting Multilateralisms*. (Palgrave, 2006). p. 35

<sup>100</sup> Karen E. Smith, 'Speaking with One Voice? European Union Co-Ordination on Human Rights Issues at the United Nations\*', *Journal of Common Market Studies*, 44/1 (2006), 113-37.

<sup>101</sup> 'Press Conference: H.E. Mr. Jan Eliasson, President of the General Assembly, Will Brief on the Human Rights Council, 15 March', (UN Webcast Archives, 2006).

<sup>102</sup> Smith claims that EU unity first of all is hindered by conflicting national interests and the willingness to act independently in the UN – I would claim that conflicting perceptions of values is a very important factor to bring

One glaring case is that of Uzbekistan, which was under scrutiny from the Commission on Human Rights, but which has not yet generated any outcome document from the Council. Kenneth Roth explains this by pointing at the new German *Ostpolitik*, which has increased its dependence on energy supply from Central Asia. Against the provisions in the Treaty of the European Union, 14 member states broke loose and supported a November 2006 resolution on Uzbekistan in the General Assembly.<sup>103</sup>

The dangers that come from spending a vast quantity of time on internal coordination are quite obvious. Firstly, every hour spent internally, is an hour missed on communicating with other states. This was recognised by the EU as a problem already in the 2001 session of the Commission on Human Rights.

Since collective action by the EU required very intensive internal coordination, the time for consultation with other non-EU delegations sometimes remained very limited. It is indispensable that the Union should address ways and means of reinforcing its cooperation with other countries and regional groups.<sup>104</sup>

Secondly, there is a risk of the EU becoming a quite inflexible interlocutor for others. Since the EU states have reached a compromise among themselves, they are simply not as keen to agree on further concessions – at least not without further time consuming coordination. Thirdly, there is the interrelated risk of micromanagement, observed for instance by Human Rights Watch:

(...) at the Human Rights Council, the EU seems to demand a consensus at an absurdly petty level. Rather than signing off on a strategy and having faith in EU representatives to pursue it wisely, EU members insist on signing off on each proposed resolution word by word. This micromanagement makes it impossible for the EU to respond effectively to changing circumstances or to engage in the quick diplomatic give-and-take needed to build majority alliances.<sup>105</sup>

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into the equation. Karen E. Smith, 'Speaking with One Voice? European Union Co-Ordination on Human Rights Issues at the United Nations\*', *Journal of Common Market Studies*, 44/1 (2006), 113-37.

<sup>103</sup> Kenneth Roth, 'Filling the Leadership Void: Where Is the European Union?' *Human rights watch world report 2007*, (2007). p. 19

<sup>104</sup> Council of the European Union (2001) 'Annual Report on Human Rights 2001'. <http://consilium.europa.eu/uedocs/cmsUpload/HR2001EN.pdf>

<sup>105</sup> Kenneth Roth, 'Filling the Leadership Void: Where Is the European Union?' *Human rights watch world report 2007*, (2007). p. 19

### 5.1.1 *The role of the Presidency*

As for the shaping of the EU Common Foreign and Security Policy in general, the question of who possesses the rotating EU presidency at the moment may be of limited importance. The decisions still have to be made with consensus. On a lower level, such as in the Human Rights Council, the presidency is nonetheless of central importance. According to article 18 of the Treaty on the European Union, the presidency shall, among other things, ‘in principle express the position of the Union in international organisations and international conferences’.<sup>106</sup> The presidency thus represents the Union in all external negotiations, which in itself is a delicate and time consuming task, but it also chairs all coordination meetings at all levels of the second pillar.

The presidency generally delivers all statements in formal debate on behalf of the EU member states, and often its candidate countries.<sup>107</sup> If individual EU states wish to add something they commonly kick off their statements by a phrase like

We associate ourselves to the intervention made by Finland on behalf of the European Union.<sup>108</sup>

The amount of work and responsibility placed on the presidency in the coordination and execution of the EU’s human rights policy in Geneva is very demanding. And how the presiding country fulfils its task is exceptionally imperative for how the EU come about in the Human Rights Council. The presidency *inter alia* has to be engaged, flexible and above all well-prepared in order to be constructive in its dialogues with others, and successfully advocate the Union’s objectives. The differences in priorities and resources (not least in terms of qualified staff) among the presiding countries, bails for deviation in the ways the EU operates at the Council.

