



DIRECTORATE-GENERAL FOR EXTERNAL POLICIES  
POLICY DEPARTMENT

**A COMPARATIVE STUDY  
OF EU AND US  
APPROACHES TO  
HUMAN RIGHTS IN  
EXTERNAL RELATIONS**

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A COMPARATIVE STUDY OF EU AND US APPROACHES TO HUMAN RIGHTS IN EXTERNAL RELATIONS





DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION

**DIRECTORATE B**

POLICY DEPARTMENT

STUDY

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IN EXTERNAL RELATIONS**

**Abstract**

Both the European Union (EU) and the United States (US) emphasise the centrality of human rights in their domestic and external policies. Despite their common attachment to human rights and a potential affinity of seemingly common transatlantic approaches to human rights issues in external policies, the EU and the US have diverged considerably in their respective promotion of human rights abroad. Drawing on the historical and legal underpinnings of human rights promotion in the EU and the US, the purpose of the present study is to provide a comparative analysis of how human rights are integrated and mainstreamed into their respective external policies, thereby using case studies such as EU Special Representatives/US Special Envoys, Democracy Promotion, the Human Rights Council and the International Criminal Court to contextualise the argument. To this end, the study outlines the intricacies behind the institutional set-up of EU and US external action, and delves into the specificities of human rights-related policy-making in the realm of traditional foreign policy, international trade and international development. The study concludes with the formulation of recommendations for the further integration of human rights in EU external policies, as well as to the future collaboration between the EU and the US on human rights.

This study was requested by the European Parliament's Subcommittee on Human Rights.

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## TABLE OF CONTENTS

<b>LIST OF FIGURES</b>	<b>7</b>
<b>LIST OF TABLES</b>	<b>7</b>
<b>LIST OF ABBREVIATIONS</b>	<b>8</b>
<b>EXECUTIVE SUMMARY</b>	<b>12</b>
<b>1. INTRODUCTION</b>	<b>14</b>
<b>2. 'MAINSTREAMING' HUMAN RIGHTS</b>	<b>17</b>
<b>3. FOREIGN POLICY AND HUMAN RIGHTS</b>	<b>18</b>
3.1 HUMAN RIGHTS IN THE EUROPEAN UNION'S FOREIGN POLICY	18
3.2 HUMAN RIGHTS IN THE UNITED STATES' FOREIGN POLICY	19
3.3 EU, US AND INTERNATIONAL AGREEMENTS	20
3.4 MAIN ACTORS IN EU AND US FOREIGN POLICY	21
<b>3.4.1 European Union</b>	<b>22</b>
<b>3.4.2 United States</b>	<b>25</b>
3.5 OBJECTIVES AND POLICY CONTEXT	26
<b>3.5.1 European Union</b>	<b>26</b>
<b>3.5.2 United States</b>	<b>28</b>
3.6 MAIN EU AND US FOREIGN POLICY INSTRUMENTS AND THEIR LINK TO HUMAN RIGHTS	29
<b>3.6.1 European Union</b>	<b>29</b>
<b>3.6.2 United States</b>	<b>32</b>
3.7 COMPARATIVE CONCLUSIONS AND THE FUTURE OF EU-US COOPERATION	35
<b>4. TRADE POLICY</b>	<b>36</b>
4.1 MAIN ACTORS	36
4.2 OBJECTIVES AND POLICY CONTEXT: TRADE AND HUMAN RIGHTS	42
4.3 MAIN INSTRUMENTS	44
<b>4.3.1 Unilateral/non-reciprocal trade instruments</b>	<b>44</b>
<b>4.3.2 Bilateral trade agreements</b>	<b>47</b>
4.4 RECOMMENDATIONS	49
<b>5. DEVELOPMENT POLICY</b>	<b>51</b>
5.1 MAIN ACTORS	51
5.2 OBJECTIVES AND POLICY CONTEXT	54

5.3	POLICY APPROACHES FOR HUMAN RIGHTS IN DEVELOPMENT COOPERATION	55
	<b>5.3.1 Human rights as a condition for providing development assistance</b>	<b>55</b>
	<b>5.3.2 Human rights as a cross-cutting aspect in development planning</b>	<b>59</b>
5.4	EU-US COORDINATION ON HUMAN RIGHTS IN DEVELOPMENT COOPERATION	59
5.5	CONCLUSIONS	60
5.6	RECOMMENDATIONS	61
<b>6.</b>	<b>CASE STUDIES</b>	<b>63</b>
6.1	EU SPECIAL REPRESENTATIVES AND US SPECIAL ENVOYS	63
	<b>6.1.1 Historical development</b>	<b>63</b>
	<b>6.1.2 Institutional setting</b>	<b>64</b>
	<b>6.1.3 Functions and tasks</b>	<b>68</b>
	<b>6.1.4 Geographical and thematic priorities</b>	<b>69</b>
	<b>6.1.5 Recommendations</b>	<b>73</b>
6.2	DEMOCRACY PROMOTION	74
	<b>6.2.1 The concept of democracy promotion</b>	<b>75</b>
	<b>6.2.2 Strategies for democracy promotion</b>	<b>77</b>
	<b>6.2.3 EU and US democracy assistance</b>	<b>78</b>
	<b>6.2.4 Supporting bottom-up democratic reform</b>	<b>84</b>
	<b>6.2.5 EU-US cooperation: challenges and opportunities</b>	<b>88</b>
	<b>6.2.6 Recommendations</b>	<b>89</b>
6.3	HUMAN RIGHTS COUNCIL	90
	<b>6.3.1 Introduction</b>	<b>90</b>
	<b>6.3.2 Positions on the mandate of the HRC</b>	<b>91</b>
	<b>6.3.3 Priorities at the HRC</b>	<b>95</b>
	<b>6.3.4 Enabling and hindering factors</b>	<b>97</b>
	<b>6.3.5 EU-US cooperation at the HRC</b>	<b>99</b>
	<b>6.3.6 Comparison and concluding remarks</b>	<b>100</b>
	<b>6.3.7 Recommendations</b>	<b>101</b>
6.4	INTERNATIONAL CRIMINAL COURT	102
	<b>6.4.1 Introduction</b>	<b>102</b>
	<b>6.4.2 Positions on the mandate of the ICC</b>	<b>102</b>
	<b>6.4.3 Strategies, methods and tools with regard to the ICC</b>	<b>109</b>
	<b>6.4.4 EU-US cooperation with regard to the ICC – past, present and future</b>	<b>117</b>
	<b>6.4.5 Conclusions</b>	<b>118</b>
	<b>6.4.6 Recommendations</b>	<b>119</b>

<b>7.</b>	<b>CONCLUDING REMARKS</b>	<b>120</b>
<b>8.</b>	<b>GENERAL RECOMMENDATIONS FOR THE EU</b>	<b>123</b>
<b>9.</b>	<b>REFERENCES</b>	<b>129</b>
<b>10.</b>	<b>ANNEX</b>	<b>138</b>

## List of Figures

Figure 1: EU Strategic Framework on Human Rights and Democracy .....	27
Figure 2: Overview of DRL Administered Foreign Assistance Appropriations (in millions).....	34
Figure 3: Institutional setting of the EUSRs.....	65
Figure 4: ODA commitments to ‘Government and Civil Society’ from the US and EU Institutions, 2000-2012, Total Amounts in USD million dollars and percentage as compared to total sector spending .....	78
Figure 5: US commitments for sub-sectors of ‘Government-Society’, 2012, as % of total sector .....	79
Figure 6: EU commitments for sub-sectors of ‘Government-Society’, 2012, as % of total sector .....	80
Figure 7: EU and US financial commitments for bottom-up democracy promotion, 2000-2012, in USD millions .....	85

## List of Tables

Table 1: Comparison between the EC ‘exclusive competence’ and USTR ‘principal responsibility’ to act in trade-related matters, prior to and after the entry into force of the Lisbon Treaty .....	37
Table 2: Comparison between EU and US Parliamentary Involvement in Trade-related Matters, prior to and after the entry into force of the Lisbon Treaty .....	39
Table 3: Comparison between EU Special Representatives and US Special Envoys.....	71
Table 4: Comparing recipients of EU and US democracy and human rights assistance.....	83
Table 5: Overview of US Criticism of the ICC.....	104



## List of Abbreviations

AA	Association Agreement
AGOA	African Growth and Opportunity Act
AFL-CIO	American Federation of Labor-Congress of Industrial Organizations
ASP	Assembly of States Parties
ASPA	American Service-Members' Protection Act
ATPA	Andean Trade Preference Act
BIA	Bilateral Immunity Agreement
BSSC	Budget Support Steering Committee
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CBI	Caribbean Basin Initiative
CCP	Common Commercial Policy
CEDAW	Convention on the Elimination of Discrimination Against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CFSP	Common Foreign and Security Policy
CHR	Commission on Human Rights
CIA	Central Intelligence Agency
CIPE	Center for International Private Enterprise
COHOM	Working Party on Human Rights
CRC	Convention on the Rights of the Child
CSDP	Common Security and Defence Policy
CSO	Civil society organization
DAC	Development Assistance Committee
DCFTA	Deep and Comprehensive Free Trade Area
DCI	Development Co-operation Instrument
DEVCO, EuropeAid	European Commission Directorate-General for Development and Cooperation
DPRK	Democratic People's Republic of Korea
DRG	Democracy, human rights and governance
DRL	Bureau of Democracy, Human Rights and Labor
DROI	European Parliament Subcommittee on Human Rights
EBA	Everything But Arms
EC	European Community, European Commission
ECFR	EU Charter of Fundamental Rights
ECJ	European Court of Justice

EDF	European Development Fund
EEAS	European External Action Service
EED	European Endowment for Democracy
EIDHR	European Instrument for Democracy and Human Rights
ENI	European Neighbourhood Instrument
ENP	European Neighborhood Policy
ENPI	European Neighbourhood and Partnership Instrument
EP	European Parliament
EPC	European Political Cooperation
ESC rights	Economic, social and cultural rights
ESF	Economic Support Fund
ESS	European Security Strategy
EU	European Union
EUSR	European Union Special Representative
FAA	Foreign Assistance Act
FAC	Foreign Affairs Council
FMF	Foreign Military Financing
FPI	Service for Foreign Policy Instruments
FRA	Fundamental Rights Agency
FREMP	Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GSP	Generalized Scheme of Preferences
HDI	Human Development Index
HR/VP	High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission
HRBA	Human rights-based approach
HRC	Human Rights Council
HRDF	Human Rights & Democracy Fund
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IfS	Instrument for Stability
ILO	International Labour Organization
IMET	International Military Education and Training

INTA	European Parliament International Trade Committee
IPA	Instrument for Pre-accession Assistance
IPC	Inter-parliamentary cooperation
IRI	International Republican Institute
LDC	Least developed country
LGBT	Lesbian, gay, bisexual and transgender
LRA	Lord's Resistance Army
MCC	Millennium Challenge Corporation
MEP	Member of the European Parliament
MFN	Most Favoured Nation
MIP	Multiannual Indicative Programme
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
NAM	Non-Aligned Movement
NAO	National Administrative Office
NDI	National Democratic Institute
NED	National Endowment for Democracy
NGO	Non-governmental Organisation
NHRI	National Human Rights Institution
NIP	National Indicative Programme
OAS	Organization of American States
ODA	Official development assistance
OFAC	Office for Foreign Assets Control
OIC	Organisation of the Islamic Conference
OPIC	Overseas Private Investment Corporation
OPT	Occupied Palestinian Territories
OTP	Office of the Prosecutor
PCA	Partnership and Cooperation Agreement
PSC	Political and Security Committee
PTA	Preferential Trade Agreement
QDDR	Quadrennial Diplomacy and Development Review
RBA	Rights-based approach
REIO	Regional economic integration organization
RIP	Regional Indicative Programme
RTA	Regional Trade Agreement
RUDs	Reservations, understandings, and declarations

SEA	Single European Act
SIDA	Swedish International Development Agency
TDCA	Trade Cooperation and Development Agreement
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UN	United Nations
UNCRPD	Convention on the Rights of Persons with Disabilities
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNMIBH	United Nations peacekeeping mission in Bosnia and Herzegovina
UNSC	United Nations Security Council
UPR	Universal Periodic Review
US	United States
USAID	United States Agency for International Development
USITC	United States International Trade Commission
USSD	United States Department of State
USTR	United States Trade Representative
WTO	World Trade Organization

## Executive Summary

This study provides a comparative analysis of how human rights are integrated and mainstreamed into EU and US external action. It examines practices, opportunities and challenges across a broad range of EU and US external policies, including trade, development cooperation, democracy promotion, the role of special representatives/special envoys, as well as the participation of the EU and the US in the Human Rights Council (HRC) and the International Criminal Court (ICC). By means of a comparative analysis in each of these areas, the study points to major similarities and differences between the EU and the US, highlights best practices and challenges on both sides, and points out avenues for future cooperation. The study concludes with a set of tailor-made recommendations which aim to foster the continuous effort of integrating and mainstreaming human rights into all aspects of EU external action.

Both the EU and the US aim to promote human rights throughout their external action. While the Lisbon Treaty has enshrined human rights as a guiding principle and objective of the Union's external action, in the US the basis for human rights in foreign policy lies in federal legislation. At the same time, both in the EU and the US a multiplicity of institutional actors have an impact on the promotion of human rights. In the US the Presidential office can be identified as the centre of gravity of human rights promotion through foreign policy, whereas in the EU the High Representative/Vice President of the Commission and the EEAS assume the role of mainstreaming human rights coherently into various fields of EU external action. With regards to the instruments of external action, the study shows several similar and distinctive tools to promote human rights. The impact of these instruments is studied in greater detail in each of the case studies:

- In EU **trade** policy, the enforcement of human rights provisions tends to be rather weak, even in those cases where complaint mechanisms are available; at the same time the US can be seen as taking a more proactive approach.
- In **development cooperation** policies, human rights and the broader question of democratization have become closely intertwined with development assistance frameworks both in the EU and the US. The study finds that both actors see development assistance as a tool to incentivize partner countries' compliance with human rights obligations by suspending or increasing development aid.
- With regard to **Special Representatives** in the EU and **Special Envoys** in the US, it was noted that the EU has opted for an explicit and transversal Special Representative, while the US does not seem to approach human rights from a cross-cutting perspective when mandating Special Envoys; rather, it focuses on sub-thematic priorities within the broader realm of human rights.
- With regard to **democracy promotion and assistance**, the EU and the US make considerable investments in both top-down democratic reforms and democratic actors at the 'grassroots' level. The US is regarded as being less risk-averse in its support for democratic reformers, although recent developments indicate a renewed engagement by the EU.
- At the **HRC**, EU and US priorities show a significant amount of overlap, both in terms of institutional, country-specific and thematic issues, with a few notable exceptions. Due to its political and diplomatic clout, the US is perceived as a strong negotiator at the HRC, while the EU's institutional architecture is identified as one of the root causes for its often inflexible and less forceful positions, as well as its aim to reach consensus.
- EU and US policies towards the **ICC** and international criminal justice reveals a multitude of measures, from direct financial support for the Court by the EU, to military assistance for the

capture of ICC fugitives by the US. It is argued that enhanced cooperation between the EU and US would ensure greater consistency and efficiency.

Given the detailed findings in each of the above mentioned topical areas, the study concludes with three sets of recommendations concerning (i) EU inter-institutional co-operation on human rights, (ii) the strengthening of EU human rights policies and (iii) EU-US collaboration on human rights. They address in particular the need for the European External Action Service to take up its role as the 'guardian of consistency', the importance of an effectively implemented Strategic Framework/Action Plan and a comprehensive foreign policy strategy on human rights, which ensures greater cohesion between the various tools and instruments at hand, as well as the value of greater EU and US cooperation in order to coordinate more effectively their external policies in the field of human rights at various levels of decision-making. Given the overlap and similarities between the EU's and the US's strategies and tools for advancing human rights through their external action, much greater synergies and collaboration could be exploited as is currently the case.

## 1. INTRODUCTION

Both the European Union (EU) and the United States (US) emphasise the centrality of human rights in their domestic and external policies. Despite their common attachment to human rights and a potential affinity of the transatlantic approaches to human rights issues in external policies, the EU and the US differ in their approaches to human rights promotion. Indeed, on occasions these approaches vary pointedly. The purpose of the present study, commissioned by the European Parliament's (EP) Subcommittee on Human Rights (DROI), is to provide a **comparative analysis on how human rights are practically integrated and mainstreamed** into the external policies of the EU and the US, using selected case studies to contextualise the argument. To this end the study will not only look into the general making and promotion of human rights policies in the broader **context of the EU's and the US's external policies**, but also inquire into the efforts of the EU and the US in mainstreaming human rights policies across external policy fields.<sup>1</sup>

Drawing on the categorical division of human rights into 'three generations' as originally put forward by Karel Vasak,<sup>2</sup> this study will approach human rights as consisting of **civil and political rights** ('first-generation human rights'); **economic, social and cultural rights** ('second-generation human rights'); and **collective rights** which transcend the former two categories ('third-generation human rights').<sup>3</sup> Furthermore, following the 1993 Vienna Declaration and Programme of Action on Human Rights, which reaffirmed that '[a]ll human rights are universal, indivisible and interdependent and interrelated',<sup>4</sup> this study will approach human rights in a transversal manner and use the different generations of human rights interchangeably. With regard to the analysis of EU human rights policies in particular, such an approach also implies that the prevailing distinction between 'internal' fundamental rights and 'external' human rights will not be taken up here, as has been done elsewhere<sup>5</sup>

**Research questions** The present study has been commissioned by the European Parliament. Its aim is to identify similarities and differences in the EU's and the US's human rights policies in their respective external action. Moreover, it looks into possible ways of cooperation between the EU and the US in human rights policies. The following research **questions** guide the study in view of the above mentioned objectives:

- How have the **integration of human rights and the corresponding legal bases** into external relations evolved in the EU and US respectively?
- What **actors** are prominently **involved in integrating human rights** into external policies? Who is the agenda-setter for human rights priorities in external policies?

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<sup>1</sup> This study partially benefited from research carried out in the context of the European Commission's Seventh Framework Programme (FP7/2007-2013) under the grant agreement on 'Fostering Human Rights Among European policies', or 'FRAME' (project n° 320000). For more information about FRAME, please visit <http://www.fp7-frame.eu>.

<sup>2</sup> Vasak, K., 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', *UNESCO Courier*, 1977.

<sup>3</sup> For a more detailed discussion of the categorization of human rights into 'three generations', see Alston, P., 'A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?', *Netherlands International Law Review*, Vol. 29(3), 1982, p. 307-322; Marks, S., 'Emerging Human Rights: A New Generation for the 1980s?', *Rutgers Law Review*, 33, 1980, p. 435-453.

<sup>4</sup> Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25.6.1993, §1(5). Available online <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>, accessed on 28.8.2014.

<sup>5</sup> Wouters, J. et al, 'Enhancing Cooperation between the European Parliament and EU National Parliaments on EU Human Rights Policy', *Directorate-General for External Policies of the Union*, EXPO/B/DROI/2013/20, March 2014.

- How **do the EU and US mainstream human rights** in their respective external action policies? What policy instruments and tools are at their disposal? How are human rights priorities developed?
- How are **human rights priorities** represented/projected externally? Who are the main actors involved?
- What are the **policy priorities regarding the enforcement of human rights** policies? How and why do the EU and US differ from each other?

In order to answer the research questions, the study will present the subsequent evolution of policy approaches to human rights focussing on the legal basis of the current respective policies in the EU and US; the **similarities and differences of the institutional set-up** of the EU and US external policies and their potential impact on human rights, and the **policy of mainstreaming human rights**, i.e. the integration of human rights norms, principles and standards throughout the various strands of external action. To structure the analysis of external action/foreign policy, three areas are identified; central decision making on foreign policy (section 3); trade policies (section 4) and development cooperation policies (section 5). To examine in further depth the differences and similarities between EU and US approaches, four case studies are included reflecting four specific policy areas: the use of Special Representatives and Special Envoys (section 6.1.), the promotion of democracy in third countries (section 6.2.), policies and positions towards the UN Human Rights Council (HRC) (section 6.3.), and policies and positions towards the International Criminal Court (ICC) (section 6.4.).

**Methodology** The comparative analysis of human rights policies in the EU and the US and mainstreaming of human rights relies primarily on the following sources and methods of data collection: primary sources: analyses of official EU, US, United Nations (UN) and ICC documents, including legislative acts, policy documents and working documents; secondary sources: review of literature on human rights policy in the external relations of the EU and the US, including scholarly research, think tank reports and civil society assessments. More than 20 semi-structured interviews with EU and US officials in respectively the European Commission, the EEAS, USAID etc. as well as civil society actors, conducted in Brussels and in Washington, D.C. Thirteen interviews were conducted with officials in the EEAS and the European Commission in Brussels as well as 1 interview with an EU official in Washington, D.C. Six further interviews were conducted with official experts of USAID and the National Endowment for Democracy in Washington, D.C. In addition, interviews were conducted with civil society organizations in Brussels. In the case of civil society actors, interview partners were selected based on their access to the respective human policy-making in the EU and the US. To ensure objectivity of this assessment and to foster an open dialogue with the interview partners, all names and affiliations have been kept confidential.

A comparison of EU and US human rights approaches in external relations poses considerable challenges due to the distinct institutional frameworks and competences of both actors.<sup>6</sup> The characteristics of the EU as a union of 28 Member States necessitated certain methodological choices to ensure comparability with the US. It is important to underline that the dynamics of interaction between the EU institutions and the EU Member States is crucial in shaping EU policy, a dimension which - given the scope of this study - cannot be fully explored for every instrument, policy or measure presented in this study. None the less, the matter of EU-wide coherence, consistency, and coordination is highlighted throughout this study, in particular in the various recommendations. The comparison focuses primarily

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<sup>6</sup> For a discussion of the distinct nature of the EU and the US institutional frameworks in external action, see De Baere, G., and Gutman, K., 'Federalism and International Relations in the European Union and the United States: A Comparative Outlook', *Modern Studies in European Law*, Vol. 33, 2012, p. 131-166.



on the similarities and differences of the EU and the US in terms of the development of their institutional-set up in terms of executive and legislative politics (and its impact on human rights policies), the comparison of policies and human rights mainstreaming (with a focus on foreign policy, development cooperation and trade) and a selection of specific areas (the four case studies).

## 2. 'MAINSTREAMING' HUMAN RIGHTS

The **concept of 'mainstreaming' human rights** can be defined as 'a strategic process of deliberately incorporating human rights considerations into processes or organisations which are not explicitly mandated to deal with human rights'.<sup>7</sup> Alternatively, it has been described as the '[...] reorganization, improvement, development and evaluation of policy processes, so that a human rights perspective is incorporated in all policies at all levels and at all stages'.<sup>8</sup> The concept emerged prominently on the policy agenda of the UN as part of the 1997 reform programme which called for a full integration of human rights into the broad range of UN activities.<sup>9</sup> Since then, the mainstreaming of human rights has become a much referred to concept within and outside the UN architecture.

Generally speaking, a mainstreaming policy is said to be instrumental for:<sup>10</sup>

- achieving **greater coherence** (and consistency) within a given policy domain wherein several actors operate, as is the case of external action and foreign policy;
- improving the **involvement of civil society**, and enhancing the transparency and accountability of policy making;
- improving **coordination between different services**, and fostering transformative policies as it aims to tackle the underlying causes of problems rather than their symptoms.

However, mainstreaming can vary widely as institutions and organizations **operationalize 'human rights mainstreaming'** according to their role and mandate:

- **Internal mainstreaming:** ensuring organizational capacity and coherence through, *inter alia*, establishing standard procedures, investing in staff training, fostering an internal 'human rights culture', and other related measures.
- Mainstreaming human rights in **bilateral relations and policies:** ensuring human rights are embedded in bilateral dialogues, carrying out country level reporting and elaborating human rights country strategies, etc.
- Mainstreaming at the **multilateral level:** consistently addressing human rights in international fora and within multilateral organizations, engaging with the UN human rights architecture, etc.

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<sup>7</sup> Benoit-Rohmer, F. et al., 'Human Rights Mainstreaming in EU's External Relations', *European Parliament, Directorate-General for External Policies of the Union, Directorate B, Policy Department*, EXPO/B/DROI/2008/66, September 2009, p. 15.

<sup>8</sup> McCrudden, C., 'Mainstreaming Human Rights', in Harvey, C. (ed.), *Human Rights in the Community: Rights as Agents for Change*, Hart Publishing, Oxford, 2005, p. 9.

<sup>9</sup> Report of the UN Secretary-General to the General Assembly, 'Renewing the United Nations: A Programme for Reform', A/51/950, 14.7.1997, para.79. Available online:

[http://www.undg.org/docs/1400/Renewing\\_the\\_UN\\_A\\_Programme\\_for\\_Reform\\_A51\\_950.pdf](http://www.undg.org/docs/1400/Renewing_the_UN_A_Programme_for_Reform_A51_950.pdf), accessed on 28.8.2014.

<sup>10</sup> For an overview of the policy benefits of human rights mainstreaming, see De Schutter, O., 'The New Architecture of Fundamental Rights Policy in the EU', in Benedek, W., Benoit-Rohmer, F., Wolfram, K., and Nowak, M. (eds.), *European Yearbook on Human Rights 2011*, Vienna 2011, p. 131-133.

### 3. FOREIGN POLICY AND HUMAN RIGHTS

Although human rights are ‘commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being’,<sup>11</sup> EU and US actors have come to a markedly different understanding of what these rights precisely entail. Indeed, whereas the EU delineates its human rights policy as encompassing ‘civil, political, economic, social and cultural rights [...], the rights of women, of children, of those persons belonging to minorities, and of displaced persons’<sup>12</sup>, the US seems to emphasise a slightly different brand of human rights issues, thereby listing anti-Semitism; business and human rights; civil society; democracy; disability rights; freedom of expression; internet freedom; human rights; labour rights; Leahy vetting of military assistance; lesbian, gay, bisexual and transgender (LGBT) rights; religious freedom and the Universal Periodic Review (UPR).<sup>13</sup>

This section focuses on the foreign policy of the EU and the US, especially in view of human rights. It will systematically analyse the development of human rights in foreign policy, the main actors, objectives and instruments regarding the mainstreaming of human rights into EU and US foreign policy.

#### 3.1 Human rights in the European Union’s foreign policy

With the entry into force of the Lisbon Treaty, the EU is now considered to have reached the ‘high point of its engagement with human rights’,<sup>14</sup> as it codified its commitment to put human rights, democracy, and the rule of law at the heart of its internal and external policies. Pursuant to **Article 2 of the Treaty on European Union (TEU)**, the EU is ‘founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.<sup>15</sup> With regard to the Union’s external action in particular, **Article 3(5)** obliges the EU to uphold and promote these values ‘[i]n its relations with the wider world’ and to contribute to the protection of human rights. **Article 21(1) TEU** provides that ‘the universality and indivisibility of human rights’ shall be one of the principles and objectives to guide ‘[t]he Union’s action on the international scene’ whereas **Article 21(3) TEU** adds that these principles must be respected and these objectives pursued ‘in the development and implementation of the different areas of the Union’s external action [...] and of the external aspects of its other policies’. As human rights have become one of the fundamental principles and objectives for the EU’s policies in their entirety, the EU is also bound to ‘pursue common policies and actions, and [...] work for a high degree of cooperation in all fields of international relations, in order to [...] consolidate and support democracy, the rule of law, human rights and the principles of international law’ (**Article 21(2)(b) TEU**). Although Article 2 TEU unequivocally declares human rights to be one of the founding values of the EU, an analysis of the Union’s legal evolution reveals that, although preliminary discussions on their integration into the founding 1957 Rome Treaty were already prevalent,<sup>16</sup> human rights have only gradually emerged in EU law through the jurisprudence of the European Court of Justice (ECJ). The decisions in the **Stauder**

<sup>11</sup> Sepulveda, M. et al, *Human Rights Reference Handbook*, University for Peace, 2004, p. 3.

<sup>12</sup> Mission statement of the ‘EU and human rights’ on the homepage of the European External Action Service. Available online: [http://eeas.europa.eu/human\\_rights/index\\_en.htm](http://eeas.europa.eu/human_rights/index_en.htm), accessed on 28.8.2014.

<sup>13</sup> List of human rights issues provided by the designated human rights website of the US Government. Available online: <http://www.humanrights.gov/issues/>, accessed on 28.8.2014.

<sup>14</sup> de Búrca, G., ‘The Road not Taken: The European Union as a Global Human Rights Actor’, *American Journal of International Law*, No 105, 2011, p. 649.

<sup>15</sup> Article 2 TEU.

<sup>16</sup> de Búrca, *supra*, n. 14

(1969), *Internationale Handelsgesellschaft* (1970), *Nold* (1974), and *Hauer* (1979) cases can be seen as milestones in this regard.<sup>17</sup> This observation has led some scholars to point out that the EU has been evoking a ‘fundamental rights myth’<sup>18</sup> throughout its internal and external policies. In fact, as will be elaborated on below, the EU not only shares its claim to this normative disposition with the US, but both actors have also only started to effectively consolidate their policy-orientation towards human rights from the 1970s onwards.

### 3.2 Human rights in the United States’ foreign policy

In a rhetoric similar to the EU’s evocation of human rights as a foundational value, the US claims that ‘the protection of fundamental human rights was a foundation stone in the establishment of the United States over 200 years ago’, and that ‘since then, a central goal of U.S. foreign policy has been the promotion of respect for human rights’.<sup>19</sup> This ‘**foundation stone**’,<sup>20</sup> as the prominent US scholar Louis Henkin pointed out, is embodied by the US Bill of Rights which was added to the US Constitution in 1791.<sup>21</sup> Even so, the legal framework in the US differs from the EU in that the basis for human rights in foreign policy lies in various acts of Congressional legislation, rather than in the Constitution itself. Indeed, the Constitution, while recognizing a variety of ‘**individual’ human rights** and determining the allocation of competences with regard to foreign policy decision-making, is silent on the objectives of US external action. This ought to be understood in light of the ‘constitutional limitation’<sup>22</sup> which was placed on the federal government from its very inception, following the ‘epic struggle’ between Thomas Jefferson and Alexander Hamilton.<sup>23</sup> With the ideological triumph of limited government to protect basic individual rights in the Lockean definition,<sup>24</sup> the founding fathers initially ‘did not see it necessary to include rights that they did not imagine could be invaded by that new government of limited powers’.<sup>25</sup> In addition, given that the Bill of Rights had to be introduced by way of constitutional amendment, this process is said to have discouraged a comprehensive reflection on what those rights precisely ought to entail.<sup>26</sup> This historical development has generated a specific political culture with strong implications for US policy-making. Or, to put it in the words of one US official, ‘we very much believe in the idea of the self-made man, in picking yourself up by your bootstraps’.<sup>27</sup>

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<sup>17</sup> See, for an overview, De Witte, B., ‘The Past and Future Role of the European Court of Justice in the Protection of Human Rights’, in Alston, P., Bustelo, M. and Heenan, J. (eds.), *The EU and Human Rights*, Oxford University Press, Oxford, 1999, p. 859; Jacobs, F., ‘Human Rights in the European Union: The Role of the Court of Justice’, *European Law Review*, Vol. 26, 2001, p. 331; Tizzano, A., ‘The Role of the ECJ in the Protection of Fundamental Rights’, in Arnall, A., Eeckhout, P. and Tridimas, T. (eds.), *Continuity and change in EU law : essays in honour of Sir Francis Jacobs*, Oxford University Press, Oxford, 2008, p. 125.

<sup>18</sup> Smismans, S., ‘The European Union’s Fundamental Rights Myth’, *Journal of Common Market Studies*, Vol. 48(1), 2010, p. 45.

<sup>19</sup> Mission Statement of the US State Department’s Bureau of Democracy, Human Rights and Labor. Available online: <http://www.state.gov/j/drl/hr/>, accessed on 28.8.2014.

<sup>20</sup> Henkin, L., *Constitutionalism, Democracy and Foreign Affairs*, Columbia University Press, New York, 1990, p. 94.

<sup>21</sup> The US Bill of Rights consists of the first 10 amendments (I-X) of the US Constitution, covering various rights such as ‘freedom of speech, or of the press’, ‘the right of the people peaceably to assemble’, the right to freedom of religion, the right ‘to keep and bear arms’, ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures’, ‘the right to a speedy and public trial’, ‘right of trial by jury’, etc.

<sup>22</sup> Henkin, *supra*, n. 20, p. 93.

<sup>23</sup> Simon, J., *What Kind of Nation: Thomas Jefferson, John Marshall, and the Epic Struggle to Create a United States*, Simon & Schuster, New York, 2003.

<sup>24</sup> Simmons, A., *The Lockean Theory of Rights*, Princeton University Press, 1994.

<sup>25</sup> Henkin, *supra*, n. 20, p. 93.

<sup>26</sup> *Ibid.*

<sup>27</sup> Interview with US official, Washington D.C., 13.3.2014.

### 3.3 EU, US and international agreements

Despite their commitment to human rights and their promotion, neither the EU nor the US have signed and ratified several of the major international human rights treaties, but for very different reasons.

The EU was initially hindered from concluding international agreements due to its lack of legal personality. While the pre-Lisbon European Treaty framework only provided for legal personality of the Communities, not of the Union,<sup>28</sup> **Article 47 TEU** now explicitly states that '[t]he Union shall have legal personality'.<sup>29</sup> Nevertheless, the EU can still only become a party to those international human rights treaties that contain a so called 'regional (economic) integration organization' (REIO/RIO) clause. A prominent example is the 2006 Convention on the Rights of Persons with Disabilities (UNCRPD), which provides in Article 42 that it 'shall be open for signature by all States and by regional integration organizations'. It was signed by the EU on 30 March 2007. After the Council adopted the Decision to conclude the UNCRPD on 26 November 2009,<sup>30</sup> the treaty entered into force for the EU on 22 January 2011, thereby binding the EU to the extent of its competences as enumerated in an Annex to the Council Decision. This is the first time that the EU has become a party to an international human rights convention.<sup>31</sup> As has been noted elsewhere, the **EU's ratification of the UNCRPD has set an interesting precedent** because of the Convention's 'strikingly experimentalist architecture'<sup>32</sup> and the European Commission's strengthened role as the guardian of the Convention. Indeed, pursuant to Article 3 of the Council Decision, '[w]ith respect to matters falling within the Community's competence and without prejudice to the respective competences of the Member States, the Commission shall be a focal point for matters relating to the implementation of the UN Convention in accordance with Article 33.1 of the UN Convention'.

Furthermore, the **EU is in the process of acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms**, in line with Article 6(2) TEU. The way for EU accession was already paved by the entry into force of Protocol No. 14 to the ECHR which added in a new Article 59(2) that '[t]he European Union may accede to this Convention'. The negotiations on the Accession Agreement were launched in July 2010 and finalized in April 2013.<sup>33</sup> Due to a number of yet unsolved legal issues, however, the conclusion of the agreement may still require some additional time.<sup>34</sup> The eventual accession of the EU to the ECHR will not only have significant symbolic and political value<sup>35</sup> but

<sup>28</sup> Article 281 TEC.

<sup>29</sup> Some scholars have asserted that the EU already enjoyed de facto legal personality before the entry into force of the Lisbon Treaty, notwithstanding the silence of the Treaties. See, for instance, Laatikainen, K.V., 'Multilateral Leadership at the UN after the Lisbon Treaty', *European Foreign Affairs Review*, Vol. 14, 2010, p. 475; Wouters, J., Coppens, D., and De Meester, B., 'The European Union's External Relations after Lisbon', in Griller, S. and Ziller, J. (eds.), *The Lisbon Treaty. European Constitutionalism Without a Constitutional Treaty?*, Springer, 2008, Vienna-New York, p. 143, at 147.

<sup>30</sup> EU Council, 'Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities', OJ L 23/35, 27.1.2010.

<sup>31</sup> For the latest progress report on the implementation of the UNCRPD see European Commission, Commission Staff Working Document, 'Report on the implementation of the UN Convention on the Rights of Persons with Disabilities (CRPD) by the European Union', SWD(2014) 182 final, Brussels, 5.6.2014.

<sup>32</sup> de Búrca, G., 'The EU in the Negotiation of the UN Disability Convention', *European Law Review*, Vol. 35(2), 2010, p. 1.

<sup>33</sup> Odermatt, J., 'The EU's Accession to the European Convention on Human Rights: An International Law Perspective', *New York University Journal of International Law and Politics*, Vol. 46, forthcoming.

<sup>34</sup> Gragl, P., 'A giant leap for European human rights? The final agreement on the European Union's accession to the European Convention on Human Rights', *Common Market Law Review*, Vol. 51, 2014, p. 16.

<sup>35</sup> Odermatt, *supra*, n. 31.

also legally strengthen the human rights system in the Union by subjecting the EU to the jurisdiction of an external international human rights court.<sup>36</sup>

The patchy **ratification record of the US**, in contrast, is not only due to legal obstacles but also to a lack of political consensus. As one interviewee confirmed, the US reluctance to ratify certain international human rights treaties is 'more a political argument than a legal one'.<sup>37</sup> At present, the US has ratified among others the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), the four Geneva Conventions and the major terrorism conventions, though often entering extensive reservations, understandings, and declarations (RUDs). However, the US has not signed or ratified a large number of other, (quasi-) universal treaties. The most frequently cited example is the **Convention on the Rights of the Child** which the US signed in 1995 but has not yet ratified due to concerns that it might restrict parental freedom of child education, including the freedom to resort to domestic corporal punishment and the freedom not to attend classes on sexual education.<sup>38</sup> The US thereby finds itself in the company of only two other countries who have not ratified the Convention – Somalia and South Sudan.<sup>39</sup> A similar picture emerges with regard to the Convention on the Elimination of Discrimination Against Women (CEDAW), the almost universally ratified backbone of international women's rights protection. Though signed by President Carter and supported by Presidents Clinton, Bush and Obama, it has not yet been ratified due to concerns about possible implications for US sovereignty, laws, policies and culture.<sup>40</sup> Other treaties which have not been ratified or acceded to by the US include the International Covenant on Economic, Social and Cultural Rights (ICESCR), highlighting the fact that the enshrined rights are not recognized as human rights by the US, the Additional Protocols to the Geneva Conventions and the Rome Statute establishing the ICC (see *infra*, section 6.4). This **reluctance to endorse the most widely accepted international human rights instruments** while simultaneously claiming the role of a champion of human rights, has given rise to the criticism of hypocrisy.<sup>41</sup>

### 3.4 Main actors in EU and US foreign policy

While in the EU distribution of competences between the EU and Member States and across EU external action policies contributes to a decentralized and multi-actor character of the EU's foreign policy system, the US has evolved over time towards an increasingly centralized system of decision making.<sup>42</sup> While the Constitution of the United States foresees strong federal competences and powers of Congress, it has been the President whose institution has acquired most powers for the conduct of foreign affairs over time.<sup>43</sup>

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<sup>36</sup> Gragl, *supra*, n. 34, p.16.

<sup>37</sup> Interview with US official, Washington, D.C., 13.3.2014.

<sup>38</sup> McBain, S., 'Why is the US so reluctant to sign human rights treaties?', *New Statesman*, 7.10.2013. Available online: <http://www.newstatesman.com/north-america/2013/10/why-us-so-reluctant-sign-human-rights-treaties>, accessed on 28.8.2014.

<sup>39</sup> The Legislative Assembly of South Sudan passed a bill on the ratification of the Convention in late November 2013. At the time of writing, it awaits to be signed in order to enter into force.

<sup>40</sup> Blanchfield, L., 'The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate', Congressional Research Service, CRS Report for Congress, June 2011.

<sup>41</sup> Bradley, C.A. 'The United States and Human Rights Treaties: Race Relations, the Cold War, and Constitutionalism', *Chinese Journal of International Law*, Vol. 9, 2010, p. 321.

<sup>42</sup> Smith, R.A., *The American Anomaly – US Politics and Government in Comparative Perspective*, Routledge, London, 2014.

<sup>43</sup> Kegley, C. W, and Wittkopf, E.R., *American Foreign Policy: Pattern and Process*, St. Martin's Press, New York, 1991, p. 420.

### 3.4.1 European Union

**European Council and Council of Ministers** In the **field of EU foreign policy and human rights**, the **European Council** has a decisive role to play. In fact, as regards Common Foreign and Security Policy (CFSP) the TEU foresees in its Article 26: 'The European Council shall identify the Union's strategic interests, determine the objectives and define general guidelines for the common foreign and security policy, including for matters with defence implications. It shall adopt the necessary decisions.' In this regard all major objectives and general guidelines for CFSP and Common Security and Defence Policy (CSDP) are adopted in the European Council. In 2003, the European Council adopted the **European Security Strategy (ESS)**, which to this day serves as a framework for EU action in the field of CFSP/CSDP and which contains a variety of guidelines regarding human rights and democracy. At the same time, the Council of Ministers' role in CFSP/CSDP is clearly defined in Article 26 TEU, too: 'The Council shall frame the common foreign and security policy and take the decisions necessary for defining and implementing it on the basis of the general guidelines and strategic lines defined by the European Council.'

**High Representative of the Union for Foreign Affairs and Security Policy/Vice-President of the European Commission (HR/VP) and Special Representative** The HR/VP is key to the coordination efforts of the EU to create one EU external action based on several types of external policies. In this regard, the role of the **HR/VP is essential for the mainstreaming of human rights**. THE HR/VP's joint communication with the Commission 'Human Rights and Democracy at the Heart of EU External Action'<sup>44</sup> and the proposal of the HR/VP to adopt the 'Strategic Framework and Action Plan on Human Rights and Democracy' (see *infra*, section 3.5.1) can be seen as a major contribution to the field. Human rights being one of the overarching objectives of the EU in external action (see Articles 3(5) and 21 TEU *supra*), the HR/VP has to keep a critical eye on the implementation of the EU's human rights policy in CFSP/CSDP.

**European External Action Service (EEAS) and Commission DGs** The EEAS assists the HR/VP in the conduct of foreign policy and human rights policies. Conversely, in the EEAS there is a department for human rights and a department for democracy. Each department is composed of three divisions – one on democracy, two on human rights. As one EU official explained,<sup>45</sup> 'the **two human rights divisions** act as if they were both part of one whole. The divisions share the responsibility, both thematically and for the country-based work'. The reason why there are nonetheless two divisions working on human rights within the EEAS, is purely managerial. As another EU official added, 'both divisions do the same work: thematic issues, bilateral relationships and human rights mechanisms.'<sup>46</sup> Moreover, **human rights focal points** in all geographic directorates are also in charge of mainstreaming human rights. Finally, there are focal points in all EU Delegations around the world, which are equally tasked with mainstreaming human rights, both in the political and in the operational section.

The **relationship between the EEAS and the Commission's DGs** is often seen as crucial for the EEAS' transversal overview of human rights coordination on the field. Because of their dossier-specific nature, some DGs are seen as more 'natural' sparring partners in the realm of human rights policies, such as DG

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<sup>44</sup> European Commission and the High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, 'Human Rights And Democracy At The Heart Of EU External Action – Towards A More Effective Approach', COM(2011) 886 final, Brussels, 12.12.2011.

<sup>45</sup> Interview with EU official, Brussels, 28.2.2014.

<sup>46</sup> Interview with EU official, Brussels, 8.4.2014.

DEVCO.<sup>47</sup> As clarified in the Council Decision on the organization and functioning of the EEAS, the latter indeed coordinates the ‘programming’ part of policy-making with DG DEVCO, while DG DEVCO is in charge of the effective implementation of policy-making in the area of development cooperation.<sup>48</sup> Moreover, the EEAS and DG DEVCO are key actors in the provision of **democracy assistance** to third countries (see section 6.2), and thus collaborate intensively on the issue of human rights and democracy promotion. Similarly, the EEAS and DG Enlargement jointly engage into the issue of human rights promotion in countries that are yet in the stage of pre-accession to the EU. With other Commission DGs, such as DG Justice and Home Affairs, an ‘increased distance’ has been noted by some EU officials, as ‘external aspects are not [the DG’s] priority’ and the internal decision-making structures are seen as ‘completely different’ than the ones of the EEAS.<sup>49</sup> However, when it comes to consultations and negotiations with the US on a wide range of human rights issues, our respondent added, it is the EEAS that coordinates with DG Home and DG Justice, rather than with DG DEVCO.

While it was reported that the EEAS has not been the main driver of human rights mainstreaming in external action – with DG DEVCO perceived as being more active on than the EEAS on the matter<sup>50</sup> – it has nevertheless been lauded for its strategic guidance in developing a ‘**comprehensive approach**’ towards EU external action.<sup>51</sup> This comprehensive approach (see *infra*, section 3.6.1), in turn, also meant that the principles of the landmark EU Strategic Framework on Human Rights (see *infra*, section 3.5.1), were reassembled and reaffirmed into one policy approach, thereby covering the role of all EU actors and Member States in arriving at a more coherent external action.

**Working Group COHOM** Another key actor in the field is the Council **Working Group COHOM**.<sup>52</sup> As one official mentioned, COHOM’s mandate has clearly widened with regard to human rights: while in the past human rights was in the first place associated with CFSP, COHOM is now dealing with human rights in other areas of EU external policies too. As one EU official explained: ‘In COHOM, we were concerned with CFSP most of the time in the past. In 2003 this changed and the work of COHOM was extended (by means of a new mandate) to look into the mainstreaming of human rights in new areas and across policy areas. For example, COHOM started dealing with CSDP and the mainstreaming of human rights in that area. In fact, COHOM is used to trigger discourses on human rights by bringing together various actors. For example, we bring together actors in the Commission, like DG Trade, but also CODEV.’<sup>53</sup>

**European Parliament** The European Parliament has often been portrayed as a champion of human rights and democracy promotion.<sup>54</sup> This can be seen in the Parliament’s attempts to **promote human rights and democracy via its parliamentary delegations**, contacts with civil society actors and parliamentarians in third countries. Between 2007 and 2011 the European Parliament adopted no less

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<sup>47</sup> For a recent analysis of the working arrangements between EEAS and DG DEVCO, see Tannous, I., ‘The Programming of EU’s External Assistance and Development Aid and the Fragile Balance of Power between EEAS and DG DEVCO’, *European Foreign Affairs Review*, Vol. 18(3), 2013, p. 329–354.

<sup>48</sup> EU Council, ‘Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service’, OJ L 201/30, 3.8.2010, Article 9(4).

<sup>49</sup> Interview with EU official, Brussels, 8.4. 2014.

<sup>50</sup> Interview with EU official, Brussels, 16.4.2014.

<sup>51</sup> European Commission and High Representative of the European Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament and the Council, ‘The EU’s comprehensive approach to external conflict and crises’, JOIN(2013) 30 final, Brussels, 11.12.2013.

<sup>52</sup> See the 1987 Annex I to the mandate establishing COHOM, the Annex II of 1999 and the Annex of 2013. Available online: [http://www.consilium.europa.eu/uedocs/cmsUpload/COHOM\\_mandates.pdf](http://www.consilium.europa.eu/uedocs/cmsUpload/COHOM_mandates.pdf), accessed on 28.8.2014.

<sup>53</sup> Interview with EU official, Brussels, 16.4.2014.

<sup>54</sup> Di Viola, D., *European Foreign Policy and the European Parliament in the 1990s: An Investigation into the Role and Voting Behaviour of the European Parliament’s Political Groups*, Ashgate, Brookfield, 2000.



than 237 resolutions on human rights issues<sup>55</sup> **The EP has also shown a willingness to take urgency measures** in condemning human rights violations around the globe, e.g. in the case of death penalty imposition. In addition, the EP serves as a forum for human rights in scrutinizing EU external action and initiating public debates. This is evident in the EP's hearings by the DROI, INTA, DEVE or AFET Committee, including regular contacts with the Fundamental Rights Agency in the DROI.<sup>56</sup> Further activity by the EP includes the Annual Reports which it completes every year on Human Rights throughout the World.<sup>57</sup> Moreover, the Sakharov Prize for the Freedom of Thought, which was established in 1988 by the EP and which is annually awarded 'to honour exceptional individuals who combat intolerance, fanaticism and oppression' contributes further to its efforts.<sup>58</sup> Around the laureates, a network is operationalized by the EP; since the inaugural meeting in 2011, the network was able to address human rights violations worldwide.

The EP is also able to advocate human rights in its positions towards EU external action, having the right to **consent to most of the EU's international** agreements since the Lisbon Treaty. In the past, for example, the EU has refused to ratify Partnership and Cooperation Agreements with Kazakhstan and Uzbekistan,<sup>59</sup> and more recently, the EP has highlighted human rights issues by its refusal to give its consent to treaties such as the SWIFT agreement or ACTA.<sup>60</sup> The EP has further influence in its role of overseeing the EU budget<sup>61</sup> and is able to directly impact upon human rights promotion, through its decisions upon the scope of relevant financial instruments.<sup>62</sup> For example, under the EP's initiative the **'European Initiative for Democracy and Human Rights'** was introduced in 1994. Building on EP support, this budget heading evolved into a full-fledged financial instrument and its financial envelope has expanded gradually over the past two decades.<sup>63</sup> In addition, parliamentary diplomacy has also become an arena of exchanges on human rights and democratisation.<sup>64</sup> While ad-hoc missions of the EP to third countries remain difficult to implement due to internal rules, there are standing EP parliamentary delegations and cooperation with other third-country parliaments, as well as joint-parliamentary assemblies, which have, for example, been established with ACP countries and in the context of the Eastern Partnership.<sup>65</sup> In the context of the Eastern Partnership, it has been argued that the EP has been able to diffuse norms, such as human rights, and engage with Eastern Partnership parliaments.<sup>66</sup> Moreover, the participation of MEPs in electoral observatory missions is a continuing tool in the field of human rights and democracy promotion. In the context of visits to third countries, the EP delegations and missions are often in contact not only with other parliamentarians, but also with civil

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<sup>55</sup> Youngs, R. et al, 'The Impact of the Resolutions and Other Activities of the European Parliament in the field of Human Rights outside the EU', European Parliament, *Directorate-General for External Policies of the Union*, EXPO/B/DROI/2011/17, December 2012, p. 16.

<sup>56</sup> Ibid.

<sup>57</sup> For the latest available report see European Parliament, 'Report on the Annual Report on Human Rights in the World 2012 and the European Union's policy on the matter', 2013/2152(INI), A7-0418/2013, 29.11.2013.

<sup>58</sup> See the homepage of the European Parliament on the 'Sakharov Prize'. Available online: <http://www.europarl.europa.eu/aboutparliament/en/00f3dd2249/Sakharov-Prize-for-Freedom-of-Thought.html>, accessed on 28.8.2014.

<sup>59</sup> Keukeleire, S. and Delreux, T., *The Foreign Policy of the European Union*, Palgrave Macmillan, Basingstoke, 2014, p. 88.

<sup>60</sup> Ibid.

<sup>61</sup> Raube, K. 'The Role of Parliaments in EU Foreign Policy', in Wilga, M. and Karolewski, I.P. (eds), *New Approaches to EU Foreign Policy*, Routledge, Oxford, 2014 (forthcoming).

<sup>62</sup> Keukeleire and Delreux, *supra*, n. 59, p. 88.

<sup>63</sup> Ibid.

<sup>64</sup> Youngs, *supra*, n. 55, p. 17.

<sup>65</sup> Delputte, S., 'The ACP-EU joint parliamentary assembly seen by its members: empowering the voice of people's representatives?', *European Foreign Affairs Review*, Vol. 17(2), 2012, p. 241-260.

<sup>66</sup> Ibid.

society actors. This is to be contrasted with the transatlantic dialogue, consisting of bi-annual meetings between the EP and US Congress, in which legislative cooperation is perceived less enthusiastically by the US,<sup>67</sup> which, in turn, has a detrimental impact upon the exchange of legislative work in the field of human rights and perceptions of joint EU and US human rights policies.

### 3.4.2 United States

**President, Vice President and State Department** The **President of the United States and his administration in the White House** oversee US foreign affairs. Every administration is able to leave a certain footprint with regard to external action in general and human rights more specifically. In addition, the Vice-President contributes to policy-making and acts as ‘diplomatic representative of the President and United States abroad’.<sup>68</sup> In this regard, the Vice-President also contributes to human rights and democracy promotion once the topic has been set on the agenda. Human rights policy in external relations has been part of the US State Department’s (USSD) mandate,<sup>69</sup> whereas the US’s development agency USAID did initially not work on human rights related issues in the past.<sup>70</sup> In the State Department, the Secretary of State can play an important role if he or she establishes either a loyal position to the President or a power base on his or her own.<sup>71</sup> Furthermore, the USSD’s **Under Secretary for Civilian Security, Democracy, and Human Rights** (formerly the Under Secretary for Democracy and Global Affairs) holds a mandate to ‘build and oversee one coherent capacity within State that promotes stability and security in conflict affected and fragile states, supports and develops democratic practices globally, and advances our human rights and humanitarian policies and programming around the world’.<sup>72</sup> Assistant Secretaries overlook the geographical and thematic desks and, in the case of human rights, the **Bureau “Democracy, Human Rights and Labor” (DRL)** oversees the US human rights country reports and Human Rights & Democracy Fund (HRDF).<sup>73</sup> In this respect, DRL is a major institutional unit informing executive decision-making on human rights and democracy. For the EEAS, in the field of human rights, the DRL is considered to be the ‘main interlocutor’. As one EEAS official mentioned, ‘they have more country-specific knowledge than we do. But we engage with them in intense thematic coordination’.<sup>74</sup> In addition to reporting, the DRL bureau also disposes of significant resources to engage in democracy assistance and reaching out to human rights defenders.