It is not uncommon that the country next in line for the rotating EU presidency shares some of the burden, especially since the presiding states are divided into troikas together responsible for eighteen months. Thus Slovenia, which is part of a troika with Germany and

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<sup>106</sup> TEU article 18

<sup>107</sup> Other European states are asked if they wish align themselves with the Union’s statements and sometimes do.

<sup>108</sup> Statement by Italy during the 4<sup>th</sup> special session of the Human Rights Council. Office of the United Nations High Commissioner for Human Rights, ‘Human Rights Council Extranet’, <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 January 2008



Portugal, has taken some responsibility already during the Portuguese presidency in the autumn of 2007.<sup>109</sup>

Amnesty International's EU Office has started to give each incoming presidency advices on how to act in human rights matters – including how to work in the UN Human Rights Council. The five-step recommendations given to the Portuguese presidency included; a clear political agenda, an integration of the approach in the HRC to other parts of the CFSP, more actively forging broader inter-regional alliances, burden sharing with other EU member states and upgrading capabilities at both diplomatic and institutional levels.<sup>110</sup>

## 5.2 EU in the First Five Special Sessions

The first three special sessions were held on initiatives by the Group of Arab States and dealt with the Israeli activities in the Occupied Palestinian Territories and Lebanon. The fourth and the fifth sessions were held on initiatives by the European Union and dealt with the situation in Darfur and Burma / Myanmar respectively. Because of a broader trend in how the EU acted depending upon on whether it was actively behind the special session or not, the first three sessions will be analysed collectively, and the last two as well.

### 5.2.1 *The Special Sessions on the situation in the Middle East*

In its formal statements that were given to the Council during these sessions, the EU signalled serious concern for the human rights and humanitarian situation in the Middle East, which is also reiterated by its annual Human Rights Reports from 2006 and 2007. During the existence of the Commission on Human Rights, the EU even sponsored a resolution that dealt with Israeli settlements in the West Bank,<sup>111</sup> and has repeated that it is convinced that this is a matter which should be on the Human Rights Council's agenda. However, it has also lined up with the criticism accounted for in chapter 3 of this essay and has expressed doubt to whether 'the

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<sup>109</sup> This is partly manifested by the fact that Slovenia has delivered a few statements during the Council's sixth session on behalf of the Union. <http://www.ukom.gov.si/eng/slovenia/publications/slovenia-news/3703/3737/index.text.html>

<sup>110</sup> Amnesty International Eu Office, 'The Ambitions and Ambivalence of Eu Human Rights Policy - Amnesty International's Ten-Point Programme for the Portuguese Presidency of the European Union', (2007). pp. 14 - 15

<sup>111</sup> Commission on Human Rights resolution 2004/9 on 'Israeli settlements in the occupied Arab territories'

continuous repetition of unbalanced and divisive resolutions on this question contributes to improve the situation on the ground'.<sup>112</sup> The EU has also 'regretted that despite repeated requests', no genuine discussions were generated on the outcome documents introduced during the first special sessions.<sup>113</sup>

Even if these sessions lacked a climate for finding common ground within the Council, which indeed is hard to estimate for the outside observer, there is still a difference in how the EU acted in comparison with states, who in the end voted in the same way, or who expressed the same basic views as the Union. Switzerland, Norway and Canada in general gave direct reference to an introduced draft resolution or came with concrete suggestions to how and why this very Council should or should not act. Switzerland even proposed a few counterbalancing amendments to the draft resolution presented at the first special session by the OIC and the Group of Arab States.<sup>114</sup> Even if these could not find enough support in the Council, their introduction in the plenary still signalled an active engagement.

During these first three special sessions, the EU delivered but initial statements and explanations of vote in formal debate. These initial statements only gave sweeping proclamations of the EU's general stance on the fixed situation in the Middle East, with hardly any references to this specific Council and no references whatsoever to any draft resolutions. In fact, it is very hard to discern from the statements whether or not the EU was in favour of passing any resolution at all in the Human Rights Council during these sessions. For instance, during the second special session, the closest one gets is a general reference to the work being done in other bodies, and a suggestion that 'a coordinated approach of different efforts guarantees that the best outcome can be achieved on the ground'.