**State agencies and Non-State Actors** Over the time of its existence the **state agency USAID received a human rights mandate** too. Regarding USAID’s ability to sustain and extend its role in the field of human rights, one US official commented: ‘There is nothing more permanent in Washington than a temporary agency’.<sup>75</sup> In terms of inter-institutional coordination, there are inter-agency working groups, for example on labour issues where the State Department, USAID, United States Trade Representative

<sup>67</sup> Archick, K. and Morelli, V., ‘The U.S. Congress and the European Parliament: Evolving Transatlantic Legislative Cooperation’, *Congressional Research Service*, CRS Report for Congress, January 2013.

<sup>68</sup> Foley, M., ‘The foreign policy process: Executive, Congress, intelligence’, in Cox, M., and D. Stokes (eds.), *US Foreign Policy*, Oxford University Press, Oxford, 2012, p. 113.

<sup>69</sup> For the sake of readability, the terms ‘US Department of State’ and ‘US State Department’ will be used inter-changeably throughout this study.

<sup>70</sup> Interview with US official, Washington D.C., 13.3.2014.

<sup>71</sup> Hastedt, G. P., *American Foreign Policy*, Pearson, Boston, 2011, p. 199.

<sup>72</sup> US Department of State and USAID, ‘Leading Through Civilian Power: The First Quadrennial Diplomacy and Development Review’, 2010, p. 42.

<sup>73</sup> See the homepage of the State Department’s Bureau of Democracy, Human Rights and Labor. Available online: <http://www.state.gov/j/drl/index.htm>, accessed on 28.8.2014.

<sup>74</sup> Interview with EU official, Brussels, 8.4.2014.

<sup>75</sup> Interview with US official, Washington D.C., 13.3.2014.

and other institutional actors are represented.<sup>76</sup> Moreover, in high-profile trade agreements the different actors convene often ‘while the iron is still hot in order to coordinate their messages when dealing with external stakeholders – but this occurs on a rather ad hoc basis, [and] there is a lack of structural, continuous and institutionalized coordination’.<sup>77</sup> Furthermore, non-state actors, in particular the **National Endowment Programme (NED)**, contribute to democratization and human rights projects via public finances. They add to the picture of various US actors who actively contribute to the shaping of human rights policies and democracy promotion (see *infra*, section 6.2).

**US Congress** The two legislative bodies (the Senate and the House of Representatives) constituting the US Congress play a key role in US foreign relations as enshrined in the Constitution.<sup>78</sup> The Congress’s **ability to hold and determine the purse** as well as its ability **introduce human-rights based legislation** gives it additional powers to determine aspects of the US’s human rights policy. Congressional activism on human rights has a long history<sup>79</sup> and strong congressional pressure is often a major driver for foreign policy adjustments, such as the introduction of ‘human rights vetting’ in the provision of US security assistance to partner governments.<sup>80</sup> Furthermore, in dealing with opposition parties and raising concerns that the executive branch may not be willing or able to address, Congress can also actively conduct parliamentary diplomacy and contribute to the awareness of human rights violations in third countries. Moreover, with regard to raising awareness of human rights policies, Special Envoys can be mandated by the President or Congress to represent the US in order to raise certain concerns, including concerns vis-à-vis specific regions and policy themes (see *infra*, section 6.1).

### 3.5 Objectives and policy context

#### 3.5.1 European Union

**Article 2 TEU** states: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.’ Furthermore, **Art 21(1) TEU** includes the general provisions for EU external action: ‘The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.’ The opening paragraph of **Article 21 TEU sets the framework** for all other EU external actions, including those in the framework of CFSP and CSDP. Furthermore, Article 21 TEU foresees common action of the EU in international relations in order to ‘consolidate and support democracy, the rule of law, human rights and the principles of international law’. The EU’s foreign policy objectives regarding human rights cannot only be traced back to the EU Treaties, but moreover to certain key documents which have informed the EU’s human rights in foreign policy. As discussed in the historical overview (see *supra*, section 3.1), the EU’s accession policies already set forth the so-called

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<sup>76</sup> Interview with US official, Washington D.C., 14.3.2014.

<sup>77</sup> Interview with US official, Washington D.C., 14.3.2014.

<sup>78</sup> See De Baere and Gutman, *supra*, n. 6, p. 153.

<sup>79</sup> Snyder, S., ‘A Call for U.S. Leadership: Congressional Activism on Human Rights’, *Diplomatic History*, Vol. 37(2), 2013, p. 372-397.

<sup>80</sup> Serafino, N. et al, ‘“Leahy Law” Human Rights Provisions and Security Assistance: Issue Overview’, *Congressional Research Service*, CRS Report prepared for Congress, January 2014.

Copenhagen criteria, in which respect for human rights is proclaimed to be a condition for EU membership.

**The EU Strategic Framework and Action Plan on Human Rights and Democracy** Introduced in 2012, the Strategic Framework and Action Plan on Human Rights and Democracy (hereafter ‘Strategic Framework/Action Plan’) foresees 7 strategic clusters through which EU human rights mainstreaming is to be developed.<sup>81</sup> These are: human rights promotion throughout EU policies, promoting the universality of human rights, pursuing coherent objectives, human rights mainstreaming in all EU external policies, implementing EU priorities on human rights, working with bilateral partners and working throughout multilateral institutions (see figure 1). A concrete Action Plan guarantees the follow-up by means of targeted actions (see also figure 1). As one EU official underlined, there was a need for having both the Framework and Action Plan at the same time: ‘The Strategic Framework contains extremely strong commitments: to raise human rights at all levels, to integrate human rights without exceptions. But the Strategic Framework alone is not enough to bring about change. Therefore we also have the Action Plan. One of the biggest strengths of the Action Plan is that it has chapters touching upon more or less all areas of external action. You have for example counterterrorism and human rights, justice and human rights, trade and human rights, development and human rights...’<sup>82</sup>

**Figure 1: EU Strategic Framework on Human Rights and Democracy<sup>83</sup>**



<sup>81</sup> Council of the European Union, ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, OJ 11855/12, Luxembourg, 25.6.2012.

<sup>82</sup> Interview with EU official, Brussels, 16.4.2014.

<sup>83</sup> Wouters et al, *supra*, n. 5, p. 34.

### 3.5.2 United States

As the pre-eminent scholar on US foreign relation Luis Henkin remarked '[the] principal constitutional limitation on [the US] government that is operative today is that government must respect the rights of the individual.' He continues: 'Nothing in the framers' conception of rights suggested that respect for individual rights should be less or different in the conduct of the foreign relations of the new republic.'<sup>84</sup> However, individual rights not only constrained government action, but also informed government action in the sense of human rights promotion. From an idealist perspective democracy and human rights promotion is a 'projection of domestic values and ethics onto the world stage'.<sup>85</sup> In this regard, democratisation and human rights become key ideas and elements in foreign affairs. With a view on tackling challenges of the post-cold-war order, multilateralism and humanitarian interventionism were seen as effective US approaches to respond to emerging crisis situations. The former focused on the US coordination and legitimacy of foreign affairs in the context of international organizations, while the latter concentrated on the potential to intervene or threaten third parties with the use of force in situations of human rights violations.<sup>86</sup> However, the Bush Jr. administration opted for an offensive unilateral approach and was portrayed as an imperial empire, focusing on security and interests rather than on norms and human rights. This approach was emulated in the National Security Strategy of 2002, in which the so-called 'Bush doctrine' was formulated, e.g. the war against terrorists and countries that 'harbour' terrorists as well as the notion of pre-emptive strikes and American unilateralism.<sup>87</sup>

Obama administration has struggled to leave behind the radical shift US foreign policy has gone through after 9/11 2001. On the one hand, a return to multilateralism has been underlined, for instance, in the 2010 National Security Strategy "When international forces are needed to respond to threats and keep the peace, we will work with international partners to ensure they are ready, able, and willing. We will continue to build support in other countries to contribute to sustaining global peace and stability operations, through U.N. peacekeeping and regional organizations, such as NATO and the African Union."<sup>88</sup> The President's strategy further emphasizes the need to "mobilize diplomatic, humanitarian, financial, and – in certain instances – military means to prevent and respond to genocide and mass atrocities" both multilaterally and bilaterally.<sup>89</sup>

While a '**return to multilateralism**', including in the field of human rights, is emphasized by the current administration, other (non-)action undermines its credibility in terms of human rights protection. The continuation of the Guantánamo detention camp<sup>90</sup> and the use of drones in US warfare have been widely criticized in this regard.

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<sup>84</sup> Henkin, *supra*, n. 20, p. 94.

<sup>85</sup> Smith, *supra*, n. 42, p. 194.

<sup>86</sup> Rowley, C. and Weldes, J., 'Identities and US foreign policy', in Cox, M., and Stokes, D. (eds.), *US Foreign Policy*, Oxford University Press, Oxford, 2012, p. 188.

<sup>87</sup> Hastedt, *supra*, n. 71, p. 20.

<sup>88</sup> President of the United States, National Security Strategy, Washington D.C., May 2010, p. 48.

<sup>89</sup> *Ibid.*

<sup>90</sup> The National Security Strategy, however, did foresee the closure of Guantanamo Bay. See Hastedt, *supra*, n. 87, p. 22.

### 3.6 Main EU and US foreign policy instruments and their link to human rights

#### 3.6.1 European Union

The EU has several instruments at its disposal to promote human rights externally. In this regard the EU instruments regarding human rights can be seen as being tackled by the EU's tool box that is related to several policies.

**Enlargement and Neighbourhood Policy** EU enlargement is not only a policy of the EU towards its immediate neighbouring countries, but also a unique tool to promote human rights. The EU offers membership to European countries under the premise of conditionality as set out in the Copenhagen European Council 1993 (so-called **Copenhagen Criteria**). The Copenhagen Criteria set out that membership can only be granted to associated countries of the EU if the following criteria are applied: 1) stability of institutions guaranteeing, 2) democracy, 3) rule of law, 4) human rights and minority protection, 5) functioning market economy, and 6) willingness to follow up on obligations of membership. As such, only those countries can become members of the EU who actually fulfil the above mentioned criteria. As such, the EU can use the **criteria as a benchmark** and sue 'carrots' and 'sticks' (conditionality) in the event that applicant states are not able to comply with the human rights standards which the EU sees necessary to apply. If at the same time applicant states are able to comply with the obligations of the EU, membership can be awarded. As such, the EU's accession policy to the East has been seen as a transformative policy which is about structural changes, including the improvement of human rights conditions.<sup>91</sup> The effect for human rights policies has been a **transformative change** throughout all new Member States. This, however, does not imply that human rights are equally well-respected within the EU, or that new Member States have all applied standards that rule out human rights violations.

**EU Enlargement Policy** The accession policy of the EU has proven to be an effective tool to introduce changes in the field of human rights through tying membership of the EU to a range of conditions. Currently, the Western Balkan states, following the EU's offer to join the EU, are willing to undergo domestic changes in that regard. While Croatia joined the EU in 2013, the EU also recently signed the Serbia Association Agreement. As the EU approach is hard to transplant into the foreign policies of a state, the **EU struggles with the difficulty of exporting its enlargement policy tool**, which transforms societies and states in political, judicial, economic and societal terms, to other regions.<sup>92</sup> Indeed, while EU conditionality is also used in other areas and policies such as trade and development cooperation (see sections 4 and 5), the 'major carrot' of membership cannot be awarded to countries outside Europe. This, observers argue, poses a major challenge for the European Neighbourhood Policy as well.

In the 1990s, the EU entered Partnership and Cooperation Agreements with the Newly independent States (NIS). They serve as a legal framework for political, economic and trade relations between the EU and its partners. There are differentiations of contents, but the main 'ingredients' are: 1) consolidating democracy, 2) economic development, 3) promoting trade and investment, 3) conditions for a future free trade area, 4) cooperation in various fields (e.g. social and cultural affairs) and 5) fostering political dialogue. In 2004, the agreements were complemented with what the EU termed its European Neighbourhood Policy (ENP). Since 2003 the European Neighbourhood and Partnership Instrument (ENPI) has been introduced to support 'democratic transition and promot[e] human rights', help 'the transition towards the market economy', and foster the 'promotion of sustainable development' and

<sup>91</sup> Keukeleire and Delreux, *supra*, n. 59, p. 259.

<sup>92</sup> *Ibid.* p. 260.

'policies of common interests'.<sup>93</sup> The **ENPI is a financial instrument made available for all ENP countries and Russia**. This also includes the Northern African to the South African and Middle Eastern countries. In the period 2010-2013 an additional 350 million Euro was added to the already existing 450 million Euro budget. In 2008, the Eastern Partnership was carved out of the ENP to develop more tailor-made responses for the EU's neighbouring region in the East. At the same time, the events of the Arab Spring in the EU's southern neighbourhood required the EU to focus on its partners in more differentiated ways.<sup>94</sup>

The EU currently has to deal with severe setbacks within the field of human rights in the Eastern and Southern Neighbourhood. The impoverished human rights situation in Egypt and Syria are telling examples in this respect. Also, to the East the situation is far from consolidated. The Vilnius Eastern Partnership Summit concluded in this regard: 'While recognising and welcoming the progress that has been made, they also recall that much remains to be done to tackle the persisting challenges posed to democracy, the respect for fundamental freedoms and the rule of law.'<sup>95</sup> Usually a compensation tool to foster conditionality, the new Deep and Comprehensive Free Trade Areas (DCFTAs) were only recently signed between the EU and Moldova and Georgia, while Ukraine suspended the DCFTA in 2013. Following the change of government in the Ukraine, the EU signed a political agreement with the provisional government of Ukraine, while signature of the DCFTA was postponed until after the Ukrainian general elections in May 2014. The European Council concluded in December 2013: 'The European Council calls for restraint, respect for human and fundamental rights and a democratic solution to the political crisis in Ukraine that would meet the aspirations of the Ukrainian people.'<sup>96</sup> In 2014, the European Council re-affirmed its interest in signing the DCFTA with Ukraine: 'The European Union and its Member States are committed to signing the remainder of the Association Agreement and Deep and Comprehensive Free Trade Area, which together with the political provisions constitute a single instrument'.<sup>97</sup>

**CFSP/CSDP** The CFSP's key instruments are its tools in civilian and military crisis management. However, one of the key challenges in the area of CSDP is the question to which degree Member States are able to contribute to international civilian and military missions of the EU. Since 1999, the EU has constantly worked on **improving its crisis management capacities**. Over the years the EU has undertaken more than 20 civilian and military crisis management missions. Most of the missions are civilian crisis management missions, with the minority falling into the category of military missions. Very often, military missions are military training missions rather than peace-enforcing humanitarian interventions. This has led to the argument that the EU prefers to avoid high-risk situations, such as the involvement of military on the ground.<sup>98</sup> Nonetheless, the EU's efforts in **crisis-management have a direct impact on human rights situations in third countries**. The human rights component is especially visible in both military and civilian crisis management missions.<sup>99</sup> As such, the EU contribution to security in a third country through either civilian or military missions is said to contribute to the development and human

<sup>93</sup> See European Commission's homepage on the 'European Neighbourhood and Partnership Instrument'. Available online: [http://ec.europa.eu/europeaid/how/finance/enpi\\_en.htm](http://ec.europa.eu/europeaid/how/finance/enpi_en.htm), accessed on 28.8.2014.

<sup>94</sup> Wouters, J. and Duquet, S., 'The Arab Uprisings and the European Union: In Search of a Comprehensive Strategy', *Yearbook of European Law*, 2013, p. 1-36.

<sup>95</sup> EU Council, 'Joint Declaration of the Eastern Partnership Summit, Vilnius, 28-29 November 2013. Eastern partnership: the way ahead', 17130/13, Press 516.

<sup>96</sup> European Council, 'European Council Conclusions', EUCO 217/13, Brussels, 20.12.2013.

<sup>97</sup> European Council, 'European Council Conclusions', EUCO 7/1/14, REV 1, Brussels, 21.3.2014.

<sup>98</sup> Keukeleire, S., and Raube, K., 'The security-development nexus and securitization in the EU's policies towards developing countries', *Cambridge Review of International Affairs*, Vol. 26(3), 2013, p. 556-572.

<sup>99</sup> Ibid.

rights situation of that third country, e.g. through security sector reforms. For example, the largest EU mission, the EULEX civilian mission in Kosovo, has a direct impact on the rule of law and human rights in Kosovo by providing direct civilian assistance to its judiciary. The EU's view is that CSDP missions cannot be seen in an isolated context. The EU has pursued this by introducing a 'Comprehensive Approach to External Conflict and Crises'.<sup>100</sup> In the HR/VP-EC joint communication introducing this comprehensive approach, the EU's aim to contribute to both security and human rights is underlined: 'A shared analysis should set out the EU's understanding about the causes of a potential conflict or crisis [...] It must also identify the EU interests and objectives and our potential role to contribute to peace, security, development, human rights and the rule of law, taking into account existing EU resources and action in the country or region in question.'<sup>101</sup> In this way, human rights are meant to become one of the key objectives when launching missions abroad and determining the respective instruments to that end.

As the case of a potential intervention of the EU in Libya has shown, Member States need to agree on taking collective action in the intergovernmental framework of CSDP, including the availability and spending of national military and civilian capabilities. The EU is often seen as looking for alternative ways of engagement, for example by providing assets for capacity building missions rather than putting its 'boots on soil'.<sup>102</sup> Another key element in the framework of CFSP are **sanctions**, based on Articles 25 and 29 TEU and making use of the EU's economic involvement, or rather reduction thereof, by introducing restrictive measures (Article 215 of the Treaty on the Functioning of the European Union (TFEU)). Sanctions are said to bring about change in the actions of third parties, be it states or individuals. Human rights violations in third countries can lead to the EU's imposition of sanctions. For example, in a standing sanction against Iran from 2011, a number of individuals are targeted with EU sanctions 'in view of the ongoing human rights abuses' in the country.<sup>103</sup> In general, smart and comprehensive sanctions can be seen as the two different sets of available sanctions. The former introduces restrictive measure vis-à-vis a small number of people and businesses, e.g. government members, whereas the latter introduces measures directed against a whole country (i.e. its markets and society), e.g. an oil embargo. Sanctions can be decided either by the EU on its own or in order to implement sanctions decided by the UN Security Council. In 2014, more than 30 states and organisations were targeted.<sup>104</sup>

**Human Rights Country Strategies and HR dialogues** The EU has introduced Local Human Rights Country Strategies which it uses to monitor the situation of human rights and human rights violations world-wide. With more than 140 strategies now in place, the process of drafting such Human Rights Country Strategy for each partner country is nearly completed as of mid-2014.<sup>105</sup> They are to be 'taken into account in human rights and political dialogues at all levels, in policymaking and when programming and implementing financial assistance with third countries' and should be 'effectively mainstreamed by the EEAS, Commission and Member States'.<sup>106</sup> However, their precise role in shaping EU foreign policy is still unclear. One EU official mentioned that they have made a significant difference,

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<sup>100</sup> *Supra*, n. 51.

<sup>101</sup> *Ibid.* p. 5.

<sup>102</sup> European Council on Foreign Relations, 'Time for European boots on Libyan soil?', *ECFR Blogpost*, 22.8.2011.

<sup>103</sup> EU Council, 'Council Implementing Decision 2011/670/CFSP of 10 October 2011 implementing Decision 2011/235/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Iran', OJ L 267/13, 12.10.2011.

<sup>104</sup> See homepage of the EEAS on 'Restrictive Measures (sanctions) in force', last updated on 26.5.2014. Available online: <[http://eeas.europa.eu/cfsp/sanctions/docs/measures\\_en.pdf](http://eeas.europa.eu/cfsp/sanctions/docs/measures_en.pdf)> accessed on 28.8.2014.

<sup>105</sup> Council of the European Union, 'EU Annual Report on Human Rights and Democracy in the World in 2013', 11107/14, Brussels, 23.6.2014, p. 15.

<sup>106</sup> OJ 11855/12, *supra*, n. 81, action point 31(c).



including by informing 'individual Member States when they have bilateral visits', and inform 'our programming of financial'.<sup>107</sup> Some criticism has been raised, notably by the EP and civil society organizations, as these country strategies remain outside the public realm and are only accessible for EU officials, making EU policy less transparent.<sup>108</sup>

In addition, the EU also undertakes more than 30 human rights dialogues around the world.<sup>109</sup> Within these dialogues, the EU is focusing on its EU human rights dialogue guidelines, adopted in 2001.<sup>110</sup> The EEAS website provides a good overview of the several dialogues which have been ongoing over the last years, including those with Russia and China. However, despite these dialogues, the question remains how international players like Russia and China can be convinced of taking a different direction in their human rights approaches.<sup>111</sup> While in the case of the ENP there may remain options to convince partners of adopting different human rights policies and offering incentives, it seems questionable whether the same approach is feasible in the case of Russia and China. Moreover, while the EU may advocate the universality of human rights, it is the concept itself that is more and more questioned by the outside world by favouring a cultural interpretation of human rights.<sup>112</sup>

### 3.6.2 United States

Regarding human rights policies or actions that impact upon the **US promotion of human rights**, several instruments can be used as part of an overarching American toolkit. As one will see below, the introduced tools resemble to a certain degree those of the EU (and vice-versa). However, differences prevail in terms of procedures, substance and scope.

**Country Reports on Human Rights Practices** One key tool in the US policy on human rights has been the elaboration of Country Reports on Human Rights Practices (Human Rights Reports). Congress receives the reports from the US State Department on the basis of the Foreign Assistance Act of 1961 and the Trade Act of 1971 (see *infra*, section 5). The US produces these **reports on an annual basis and uses the Universal Declaration of Human Rights and other human rights treaties as benchmarks to assess the human rights situations** in countries all over the world. In his preface to the publication of the Human Rights Reports 2013, Secretary of State John Kerry stated: 'As we mark the 65th anniversary of the Universal Declaration of Human Rights this year, the Country Reports on Human Rights Practices highlight the continued pursuit of 'free and equal dignity in human rights' in every corner of the world. Based on factual reporting from our embassies and posts abroad, these congressionally mandated **reports chronicle human rights conditions in almost 200 countries and territories**. The reports draw attention to the growing challenges facing individuals and organizations as 'governments around the world fall short of their obligation to uphold universal human rights'.<sup>113</sup> In contrast with the EU, the DRL (Bureau of Democracy, Human Rights and Labor) is very transparent in showing how the human rights reports are produced. The DRL's indicate that the human rights reports

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<sup>107</sup> Interview with EU official, Brussels, 27.3.2014.

<sup>108</sup> Interview with EU official, Brussels, 25.4.2014.

<sup>109</sup> EEAS homepage on EU human rights dialogues. Available online: [http://eeas.europa.eu/human\\_rights/dialogues/index\\_de.htm](http://eeas.europa.eu/human_rights/dialogues/index_de.htm), accessed on 28.8.2014.

<sup>110</sup> Council homepage on EU guidelines on human rights dialogues with third countries. Available online: <http://www.consilium.europa.eu/uedocs/cmsUpload/16526.en08.pdf>, accessed on 28.8.2014.

<sup>111</sup> Wouters, J. et al, 'EU Human Rights Dialogues – Current Situation, Outstanding Issues and Resources', *Leuven Centre for Global Governance Studies*, Policy Brief No. 1, July 2007.

<sup>112</sup> Carothers, T. and Brechenmacher, S., 'Closing Space – Democracy and Human Rights under Fire', *Carnegie Endowment for International Peace*, 2014.

<sup>113</sup> State Department's DRL homepage on 'Country Reports on Human Rights Practices 2013'. Available online: <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>, accessed on 28.8.2014.

are produced in close cooperation with US embassies and consulates, foreign policy officials in Washington D.C., as well as non-governmental and international organisations, with first drafts being completed by US delegations in third countries which work closely with information sources on the ground. Moreover, in a second phase, the reports are edited by the DRL in close coordination with other units at the State Department. All editors at the DRL, including the editor in chief, are publicly listed on the website of the DRL.<sup>114</sup> Again with contrast to the EU's human rights strategies, the human rights reports are also publicly available. While the EU uses its reports only internally, the US has a 'public' approach in addressing and tracking human rights abuses. While according to DRL the human rights reports have a direct impact on US policy-making ('these reports are used as a resource for shaping policy; conducting diplomacy; and making assistance, training, and other government-related resource allocations'), the reports also perform a 'naming and shaming' function.

**Diplomatic tools** The DRL points to several measures which the US adopts to promote human rights: to 'hold governments accountable to their obligations under universal human rights norms and international human rights instruments', to 'promote the rule of law, seek accountability, and change cultures of impunity', to 'assist efforts to reform and strengthen the institutional capacity of the Office of the UN High Commissioner for Human Rights and the UN Commission on Human Rights'; and to 'coordinate human rights activities with important allies, including the EU, and regional organizations'.<sup>115</sup> Regarding bilateralism, US human rights dialogues with important partners, such as the EU, and significant powers such as China are crucial diplomatic tools to accentuate the US position on human rights vis-à-vis third countries. In 2013, for example, the 18th US-China Human Rights Dialogue took place. Acting Assistant Secretary, Uzra Zeya (DRL), after meeting with China, mentioned in a press conference: 'Throughout the Human Rights Dialogue I made the [the point that] China will be stronger and more stable and more innovative if it represents and respects international human rights norms. I also made clear that the United States is committed to building a cooperative partnership with China; welcomes the rise of a strong, stable and prosperous China; and reaffirmed the centrality of human rights to our bilateral engagement.'<sup>116</sup>

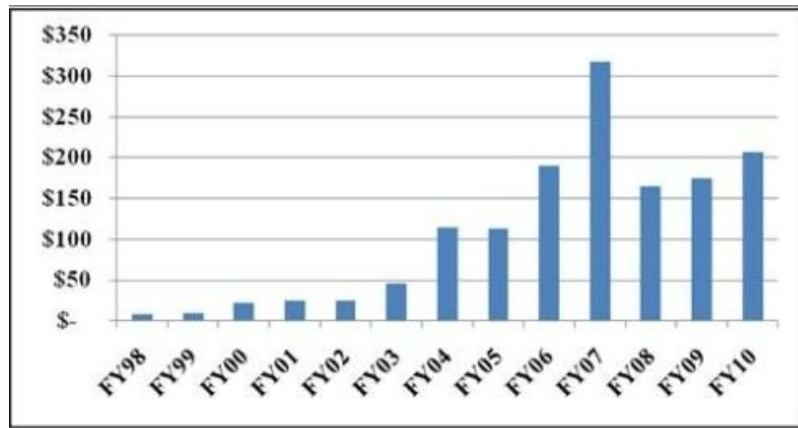
Diplomatic persuasion coupled with other foreign policy instruments, such as the building of further partnerships or – quite the opposite – **the threat to use sanctions or the reduction of foreign aid** become a viable tool for the US. The diplomatic efforts of the US are complemented by financial tools, such as **the DRL's Human Rights & Democracy Fund**. Established in 1998 by Congress, the HRDF is the 'flagship' programme of DRL, contributing significantly to the overall financing of aid run by DRL (see figure 2).

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<sup>114</sup> Ibid.

<sup>115</sup> State Department's homepage on 'Human Rights', available online: <http://www.state.gov/j/drl/hr/index.htm>, accessed on 28.8.2014.

<sup>116</sup> Press Conference following the U.S.-China Human Rights Dialogue, 2.8.2013. Available online: <http://www.state.gov/j/drl/rls/rm/2013/212667.htm>, accessed on 28.8.2014.

**Figure 2: Overview of DRL Administered Foreign Assistance Appropriations (in millions)<sup>117</sup>**

**Sanctions** The US, like the EU, uses smart and comprehensive sanctions in case of human rights abuses. The Office for Foreign Assets Control (OFAC) under the Treasury Department acts upon presidential and legislative acts. Such actions have been targeting businesses and individuals. The OFAC publishes the lists of persons, countries and businesses which are targeted. In the context of the US's war against terrorism, sanctions have become a prominent tool to act against suspected terrorists, who are seen as threatening not only democratization efforts but also human rights promotion. A notable example is the Magnitsky Act. Following the death of the Russian lawyer Magnitsky, US Congress adopted this act to black-list several Russian nationals who were involved in his murder. Several Russian counter-laws were adopted in response to the US blacklist. Judging the effectiveness of the US sanctions remains difficult, but, as the Washington Post commented: 'the reaction from Russian lawmakers suggests it hurt: [s]hortly after it was implemented, Russia passed a law banning U.S. parents from adopting Russian children. Later, Russia responded with their own 'black list' of U.S. officials, and Magnitsky himself was eventually found guilty of tax evasion – even though he was already dead'.<sup>118</sup>

**Military Interventions** The US, in stark contrast with the EU, is the largest military power in the world. It can make use of its military strength in several ways; unilaterally, bilaterally or multilaterally. Often accused of using military power to achieve political and economic goals, the **US also has a record of taking military action in the name of human security**, for example in cases when human rights are endangered. US military spending accounted for 46% of global military spending in 2011.<sup>119</sup> A significant increase in military spending occurred after September 11, 2001. Between the end of the Cold War and before 9/11, interventions ranged from small-scale missions to large exercises. Academics have identified some of these military deployments, such as 'Operation Restore hope' (1992-1994), i.e. the contribution to the NATO mission in Bosnia 1993-2001, or the 1999 NATO campaign in Kosovo, as **contributions to the international restoration of human rights**.<sup>120</sup> After 9/11 the US policies on interventions took another turn, concentrating on its fight against terrorism. Following the Bush doctrine, terrorist acts were no longer perceived as a crime, but as an act of war which could be

<sup>117</sup> State Department homepage on 'DRL Programs'. Available online: <http://www.state.gov/j/drl/p/index.htm>, accessed on 28.8.2014.

<sup>118</sup> Taylor, A., 'The man behind the Magnitsky Act explains why now is the time to go after the Russian elite's assets', *The Washington Post*, 3.3.2014.

<sup>119</sup> See Global Issues homepage on US Military Spending and how it relates to global levels. Available online: <http://www.globalissues.org/article/75/world-military-spending#USMilitarySpending>, accessed on 28.8.2014.

<sup>120</sup> Fischer, Beth A., 'Military power and US foreign policy', in Cox, M. and Stokes, D., *US Foreign Policy*, Oxford University Press, 2012, p. 130-142, p. 136

answered with pre-emptive strikes.<sup>121</sup> The wars in Afghanistan and Iraq were expressions of the new US policy. The Obama administration has focused on ending the deployment of large scale US troops in Afghanistan and Iraq. At the same time, the maintenance of the Guantanamo detention camp, the usage of armed drones and specialized commandos, such as the which killed Osama Bin-Laden in 2011, are expressions of the ongoing US **extra-ordinary measures** in its fight against terrorism. Moreover, the US has shown that it is still concerned with human security in the European neighbourhood, using force in the context of a NATO-Libya operation, 'Operation Unified Protector'.

### 3.7 Comparative conclusions and the future of EU-US cooperation

While arguably the EU has become more successful in making human rights a part of its foreign policy, several remaining challenges can be pointed out: human rights implementation is still seen as problematic with varying results, depending on the policy area of concern. Moreover, despite efforts to prioritize human rights, in particular in the context of the Strategic Framework/Action Plan, human rights awareness within EU foreign policy still needs to be raised.

Comparing the EU with the US, the sharpest **difference between the two** is that the US can use is willing to use unilateral action if needed to protect human rights abuses in third countries. As Risse and Börzel have observed elsewhere, the EU prefers 'soft security' in its foreign policy including compliance with its policies by incentives, capacity-building and learning.<sup>122</sup> By contrast, **the US is militarily equipped and more willing to take action**, while the EU has shown continuous efforts to build capacities in the field, be it with regard to civilian or military missions in the context of CSDP. The EU's focus on civilian missions is not a downside, rather a complementary tool, for example in the field of rule of law missions which trigger a direct impact on human rights. At the same time, the two actors do have many **similarities with a view to the promotion of human rights and the use of instruments**, be it diplomatic action, human rights dialogues or sanctions. The US and the EU should use their similarities to look to greater synergies. The EU's enlargement policy is a good example of the **transformative impact the EU can have on accession countries**, including the improvement of human rights regimes. At the same time, **the human rights situation within the ENP currently suffers from many setbacks**, in particular with respect to Europe's Northern African Neighbours. More comprehensive and closer coordination within the EU, and between the EU and the US, seems called for. Similar collaborative action to protect human rights in other countries in a phase of transition (e.g. Myanmar) or countries which are showing serious backsliding in terms of human rights and democratic governance (e.g. South Sudan, Burundi), seems necessary. It is in this context that both the US and the EU need to use more of their diplomatic toolbox. The US and the EU will have to invest in **soft power; the power of enticement to persuade other actors to follow their examples and a policy of universal human rights**. In this context, the EU and the US face challenges as they have to ensure the coherence of their actions, both internally and externally. If diplomatic efforts, such as human rights dialogues and the work of special representatives and envoys is supposed to be effective, then human rights need to be implemented internally as much as they are preached externally.

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<sup>121</sup> Ibid. p. 138.

<sup>122</sup> Risse, T. and Börzel, T., 'Venus Approaching Mars', in: Magen, A., Risse, T. and McFaul, M. (eds.), *Promoting Democracy and the Rule of Law: American and European Strategies*, Palgrave MacMillan, 2009.

## 4. TRADE POLICY

### 4.1 Main actors

EU Trade Actors and competences Both the EU and the US dispense 'exclusive' or 'principal' competence to carry out their trade-related policies on the respective Union and federal level. In the EU, the competence to initiate legislation has lain in the hands of the European Commission (EC) since the Treaty of Rome.<sup>123</sup> As the EU's executive actor, the EC and its Directorate-General for Trade (DG Trade) in particular, have the sole right to negotiate the trading partners on behalf of the EU, and to speak with that same 'unified voice' at the World Trade Organization (WTO). As a result, the Common Commercial Policy (CCP) is regarded to be 'the oldest, most integrated and most powerful external policy domain of the EU',<sup>124</sup> and DG Trade is considered to have achieved a 'high degree of institutional autonomy' and a 'distinct organization esprit de corps'.<sup>125</sup>

As the EU increasingly wandered into the 'new trade' territory services and intellectual property rights,<sup>126</sup> the exclusiveness of its CCP competences had become contested after the ECJ adopted the Opinion that the EU needed to conclude, in close cooperation with its Member States, the General Agreement on Trade in Services (GATS) and the Agreement on Intellectual Property Rights (TRIPS).<sup>127</sup> After more than a decade of legal uncertainty with regard to the distribution of competences in these matters, the Lisbon Treaty effectively extended the EU's exclusive competence into the full range of trade in goods, services, trade-related intellectual property rights and foreign direct investment (see table 1).<sup>128</sup> This development significantly enhanced the similarities between the scope of the EC and the USTR (United States Trade Representative) competences in trade-related matters, with the latter highlighting roughly the same 'major areas of responsibility'<sup>129</sup> as the former in its post-Lisbon setting. With regard to trade policies, in other words, the EU has steadily been moving towards a division of competences which is similar to the one found in the US. With the entry into force of the Lisbon Treaty and the further consolidation of the EU's exclusive competences in this regard, that trend has now markedly come to fruition.

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<sup>123</sup> For a discussion on the historical origin and development of the EU's exclusive competence in trade policy, see for instance Gstöhl, S., 'The European Union's Trade Policy', *Ritsumeikan International Affairs*, Vol. 11, 2013, p. 1-22.

<sup>124</sup> Bossuyt, F., Drieghe, L. and Orbie, J., 'Living Apart Together: EU Comprehensive Security from a Trade Perspective', *European Foreign Affairs Review*, Vol. 18, 2013, p. 63.

<sup>125</sup> Ibid.

<sup>126</sup> Meunier, S. and Nicolaïdis, K., 'The European Union as a trade power', in Hill and Smith (eds.), *International Relations and the European Union*, Oxford University Press, Oxford, 2011, p. 275-298.

<sup>127</sup> Hilf, M., 'The ECJ's Opinion 1/94 on the WTO – No Surprise, But Wise?', *European Journal of International Law*, 6, 1995, p. 245-259.

<sup>128</sup> Woolcock, S., *European Union economic diplomacy: the role of the EU in external economic relations*, Ashgate, Farnham, 2012.

<sup>129</sup> USTR Mission Statement. Available online: <http://www.ustr.gov/about-us/mission>, accessed on 28.8.2014.

**Table 1: Comparison between the EC ‘exclusive competence’ and USTR ‘principal responsibility’ to act in trade-related matters, prior to and after the entry into force of the Lisbon Treaty<sup>130</sup>**

<b>Trade Issues</b>	<b>EU competence in Trade pre-Lisbon</b>	<b>EU competence in Trade post-Lisbon</b>	<b>USTR competence in Trade</b>
Bilateral, regional and multilateral trade agreements	Exclusive competence	Exclusive competence	USTR principal responsibility
Trade in goods	Exclusive competence	Exclusive competence	USTR principal responsibility
Trade in services	Shared competence between the EU and its Member States	Exclusive competence	USTR principal responsibility
Trade-related intellectual property rights	Shared competence between the EU and its Member States	Exclusive competence	USTR principal responsibility
Foreign Direct Investment	Shared competence between the EU and its Member States	Exclusive competence	USTR principal responsibility

Source: Opinion 1/94, Treaty of Lisbon (EU) and Office of the US Trade Representative (US)

At the same time, the expansion of the EU’s CCP coverage has also brought about institutional changes, with the introduction of small amendments to the Council’s decision-making procedures and the introduction of full co-decision powers for the European Parliament in trade-related matters. Save for a number of exceptions which have now been clarified in the Lisbon Treaty,<sup>131</sup> the Council ‘shall act by a qualified majority’ when negotiating and concluding international agreements,<sup>132</sup> and has thus retained its decision-making powers in trade policy – including the mandate to authorize the EC to engage in trade negotiations.

The most drastic change, however, has come in the form of the newly empowered European Parliament which has been, in a role increasingly similar to that of the US Congress, increasingly involved in the conduct of trade affairs (see *infra*, table 2). Taking into account the observation that the European Parliament has been adamant in linking trade relations to beyond-trade issues such as human rights,<sup>133</sup> this means that the European Parliament is now well-equipped to ensure ‘good governance through trade’ (see *infra*, section 4.2). Indeed, the Lisbon treaty enhanced the EP’s mandate in trade-related affairs in three important ways.

First, the ‘ordinary legislative procedure’ – read: co-decision – is now applicable for the adoption of ‘the measures defining the framework for implementing the common commercial policy’.<sup>134</sup> This means that

<sup>130</sup> Cleary Gottlieb Steen & Hamilton LLP, ‘Trade Policy one year into the Lisbon Treaty’, 2010. Available online: <http://www.europarl.europa.eu/document/activities/cont/201012/20101207ATT07748/20101207ATT07748EN.pdf>, accessed on 28.8.2014.

<sup>131</sup> Subparagraphs 2 and 3 of Article 207(4) TFEU.

<sup>132</sup> Art. 207(4) TFEU.

<sup>133</sup> Gstöhl, *supra*, n. 123.

<sup>134</sup> Art. 207(2) TFEU.

all essential EU trade legislation, such as on trade preferences and their potential human rights-related aspects, should be adopted jointly by Parliament and Council. The EP, in other words, has hereby gained an additional and important ‘power of co-legislation on human rights issues’.<sup>135</sup> Recalling Art. 207 TFEU which stipulates that the CCP must now be pursued in the broader context of the EU’s human rights principles as enshrined in Art. 21 TEU (see *infra*, section 5.2), the EP recently set a precedent in this regard when it suspended the 1977 EEC-Syria cooperation on the grounds of human rights violations.<sup>136</sup>

Second, the EP must now grant its ‘hard power of consent’<sup>137</sup> prior to the ratification of all EU trade agreements.<sup>138</sup> Not counting the conclusion of ‘agreements relate[d] exclusively to the common foreign and security policy’<sup>139</sup> or ‘agreements concerning monetary or foreign exchange regime matters’,<sup>140</sup> where it does not play any role at all, the Parliament now has the ‘power to withhold consent to almost all international agreements’.<sup>141</sup> Soon after the entry into force of the Lisbon Treaty, the EP already withheld its consent for the EU’s interim agreement on sharing banking data with the US via the Society for Worldwide Interbank Financial Telecommunications (SWIFT) in 2010, thereby strongly evoking human rights-related concerns.<sup>142</sup> Aimed at sharing securitized data under the Terrorist Finance Tracking Program (TFTP),<sup>143</sup> the SWIFT agreement had raised a number of concerns regarding the fundamental right to the protection of personal data as enshrined in the EU Charter of Fundamental Rights (ECFR).<sup>144</sup> The EP also set an important precedent when it rejected the Anti-Counterfeiting Trade Agreement (ACTA) on the basis of human rights-related concerns. Citing the possibility that the agreement might ‘jeopardize citizens’ liberties’, ACTA rapporteur David Martin went on record as stressing ‘the need to find alternative ways to protect intellectual property in the EU’.<sup>145</sup> Third, whereas prior to the Lisbon Treaty the Parliament had been virtually absent from the negotiation of trade agreements, it is now more prominently involved – a development which has been dubbed to be ‘a degree of parliamentary scrutiny unparalleled in the field of international negotiations’.<sup>146</sup> Indeed, the European Commission is legally required to ‘report regularly [...] on the progress of negotiations’<sup>147</sup> to the EP’s International Trade Committee (INTA), so that ‘the European Parliament shall be immediately and fully informed at all stages of the procedure’.<sup>148</sup>

<sup>135</sup> Bartels, L., ‘The European Parliament’s Role in relation to Human Rights in Trade and Investment Agreements’, *European Parliament, Directorate-General for External Policies of the Union*, EXPO/B/DROI/2012-09, February 2014, p. 21.

<sup>136</sup> EU Council, ‘Council Decision 2012/123/CFSP of 27 February 2012 amending Decision 2011/523/EU partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic’, L 54/18, 28.2.2012.

<sup>137</sup> Richardson, L., ‘The Post-Lisbon Role of the European Parliament in the EU’s Common Commercial Policy: Implications for Bilateral Trade Negotiations’, *College of Europe*, EU Diplomacy Paper No. 5, 2012, p. 5.

<sup>138</sup> Art. 207(2) and (3) TFEU juncto art 218(6)(a)(v) TFEU.

<sup>139</sup> Art. 218(6) TFEU.

<sup>140</sup> Art. 219(3) TFEU.

<sup>141</sup> Bartels, *supra*, n. 135, p. 21.

<sup>142</sup> See, for instance, European Parliament, ‘SWIFT: European Parliament votes down agreement with the US’, *Press Release*, IPR68674, 11.2.2010.

<sup>143</sup> Bossong, R., ‘The Fight Against Terrorism: A Key Global Objective for the EU?’, in Boening, A. et al (eds.), *Global Power Europe – Vol. 2, Global Power Shift*, Springer-Verlag, Berlin-Heidelberg, 2013, p. 28.

<sup>144</sup> Art. 8, ECFR.

<sup>145</sup> See, for instance, European Parliament, ‘European Parliament rejects ACTA’, *Press Release*, IPR48247, 04.7.2012.

<sup>146</sup> European Commission, ‘What did the Lisbon Treaty change?’, Factsheet, 14 June 2011. Available online: [http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc\\_147977.pdf](http://trade.ec.europa.eu/doclib/docs/2011/june/tradoc_147977.pdf), accessed on 28.8.2014.

<sup>147</sup> Art. 207(3) TFEU juncto art 218(6)(a)(v) TFEU.

<sup>148</sup> Art. 218(10) TFEU.

**Table 2: Comparison between EU and US Parliamentary Involvement in Trade-related Matters, prior to and after the entry into force of the Lisbon Treaty<sup>149</sup>**

Trade Issue	EC-EP relations in Trade (Nice)	EC-EP relations in Trade (Lisbon)	USTR-Congress relations (1962 TEA)	USTR-Congress relations (1974 TA)
Trade policy framework	Commission shall submit proposals to the Council for implementing the common commercial policy (Article 133 (2))	EP and Council shall adopt the measures defining the framework for implementing the common commercial policy (Article 207(2))	Upon recommendation of Congress, President selects 4 'congressional delegates to negotiations' <sup>150</sup>	Upon recommendation of congressional committees, Congress selects 10 'congressional advisers for trade policy and negotiations' <sup>151</sup>
Negotiation of Agreement	Commission shall report to a special committee appointed by the Council (Article 133 (3))	Commission shall report to EP's INTA, in addition to the special committee, on the progress of negotiations (Article 207 (3))	Congress may grant the President TPA for five years  President required to submit for congressional review a copy of each concluded agreement and a presidential statement explaining why the agreement was necessary	Congress may grant the President TPA for five years  President required to submit for congressional review a copy of each concluded agreement and a presidential statement explaining why the agreement was necessary
Conclusion of Agreement	No formal role EP	Council must obtain EP consent (Article 218 (6)(a)(v))	USTR/President	USTR/President

**US Trade Actors and competences** The US the Constitution assigns the authority to 'regulate commerce with foreign nations' and to 'lay and collect taxes, duties, imports and excises'<sup>152</sup> to its legislative branch,

<sup>149</sup> *Supra*, n. 130.

<sup>150</sup> Public Law 87-794, 11.10.1962, SEC. 243, p. 878.

<sup>151</sup> Trade Act of 1974, Sec. 161, p. 45.

<sup>152</sup> Article I, Section 8 of the US Constitution.



Congress. Under Article II of the US Constitution, the President has the sole authority to negotiate and conclude trade agreements. However, as part of the executive branch, the Office of the United States Trade Representative (USTR) has, as indicated by its mission statement, the ‘principal responsibility for administering U.S. trade agreements’.<sup>153</sup> Legally, the President can act on behalf of Congress in certain cases, by way of receiving ‘Trade Promotion Authority’ from Congress.<sup>154</sup> The USTR also acts as the President’s principal advisor on trade-related issues, and can thus be analysed on a par with DG Trade in their respective mandates to develop and coordinate international trade and foreign direct investment policies. In terms of intra-institutional coordination in practice, there are inter-agency working groups through which the Labor Department, the State Department, the Treasury Department, the Agency for International Development (USAID) and the USTR come together and discuss potential labour rights-related implications of US international trade policies.<sup>155</sup> To this end, a Labor Advisory Committee was set up under the joint auspices of the USTR and the Department of Labor. As stipulated by its founding Charter, its objectives are:

‘[t]o advise, consult with, and make recommendations to the Secretary of Labor and the United States Trade Representative jointly, on issues and general policy matters concerning labor and trade negotiations, operation of any trade agreement once entered into, and other matters arising in connection with the administration of the trade policy of the United States’.<sup>156</sup>

Should the occasion to negotiate and conclude an international trade agreement arise, the Labor Advisory Committee is mandated to ‘provide reports on trade agreements to the President, the Congress, and the Office of the United States Trade Representative at the conclusion of negotiations for each trade agreement’.<sup>157</sup> In addition to its role as an inter-agency coordination mechanism, the Labor Advisory Committee also invites a wide range of civil society representatives to participate as Committee Members. Currently composed of 23 members, its designated website lists representatives from across the spectrum of public- and private sector actors. Unlike the situation in the EU where relevant actors are poised to meet when the situation calls for it, the Committee meets on an institutionalized regular basis. As one respondent pointed out, however, the relevant US actors do meet more frequently in the case of ‘high-profile trade agreements, when much is at stake’, in order ‘to keep the iron hot’ and to coordinate messages when dealing with external stakeholders.<sup>158</sup> Ensuring system-wide coordination, the conclusions of the Labor Advisory Committee Meetings subsequently feed into the labour-rights related sections of the DRL’s annual Country Reports on Human Rights Practices.

**EU Trade Policies: from ‘elusive’ to ‘exclusive’ competences** As ‘unparalleled’ as the EP’s scrutiny in trade-related matters may be, it has not yet achieved a level of political leverage which is comparable to the US, where both the legislative and executive actors play a defining role in the development and execution of trade agreements.<sup>159</sup> This divergence may be explained by an interplay of institutional and

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<sup>153</sup> *Supra*, n. 129.

<sup>154</sup> For a comprehensive analysis, see Cooper, W., ‘Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy’, Congressional Research Service, CRS Report for Congress, 13.1.2014, p. 1. TPA is defined as ‘the authority Congress grants to the President to enter into certain reciprocal trade agreements, and to have their implementing bills considered under expedited legislative procedures, provided the President observes certain statutory obligations’.

<sup>155</sup> Interview with US official, Washington D.C., 14.3.2014.

<sup>156</sup> Charter of the Labor Advisory Committee for Trade Negotiations and Trade Policy. Available online: <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/labor-advisory-committee-lac>, accessed on 28.8.2014.

<sup>157</sup> Charter of the Labor Advisory Committee for Trade Negotiations and Trade Policy. Available online: <http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/labor-advisory-committee-lac>, accessed on 28.8.2014.

<sup>158</sup> Interview with US official, Washington D.C., 14.3.2014.

<sup>159</sup> Cooper, *supra*, n. 154, p. 2.

historical factors. In the EU, the EP had little to no means of effectively scrutinizing trade and investment policies, especially with regard to their human rights implications, before the entry into force of the Lisbon Treaty. Indeed, the EP's INTA had only been created in 2004,<sup>160</sup> while to date no unit within DG Trade deals exclusively with parliamentary affairs.<sup>161</sup> By the same token, the EP's Subcommittee on Human Rights was also only 'reconstituted' in 2004.<sup>162</sup> Although the Lisbon Treaty and the EU's Action Plan on Human Rights have recently instigated more EC-EP collaboration in this regard, many respondents noted that this collaboration still remains 'ad hoc' without any clear guidance as to how to systematically ensure cooperation on a recurring basis. In certain instances, EU respondents even indicated that they were in the mere process of developing a framework for inter-institutional cooperation on human rights-related trade issues.<sup>163</sup> Given the relative lack of institutional memory in this regard, this finding should perhaps not come as a surprise.

In the US, by contrast, the USTR has been working closely with Congress 'since its creation' in the early 1960s.<sup>164</sup> Whereas until then, US trade and investment policies were tucked away under the auspices of the US State Department, this situation changed when Congress adopted the 1962 Trade Expansion Act, which established a Special Representative for Trade 'who shall hold office at the pleasure of the President'.<sup>165</sup> Ensuring system-wide collaboration, the Act called for the establishment of an 'interagency trade organization' under the chairmanship of the USTR, and composed of the 'heads of such departments and of such other officers as the President shall designate'<sup>166</sup> with a mandate to formulate recommendations to the President on trade and investment policies. In order to ensure parliamentary scrutiny, finally, the Act also established the practice of 'congressional delegates to negotiations [...] who shall be accredited as members of the United States delegation to such negotiation'.<sup>167</sup> Reiterating former President [John F.] Kennedy's remarks upon signing the Act, expressing his 'strong appreciation to the members of the Congress who were so greatly involved in the passage of this bill',<sup>168</sup> the USTR Office notes that it indeed 'reflected Congressional interest in achieving a better balance between competing domestic and international interests in formulating and implementing U.S. trade policy'.<sup>169</sup> One such manifestation of that balance was the requirement of an annual Congressional authorization in order to grant 'most favored nation trade status for countries with nonmarket economies'.<sup>170</sup> In the decades that followed, Congress continued to enhance the USTR's responsibilities, including by adopting the 1974 Trade Act which instilled the USTR's accountability vis-

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<sup>160</sup> Woolcock, S., 'Trade Policy: A Further Shift Towards Brussels', in Helen Wallace, Mark Pollack and Alasdair Young (eds.), *Policy-making in the European Union*, Oxford University Press, Oxford, 2010, p. 389.

<sup>161</sup> Within the Directorate on 'Resources, Information and Policy Coordination', there is a unit responsible for general 'Policy Coordination and Inter-Institutional Relations', to which the relations with the European Parliament also pertain. See DG Trade's organogram. Available online: <http://ec.europa.eu/trade/trade-policy-and-you/contacts/people/>, accessed on 28.8.2014.

<sup>162</sup> EP's DROI Subcommittee homepage. Available online: <http://www.europarl.europa.eu/committees/en/droi/home.html>, accessed on 28.8.2014.

<sup>163</sup> Interview with EU officials, Brussels, 18.3.2014.

<sup>164</sup> *Supra*, n. 129.

<sup>165</sup> Public Law 87-794, 11.10.1962, SEC. 241, p. 878.

<sup>166</sup> Public Law 87-794, 11.10.1962, SEC. 242, p. 878.

<sup>167</sup> Public Law 87-794, 11.10.1962, SEC. 243, p. 878.

<sup>168</sup> See President John F. Kennedy's remarks upon signing the Trade Expansion Act. Available online: <http://www.presidency.ucsb.edu/ws/?pid=8946>, accessed on 28.8.2014.

<sup>169</sup> USTR History on designated homepage. Available online: <http://www.ustr.gov/about-us/history>, accessed on 28.8.2014.

<sup>170</sup> Brimmer, E., 'The United States, the European Union, and International Human Rights Issues', *Center for Transatlantic Relations*, Washington D.C., 2002, p. 3.