Nevertheless, the EU statement that was delivered during this special session was in fact but a copy paste version of the General Affairs and External Relations Council's conclusions on 'the Crisis in Lebanon', which were passed in Brussels ten days ahead of the UNHRC's session. The language was scarcely contextualised. This could be exemplified by the following phrase in the original conclusions.

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<sup>112</sup> Eu Presidency, 'Statement by Portugal on Behalf of the European Union, United Nations ', *62nd Session of the General Assembly, 3rd Committee Item 65. Report of the Human rights Council* New York/5 November (2007).

<sup>113</sup> Council of the European Union, 'Eu Annual Report on Human Rights 2007', (2007b).p. 61

<sup>114</sup> Swiss proposals as presented in the Plenary during the Human Rights Council's First Special Session (A/HRC/S-1/L.1) Office of the United Nations High Commissioner for Human Rights, 'Human Rights Council Extranet', <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 january 2008

All parties must do everything possible to protect civilian populations and to refrain from actions in violation of international humanitarian law.<sup>115</sup>

In the statement before the Human Rights Council, it was slightly altered to read:

All parties must do everything possible to protect civilian populations and must refrain from disproportionate actions and other actions in violation of international humanitarian law and human rights law.<sup>116</sup>

Yet, in most parts the wording is exactly the same as in the original conclusions. This could of course give proof of a consistency within the different branches of the Common Foreign and Security Policy, but is also proof of inflexibility when the EU obviously had no specific agenda at that time for the work in this specific UN body – and thus had but a limited possibility to react in a constructive and effective manner.

One explanation for this could be a lack of will to deal with these matters in the Human Rights Council – partly because the world's eyes were on the Security Council, which only a few hours later in New York passed Security Council Resolution 1701 on 'The situation in the Middle East',<sup>117</sup> and partly because of the apparently small chances of creating any climate for finding common ground with other states.<sup>118</sup> Another explanation would be a lack of ability to react and coordinate quickly – perhaps due to inexperience of dealing with special sessions at the UNHRC. One should remember that the previous Commission on Human Rights was granted the possibility to hold special sessions if a majority of its members were supportive, but this possibility was only used five times between 1992 and 2000.<sup>119</sup> The Human Rights Council on the other hand has had five special sessions within eighteen months.

During the third special session the EU states even failed to reach a consensus on how to vote. No parties could support the resolution on 'Human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, including the recent one in northern

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<sup>115</sup> Council of the European Union, 'General Affairs and External Relations: The Crisis in Lebanon - Council Conclusions', 12023/06 (*Presse 230*), 1 August (2006a).

<sup>116</sup> Intervention by Finland (on behalf of the European Union, Bulgaria and Romania) during the Human Rights Council's First Special Session Office of the United Nations High Commissioner for Human Rights, 'Human Rights Council Extranet', <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 January 2008

<sup>117</sup> [http://www.un.org/Docs/sc/unsc\\_resolutions06.htm](http://www.un.org/Docs/sc/unsc_resolutions06.htm)

<sup>118</sup> Council of the European Union, 'Eu Annual Report on Human Rights 2007', (2007b).

<sup>119</sup> Office of the United Nations High Commissioner for Human Rights, 'Chr - Special Session', <<http://www2.ohchr.org/english/bodies/chr/special-sessions.htm>>, accessed 2 January 2008.

Gaza and the assault on Beit Hanoun', but while the UK, Poland, the Netherlands, Germany, Finland and the Czech Republic voted against – France decided to abstain and gave a special explanation of vote where it regretted that there was no opportunity to take the time needed for negotiating a consensus in the Council.<sup>120</sup>

### 5.2.2 *The Special Sessions on Darfur and Burma/Myanmar*

The initiatives for the fourth and fifth special sessions were taken by the EU. But since such an initiative requires the support from one third of the council, it first had to get member states from other regional groups on board as well. The supporters for the special session on Darfur amounted to 33 states; among them were Gabon, Ghana, South Africa and Nigeria.<sup>121</sup>