à-vis both the President and Congress,<sup>171</sup> established an Office dealing solely with ‘Congressional Affairs’ within the USTR,<sup>172</sup> and thus consolidated its ‘pivotal role’ in US trade and investment policies.<sup>173</sup>

## 4.2 Objectives and policy context: trade and human rights

***The Inter-linkages between Trade and Human Rights*** In the last two decades, human rights provisions have increasingly been integrated into a growing number of unilateral, bilateral and regional trade policy instruments and tools. The bulk of this expansion is due to the heightened speed at which both the EU and the US, as the world’s most powerful trade actors, have been concluding ‘new generation trade agreements’ in a rapidly changing international context.<sup>174</sup> Indeed, as one scholar observed, ‘commerce, on the face of it, has never looked so principled’.<sup>175</sup> In light of the contentious debate surrounding the ‘shot-gun wedding’<sup>176</sup> of trade and human rights, however, this recent development has been rather remarkable. Although the International Labour Organization (ILO) had already declared in its Constitution that the ‘the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries’,<sup>177</sup> the 1996 Ministerial meeting of the WTO in Singapore declared the protection of such conditions to pertain to the ILO’s competence. In the resulting ‘Singapore Consensus’, the signatories ‘reject[ed] the use of labour standards for protectionist purposes, and agree[d] that the comparative advantage of countries, particularly low-wage developing countries, must in no way [be] put into question’.<sup>178</sup> As a result, WTO agreements are ‘virtually silent’<sup>179</sup> on the human rights-related aspects of trade agreements.<sup>180</sup>

The Treaty of Lisbon brought forth an expansion of the EU’s CCP to not only encompass a broader portfolio of international trade and foreign direct investment policies, but also to link the EU’s commercial agenda to the projection of what it considers to be foundational values. Placed within the remit of ‘external action by the Union’,<sup>181</sup> the EU’s CCP policies are now poised to be guided by the human rights provisions as laid down in Article 21(1) TEU,<sup>182</sup> thereby reflecting an overall spirit of ‘consistency’<sup>183</sup> and ‘good governance through trade’. The United States, by contrast, seems to be more succinct in its objectives of pursuing international trade policies. Although the pivotal 1974 Trade Act also pronounces ‘to promote the development of an open, non-discriminatory, and fair world economic

<sup>171</sup> Trade Act of 1974. Available online: <http://www.house.gov/legcoun/Comps/TRADE74.PDF>, accessed on 28.8.2014.

<sup>172</sup> USTR Relations with Congress. Available online: <http://www.ustr.gov/about-us/congressional-affairs>, accessed on 28.8.2014.

<sup>173</sup> *Supra*, n. 169.

<sup>174</sup> Carbone, M. and Orbie, J., ‘Beyond Economic Partnership Agreements: the European Union and the trade-development nexus’, *Contemporary Politics*, Vol. 20(1), 2014, p. 1-9.

<sup>175</sup> Hafner-Burton, E., *Forced to be Good. Why Trade Agreements Boost Human Rights*, Cornell University Press, Ithaca, 2009, p. 4.

<sup>176</sup> Aaronson, S. and Chauffour, J.P., ‘The Wedding of Trade and Human Rights: Marriage of Convenience or Permanent Match?’, WTO Publications, Geneva, 2011.

<sup>177</sup> ILO Preamble to the Constitution. Available online:

[http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0:NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0:NO:62:P62_LIST_ENTRIE_ID:2453907:NO), accessed on 28.8.2014.

<sup>178</sup> Singapore WTO Ministerial 1996, ‘Ministerial Declaration Wt/Min(96)/Dec’, 18.12.1996. This statement was later reaffirmed in the 2001 Doha WTO Ministerial Declaration.

<sup>179</sup> Brown, D., Deardorff, A. and Stern, R., ‘Labor Standards and Human Rights: Implications for International Trade and Investment’, *University of Michigan*, IPC Working Paper Series No. 119, 2011, p. 1.

<sup>180</sup> The only reference made to such standards in the WTO context is enshrined in Article XX(e) GATT 1947, which allows WTO members to prohibit trade ‘relating to the products of prison labour’.

<sup>181</sup> Part Five, External Action by the Union, Articles 205 – 214 TFEU.

<sup>182</sup> Art. 205 TFEU.

<sup>183</sup> Art. 21(3) TEU.

system<sup>184</sup> it explicitly links this mission to labour rights-related provisions by evoking the need to ‘provide adequate procedures to safeguard American industry and labor [...] and to assist industries, firms, workers, and communities to adjust to changes in international trade flows’.<sup>185</sup> In doing so, it thus pays considerably less attention than the EU to the comprehensive human rights principles as enshrined in Article 21(1) TEU. Indeed, paving the way for today’s US trade and investment policies, the 1962 Trade Expansion Act had already proclaimed to ‘promote the general welfare, foreign policy, and security of the United States through international trade agreements and through adjustment assistance to domestic industry, agriculture, and labor’.<sup>186</sup>

Echoing the fear for instilling protectionist measures in disguise, some have questioned the very rationale for integrating human rights into trade policies,<sup>187</sup> or have even posited that these areas ‘diverge at the theoretical level’.<sup>188</sup> Still others have pondered whether the sticks-and-carrot approach of tying material benefits to the compliance with certain standards might, in fact, provide one of the few reliable and effective ways to enforce human rights protection worldwide.<sup>189</sup> In the midst of this debate, the EU and the US focus has increasingly shifted from concluding multilateral agreements within the WTO to pursuing bilateral trade routes with strategic partners instead. Faced with the frustrations surrounding the everlasting Doha Round stalemate<sup>190</sup> and the perceived regulatory deficit of human rights governance,<sup>191</sup> it perhaps comes as no surprise that both actors have increasingly opted for a bilateral ‘Plan B’.<sup>192</sup>

**Promoting the Trade-Human Rights Nexus** Given the above mentioned and operating at the frontline of the trade-human rights nexus which falls outside the scope of the WTO, both the EU and the US use a combination of two broad avenues to pursue their trade agenda: unilateral (non-reciprocal) policies and bilateral (reciprocal) trade agreements. In practice, the EU and the US have been granting preferential tariff cuts to developing countries in exchange for the implementation of human rights standards under their unilateral Generalized Scheme of Preferences (GSP), and have also been including human rights clauses in their bilateral trade agreements – albeit to a lesser extent. Following the slightly divergent approach towards their respective trade objectives, the EU defines its guiding human rights principles as constituting broader and more transversal rights, while the US mainly focuses on the integration of labour standards in particular.<sup>193</sup>

<sup>184</sup> Preamble, Trade Act of 1974, Public Law 93–618, as amended.

<sup>185</sup> Sec. 2, Trade Act of 1974, Public Law 93–618, as amended, p. 7.

<sup>186</sup> Public Law 87-794, 11.10.1962, Preamble, p. 872.

<sup>187</sup> Schneider, F., ‘Human Rights Conditionality in the EU’s Generalised System of Preferences: Legitimacy, Legality and Reform’, *Zeitschrift für Europarechtliche Studien*, Vol. 3, 2012, p. 301-328.

<sup>188</sup> Ibrahim, A., ‘International Trade and Human Rights: An Unfinished Debate’, *German Law Journal*, Vol. 14(1), 2013, p. 322.

<sup>189</sup> Hafner-Burton, E., ‘Trading Human Rights: How Preferential Trade Agreements Influence Government Repression’, *International Organization*, Vol. 59(3), 2005, p. 593-629.

<sup>190</sup> Hartman, S., ‘The WTO, the Doha Round Impasse, PTAs, and FTAs/RTAs’, *International Trade Journal*, Vol. 27(5), 2013, p. 411.

<sup>191</sup> Pogge, T., *World Poverty and Human Rights*, Polity, Cambridge, 2008, p. 25.

<sup>192</sup> Keukeleire and Delreux, *supra*, n. 59, p. 199.

<sup>193</sup> Kerremans, B. and Martins Gistelinc, M., ‘Interest Aggregation, Political Parties, Labour Standards and Trade: Differences in the US and EU Approaches to the Inclusion of Labour Standards in International Trade Agreements’, *European Foreign Affairs Review*, Vol. 14, 2009, p. 683-701. See also Aaronson, S. and Zimmerman, J., *Trade imbalance: the struggle to weigh human rights concerns in trade policymaking*, Cambridge University Press, Cambridge, 2008.

## 4.3 Main instruments

### 4.3.1 Unilateral/non-reciprocal trade instruments

**Human Right Provisions** As the oldest trade instrument to employ normative conditionalities through commercial incentives, the GSP was established at the 1968 United Nations Conference on Trade and Development (UNCTAD) in New Delhi. According to Resolution 21 (ii), '[...] the objectives of the generalized, non-reciprocal, non-discriminatory system of preferences in favour of the developing countries, including special measures in favour of the least advanced among the developing countries, should be: (a) to increase their export earnings; (b) to promote their industrialization; and (c) to accelerate their rates of economic growth'.<sup>194</sup> The so-called 'Enabling Clause',<sup>195</sup> adopted in 1979 as part of the GATT Tokyo Round, granted permanent validity to the GSP.<sup>196</sup> The EU and the US were amongst the first global actors to establish their GSP schemes in 1971 and 1974 respectively,<sup>197</sup> and to gradually integrate human rights provisions in their respective policies. While the EU claims its scheme to be 'the flagship EU trade policy instrument supporting sustainable development and good governance in developing countries',<sup>198</sup> the US variants have also been hailed for being 'the chief policy vehicle in US law to promote [human rights] principles'.<sup>199</sup>

**The US Generalized System of Preferences** The US was the first actor to effectively integrate this conditionality in its GSP scheme. Backed by a strong Congress controlled by Democrats, President Reagan signed the GSP Renewal Act of 1984<sup>200</sup> and thereby made GSP benefits conditional upon whether the country was 'taking steps to afford internationally recognized worker rights'.<sup>201</sup> In addition, the Act also foresaw procedural guidelines to file complaints against a country's GSP status in the case of labour rights violations, which could possibly lead to an investigation launched by the USTR and ultimately result in the suspension of trade preferences.<sup>202</sup> Perhaps most importantly, and following a long period of political meandering in Congress<sup>203</sup> it also consolidated the applicable definition of such rights, which would continue to be utilized in current GSP schemes and throughout the designated 'labour chapters' of present-day Free Trade Agreements (FTAs, *infra*). In the years that followed, the US increasingly strengthened the labour provisions in its GSP scheme,<sup>204</sup> ranging from the 1985 inclusion of labour provisions in the legislation governing the Overseas Private Investment Corporation (OPIC)<sup>205</sup> to

<sup>194</sup> See designated UNCTAD information about GSP. Available online: <http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx>, accessed on 28.8.2014.

<sup>195</sup> See, for more background information, Wouters, J. and De Meester, B., *The World Trade Organization. A Legal and Institutional Analysis*, Intersentia, Cambridge, 2007, p. 65-68, paras 88-92.

<sup>196</sup> WTO Decision of 28.11.1979 (L/4903), 'Differential and more favourable treatment reciprocity and fuller participation of developing countries'. Available online: [http://www.wto.org/English/docs\\_e/legal\\_e/enabling1979\\_e.htm](http://www.wto.org/English/docs_e/legal_e/enabling1979_e.htm), accessed on 28.8.2014.

<sup>197</sup> The UNCTAD Secretariat lists a total of 13 national schemes, including Australia, Belarus, Bulgaria (consolidated under the EU), Canada, Estonia (consolidated under the EU), the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the United States of America.

<sup>198</sup> European Commission, 'Communication on Trade, Growth and Development. Tailoring trade and investment policy for those countries most in need', COM(2012) 22 final, Brussels, 27.1.2012, p. 13.

<sup>199</sup> Compa, L., and Vogt, J.S., 'Labor rights in the generalized system of preferences: a 20-year review', *Comparative Labour Law and Policy Journal*, Vol. 22, 2000, p. 199.

<sup>200</sup> GSP Renewal Act of 1984, Pub. L. No. 98-573, 98 Stat. 3019.

<sup>201</sup> 19 U.S.C.A § 2462(b)(2)(G).

<sup>202</sup> Regulations of the U.S. Trade Representative Pertaining to Eligibility of Articles and Countries for the Generalized System of Preferences Program, 15 C.F.R. § 2007 et seq., 2002.

<sup>203</sup> Compa and Vogt, *supra*, n. 199, p. 203-204.

<sup>204</sup> *Ibid.* p. 205-206.

<sup>205</sup> 22 U.S.C.A. § 2191 a(a)(1).

the 2000 establishment of the flagship African Growth and Opportunity Act (AGOA), the Andean Trade Preference Act (ATPA), and the Caribbean Basin Initiative (CBI), which were all effectively made conditional upon the compliance with labour rights as defined in the original GSP Act.<sup>206</sup> In terms of implementation, the US GSP is governed by Title V of the 1974 Trade Act, under which the executive branch has the sole competence to grant or withdraw GSP preferences by unilateral Presidential proclamation.<sup>207</sup> As in many other cases of US external action, however, there is also a certain 'tension in the twilight zone',<sup>208</sup> as the GSP scheme has to be periodically reauthorized and extended by US Congress – most notably, by the Ways and Means committee in the House of Representatives – reinforcing the leverage of the legislative branch over human rights provisions in the GSP. Most recently, the GSP scheme was extended until 31 July 2013, in Section 1 of P.L. 112-40. This means that, at the time of writing, US Congress is still in the process of considering a renewal of the GSP scheme<sup>209</sup>

**The EU Generalized System of Preferences** The EU followed suit from 1991 onwards, when it first included a provision of 'positive conditionality' in its GSP schemes with a number of Latin American countries, in order to reward progress made on combating drug trafficking.<sup>210</sup> The possibility of withdrawing preferences in light of evidence of forced labour as defined in the Geneva Conventions (1926 and 1956) and the ILO Conventions (No 29 and 105) was subsequently introduced in the first GSP Regulation.<sup>211</sup> Against the backdrop of the 1995 UN World Summit for Social Development in Copenhagen, as well as the 1998 ILO Declaration on Fundamental Principles and Rights, the EU was prompted to revise its scheme in 2001, which extended its legal basis 'to correspond with all the eight fundamental Conventions of the ILO',<sup>212</sup> for both the incentive and the withdrawal clause. Since the reform of the EU's GSP scheme following the WTO Appellate Body Report in the 2004 case EC Tariff Preferences, the EU's GSP has consisted of three distinct arrangements, which have been slightly amended following the most recent 2014 reform.<sup>213</sup> The Generalized Preferences Committee is mandated to 'examine any matter relating to the application of th[e] [GSP] Regulation, raised by the Commission or at the request of a Member State'.<sup>214</sup> Hitherto established by the 2008 GSP Regulation,<sup>215</sup> the GSP Committee is composed of representatives of the Commission, EEAS, the EP's INTA committee and the individual Member States, and meets on a regular basis to discuss the economic, social and

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<sup>206</sup> 19 U.S.C.A. § 3703(a)(1)(F).

<sup>207</sup> Blanchard, E., and Hakobyan, S., 'The U.S. Generalized System of Preferences in Principle and Practice', *Tuck School of Business*, Working Paper No. 2439798, 2013, p. 5.

<sup>208</sup> Henkin, *supra*, n. 20, p. 888.

<sup>209</sup> USTR designated homepage about the US GSP. Available online: <http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp>, accessed on 28.8.2014.

<sup>210</sup> Portela, C. and Orbie, J., 'Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?', *Contemporary Politics*, Vol. 20(1), 2014, p. 65.

<sup>211</sup> Council Regulation (EC) No 3281/94 of 19.12.1994 applying a four-year scheme of generalized tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries.

<sup>212</sup> Portela and Orbie, *supra*, n. 210, p. 65.

<sup>213</sup> 'Regulation (EU) No. 978/2012 of the European Parliament and of the Council of 25.10.2012 applying a scheme of generalized tariff preferences and repealing Council Regulation (EC) No. 732/2008', L 303/1, 31.10.2012.

<sup>214</sup> 'Commission Delegated Regulation (EU) No 1083/2013 of 28.8.2013, establishing rules related to the procedure for temporary withdrawal of tariff preferences and adoption of general safeguard measures under Regulation (EU) No 978/2012 of the European Parliament and the Council applying a scheme of generalized tariff preferences', L 293/16, 5.11.2013, Art. 39(1).

<sup>215</sup> 'Council Regulation (EC) No 732/2008 of 22.7.2008 applying a scheme of generalized tariff preferences for the period from 1.1.2009 to 31.12.2011 and amending Regulations (EC) No 552/97, (EC) No 1933/2006 and Commission Regulations (EC) No 1100/2006 and (EC) No 964/2007', Art. 27.

political impacts of the scheme.<sup>216</sup> In practice, EU GSP preferences, from either the general or specialized scheme, have been withdrawn on only three occasions.

Although no official information is publicly available to assess the current number of labour rights reviews in the US, interview findings and previously conducted evaluations confirm the perception that the US is, in fact, a more adamant enforcer of human rights provisions through trade than the EU. When it comes to withdrawing GSP preferences, the maxim that ‘when all you have is a hammer, every problem looks like a nail’<sup>217</sup> still seems to hold for the US to a large extent. Indeed, in the US between 1984 and 2001 alone, more than 100 reviews of countries’ labour rights records were conducted, as a result of which 13 countries were suspended from GSP benefits and 17 were temporarily extended pending the results of continuing review.<sup>218</sup> In view of the EU’s much more limited track record in suspending GSP benefits, therefore, it perhaps comes as no surprise that one observer employed a modified maxim to describe the role of EU sanctions in EU Foreign Policy: ‘when all you have are carrots, every problem looks like a rabbit’.<sup>219</sup>

**GSP: empty shell or springboard for human rights?** The GSP tends to trigger some ‘strongly diverging partisan views’. Whereas some regard it as a ‘springboard for the promotion of human rights’, others have debunked the instrument for being ‘an empty shell’.<sup>220</sup> The EU’s GSP has not remained devoid of criticism with regard to its effective promotion of human rights throughout its schemes. Scholars from across several disciplines have accused the EU of employing ‘double standards’,<sup>221</sup> espousing a ‘dichotomy between norms and interests’<sup>222</sup> whereby the procedure behind the granting and withdrawing of GSP preferences has been noted to be ‘lacking in transparency’.<sup>223</sup> In addition, the EU has also been questioned upon its reluctance to employ sanctions in the context of its GSP scheme,<sup>224</sup> and this in spite of the observation that the EU has been imposing a panoply of sanctions with increasing frequency in recent years.<sup>225</sup> With regard to the US GSP scheme, criticism has been raised on five fronts. First, it is noted that the reference to ‘internationally recognized worker rights’ does not explicitly mention multilateral frameworks, including ILO Conventions, pertinent human rights treaties or any other benchmarks of high international standing. As a result, some have argued that the US has been undermining multilateral efforts to forge internationally consistent norms.<sup>226</sup> Second, due to the unilateral nature of the GSP, some have raised the point that third country partners cannot negotiate its terms,<sup>227</sup> and therefore view the scheme as an example of ‘aggressive unilateralism’ or even ‘global bullying by the United States’.<sup>228</sup> Third, the US decision-making process has been faulted with assigning

<sup>216</sup> Interview with EU official, Brussels, 12.5.2014.

<sup>217</sup> Lehne, S., ‘The Role of Sanctions in EU Foreign Policy’, *Carnegie Endowment for International Peace*, 2012, p. 1.

<sup>218</sup> Compa and Vogt, *supra*, n. 199, p. 208-209. See also Brown, Deardorff and Stern, *supra*, n. 179, p. 4.

<sup>219</sup> Lehne, *supra*, n. 217.

<sup>220</sup> Interview with EU official, Brussels, 12.5.2014.

<sup>221</sup> Fierro, E., *The European Union’s Approach to Human Rights Conditionality in Practice*, Martinus Nijhoff, The Hague/London/New York, 2003, p. 378.

<sup>222</sup> Carbone and Orbie, *supra*, n. 174, p. 5.

<sup>223</sup> Bartels, L., The Application of Human Rights Conditionality in the EU’s Bilateral Trade Agreements and other Trade Agreements with Third Countries, European Parliament, *Directorate-General for External Policies of the Union*, Directorate B, Policy Department, EXPO-B-INTA-2008-57, November 2008, p. 8.

<sup>224</sup> Vandenberghe, J., ‘On carrots and sticks: The social dimension of EU trade policy’, *European Foreign Affairs Review*, Vol. 13(4), 2008, p. 561-581.

<sup>225</sup> Portela, C., *European Union Sanctions and Foreign Policy: When and Why Do They Work?*, Taylor & Francis, Oxford, 2009. See also Gebert, K., ‘Shooting in the Dark? EU Sanctions Policies’, *European Council on Foreign Relations*, Policy Brief No. 71, January 2013.

<sup>226</sup> Alston, P. ‘Labor Rights Provisions in US Trade Law: "Aggressive Unilateralism"’, *Human Rights Quarterly*, 1993, p. 1-35.

<sup>227</sup> Portela, *supra*, n. 225.

<sup>228</sup> Compa and Vogt, *supra*, n. 199, p. 235.

too much power to the USTR which may decide ‘whether to accept the case (a prosecutor’s role), to hear the case (a judge’s role), to weigh the evidence (a jury’s role), and to apply the sanction (an executioner’s role)’.<sup>229</sup> Fourth, the US has been deemed hypocritical in requiring labour standards without itself having ratified a number of important treaties: for instance, the US is not a party to the International Covenant on Economic, Social and Cultural Rights. Finally, in spite of the seemingly long list of complaints filed against GSP beneficiaries’ human rights records, it has been argued that the ‘merits of a petition have little bearing on the outcome of a case’. Instead, ‘geopolitics and foreign policy are the chief considerations in applying the GSP labor rights clause, not the merits of a country’s compliance or non-compliance with the law’.<sup>230</sup>

#### 4.3.2 Bilateral trade agreements

**FTAs and the ‘Most Favoured Nation’ principle and the integration of human rights** FTAs constitute reciprocal trade benefits between two or more concluding parties. These ‘Preferential Trade Agreements’ (PTAs) or ‘Regional Trade Agreements’ (RTAs) are often – but not always - concluded between a developed and a developing country (or group of countries), where the developed country grants preferential market access to the developing country in the form of low tariffs or high import quota. Under international trade law, PTAs thus constitute a deviation from the ‘Most Favoured Nation’ (MFN) principle, which foresees that, in a bid to liberalize trade relations around the world, any country must receive the same trade benefits as those of the most favoured nation with which the country granting such preferential treatment is engaged. Whereas human rights standards used to be merely linked to unilateral measures such as the GSP without placing an obligation on the EU or the US to uphold human rights,<sup>231</sup> they have now been expanded into the delicate realm of bi- and multilateral PTAs – thereby creating reciprocal obligations for the contracting parties under international law to protect human rights.

In the EU, human rights have formed an ‘essential element’ or ‘suspension clause’ in all framework agreements since 1995. This means that the EU may suspend or even terminate bilateral agreements in the case of serious human rights violations (see also link with the suspension mechanisms under the Cotonou Agreement, *infra*).<sup>232</sup> In the years leading up to the human rights momentum brought forth by the Lisbon Treaty, the EU pronounced a number of commitments to ‘deliberately put ‘sustainable development’ and ‘social solidarity’ at the heart of EU trade policy discourse’.<sup>233</sup> Ranging from the 2004 Communication on the ‘Social Dimension of Globalization’ and the 2006 ‘Global Europe’ Strategy, to the 2009 Council Guidelines on the use of such provisions in trade agreements, the major breakthrough eventually came with the adoption of the 2012 Human Rights Action Plan in which the EU pledged to ‘make trade work in a way that helps human rights’.

Similar to the EU, the integration of labour standards in US FTAs is also found to have taken off from the mid-1990s onwards, with the adoption of the North American Agreement on Labour Cooperation (NAALC) as an annex to the North American Free Trade Agreement (NAFTA).<sup>234</sup> As has been noted

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<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> Hafner-Burton, *supra*, n. 175, p. 8.

<sup>232</sup> Fierro, *supra*, n. 221.

<sup>233</sup> Orbie, J., ‘Promoting Labour Standards Through Trade: Normative Power or Regulatory State Europe’, in Orbie, J. (ed.) *Normative Power Europe: Empirical and Theoretical Perspectives*, Palgrave MacMillan, Basingstoke, 2011, p. 165.

<sup>234</sup> International Institute for Labour Studies, ‘Social Dimensions of Free Trade Agreements’, *ILO Studies on Growth With Equity*, ILO, Geneva, 2013, p. 19.



above, this development followed the precedent set by the 1984 GSP Renewal Act.<sup>235</sup> Signed between the Canadian, Mexican and US governments, the 1994 NAALC constitutes the first labour agreement to have been negotiated as part of a PTA. According to the designated Secretariat of the Commission for Labor Cooperation, mandated to oversee its effective implementation, NAALC is unique in that it 'provides a mechanism for member countries to ensure the effective enforcement of existing and future domestic labor standards and laws [...], to improve working conditions and living standards, and to protect, enhance and enforce basic workers' rights'.<sup>236</sup>

**Comparing EU and US human rights conditionalities in FTAs** The table in the annex to this study maps and compares the different countries with which the EU and the US have already concluded FTAs. For the sake of maintaining a certain level of comparability in the myriad of FTAs which are currently being negotiated by both actors, the table takes as a point of departure those countries where an FTA is in place with either the EU, the US or both, in order to subsequently highlight the prominence of human rights considerations contained therein. Drawing on this table, it once again emerges that the EU is a more reluctant enforcer of human rights provisions through FTAs than the US. As noted by the ILO in a recent assessment, in the EU's case the enforcement of human rights provisions tends to be rather weak. Even in those cases where complaint mechanisms are available, they have seldom been put into motion. Reflecting the US conditional approach, it is interesting to note that in the four cases in which a complaint mechanism has been used, the ILO comes to the conclusion that these always involved the US.<sup>237</sup> Still, it adds, 'no complaint has given rise to a decision of a dispute settlement body or even led to sanctions'.<sup>238</sup>

**EU missing FTA targets vs. US consolidated FTA models** First, as evidenced by the comparative analysis in the table in the Annex, the EU seems to be employing a number of moving targets when integrating human rights provisions in its FTAs. Contrary to the US FTA model framework, in which every country is subject to almost identical provisions in every bilateral trade agreement, the EU FTA model integrates a so-called 'Trade and Sustainable Development Chapter' which substantially differs from one trade agreement to the next. Although the same themes recur in the Preamble to an EU trade agreement, in which references are made to the 'commitment to the United Nations Charter and the Universal Declaration of Human Rights', as well as to the 'objective of sustainable development, including [...] respect for labour rights', the EU does not uphold the same level of consistency as the US, which prescribes an entire chapter on 'Labor' and the adhering ILO Declaration on Fundamental Principles and Rights at Work, in which each article spells out the precise scope of each labour right and standard upon which the US FTA has been made conditional. Indeed, as has been remarked elsewhere, 'contrary to the US's agreements, the standards used [in EU agreements] to evaluate the respect of the labour rights by the contracting parties seem to be stemming from international rather than national labour law, as the standards adopted by the ILO are the main point of reference'.<sup>239</sup> It follows, therefore, that the US FTA model pinpoints labour rights conditionalities in a more concrete manner than the EU FTA model, where labour standards are not merely limited to the ILO Declaration, but also refer to much broader notions of human rights promotion in general.

**EU carrots vs. US sticks** The differences in FTA models are partly a result of the differences in the institutional and political context within which the EU and the US are respectively embedded. Indeed, in

<sup>235</sup> Compa and Vogt, *supra*, n. 199, p. 206.

<sup>236</sup> Designated homepage of the Secretariat of the Commission for Labor Cooperation. Available online: <http://www.naalc.org/naalc.htm>, accessed on 28.8.2014.

<sup>237</sup> International Institute for Labour Studies, *supra*, n. 237, p. 3.

<sup>238</sup> *Ibid.*

<sup>239</sup> Kerremans and Martins Gistelincq, *supra*, n. 193, p. 686.

the US, backed by a relatively strong Congress, the 'political process'<sup>240</sup> is said to play a fundamental role in stipulating the conditions for the ratification of trade agreements, which has resulted in the requirement to make FTAs conditional upon the compliance with labour standards, prior to their approval by Congress, since 2006.<sup>241</sup> According to several US respondents, this policy development mirrors a growing sense in both public opinion and an adamant Congress that the domestic implications of economic globalization should not be ignored. Given the recent political climate in the US and the disposition of Congress to effectively influence US trade agreements, it perhaps comes as no surprise that in six out of seven trade agreements which have been concluded since the 2006 requirement, the ILO found that 'pre-ratification conditionality has contributed to significant reforms of domestic labour legislation and practice'.<sup>242</sup> A telling example in this regard was the contentious US-Oman FTA which, prior to its conclusion, had been subject to a significant amount of Congressional pressure because of serious labour rights concerns.<sup>243</sup> Citing the outcome as a tremendous contribution to labour rights protection on the ground, one respondent confirmed that, because of Congress' commitment, 'President Bush had to address the union issue before signing the FTA, and Oman actually changed its labour laws'.<sup>244</sup> In a similar vein, there had been a heated debate surrounding the US-Bahrain FTA, especially given the context of the Arab Spring when, as one respondent noted, 'the US really wanted to be vocal on human rights but realized it had lost a lot of credibility in the region'. When the AFL-CIO subsequently filed a complaint, 'US diplomats were happy that they could play the labor rights card and use the FTA leverage as a means to be vocal on human rights issues in the region'.<sup>245</sup> In view of its rather forceful foreign policy credentials, however, it seems that the US only employs trade instruments when the first option of traditional foreign policy is not immediately at hand. The EU, meanwhile, is faced with a traditional foreign policy which is still, euphemistically speaking, at a 'complicated crossroads'.<sup>246</sup>

#### 4.4 Recommendations

##### Recommendations on integrating human rights into EU trade policies

- **Consistently apply human rights conditionality in trade by employing the same standard clauses in all EU international agreements** The EU may learn from the rather straightforward US approach in consistently employing the same language, which has resulted in more narrowly defined and thus more credible human rights-related trade policies.
- **Ensure transparent decision-making by presenting annual EC reports on the trade-human rights nexus to the EP and the Council** Coherence and transparency in unilateral measures such as GSP remain important signifiers of credibility in external action. In response to the prevailing criticism that the decision-making process behind the EU's human rights-related trade policies remain incoherent and opaque, the EC should present annual reports on the trade-human rights nexus to the EP and the Council and seek synergies with the EP's Annual Report on human rights in the world.

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<sup>240</sup> International Institute for Labour Studies, *supra*, n. 237, p. 2.

<sup>241</sup> *Ibid.* p. 35.

<sup>242</sup> *Ibid.* p. 2.

<sup>243</sup> *Ibid.*

<sup>244</sup> Interview with US official, Washington D.C., 14.3.2014.

<sup>245</sup> Interview with US official, Washington D.C., 14.3.2014.

<sup>246</sup> Balfour, R. and Raik, K., 'Equipping the European Union for the 21st Century – National Diplomacies, the European External Action Service and the making of EU foreign policy', *FIIA Occasional Report*, No. 1(36), 2013, p. 11.

- **Ensure accountability of human rights-related trade policies by establishing an agency tasked with monitoring the EU's conditionality policies** If there is not the necessary political will to add this task to the existing mission of the FRA of monitoring 'internal' fundamental rights issues within the EU, an external human rights agency could be established to maintain an oversight of human rights in all of the EU's external relations, including clauses in all international agreements.

#### Recommendations on EU inter-institutional cooperation in EU trade policies

- **Encourage the EEAS to take up its role as the 'guardian of consistency', in order to systematically mainstream human rights into trade policies and to ensure COM-EEAS-EP coordination in matters relating to the trade-human rights nexus** This may be done by expanding the established good practice of having institutionalized GSP Committee meetings during which the Commission, EEAS and EP aim to formulate a common stance on GSP policies. By the same token, a similar process may be envisaged to discuss EU international agreements on a recurring basis.
- **Encourage MEPs to take their role as human rights actors in trade-related affairs to heart** The EP should take up its empowered role as a human rights watchdog and effectively ensure that 'trade works in a way that helps human rights'. In collaborating with the EEAS as the 'guardian of consistency' (*supra*), a permanent representation of the HR/VP in parliamentary settings may be considered to this end.
- **Foster institutional memory in devising human rights-sensitive trade policies** In light of the myriad of human rights considerations relating to EU international agreements, there is a clear need to consolidate all relevant human rights information surrounding these agreements in an up-to-date database, which can be shared between the EU Institutions and the Member States.

#### Recommendations on EU-US Cooperation in international trade policies

- **Forge a stronger partnership on human rights-related trade policies** A stronger transatlantic partnership may generate a higher degree of economic and political clout to arrive at a new consensus on including non-trade issues in multilateral trade agreements. The EU and the US may pull their collective weight to ease the current tensions surrounding the increasing scramble for bilateral agreements and the declared moratorium on multilateral trade fora.
- **Establish a platform for EP-Congress inter-parliamentary cooperation on human rights-related aspects of foreign policy** The EP and US Congress may reinvigorate a stronger transatlantic partnership on human rights-related trade policies by establishing a platform for inter-parliamentary cooperation across the Atlantic.

## 5. DEVELOPMENT POLICY

Human rights and development are considered to be intimately connected, with a common emphasis on issues of poverty, inequality, discrimination and injustice. Since the mid-1980s, and particularly since the adoption of the 1986 Declaration on the Right to Development by the UN General Assembly, the mutual **synergies between human rights and development have increasingly been addressed by scholars, activists, and policy-makers**. The past two decades have brought forth an increasingly integrated framework within which human rights and development practitioners have been striving towards one common working language. The concept of **mainstreaming human rights in the area of development cooperation**<sup>247</sup> has been taken up by a growing number of committed actors in the development community. Development assistance in its various forms is often seen as a key tool for advancing and addressing human rights in partner countries. Such efforts are strongly linked to US and EU efforts in 'democracy promotion', which are further discussed in the case study under section 6.2.

### 5.1 Main actors

**USAID and the US State Department** Since its creation by the Foreign Assistance Act (FAA) of 1961, USAID's status as an independent development agency, and its relationship with the State Department, has been a point of dispute. Several political initiatives have been undertaken to fully integrate USAID into the USSD.<sup>248</sup> Since 1995 the Secretary of State is the coordinator of all US economic aid programs.<sup>249</sup> The USAID administrator operates under **the direct policy authority and foreign guidance** of the Secretary of State<sup>250</sup>. Despite several reforms, it has been noted that in practice 'USAID's relationship with the USSD, both in Washington and in the field, has rested less on organizational lines of authority than on informal personal relationships [...]'.<sup>251</sup> Depending on the account/fund allocated by Congress, either USAID or the USSD has direct control over the planning of development assistance. Similarly, in the area of democracy assistance and human rights promotion, both USAID and the USSD develop policies and each has their own budget to administer (see *infra*, section 6.2.3). Observers note that a 'gradual erosion' of USAID's *de facto* autonomy in planning development policy has occurred,<sup>252</sup> a process catalysed by the creation of a 'Foreign Assistance Bureau' within the USSD charged with aligning USAID's budget and activities with foreign policy objectives.<sup>253</sup> In addition, **funding for development assistance has been increasingly** directed through new mechanisms, such as the Millennium Challenge Corporation (MCC), or presidential initiatives. Reforming the fragmented landscape of US foreign assistance has remained on the political agenda, with some calling for a complete integration of all foreign assistance activities in the USSD, while others have called to upgrade

<sup>247</sup> For this section we adopt the term 'development assistance' as comprising assistance for long-term economic development and poverty alleviation, as well as 'political aid' for human rights promotion and democracy assistance, but excluding military assistance and humanitarian aid, as well as the regulations and policies of development banks and overseas investment funds or organizations.

<sup>248</sup> Cutshall, C.R. et al, 'Integrating USAID and DOS: The Future of Development and Diplomacy', Project on National Security Reform, *Maxwell School of Citizenship and Public Affairs*, 2009.

<sup>249</sup> Wiese, S.J., 'U.S. Foreign Aid Reform: Changing Institutional Problems in Order to Meet Modern Day Needs', *Washington University Global Studies Law Review*, Vol 8(4), p. 747, at 752.

<sup>250</sup> USAID, 'Agency Organization and Legal Affairs, ADS 101 – Agency Programs and Functions', April 2013.

<sup>251</sup> Epstein, S., Nowels, L. and Hildreth, S., 'Foreign Policy Agency Reorganization in the 105th Congress', *Congressional Research Service*, CRS Report for Congress, November 1998, p. 21.

<sup>252</sup> Hyman, G., 'Foreign Policy and Development Structure, Process, Policy, and the Drip-by-Drip Erosion of USAID', *Center for Strategic and International Studies*, Washington, D.C., 2010.

<sup>253</sup> Veillette, C., 'Foreign Aid Reform: Issues for Congress and Policy Options', *Congressional Research Service*, CRS Report for Congress, November 2007, p. 3.

USAID's status to 'cabinet' level.<sup>254</sup> The **Obama administration has sought to redefine the relationship between USAID and USSD** through the reform process under the Quadrennial Diplomacy and Development Review (QDDR) which seeks to 'rebuild' USAID as a 'preeminent global development institution'.<sup>255</sup> The QDDR is part of a new emphasis on development policy as 'a central pillar' of national security policy, on equal footing with diplomacy and defence.<sup>256</sup>

**US Congress** The US Congress directly allocates funding for US bilateral and multilateral development assistance through the annual State Department and Foreign Operations Appropriations bill. Several congressional authorizing committees and appropriations subcommittees exert control over what countries and what sectors receive more or less development funding.<sup>257</sup> Moreover, by setting funding levels and earmarking funding, Congress identifies certain priority countries and priority human rights issues it wants to see addressed.<sup>258</sup> In the adoption of new bills, such as the ADVANCE Democracy Act of 2007, **Congress can authorize additional funding for assistance dedicated to human rights promotion and democracy support.**<sup>259</sup> It is also able to set human rights conditions for certain countries through adding specific provisions in budget appropriations. While such conditions are more systematically attached to the provision of military assistance rather than economic assistance,<sup>260</sup> the recent 2014 allocations Act provides a salient example of how **Congress can scrutinize USAID's activities.** It prohibits funding for activities that may 'directly or indirectly' involve forced eviction in certain regions of Ethiopia where USAID has been active.<sup>261</sup> These prohibitions illustrate the broad powers of Congress to scrutinize and influence US development policy, from the allocation of funding to broad sectors or countries, down to the level of implementation of programmes.

**DG DEVCO and the EEAS** The establishment of a new DG 'Development and Cooperation –EuropeAid' (DG DEVCO)<sup>262</sup> and the creation of the EEAS have significantly changed the decision making process and management of EU development assistance, in particular since development programming is the only specific policy area included in the EEAS's mandate.<sup>263</sup> Summarizing the new structure, the EEAS and DG DEVCO are co-programming development cooperation, while DG DEVCO remains in charge of the implementation of development policy.<sup>264</sup> A set of Working Arrangements elaborates how the Commission and the EEAS give shape to the EU's development assistance policy; they 'will perform their respective tasks throughout the programming and implementation cycle in full transparency, informing and consulting each other [...]'.<sup>265</sup> The working arrangement set out a **division of work in the allocation of development funding for 2014-2020**, whereby the EEAS will lead in planning the allocation of the European Development Fund (EDF), the European Neighbourhood and Partnership

<sup>254</sup> Cutshall, C.R. et al, *supra*, n. 248; Atwood, B. et al, 'Arrested Development Making Foreign Aid a More Effective Tool', *Foreign Affairs*, Vol. 6, 2008, p. 123-132.

<sup>255</sup> US Department of State, *supra*, n. 72.

<sup>256</sup> The White House, Presidential Policy Directive on Global Development, 22.9.2010. Available online: <http://www.whitehouse.gov/the-press-office/2010/09/22/fact-sheet-us-global-development-policy>, accessed 29.8.2014.

<sup>257</sup> Tarnoff, C. and Leonardo Lawson, M., 'Foreign Aid: An Introduction to U.S. Programs and Policy', *Congressional Research Service*, CRS Report to Congress, February 2011, p. 27-28.

<sup>258</sup> Epstein, S., Serafino, N. and Miko, F., 'Democracy Promotion: Cornerstone of U.S. Foreign Policy?' *Congressional Research Service*, CRS Report to Congress, December 2007, p. 22.

<sup>259</sup> *Ibid.* p. 23.

<sup>260</sup> Serafino et al, *supra*, n. 80.

<sup>261</sup> Consolidated Appropriations Act, 2014, 113th Congress (2013-2014), H. R. 3547—525.

<sup>262</sup> The Commission's DG DEVCO is composed of the former DG Development and Cooperation (DG Dev) and the EuropeAid Cooperation Office (AIDCO).

<sup>263</sup> Council Decision 2010/427/EU, *supra*, n. 48, Article 9.

<sup>264</sup> Interview with EU official, Brussels, 8.4.2014.

<sup>265</sup> European Commission, Working Arrangements Between Commission Services and the European External Action Service (EEAS) in Relation to External Relations Issues, SEC(2012)48, 13.1.2012, p. 15.

Instrument (ENPI), and the Development Co-operation Instrument's (DCI's) geographic programming.<sup>266</sup> The EEAS thus establishes the allocations for individual countries and regions - within the framework of the regulations establishing the aforementioned financial instruments - in agreement with DG DEVCO. The programming of thematic programmes under the DCI is undertaken by DG DEVCO in consultation with the EEAS and other relevant EC services.<sup>267</sup> An important exception here is the programming of EIDHR, a thematic instrument specifically aimed at financing democracy and human rights promotion (see section 6.2.3.), for which the strategic programming falls under the responsibility of the EEAS, with DG DEVCO (or the FPI in case of electoral observation missions) to be consulted.<sup>268</sup> In the drafting of Multiannual Indicative Programmes (MIPs), National Indicative Programmes (NIPs) or Regional Indicative Programmes (RIPs) the EU Delegations - consisting of staff from DG DEVCO, the EEAS, and other EC services - further coordinate. Such co-management between the EEAS and DG DEVCO is also apparent in the new budget support policy, where both actors convene in the Budget Support Steering Committee to decide what type of aid modality can be used in which countries (see *infra*, section 5.3.1).

**European Parliament** The European Parliament's Development Cooperation Committee monitors the EU's annual budget for development assistance as part of the budgetary procedure consolidated by the TFEU, which provides for joint powers of the EP and the Council to decide over all expenditure. In proposing amendments to the budget under the titles for development cooperation, the EP is able to influence decision-making. Moreover, the **Multiannual Financial Framework** and the regulations establishing the EU's financial instruments for development assistance also require the EP's approval. The financial instruments constituting EU development assistance, particularly the DCI, fall under the scrutiny of the EP, but until recently its oversight over the Commission's programming process was constrained. Under the previous DCI Regulation (2007-2013), the programming of EU development cooperation was consolidated through implementing acts, whereby the allocation of funding to countries and sectors proposed by the Commission was reviewed and adopted by Commission Committees consisting of Member States (i.e. the "comitology" procedure).<sup>269</sup> While Parliament could scrutinize the draft implementing acts together with the Council, the Member States retained the authority to approve these acts. The **EP has claimed greater control and oversight over the development programming process** now that the Commission will adopt a list of elements framing the areas of EU cooperation, in the form annexes, as delegated acts (instead of the hitherto co-decision procedure). This empowers the EP to veto specific programming documents and allocations, reinforcing its role in the decision-making process. In addition, a **strategic dialogue between the Commission and the EP** has been introduced as a new element of procedure in the programming process, thereby giving the latter more room to provide early input into the decision-making process. After lengthy negotiations, this reform has been adopted in the new regulations establishing financial

<sup>266</sup> Ibid. p. 17. The Regulation for the DCI includes six geographic programmes (i) Latin America (ii) South Asia (iii) North and South East Asia, (iv) Central Asia, (v) Middle East, and (vi) Other countries. In the 2014-2020 indicative Financial Allocations, these geographic programmes account for approximately 60% of the DCI Instrument's total budget. See Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, Annex IV.

<sup>267</sup> European Commission, *supra*, n. 265, p. 20. The DCI covers five thematic clusters as part of the 'Global Public Goods And Challenges' Programme; (i) Environment and climate change (ii) Sustainable energy (iii) Human development including decent work, social justice and culture (iv) Food and nutrition security and sustainable agriculture (v) Migration and asylum. In addition, the 'Civil Society Organisations and Local Authorities' programme also falls under the DCI's thematic programming. See also Regulation (EU) No. 233/2014, *supra*, n. 266, Annex II.

<sup>268</sup> European Commission, *supra*, n. 265, p. 23.

<sup>269</sup> Herrero, A. et al, 'Early Experiences in Programming EU Aid 2014-2020 - Charting the Agenda for Change', in Sherriff, A (ed.), The European Union's International Cooperation – Recent Developments and Future Challenges, *European Centre for Development Policy Management (ECDPM)*, Policy and Management Report, Maastricht, 2014, p. 32.

instruments for development assistance.<sup>270</sup> However, the EP's 'power over the purse' is limited when it comes to the European Development Fund (EDF). Indeed, as the EU's oldest and largest instrument for financing development, the EDF consists of voluntary contributions from Member states and is thus not part of the EU budget – in spite of financing the majority of the EU's cooperation in ACP Countries. While the EP's consent was required in the adoption of the Cotonou Agreement which regulates the EDF, the EP is unable to scrutinize the use of EDF funding directly.

## 5.2 Objectives and policy context

The majority of OECD donors, which together provide the bulk of the world's Official Development Assistance (ODA), see human rights and democracy as a constitutive element of development cooperation. Whether development assistance should in the first instance promote economic growth and poverty reduction, and address human rights and democracy only as a secondary objective, remains a pertinent question for both the US and the EU. However, among the various objectives of development cooperation, the pursuit of human rights and democracy has clearly proliferated in both US and EU development policies.

**US Development Policy and Human Rights** As is the case in the broader domain of US foreign policy, the emphasis of US development policy on human rights, rather than broader democracy promotion, has fluctuated between administrations. Democracy promotion and support has been a **constant dimension of US development assistance** and human rights have been a key aspect of USAID's 'democracy and governance' agenda.<sup>271</sup> However, disentangling how human rights substantially influence or shape US development policy is less straightforward. Reference to respect for and the advancement of human rights has been included in each of the **USSD-USAID Joint Strategic Plans** since the first was launched in 2004, and the latest of such Plans adopts as a goal to 'protect core US interests by advancing democracy and human rights and strengthening civil society'.<sup>272</sup> A more explicit emphasis on human rights, democracy and governance has emerged within USAID's policy. The new 'Strategy on Democracy Human Rights and Governance' reaffirms that **democracy, human rights and governance constitute the foundation for the eradication of extreme poverty**.<sup>273</sup> This strategy sets out objectives relating to representative and inclusive political processes, accountability of institutions and leaders to citizens, protection and promotion of universally recognized human rights, and improving development outcomes through the integration of democracy, human rights and governance. In this sense, one US official noted that issues of transparent and accountable governance have come to the fore, and USAID has thereby adopted priorities reflecting those of European development agencies, in particular the human rights policy elaborated by the Swedish International Development Agency (SIDA).<sup>274</sup>

**EU Development Policy and Human Rights** As early as 1991, the Commission underlined the relationship between development policy and the 'promotion and defense of human rights and support for the democratic process in all developing countries'.<sup>275</sup> Since then, **human rights and democracy have gradually come to the foreground of EU development policy**. In 2006 the 'European Consensus on Development Cooperation' – a joint statement by the Council, the Member

<sup>270</sup> Regulation (EU) No. 233/2014, *supra*, n. 262, Article 17(1).

<sup>271</sup> USAID Center for Democracy and Governance, *Democracy and Governance: A Conceptual Framework*, Report, 1998.

<sup>272</sup> US Department of State and USAID, *Strategic Plan FY 2014-2017*, Report, 2014, p. 30.

<sup>273</sup> USAID, 'Strategy on Democracy Human Rights and Governance', June 2013, p. 5.

<sup>274</sup> Interview with US official, Washington, D.C., 13 March 2014.

<sup>275</sup> European Commission, Communication from the Commission to the Council and the European Parliament, 'Human Rights, Democracy and Development Cooperation Policy', SEC(91)61 final, Brussels, 25.3.1991, p. 2.

States, the European Parliament and the Commission - stated that progress in the protection of human rights, good governance and democratization is fundamental for poverty reduction and sustainable development<sup>276</sup> In 2011, the Commission's communication 'Increasing the impact of EU Development Policy: an Agenda for Change' underlined that a focus on the EU's partners' commitments to **human rights, democracy and the rule of law should become a prominent feature** of EU development policy.<sup>277</sup> Further defining this agenda, the Commission and the HR/VP set out a joint strategy entitled 'Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach'.<sup>278</sup> Of particular importance for development policy is the communication's objective to increase the EU's 'impact on the ground' through 'tailor-made approaches'.<sup>279</sup> Building on these communications, the Strategic Framework/ Action Plan adopted by the Council signalled further engagement as it stated that a **human rights-based approach' (HRBA) to EU development cooperation** should be elaborated to ensure 'the EU strengthens its efforts to assist partner countries in implementing their international human rights obligations'.<sup>280</sup> One of the key actions the Commission has since realized is the adoption of a toolbox for implementing a 'Rights-Based Approach, Encompassing all Human Rights' into its cooperation activities.<sup>281</sup> Endorsing this new approach, the Council notes that 'several Member States are already developing or applying similar approaches for the integration of human rights principles and standards in their development cooperation'.<sup>282</sup> While the implementation and impact of this comprehensive approach remain to be assessed, the **strong integration of human rights into EU development cooperation** has been hailed as one of the most significant achievements of the Strategic Framework and Action Plan.<sup>283</sup>

### 5.3 Policy approaches for human rights in development cooperation

#### 5.3.1 Human rights as a condition for providing development assistance

Both the US and the EU have policy and legal frameworks in place for conditioning the provision of development assistance on the human rights situation in a partner country. Human rights are often part of a **larger set of 'democratic' or 'good governance' conditions**, which can relate to various aspects such as anti-corruption policy and macro-economic performance. Conditions related to human rights and democratic governance affect the allocation of assistance in several ways; the 'eligibility' of countries to receive aid, the amount of aid allocated to a country, and the type of aid that is provided.

**Human Rights and Aid Conditionality in the EU** The EU's legal and policy framework for taking into account human rights when providing development assistance has evolved strongly since 1958, when the European Economic Community started to engage in economic, financial and technical cooperation with third countries. Since 1977, when all financial support to Uganda was suspended following large-

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<sup>276</sup> Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', OJ C46/1, 24.2.2006.

<sup>277</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Increasing the Impact of EU Development Policy: an Agenda for Change', COM(2011) 637 final, Brussels, 13.10.2011, p. 5.

<sup>278</sup> COM(2011) 886 final, *supra*, n. 44.

<sup>279</sup> *Ibid.* p. 7.

<sup>280</sup> OJ 11855/12, *supra*, n. 81, at 2.

<sup>281</sup> European Commission, Commission Staff Working Document, 'Toolbox. A Rights-Based Approach, Encompassing all Human Rights for EU Development Cooperation', SWD(2014) 152 final, Brussels, 30.4.2014.

<sup>282</sup> Council of the European Union, 'Council conclusions on a rights-based approach to development cooperation, encompassing all human rights', Foreign Affairs (Development) Council meeting, Brussels, 19.5.2014, para. 2.

<sup>283</sup> Interview with EU official, Brussels, 16.4.2014.



scale massacres the **EU has sought to explicitly incorporate human rights as an essential element in all its partnership agreements** with third countries. In particular in its agreements with ACP countries, the EU has elaborated a strong conditionality framework with human rights and democracy at its centre.<sup>284</sup>

The use of human rights as a condition for cooperation between the EU and the ACP countries was first institutionalized in the Lomé IV Agreement and the legal framework and instruments for applying human rights-based conditionality were further developed in the revision of the Lomé Agreements and in the Cotonou Agreement signed in 2000.<sup>285</sup> The Cotonou Agreement affirms respect for human rights, adherence to democratic principles and the rule of law as ‘essential elements’ of the ACP–EU partnership. In case of a breach of any of these essential elements, a three step process is initiated, as described under Article 96 of the Agreement.<sup>286</sup> First, an ‘exhaustive political dialogue’ must be undertaken between the concerned parties. If these efforts are not satisfactory, a consultation procedure is launched in which the EU negotiates with the ACP country accompanied by friendly countries, regional organizations and members of the ACP Secretariat. These enhanced dialogues are at the centre of the Cotonou partnership; only if consultations are refused or when no agreement can be found on a ‘roadmap’ acceptable to all parties, the adoption of ‘**appropriate measures**’ can be considered, with suspension of the Agreement - and subsequent freezing of official aid - as a last resort.

Given the legally binding nature of Cotonou’s human rights clause, and the relative frequency with which it has been invoked, the agreement still remains a strong tool to enforce human rights protection in third countries. Indeed since 2000 alone, consultations and political dialogue under Article 96 have been initiated on several occasions, primarily as a response to a military coup d’état. This was the case in Fiji (2000 and 2007), Central African Republic (2003), Guinea-Bissau (2003), Mauritania (2005 and 2008), Guinea (2009), and Madagascar (2009). In reaction to flawed elections, political dialogue was initiated in Haiti (2000), Côte d’Ivoire (2001), Togo (2004), Guinea (2004), and in Niger (2009). With Liberia (2001) and Zimbabwe (2001), dialogues were initiated on several human rights issues including lack of freedom of expression.<sup>287</sup> In general, the **Article 96 consultations** are initiated in response to a confluence of political, security and human rights concerns, and individual instances of human rights violations usually do not lead to the activation of the consultation procedure.<sup>288</sup> In these dialogues on human rights, there is a strong focus on political rights and less attention on social and economic rights.<sup>289</sup> Despite that the systematic inclusion of a ‘**human rights clause**’ in cooperation agreements has become standard practice, the evocation of the ‘human rights clause’ to suspend or freeze EU cooperation has mainly been applied in the context of the EU-ACP partnership under the Lomé IV and Cotonou Agreements.