The EU Presidency also introduced draft resolutions during both special sessions, the first of which was co-sponsored by 15 non-EU members of the United Nations. Both these initiatives required the EU states to actively engage in co-operation with states from other regional groups. As mentioned earlier, the draft resolution on Darfur was considerably watered down, but both special sessions at least resulted in outcome documents adopted without a vote – which has to serve as a compliment to the EU efforts. The EU's Annual Report on its human rights endeavours proudly recognises the fourth special session as the 'first special session to include an open process of negotiations on the outcome'.<sup>122</sup>

The change in EU activity can also be illustrated by the fact that a number of EU states, 18 and 19 respectively, made complementary statements to the initial remarks delivered by the EU presidency. Even if the language in these statements is corresponding, they were without a doubt cut for the Human Rights Council and the given session. Some of them also gave nationally specific reasons for why the Council should pay attention to this very matter – for instance Poland, which during the fifth special session elaborated on its own historic experience as a

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<sup>120</sup> Intervention du Représentant permanent de la France – Session spécial du Conseil des droits de l'homme. (15 novembre 2006). Office of the United Nations High Commissioner for Human Rights, 'Human Rights Council Extranet', <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 january 2008 . Romania voted against as well, but was not a part of the EU at that moment.

<sup>121</sup> Note verbale from the Human Rights Council secretariat (30.11.06) Ibid.

<sup>122</sup> Council of the European Union, 'Eu Annual Report on Human Rights 2007', (2007b).

reason for being ‘especially attentive, sympathetic and supportive of the struggle of the people of Burma /Myanmar for a return to normal life in a rebuilt, democratic Homeland’.<sup>123</sup>

### 5.3 Conclusion – Being Active *and* Reactive

There is thus an observable difference in how the European Human Rights Policy come about in the Human Rights Council, depending on whether its is actively behind the item on the agenda or not. The simple conclusion would be that the EU has to be as active as possible in shaping in the agenda, in order to be successful in shaping the outcome documents.

Yet, one question that needs to be addressed is the number and character of issues that the EU should strive to put for the Council. Two country specific issues that have been touched upon in plenary, but which have not led to any resolutions, much due to the composition of the Council, are the situations in Sri Lanka and Zimbabwe.<sup>124</sup> During the sessions of the Commission on Human Rights between 2002 and 2004, the EU in vain presented draft resolutions on Chechnya and notably Zimbabwe. Ahead of the 2005 session Benita Ferrero-Waldner, Commissioner for External Relations & European Neighbourhood Policy, addressed the European Parliament on the issue.

I would underline that the EU is responsible for the lion's share of country resolutions and it is not realistic to expect it to expand that list indefinitely. We must rather concentrate our energies on rallying support for our initiatives amongst like-minded countries and the wider membership of the CHR in an effort to avert further defeats. I would emphasise, however, that the likelihood of defeat does not, in itself, constitute an overriding reason to refrain from running a resolution: as human rights defenders constantly attest, the very act of tabling a draft resolution sends a clear signal to the government and people of the country concerned.<sup>125</sup>

However, during the 2005 session of the Commission on Human Rights no such resolutions were introduced. And in a similar manner, the European states today seem to refrain from

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<sup>123</sup> Human Rights Council 5th Special Session – intervention by Poland. Office of the United Nations High Commissioner for Human Rights, 'Human Rights Council Extranet', <<http://www2.ohchr.org/english/bodies/hrcouncil/form.htm>>, accessed 2 January 2008

<sup>124</sup> Eu Presidency, 'Statement by Portugal on Behalf of the European Union, United Nations ', *62nd Session of the General Assembly, 3rd Committee Item 65. Report of the Human rights Council* New York/5 November (2007).

<sup>125</sup> Benita Ferrero-Waldner, 'Declaration on 61st Session of the Un Commission on Human Rights (Chr), 23 February', *European Parliament* (2005).

introducing draft resolutions or amendments which have very small prospects of being adopted. Such passivity, which obviously is not in line with the request from Mrs. Ferrero-Waldner in 2005, was at least indicated in the first three special sessions of the UNHRC.

But even if the EU states would table a draft resolution on every single human rights issue its member states wish to address, it will never shape the agenda alone. Hence, it also has to improve its reactive mode. And this is where the main challenge lies for the European Union's future work in the Council. This will require faster coordination, and perhaps more burden sharing among EU's member states, which has been suggested by Human Rights Watch commentator Peggy Hicks.