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<sup>284</sup> The Cotonou Agreement regulates ACP-EU cooperation and provides the framework under which assistance for the European Development Fund (EDF) is used. The EDF, while managed and implemented by DEVCO and the EEAS, is not part of the EU’s regular budget. For the first time, the programming, allocation and implementation of the EDF funding has been aligned with the other instruments for development cooperation under the EU Multi-Annual Financial Framework for 2014-2020.

<sup>285</sup> With South Africa, the EU has a Trade and Development Cooperation Agreement which takes precedence over the ACP-EU partnership agreement.

<sup>286</sup> Cuyckens, H., ‘Human Rights Clauses in Agreements between the Community and Third Countries. The Case of the Cotonou Agreement’, *Institute for International Law*, Working Paper No. 147 (unpublished paper), March 2010; Laakso, L., Kivimäki, T., and Sepänen, M., ‘Evaluation of Coordination and Coherence in the Application of Article 96 of the Cotonou Partnership Agreement’, Evaluation services of the European Union, 2007.

<sup>287</sup> Del Biondo, K., ‘EU Aid Conditionality in ACP Countries. Explaining Inconsistency in EU Sanctions Practice’, *Journal of Contemporary European Research*, Vol. 7(3), 2011, p. 395.

<sup>288</sup> Herrero et al, *supra*, n. 269, p. 11-12.

<sup>289</sup> *Ibid*, p. 28.

In addition to the use of human rights clauses to suspend agreements, the EU has further elaborated a conditionality policy to determine how development funding is provided, e.g. what aid modality can be used in which countries. This relates to **the key issue of whether or not to provide assistance as budget support to a partner government**, and under what conditions this budget support should be suspended. After consultations with Member States and other stakeholders, the Commission adopted the 'Future Approach to EU Budget Support to Third Countries',<sup>290</sup> which was endorsed by the Council shortly after.<sup>291</sup> This policy foresees a 'tailor-made' approach and proposes three types of budget support 'contracts' to be allocated; 'Good Governance and Development Contracts' or general budget support, 'Sector Reform Contracts', and 'State Building Contracts'. One EU official indicated that the number of countries receiving General Budget support will decrease significantly, indicating stricter selectivity in terms of political and civil rights.<sup>292</sup> Response to deteriorations should be 'progressive and proportionate' and in first instance relies on initiating an 'enhanced dialogue'. Where budget support is suspended funds may be reallocated through project aid via NGOs. Insiders note that **suspending budget support based on human rights violations** can imply a prioritization of some rights over others. The recent example of Uganda, whereby the violation of LGBT rights led some donors to halt budget support for programmes concerning maternal health, was considered to be problematic by some of the interviewees.<sup>293</sup>

In addition to integrating human rights as negative conditions, the Commission also conditions its development funding on positive conditions by offering **more assistance to partner governments which formulate plans for improving governance** in line with democratic principles, including rule of law and human rights protection. In the ACP region, such incentives were provided under the 'Governance Initiative' of the EDF (2008-2013) which foresaw a 'governance incentive tranche' for partner governments. A similar approach can be found in the 'governance facility' of the ENPI 2007-2010. The possibility of using incentives to reward performance in the area of democratic governance is also part of the new budget support policy. While some of these experiences with positive conditionalities have been disappointing in terms of impact, this 'more for more' approach to incentivizing reforms has become a pronounced characteristic of the EU's development assistance policy as well as its democracy promotion efforts.

**Human Rights and Aid Conditionality in the US** Unlike the EU, the US's conditionality policy towards partner countries is more guided by general legislation rather than bilateral agreements.<sup>294</sup> A number of amendments made to the FAA place clear restrictions on providing aid to governments which violate human rights. In particular, section **508 of the FAA** prohibits the provision of assistance to 'any country whose duly elected head of government is deposed by decree or military coup'. In 1975, Congress adopted **the Harkin amendment to the FAA**, prohibiting economic assistance for the government of a country which engages in a consistent pattern of gross violations of internationally recognized human rights. Exceptions can be made where 'extraordinary circumstances' - routinely cited by the executive to continue the provision of assistance<sup>295</sup> - and when assistance will directly help needy people.<sup>296</sup> The

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<sup>290</sup> European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'The Future Approach to EU Budget Support to Third Countries', COM(2011) 638 final, Brussels, 13.10. 2011.

<sup>291</sup> Council of the European Union, Council Conclusions, 'The Future Approach to EU Budget Support to Third Countries', Foreign Affairs Council, Brussels, 14.5.2012.

<sup>292</sup> Interview with EU official, Brussels, 24.4.2014.

<sup>293</sup> Interview with EU official, Brussels, 24.4.2014.

<sup>294</sup> Hazelzet, H., 'Carrots or Sticks? EU and US Reactions to Human Rights Violations (1989 - 2000)', Thesis submitted for assessment with a view to obtaining the degree of Doctor, European University Institute, Florence, 2001, p. 125

<sup>295</sup> Snyder, *supra*, n. 79.

**vagueness in these provisions opens up loopholes which both Congress and the President can exploit to continue providing assistance**, by refraining from labelling a situation a military coup or by not recognizing a 'consistent pattern' of human rights violations in a certain country.<sup>297</sup> Furthermore, a presidential waiver can be used for exemption based on national security grounds. In addition to these general provisions in the FAA, more specific amendments and new acts have been adopted which lay down more specific prohibitions on the provision of assistance for certain types of cooperation (e.g. the International Financial Institutions Act of 1983) or for specific countries (e.g. the Zimbabwe Democracy and Economic Recovery act of 2004).<sup>298</sup> In recent years, suspensions or partial restrictions on development assistance have been applied to several countries particularly in Africa, such as Madagascar<sup>299</sup> and Uganda.<sup>300</sup>

Greater **attention to human rights and democratic governance** has also come to the foreground in the implementation of development policy by USAID. In addition to its new DRG strategy, USAID aims to channel more assistance through partnerships with host country governments, and local NGOs and private actors (instead of using US-based NGOs and contractors). Moving towards government-to-government partnerships and using arrangements resembling the EU's 'budget support' policy, USAID identifies three types of country contexts which determine its approach to programming: authoritarian regimes, hybrid regimes, and developing democracies.<sup>301</sup> In this regard, USAID undertakes an 'enhanced democracy, human rights and governance review' (DRG review) to determine 'whether a government-to-government investment could empower a government at the expense of its people'.<sup>302</sup> Countries which fall below an established democracy threshold will require an enhanced review in addition to a standard appraisal.<sup>303</sup> However, countries can be exempt from an enhanced review in order to 'avoid impairment of foreign assistance objectives'.<sup>304</sup> The US also applies different ways of positive conditionalities to incentivize the human rights performance of partner governments. The Millennium Challenge Corporation (MCC), established by Congress as a separate entity independent from the State Department and USAID, illustrates this approach. The MCC provides extra development funding in a select number of developing countries that demonstrate a commitment to political, economic, and social reforms.<sup>305</sup> It applies a set of indicators to determine a country's eligibility for a 'contract' or 'compact', whereby the 'civil liberties' and 'political rights' indicators are considered essential.<sup>306</sup> The MCC currently operates in 30 countries around the world.<sup>307</sup>

<sup>296</sup> Apodaca, C., 'US human rights policy and foreign assistance: A short history', *Ritsumeikan International Affairs*, Vol. 3, 2005, p. 67.

<sup>297</sup> *Ibid*, p. 66.

<sup>298</sup> For an overview, see Haas, M., *International Human Rights: A Comprehensive Introduction*, Routledge, Oxford University Press, Oxford, 2014, p. 343.

<sup>299</sup> Ploch, L. and Cook, N., 'Madagascar's Political Crisis', *Congressional Research Service*, CRS Report to Congress, June 2012.

<sup>300</sup> Croome, Ph., 'U.S. suspends some aid to Uganda over anti-gay law', *Reuters*, Kampala, 13.3.2014.

<sup>301</sup> USAID, *supra*, n. 273, p. 27-29

<sup>302</sup> USAID, 'Use and Strengthening of Reliable Partner Country Systems for Implementation of Direct Assistance', Automated Directives System- Chapter 2020, 2014, p. 15.

<sup>303</sup> *Ibid*, p. 6, 26. USAID's DRG Center in consultation with Bureau of Policy, Planning and Learning, determine which countries fall below the democracy threshold. The exact methodology applied does not seem to be publicly available.

<sup>304</sup> *Ibid*, p. 20.

<sup>305</sup> Millennium Challenge Cooperation, 'Report on the Selection of Eligible Countries for Fiscal Year 2014', Washington, D.C., December 2013.

<sup>306</sup> Millennium Challenge Cooperation, 'Report on the Criteria and Methodology for Determining the Eligibility of Candidate Countries for Millennium Challenge Account Assistance in Fiscal Year 2014', Washington, D.C., September 2013.

<sup>307</sup> Albania, Armenia, Benin, Burkina Faso, Cape Verde, El Salvador, Georgia, Ghana, Guyana, Honduras, Indonesia, Jordan, Kenya, Kyrgyz Republic, Lesotho, Liberia, Madagascar, Malawi, Mali, Moldova, Morocco, Mozambique, Namibia, Nicaragua, Niger, Paraguay, Peru, Philippines, Rwanda, Sao Tome and Principe, Senegal, Tanzania, Timor-Leste, Uganda, Ukraine, Vanuatu and Zambia. See MCC website. Available online <http://www.mcc.gov/pages/countries>, accessed on 21.8.2014.

### 5.3.2 Human rights as a cross-cutting aspect in development planning

Policies introducing human rights as a cross-cutting aspect at the 'micro-level' of planning and managing development programmes have been adopted by several donors. Often, such policies identify specific groups which rights are neglected, unrecognized or violated, and aim to develop anti-discriminatory measures. Such **mainstreaming policies can thus address gender equality and women's rights, children's rights, rights of persons with a disability, rights of indigenous people, and LGBT rights**. They reflect an 'inward focus', requiring US and EU development planning to engage with these issues systematically. In the EU, policies for mainstreaming women's rights and children's rights have been particularly well established through internal 'action plans'.<sup>308</sup> Separate toolkits have been issued to guide development practitioners at 'field level' in operationalizing such mainstreaming.<sup>309</sup> Similarly, USAID has elaborated policies for systematically integrating 'gender equality and female empowerment' in programming.<sup>310</sup>

In addition to policies focusing on specific issues of group discrimination, there is also a growing **effort being made by DG DEVCO and USAID to systematically integrate 'democratic governance' and a 'human rights-based approach'** in their planning and implementation of projects and programmes. DG DEVCO's recent adoption of an 'RBA tool-box' for 'integrating human rights principles into EU operational activities' at both field and HQ level, is illustrative.<sup>311</sup> This toolbox provides a 'qualitative methodology to advance the analysis, design and implementation of development programme and projects to better reach target - groups and to strengthen their access to basic services in all sectors of intervention'.<sup>312</sup> A similar 'transversal' approach has also been put forward in USAID's Policy Framework for 2011-2015, which notes that initiatives on democracy, human rights, and governance will be integrated into other sectors, such as health programmes. Following this, the development of a cross-cutting policy for democratic governance and human rights is one of the priorities included in USAID's Strategy for Democracy, Human Rights and Governance.<sup>313</sup> USAID's Center for Democracy, Human Rights and Governance will thereby be responsible for the integration of 'democracy, human rights and governance principles and practices' throughout USAID's portfolio of interventions, ensuring that 'work in social and economic sectors also supports related political reform'.<sup>314</sup> What substantive implications these new approaches will have on how EU and US development assistance is provided remains an open question as their implementation is still in an early phase.

## 5.4 EU-US coordination on human rights in development cooperation

Coordination in the field of development assistance between the EU and the US occurs through various channels. The call for a 'New Transatlantic Agenda for Development' by former EU Commissioner for Development, Mr. Louis Michel,<sup>315</sup> was followed through when a reinvigorated 'EU-US Development

<sup>308</sup> European Commission, 'Gender Equality and Women Empowerment in Development Cooperation', COM(2007) 100 final, Brussels, 8.3.2007; 'EU Plan of Action on Gender Equality and Women's Empowerment in Development', SEC(2010) 265 final, Brussels, 18.3.2010; 'A Special Place for Children in EU External Action', COM(2008)55 final, Brussels, 05.2.2008; 'European Union's Action Plan on Children's Rights in External Action', SEC(2008)135/136 final, Brussels, 5.2.2008.

<sup>309</sup> European Commission, Toolkit on Mainstreaming Gender Equality in EC Development Cooperation. Available online <http://ec.europa.eu/europeaid/sp/gender-toolkit/index.htm>, accessed 10.5.2014.

<sup>310</sup> USAID, 'Gender Equality and Female Empowerment Policy', Report, March 2012.

<sup>311</sup> SWD(2014) 152 final, *supra*, n. 281, para. 12.

<sup>312</sup> *Ibid.* p. 8.

<sup>313</sup> USAID, *supra*, n. 273.

<sup>314</sup> *Ibid.* p. 13.

<sup>315</sup> Michel, L., 'A New Transatlantic Agenda for Development', Washington, D.C., SPEECH/05/54, 28.1.2005. Available online: [http://europa.eu/rapid/press-release\\_PRES-09-316\\_en.htm?locale=en](http://europa.eu/rapid/press-release_PRES-09-316_en.htm?locale=en), accessed on 10.8.2014.

Dialogue' was launched in 2009.<sup>316</sup> In this framework, a **US-EU High Level Consultative Group Meeting** takes place annually, and exchanges among USAID and DG DEVCO staff at headquarters, and in-country coordination are also understood to be part of this dialogue.<sup>317</sup> The USSD (Bureau for European Affairs) and the EEAS (US and Canada Division) are also part of the high-level dialogue and related exchanges.<sup>318</sup> In addition to this platform, the OECD's Development Assistance Committee (OECD-DAC) offers a forum of exchange which brings together OECD donors.<sup>319</sup> The particular question of **human rights and democratic governance has been at the centre of the OECD-DAC's Governance network**, wherein both the USAID and the Commission engage and contribute to broadening policy expertise among the donor community. Lastly, the EU and US delegations at regional and country level further coordinate the planning and implementation of development assistance programmes. Such coordination - a priority for donors since the Paris Declaration on Aid Effectiveness - takes place within larger donor coordination groups at national level or sector level. Moreover, regular informal consultations between USAID and DG DEVCO staff are also likely to be an important factor in country- or sector-level coordination.

To what extent the intensified interaction under the EU-US Development Dialogue touches upon the issue of mainstreaming human rights and democracy in development assistance is unclear. One expert of USAID's DRG Center remarked that 'there are no effective or institutionalized working relations with the EU'.<sup>320</sup> It was noted that more institutionalized interaction with the EU as well as Member States through annual meetings on 'transatlantic approaches towards human rights' would be helpful. Several interviewees engaged in US development and democracy assistance noted that they tended to coordinate in first instance with individual EU Member States and their development agencies, or with organizations based within Member States.<sup>321</sup> Given that human rights and democratic governance have gradually gained importance in US and EU development policy, more systematic avenues of coordination and collaboration could enhance coordination at several policy levels.

## 5.5 Conclusions

Human rights, and the broader question of democratization, have become intertwined in the development assistance frameworks of both the EU and the US. First of all, both actors see development assistance as a tool to discourage human rights violations through suspending development aid. At the same time, **conditionality policies are not applied consistently** by the EU or the US. Within the EU, the use of negative conditionalities has remained largely concentrated on its cooperation with ACP countries under the Cotonou framework, whereby the EU has strategically used its provision of development assistance as leverage to demand dialogues and action following human rights violations and deteriorations in democratic governance. The US has similarly **frozen or withdrawn its development assistance** on various occasions, although this is not part of a structured

<sup>316</sup> European Council, EU-U.S. Summit Declaration, 'Statement on Development Dialogue and Cooperation', Washington, D.C., PRES/09/316, 3.9.2009. Available online: [http://europa.eu/rapid/press-release\\_PRES-09-316\\_en.htm?locale=en](http://europa.eu/rapid/press-release_PRES-09-316_en.htm?locale=en), accessed on 10.8.2014.

<sup>317</sup> Gaus A., and Hoxtell, W., 'The EU-US Development Dialogue: Past, Present and Future', *Global Public Policy Institute*, Working Paper, July 2013.

<sup>318</sup> Ibid.

<sup>319</sup> The EU is not a formal member of the OECD, but enjoys special status as a 'quasi-member' participating fully in the different OECD Committees. It does not, however, have the competence to vote on legal acts to be adopted by the OECD Council. See explanatory note on the EEAS homepage. Available online: [http://eeas.europa.eu/delegations/oecd\\_unesco/oecd\\_eu/political\\_relations/institutional\\_framework/index\\_en.htm](http://eeas.europa.eu/delegations/oecd_unesco/oecd_eu/political_relations/institutional_framework/index_en.htm), accessed on 21.8.2014.

<sup>320</sup> Interview with US official, Washington, D.C., 13.3.2014.

<sup>321</sup> Ibid.

dialogue or procedure. In addition to applying negative conditionalities, both the EU and the US have elaborated new mechanisms **for incentivizing democratic governance and human rights** performance through positive conditionalities. This ‘more for more’ principle has been emphasized in the EU’s development partnerships as a more constructive approach than negative conditions. Similarly, in decisions on what type of aid modality to deploy in a given country – most importantly the question of how much **assistance should be provided as budget support to a partner government** – the human rights and democratic governance dimension has been more explicitly integrated in recent policy frameworks in both the EU and the US. A second strategy for integrating human rights in development cooperation is using aid for **democracy assistance or human rights promotion**. The EU and the US are the largest donors in this area, and have significantly scaled up their spending on democracy assistance over the last decades (see section 6.2). Thirdly, the understanding that human rights, and in particular the rights of vulnerable groups, permeate all areas and sectors of development assistance, has become a priority in the management of development projects and programmes. Against this increasing proliferation of human rights strategies, guidelines, and toolboxes, which suggest greater coherence in how human rights are addressed in EU and US development policy, **the question of consistent implementation remains pertinent.**

## 5.6 Recommendations

### Recommendations on integrating human rights in EU development cooperation

- **Consistency in integrating human rights as a strong and substantive pre-condition for entering into a cooperation partnership with the EU** The EU should ensure greater consistency in how the existing legal and policy frameworks for human rights conditionality are applied to all partner countries and across regions, including the clarification of criteria for the application of the human rights clauses included in the EU’s partnership agreements with third countries.
- **Harmonize EU-wide application of conditionalities for the provision of different types of aid** The EU should foster greater coherence between EU institutions and Member States in applying different types of aid modalities. In particular, harmonizing the provision of budget support has already been emphasized in the Commission’s new budget support policy and has been endorsed by the Council.
- **Rolling out a substantive ‘rights-based approach encompassing all human rights’** The adoption of a ‘rights-based approach encompassing all human rights’ can be considered one of the more innovative steps taken by the Commission to integrate human rights in its development cooperation programmes. The implementation of the RBA toolbox by the Commission will have to be supported with adequate resources and closely scrutinized in the coming years.

### Recommendations on EU inter-institutional cooperation in EU Development Policies

- **Reaching a common understanding on the interrelation between poverty reduction and human rights protection**, and a consensus on when the absence of the latter prohibits the pursuit of the former. Both the EEAS and the Commission rely on each other in the programming of EU development cooperation. Their internal capacity and collaboration could be enhanced to come to an ‘organizational culture’ which addresses human rights more consistently. A mechanism such as the new Budget Support Steering Committee provides an avenue to discuss frictions concerning development-human rights nexus, but this only relates to a specific aspect of EU assistance. At the country level, EU delegations will need to be capacitated adequately to play

the crucial role of coordinating and harmonizing EU-wide development strategies, carrying out joint assessments, and coordinating a clear EU response when human rights violations occur.

- **Strengthen the capacity of the EP in scrutinizing EU development cooperation** Given its new capacity to exercise oversight and its ‘strategic dialogue’ with the Commission, MEPs now have a crucial role to play in safeguarding the integration of human rights throughout EU development cooperation. In meaningfully fulfilling this role, the EP and its members will require extensive know-how, based on input from various stakeholders and independent researchers, detailing how EU development policies, the implementation of EU country strategies, or even specific EU-funded programmes/projects, affect the human rights situation within developing countries.

#### Recommendations on EU and US development policy

- **Aligning conditions: greater leverage through EU-US coordination** While it is widely understood that the effectiveness of applying conditions increases when donors act in concert,<sup>322</sup> for various reasons the EU, US and other donors often struggle to harmonize their conditionality policies and find a common response strategy when human rights violations occur in a partner country. More strategic dialogue on the use of conditionalities between the EU and the US could enhance the ‘signalling’ and ‘leverage’ function of development assistance. A ‘common approach’ to what types of assistance should be suspended immediately, and what forms of aid should be suspended only as a last resort, would be instrumental in developing a joint strategy which takes into account the potential impact of aid suspensions on the population. Similarly, the various mechanisms the EU and the US have in place to incentivize reforms in the broad area of governance could benefit from greater harmonization and a stronger common emphasis on human rights. Realizing that external leverage and incentives are not sufficient in fostering meaningful reforms, such efforts should be in sync with support for ‘bottom-up’ processes as part of the EU’s and US’s democracy assistance (see infra, section 6.2.4).
- **A mutually-enforcing learning process on human rights mainstreaming and an HRBA** The notion that human rights principles and the rights of vulnerable groups should be mainstreamed in all development planning, including at the micro-level of managing and implementing projects and programmes, has led to several policy initiatives by USAID and DG DEVCO. Both could further engage in a mutual learning process, also including other donor agencies, which are committed to working with ‘human rights-based approaches’ to development.

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<sup>322</sup> See Crawford, G., ‘Foreign aid and political conditionality: Issues of effectiveness and consistency’, *Democratization*, Vol. 4(3), 2007, p. 69-108. See also Stokke, O. (ed.), *Aid and political conditionality*, Routledge Research EADI Studies in Development, Routledge, Oxford, 1995.

## 6. CASE STUDIES

In this section, the study presents case studies to compare more in depth the differences and similarities between EU and US approaches in the integration of human rights policies into external action, thereby focusing on the use of Special Representatives and Special Envoys (section 6.1), the promotion of democracy in third countries (section 6.2), as well as EU and US engagement with the HRC (section 6.3) and the ICC (section 6.4).

### 6.1 EU Special Representatives and US Special Envoys

#### 6.1.1 Historical development

In their respective development as foreign policy actors, both the EU and the US employ 'Special Representatives' (EU) or 'Special Envoys' (US).<sup>323</sup> Both the EU and the US have historically relied on this specific diplomatic instrument given that 'being equipped with diplomatic representatives and having them recognized by other entities can be regarded as a sign of statehood, or at least actorness'.<sup>324</sup> This investment in actorness, in turn, has strengthened the credibility of the EU as a global player on the international scene.<sup>325</sup>

In the US, the custom of having a Special Envoy has been noted to exist since the early years of its inception.<sup>326</sup> In a similar fashion, the **EU's Special Representatives (EUSRs)** had already been brought into existence by a provision in the 1992 Maastricht Treaty, thereby rendering them one of the longest-standing EU foreign policy instruments on the ground, and predating even the main CFSP bodies and operations. In both the EU and the US case, the Special Representatives and the Special Envoys have been noted to have 'filled a vacuum at the outset',<sup>327</sup> as neither actor had any mandate in place to ensure their permanent representation in a foreign country when the practice of employing envoys was established. In light of the EU's particularly intricate road towards a coherent external action, therefore, some have even dubbed EUSRs to be 'a forerunner of Europe's efforts to forge a common foreign policy'.<sup>328</sup> Indeed, the first EUSRs had already been deployed before the post of CFSP High Representative was even created in the 1997 Treaty of Amsterdam, with the appointment of Aldo Ajello for the 'Great Lakes'<sup>329</sup> and Miguel Angel Moratinos for the 'Middle East Peace Process'.<sup>330</sup> From this moment onwards, the number of EUSRs grew exponentially. Subsequently, their relevance for EU

<sup>323</sup> For conceptual clarity, this study will use the US terms of 'special envoys', 'special representatives', 'special advisors' and 'special coordinator' interchangeably, as their differing titles 'offer no clear indication of the scope or nature of their duties'. See Naland, J., 'U.S. Special Envoys: A Flexible Tool', *United States Institute of Peace*, Peacebrief No. 102, 2011, p. 2.

<sup>324</sup> Adebahr, C., *Learning and Change in European Foreign Policy: The case of the EU Special Representatives*, Nomos Publishers, Berlin, 2009, p. 15.

<sup>325</sup> 'Actorness' was originally coined as the ability to function autonomously and independently from other actors in the international community. For a first discussion, see Sjöstedt, G., *The External Role of the European Community*, Saxon House, Farmborough, 1977. For a recent overview of the ensuing conceptual debate, see Ozoguz-Bolgi, S., 'Is the EU Becoming a Global Power After the Treaty of Lisbon?', in Boening, A., Kremer, J.F. and van Loon, A. (eds.), *Global Power Europe (Vol. 1). Theoretical and Institutional Approaches to the EU's External Relations*, Springer, Berlin-Heidelberg, 2013, p. 3-18.

<sup>326</sup> Fullilove, M., 'All the Presidents' Men. The Role of Special Envoys in U.S. Foreign Policy', *Foreign Affairs*, Vol. 84(2), 2005, p. 14.

<sup>327</sup> Adebahr, *supra*, n. 324, p. 74.

<sup>328</sup> Gardner, A., 'Future of special envoys out of Ashton's hands', *European Voice*, 12.2.2014.

<sup>329</sup> EU Council, 'Joint action of 25 March 1996 adopted by the Council on the basis of Article J.3 of the Treaty on European Union, in relation to the nomination of a Special Envoy for the African Great Lakes Region', 96/250/CFSP, OJ L 087, 4.4.1996.

<sup>330</sup> EU Council, 'Joint action of 25 November 1996 adopted by the Council on the basis of Article J.3 of the Treaty on European Union in relation to the nomination of an EU special envoy for the Middle East peace process', 96/676/CFSP, OJ L 315, 4.12.1996.



foreign policy was formally recognized by their inclusion in the Amsterdam Treaty under former Article 18(5) TEU, which stipulated that ‘the Council may, whenever it deems it necessary, appoint a special representative with a mandate in relation to particular policy issues’ (see below).