EU member states need to speak sooner and more forcefully on the issues that they care about, but thus far they have been hamstrung by their desire to first achieve consensus. When they finally formulate a position, all too often they delegate responsibility to the country that holds the EU presidency to speak on their behalf, allowing obstructionist states to dominate debate. EU members need to recognize that many voices singing the same tune can be more powerful than one singing alone.<sup>126</sup>

With the present construction of the Common Foreign and Security Policy, there will always be a delay for coordination before the EU states can speak out. The previous chapter mentioned the simultaneous work being done by the EU in the Human Rights Council and in the General Assembly's Third Committee on a resolution on religious intolerance. This is EU at its best; powerful and coherent, and working through different channels at the same time. But this resolution is a follow up to a General Assembly declaration from 1981. The proactive force that the EU wishes to be, a force that is 'punching according to its weight', is so far only visible by fair weather.

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<sup>126</sup> Peggy Hicks, 'How to Put U.N. Rights Council Back on Track', *Human Rights Watch Commentary* (November 3, 2006).

## 6 Conclusions

The European Union's own conclusion after the Human Rights Council's first year of operation says that 'despite the fact that the EU is in a minority in the Council, it has nevertheless established itself as a key/influential actor in all aspects of the Council's work'.<sup>127</sup> The Human Rights Watch's view is somewhat different:

Due in part to structural problems and in part to a lack of political will, the EU's underperformance on human rights has left a gaping leadership hole. The EU role at the UN Human Rights Council illustrates the problem. (...) The EU and other governmental supporters of human rights never put forward a compelling vision for the council's treatment of abusive governments. They never did the needed outreach and lobbying to dissuade swing voters from following their spoiler-led regional blocs rather than their own stated human rights principles.<sup>128</sup>

So, how should we value such different views? Obviously, the new political UN Human Rights body, of a quasi-permanent character and with a new geographical distribution of its membership, has posed new challenges to the EU's ambitions to promote its 'founding principle' of human rights through the United Nations. It has also highlighted some of the insufficiencies of the Common Foreign and Security Policy in the area of human rights promotion.

The coordination needed for reaching required consensus in the Human Rights Council is un-matched by the EU in any other multilateral forum. This is mainly due to the sensitive character of human rights issues – which might be a common value in theory, but where member states have different understandings and emphasises when it comes down to details – and other differences, such as conflicting national interests. Many items on the Council's agenda also have an indirect connection to international human rights law, which makes a strictly legal approach to human rights insufficient, for acting successfully at the Council. These structures are restraining to the EU's ambitions of being a major force in promoting human rights through the UN system.

The EU's performances in shaping the outcome document of the Council depend upon fair weather. Firstly, its member states must be actively behind the item on the agenda. Secondly,

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<sup>127</sup> Council of the European Union, 'Eu Annual Report on Human Rights 2007', (2007b).p. 64

<sup>128</sup> Kenneth Roth, 'Filling the Leadership Void: Where Is the European Union?' *Human rights watch world report 2007*, (2007). p. 16 - 17

they have to find a relatively high common denominator and a comprehensive strategy, which is often restricted to *direct* human rights issues that have been up for discussion during several years. Thirdly, success also requires a strong presidency, which has all the necessary resources in Geneva for leading both the internal coordinating process and the external negotiations, and which is able to share the burden with the other 26 member states.

The CFSP in reactive mode still lacks the flexibility that is required by the work in the Human Rights Council – especially during its special sessions. Reaching a general common stance is simply not enough; the EU must have a common objective on every item before the Council, in order to successfully shape its outcome documents. Apart from improving the reactive mode, the EU states need to become even more active at the Council if it wants to remain credible in the eyes of internal and external observers, such as the constituencies of its member states and the above mentioned Human Rights Watch. Yet, the balance act is tough, since the polarisation between north and south is a significant feature of the Council’s work so far – and thus is vital for its failure to fulfil its high expectations from the very start.

As mentioned earlier, human rights politics is a lot of politics. The EU states are acting coherently at the Human Rights Council – but because of the complex milieu provided by the Council and the shortcomings of the CFSP itself – the policies generated so far are best described as consented and successful by fair weather, than common and showing the way.



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