Reflecting a mounting international consensus on the need for ‘a type of actor that is indispensable for successful diplomacy under today’s complex conditions’,<sup>331</sup> both the EU and the US thus increasingly started to rely on their envoys in foreign policy. From the mid-1990s onwards the number EUSRs increased, from two in 1996 to an accumulated total of 47 in 2014. In the US ‘personal envoys sprouted like mushrooms’ under the Clinton administration.<sup>332</sup> After a marked decline in the use of special envoys under the Bush administration, during which Secretary of State Colin Powell was said to have ‘purposefully eliminate[d] most of such positions’,<sup>333</sup> the Obama administration once again vastly expanded the practice, reaching the current total of 24 special envoys (see *infra*, table 3).<sup>334</sup>

### 6.1.2 Institutional setting

***EUSRs as ‘Free Electrons’?*** Faced with an exponential growth in the use of special envoys and representatives by a myriad of international actors, the EU adopted its designated ‘Guidelines on the appointment, **mandate and financing** of EU Special Representatives’ (hereinafter ‘the Guidelines’) in 2007.<sup>335</sup> Further to the entry into force of the Lisbon Treaty and the altered institutional set-up it brought forth, with notable implications for the conduct of the EU’s CFSP policies in particular, these guidelines recently underwent a thorough revision as part of the ongoing review of the organization and functioning of the EEAS.<sup>336</sup> In its conclusions of 17 December 2013 on this review, the Council recently pledged its ‘continuing commitment to the role of EU Special Representatives as a valuable instrument of EU foreign policy and stressed the need to **enhance overall efficiency and accountability**, as well as to ensure coordination and coherence with all other EU actors, emphasising the importance of close cooperation with the EEAS’.<sup>337</sup> Indeed the Foreign Affairs Council (FAC) recently approved the revised Guidelines on the appointment, mandate and financing of EU Special Representatives. Purportedly, it did so with a particular view to ‘the appointment of EUSRs and the definition of their mandates, in accordance with the Lisbon Treaty’.<sup>338</sup> Moreover, the ‘reporting and evaluation mechanism of EUSRs was also elaborated in greater detail’.<sup>339</sup> At the time of writing, however, these new guidelines were unfortunately not publicly available for further analysis. The following sections will therefore rely on the changes brought about in EU primary law.

The entry into force of the Lisbon Treaty essentially reinforced the hybrid nature of the EU Special Representative to the extent that ‘the confusion over how EUSRs fit into post-Lisbon structures –

<sup>331</sup> Adebahr, *supra*, n. 324, p. 79.

<sup>332</sup> Fullilove, *supra*, n. 326, p. 16.

<sup>333</sup> Naland, *supra*, n. 323, p. 1.

<sup>334</sup> *Ibid.* p. 2.

<sup>335</sup> EU Council, ‘Guidelines on appointment, mandate and financing of EU Special Representatives – revised guidelines: approval’, 11328/1/07 REV 1, Brussels, 24.7.2007, para. 2(1).

<sup>336</sup> See Blockmans, S. and Hillion, C. (eds.), ‘EEAS 2.0. Recommendations for the amendment of Council Decision 2010/427/EU establishing the organization and functioning of the European External Action Service’. *Centre for European Policy Studies (CEPS)*, Special Report No. 78, November 2013. See also Wouters, J., De Baere, G., Van Vooren, B., Raube, K., Odermatt, J., Ramopoulos, T., Van Den Sanden, T. and Tanghe, Y., ‘The Organisation and Functioning of the European external Action Service: Achievements, Challenges and Opportunities’, European Parliament, *Directorate-General for External Policies of the Union*, EXPO/B/AFET/2012/07, February 2013.

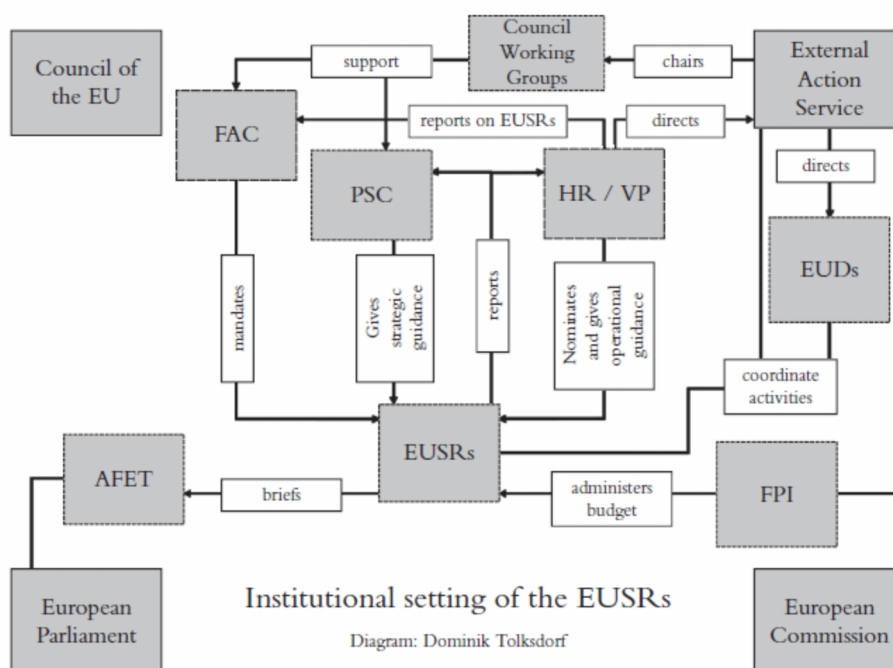
<sup>337</sup> EU Council, ‘Council Conclusions on the EEAS Review’, General Affairs Council Meeting, Brussels, 17.12.2013, para. 4.

<sup>338</sup> EU Council, ‘Guidelines on appointment, mandate and financing of EU Special Representatives – Approval’, 7681/14. Brussels, 13.3.2014, para. 4.

<sup>339</sup> *Ibid.*

coupled with the establishment of a permanent foreign policy body [the EEAS] – led to initial scepticism about the continued need for an ad hoc instrument in the form of the EUSR's.<sup>340</sup>

**Figure 3: Institutional setting of the EUSR's**<sup>341</sup>



Indeed, by organizationally adhering to the EEAS yet being funded by the Council's CFSP budget, all the while pertaining to the Commission's administrative management of Foreign Policy Instruments, **EUSR's represent a rare breed of 'free electrons'**<sup>342</sup> in the institutional set-up of the EU's foreign policy (see figure 3). It is precisely because of their ambiguous position in relying on the Council for operational guidance, while turning to the HR/VP for operation guidance, that EUSR's have been noted to remain an 'intergovernmental instrument'<sup>343</sup> in the EU's external action. Pursuant to Article 33 TEU, they are **appointed, extended and dismissed by a Decision of the FAC.**<sup>344</sup> Since the entry into force of the Lisbon Treaty, this appointment no longer requires unanimity rule but is now subject to a qualified majority rule – a notable exception in the realm of CFSP policy-making. In practice, however, it is the Council's Political and Security Committee (PSC) with which the EUSR's are noted to entertain 'privileged' relations, as it 'remains their primary point of contact within the Council'.<sup>345</sup>

**Increased EEAS Clout** Although EUSR's have been noted to 'remain a de facto Council instrument',<sup>346</sup> the HR/VP has gained a 'previously unknown clout over the EUSR's'<sup>347</sup> since the entry into force of the Lisbon

<sup>340</sup> Mateja, P., 'Double-hatting in EU External Engagements. EU Special Representatives and the Question of Coherence Post-Lisbon', *Stiftung Wissenschaft und Politik, SWP Comments* Vol. 46(4), 2012, p. 3.

<sup>341</sup> Tolksdorf, *supra*, n. 343, p. 484.

<sup>342</sup> Tolksdorf, D., 'The role of EU Special Representatives in the post-Lisbon foreign policy system: A renaissance?', *Institute for European Studies*, Policy brief No. 2012/02, June 2012, p. 2.

<sup>343</sup> Tolksdorf, D., 'EU Special Representatives: An Intergovernmental Tool in the Post-Lisbon Foreign Policy System?', *European Foreign Affairs Review*, Vol. 18(4), 2013, p. 471.

<sup>344</sup> Art. 33 TEU states that 'The Council may, on a proposal from the High Representative of the Union for Foreign Affairs and Security Policy, appoint a special representative with a mandate in relation to particular policy issues. The special representative shall carry out his mandate under the authority of the High Representative'.

<sup>345</sup> Tolksdorf, *supra*, n. 343, p. 477.

<sup>346</sup> *Ibid.* p. 478.

Treaty. While prior to Lisbon it was the Council who could appoint a EUSR whenever it deemed it necessary to do so, it is now the HR/VP who, pursuant to Article 33 TEU, 'has the sole right of initiative for the establishment of EUSRs and also proposes the person to occupy the post'.<sup>348</sup> Subsequently, the **HR/VP is also able to obstruct the nomination of a post**. Others have noted an increased tendency for Member States to retain intergovernmental control over the appointment and mandates of EUSRs in order to exert their influence over EU foreign policy, resulting in more explicit **turf battles between the HR/VP and the Council**.<sup>349</sup> As past experiences have shown, however, still others have pointed out that 'the HR/VP is unlikely to refrain from proposing the deployment of a new EUSR when a group of Member States pushes for it'.<sup>350</sup> In addition, as EUSRs are also required to report on their activities by submitting annual implementation reports to the Council, the HR/VP and the Commission, their purported role as 'free electrons' should also be taken with a grain of salt. After all, as acknowledged elsewhere, they 'have to maintain close contacts with all of these institutions and to coordinate their activities with them in order to fulfil their mandates properly'.<sup>351</sup>

**Harmonious Relations with the Empowered EP** Since the entry into force of the Lisbon Treaty, the EP has gained slightly more powers in the realm of the CFSP. In the past, some members of the European Parliament (MEPs) had expressed criticism over **EUSRs' lack of democratic accountability** in their work. In an attempt to alleviate these concerns, the EP now has the competence to review and to adopt the EEAS budget, thereby holding the HR/VP politically accountable. By the same token, all EUSRs are now also expected to (informally) present themselves in AFET prior to the start of their mandate, thereby pledging to take the positions of Parliament into account during the course of their mandate. Pursuant to Article 36 TEU, the EP's views 'on the main aspects and basic choices' of the CFSP must be 'duly taken in consideration' by the HR/VP, while EUSRs 'may be involved in briefing the European Parliament'. Opinions differ as to whether the EP's role actually matters in these CFSP deliberations, and Parliament purportedly has taken issue with 'a perceived **lack of clear guidelines for creating new EUSR posts**, with a 'proliferation' of envoys that threaten to weaken the role of Commission [now EU] delegations, and with the growing costs of existing missions and offices'.<sup>352</sup> Others have, however, noted more frequent **participation of EUSRs in parliamentary hearings** in recent years, and have preliminarily concluded that 'the relationship between the EP and the EUSRs has improved'.<sup>353</sup> Indeed, the EP had already called for the appointment of an EUSR for Human Rights on two earlier occasions, thereby stressing that 'the appointment of EU Special Representatives on human rights, notably for human rights defenders, for IHL and international justice and for women's rights and children's rights, could help to give EU external action in this field greater coherence and visibility'.<sup>354</sup> In a later attempt, the EU had also requested that the EUSR's mandate, upon establishment, 'should have cross-sectoral skills enabling the implementation of a cohesion policy aimed at integrating human rights in all EU policies', whilst warning 'against any attempt to isolate human rights policy from the overall external policy strategies through the creation of such a Special Representative'.<sup>355</sup> The subsequent

<sup>347</sup> Adebahr, C., 'Working inside out: what role for Special Envoys in the European External Action Service?', *European Policy Centre*, Policy Brief, January 2011, p. 2.

<sup>348</sup> Mateja, *supra*, n. 340, p. 2.

<sup>349</sup> Tolksdorf, *supra*, n. 343, p. 471.

<sup>350</sup> *Ibid.* p. 479.

<sup>351</sup> *Ibid.* p. 477.

<sup>352</sup> Adebahr, *supra*, n. 324, p. 128 (addition between brackets by the authors of this study).

<sup>353</sup> Tolksdorf, *supra*, n. 342, p. 3.

<sup>354</sup> European Parliament, 'Resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy on the matter', 2010/2202(INI), para 6.

<sup>355</sup> European Parliament, 'Resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy', 2011/2185(INI), para. 23.

**appointment of the EUSR for Human Rights** in the framework of the EU's Action Plan on Human Rights was thus enthusiastically endorsed by the EP.<sup>356</sup> At the level of inter-parliamentary cooperation (IPC), moreover, the IPC Conference on CFSP/CSDP held in September 2013 hailed the work of the EUSR by stating that he had 'enhanced the effectiveness and visibility of the EU's human rights policy'.<sup>357</sup> Some weeks later, the EUSR was invited to shed light on its mandate during the Inter-Parliamentary Committee Meeting on EU Human Rights Policy.<sup>358</sup>

In its latest Annual Report on Human Rights, finally, the **EP has continued to hold the role of the EUSR for Human Rights in high esteem**, as it devoted an entire sub-section to his achievements thus far by stipulating that it:

'[r]ecognises the importance of the mandate given to the first [EUSR] for Human Rights; encourages the EUSR to enhance the visibility, mainstreaming, coherence, consistency and effectiveness of EU human rights policy, in particular on women's rights, and to strike the right balance between silent and public diplomacy in carrying out his mandate; repeats its recommendation that the EUSR provide Parliament with a regular report on his activities and clarification of his thematic and geographic priorities, and ensure that concerns raised by Parliament are followed up'<sup>359</sup>

'[c]ommends the EUSR on the openness of the dialogue which he has conducted with Parliament and civil society, thus establishing an important practice that should be continued and consolidated to ensure due transparency and accountability; welcomes the EUSR's cooperation with regional bodies and in multilateral fora and encourages him to further expand such activities'<sup>360</sup>

'[w]elcomes the fact that cooperation with the EUSR for Human Rights was included in the mandate of the geographic EUSR for the Sahel, and urges the Council and the VP/HR to adopt this practice too, with regard to the mandates of future geographic EUSRs'<sup>361</sup>

**The Colloquial US Envoy** In the US, a less intricate yet more politicized picture emerges.<sup>362</sup> Depending on the initial act of appointment itself, US Special Envoys report directly to the President, the Secretary of State or, in the case of **congressionally-mandated positions**, to the House of Representatives. In addition, Special Envoys may also be appointed as 'domestic policy czars'<sup>363</sup> or personal advisors to the President, whose mandates often relate to 'particular high-profile domestic issues'.<sup>364</sup> Because of this looser institutional set-up, the US President is said to have much more leeway in pursuing **partisan interests through external representation** than the EU's executive actors, as he has 'unparalleled freedom in determining both the individual and the job in question' to such an extent that 'he is even free to bypass the State Department [...] and its network of accredited ambassadors who are, by default, already his personal representatives'.<sup>365</sup> In addition, EUSRs do not personally represent the **EU institutions in the same way that the US Special Envoy embodies US foreign policy**. Unsurprisingly, the US Special Envoy is thus noted to have a more informal, personal and trust-based relationship with

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<sup>356</sup> European Parliament, 'Recommendation to the Council of 13 June 2012 on the EU Special Representative for Human Rights', 2012/2088(INI).

<sup>357</sup> Conclusions of the Inter-Parliamentary Conference for the Common Foreign and Security Policy and the Common Security and Defence Policy, para. 9.

<sup>358</sup> Agenda of the AFET/DROI Inter-Parliamentary Committee Meeting, 'The implementation of the EU Strategic Framework and Action Plan on Human Rights and Democracy', 25.9.2013. See also Wouters, J. et al, *supra*, n. 5, p. 10.

<sup>359</sup> 2013/2152(INI), *supra*, n. 57, para. 17.

<sup>360</sup> *Ibid.* para. 18.

<sup>361</sup> *Ibid.* para. 19.

<sup>362</sup> It should be noted for the sake of methodological completeness that no equivalent US 'Guidelines' are available concerning the mandate of US Special Envoys.

<sup>363</sup> Naland, *supra*, n. 323, p. 1.

<sup>364</sup> *Ibid.*

<sup>365</sup> Adebahr, *supra*, n. 324, p. 75.

the executive than the EUSRs does. Indeed, 'the issue of personal trust should be less prevalent for the EU as the envoy is not anyone's alter ego'.<sup>366</sup> Because of the EU's formalized and often cumbersome selection procedure, the predominantly partisan considerations characteristic of the appointment of US Special Envoys are deemed to be much less relevant. Indeed, the appointment of EUSRs has been noted to be rather akin to the '**usual horse-trading between [M]ember [S]tates**',<sup>367</sup> thereby carefully balancing sometimes diverging national and ideological interests.

### 6.1.3 Functions and tasks

As has succinctly been formulated elsewhere, 'the business of special envoys – diverse as they are in individual cases – is, in principle (and maybe not surprisingly) alike across institutions: they engage in all forms of **multilateral diplomacy, usually aimed at diffusing international crises**, and they have considerable room for manoeuvre'.<sup>368</sup> Such is also the case in the EU and the US, where both the Special Representatives and the Special Envoys are seen as the 'eyes and ears'<sup>369</sup> of foreign policy-making. There are several advantages that come with giving a face to the represented actor in question. First, it significantly enhances the **visibility of an actor on the ground**, thereby strengthening its actorness.<sup>370</sup> Second, envoys may provide their respective headquarters with information about developments on the ground, while strengthening ties with local policy-makers and civil society actors. As has been noted elsewhere, this task is of particular importance in the EU, where smaller Member States who do not have diplomatic missions in countries where EUSRs operate have been noted to rely on the EUSR as a much appreciated complementary source of information in the development of their own foreign policy.<sup>371</sup> Third, the **availability of first-hand information** enables a clear and coherent strategy for policy formulation in a particular country. Fourth, that coherent strategy may lead to the dissemination of one single message on the ground, thereby enhancing the credibility of the actor as a foreign policy player. Finally, an envoy also allows for stronger coordination of potentially conflicting activities on the ground. This is particularly the case in those countries where both the EU and individual Member States are all implementing their respective activities.

As highlighted in the EU's comprehensive approach to external conflict and crises, '[t]he EU has a unique network of 139 in-country EU Delegations, diplomatic expertise in the EEAS including through EU Representatives, and operational engagement through CSDP missions and operations. By bringing all these together, with the European Commission and the 28 Member States, to work in a joined-up and strategic manner, the **EU can better define and defend its fundamental interests** and values [...].'<sup>372</sup> In a further step, as the comprehensive approach elucidates, stronger internal coordination also enable better cooperation with other international actors. In the US, a similar picture of the necessity to coordinate emerges, as 'in addition to the State Department as primary competitor of the special envoys, there is a whole government bureaucracy with different ministries involved in turf battles. These are mirrored by a web of ministerial agencies and delegations abroad that, even for an allegedly unitary actor such as the United States, add to a chorus of different foreign policy voices'.<sup>373</sup> The need for

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<sup>366</sup> Ibid.

<sup>367</sup> Ibid.

<sup>368</sup> Adebahr, *supra*, n. 324, p. 76.

<sup>369</sup> Grevi, G., 'Pioneering foreign policy. The EU Special Representatives', *Institute for Security Studies*, Chaillot Paper No. 106, October 2007, p. 11.

<sup>370</sup> Adebahr, *supra*, n. 324, p. 15.

<sup>371</sup> Tolksdorf, *supra*, n. 343, p. 475.

<sup>372</sup> JOIN(2013) 30 final, *supra*, n. 51, p. 3.

<sup>373</sup> Adebahr, *supra*, n. 324, p. 77.

internal coordination prior to the external implementation of activities on the ground, therefore, is also a common characteristic of both EU Special Representatives and US Special Envoys.

Reflecting the Lisbon Treaty's renewed **emphasis on ensuring policy coherence**, the EU has in recent years resorted to 'double hatting'<sup>374</sup> for its foreign policy actors, 'in the expectation that it will ensure coordination in the absence – or in lieu – of legal-institutional reform'.<sup>375</sup> Indeed, mirroring the EU's incessant 'quest for coherence',<sup>376</sup> its recent comprehensive approach exuded the conviction that '[t]he EU is stronger, more coherent, more visible and more effective in its external relations when all EU institutions and the Member States work together on the basis of a common strategic analysis and vision'.<sup>377</sup> The fate of double-hatting for the sake of policy coherence has increasingly been bestowed upon EUSRs as well, who in certain countries now act as both the special envoy and the Head of the EU Delegation on the ground (see table 3).<sup>378</sup> This recent development has not been inevitable and was in fact long deemed to be unthinkable, given that, as one observer remarked, prior to the entry into force of the Lisbon Treaty, 'Delegations were representing the Commission and its longer-term interests, while the EUSRs were exclusively focusing on security policy and crisis management'.<sup>379</sup> What makes the practice of **double-hatting EUSRs even more peculiar**, moreover, is that it also implies that EUSRs are physically located in their mandate area when taking up their double capacity. This practice stands in stark contrast with US Special Envoys, who have remained based in Washington, D.C. As recently observed by one analyst, however, double-hatting is not a panacea for the EU's quest for coherence. Indeed, 'it would be unrealistic to expect double-hats to resolve deep-seated disagreements on particular countries or regions of operation', just as much as it would be 'impossible for double-hats to resolve the tensions that arise in contexts that involve both inter-governmental and communitarian decision-making'.<sup>380</sup>

#### 6.1.4 Geographical and thematic priorities

Echoing the aforementioned differences between the rather formalized nature of the EU Special Representative and the more informal proceedings pertaining to the appointment of the US Special Envoy, **differences equally emerge in terms of the duration of an envoy's mandate, the scope of its mission and the level of operational engagement.** As it has been noted elsewhere, the mandates of US Special Envoys may even be 'as short as only a few weeks to solve a particular issue ('troubleshooters')',<sup>381</sup> whereby the scope of the mission would be rather focused and highly specialized. By contrast, following the EU's more generic guidelines which stipulate that, '[a]s a general rule, the tenure of office of an EUSR shall not exceed four years',<sup>382</sup> the mandates tend to be much broader and geared towards a more long-term, structural engagement with the third country in question. As can be seen in table 3 below, these differences also tangibly manifest themselves in the number and geographic

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<sup>374</sup> Mateja, *supra*, n. 340, p. 4.

<sup>375</sup> Portela, C. and Raube, K., 'The EU Polity and Foreign Policy Coherence', *Journal of Contemporary European Research*, Vol. 8(1), 2011, p. 9.

<sup>376</sup> Smith, M., 'The Quest for Coherence: institutional dilemmas of external action from Maastricht to Amsterdam', in Stone Sweet, A., Sandholtz, W. and Fligstein, N. (eds), *The Institutionalization of Europe*, Oxford University Press, Oxford, 2011, p. 79.

<sup>377</sup> JOIN(2013) 30 final, *supra*, n. 51, p. 3.

<sup>378</sup> Tolksdorf, *supra*, n. 342.

<sup>379</sup> Mateja, *supra*, n. 340, p. 2.

<sup>380</sup> *Ibid*, p. 4.

<sup>381</sup> Adebahr, *supra*, n. 324, p. 76.

<sup>382</sup> EU Council (2007), 'Guidelines on appointment, mandate and financing of EU Special Representatives – revised guidelines: approval', 11328/1/07 REV 1. Brussels, 24.7.2007, para. 2(1).

and/or thematic nature of the mandates.<sup>383</sup> Whereas the EU currently disposes of 9 Special Representatives, the **US significantly outnumbers the EU** by having 23 Special Envoys active on the global scene.

The lower EU number might be explained by the post-Lisbon expectation that EUSRs would gradually be removed or integrated into the EEAS' structure.<sup>384</sup> Indeed, recent developments seem to have brought the number of EUSRs down from twelve to nine, thereby affecting the EU's diplomatic presence in Central Asia, the Horn of Africa, the Middle East and the Sudans.<sup>385</sup> What is perhaps even more interesting, is that the **EU tends to favour geographic mandates over thematic ones** (8:1 ratio), while the US seems to have a preference for specifically targeted and thematic mandates (10:13 ratio). The EU's preference for geographic mandates might be explained by the fact that its Member States have specific and sometimes diverging national interests to uphold in third countries – particularly in former colonies.<sup>386</sup> Indeed, '[g]iven that mandate areas are themselves a politically sensitive issue in which the Council has to strike a balance between the Member States' diverging interests in regions outside of the EU, both the choice and deployment of EUSRs is no easy task'.<sup>387</sup>

From a thematic perspective, however, it is interesting to note that the EU has opted for an explicit, transversal Special Representative on Human Rights whose mandate is 'based on the policy objectives of the Union regarding human rights as set out in the Treaty, the Charter of Fundamental Rights of the European Union, as well as the EU Strategic Framework [and] Action Plan on Human Rights and Democracy'.<sup>388</sup> Following the adoption of the 2012 EU Action Plan, the High Representative proposed the position of an **EUSR for Human Rights, based on Article 33 TEU** – a mandate which has recently been prolonged until 28 February 2015. In line with the new Guidelines, 'the Council may decide that the mandate of the EUSR be terminated earlier, based on an assessment by the Political and Security Committee (PSC) and a proposal from the High Representative of the Union for Foreign Affairs and Security Policy (HR)'.<sup>389</sup>

Hinting at the **effort of mainstreaming human rights into EU external action**, the mandate of Special Representative Stavros Lambrinidis further outlines the tasks with regard to human rights mainstreaming in EU external action:

'In order to achieve the policy objectives, the mandate of the EUSR shall be to: (a) contribute to the implementation of the Union's human rights policy, in particular the EU Strategic Framework on Human Rights and Democracy and the EU Action Plan on Human Rights and Democracy, including by formulating recommendations in this regard; (b) contribute to the implementation of Union guidelines, toolkits and action plans on human rights and international humanitarian law; (c) enhance dialogue with governments in third countries and international and regional organisations on human rights as well as with civil society organisations and other relevant actors in order to ensure the effectiveness and the visibility of the Union's human rights policy; (d) contribute to better coherence and consistency of the Union policies and actions in the area of protection and promotion of human

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<sup>383</sup> Given that the designated EEAS website has not yet been brought in line with the latest developments, the authors would like to thank the EEAS and the EC for their much appreciated collaboration in providing an up-to-date overview of the 9 EUSR mandates which are currently in place.

<sup>384</sup> Tolksdorf, *supra*, n. 343.

<sup>385</sup> Gardner, *supra*, n. 328.

<sup>386</sup> Tolksdorf, *supra*, n. 343, p. 477.

<sup>387</sup> Tolksdorf, *supra*, n. 342, p. 2.

<sup>388</sup> EU Council, 'Council Decision 2012/440/CFSP of 25.7.2012 appointing the European Union Special Representative for Human Rights', OJ L 200/21, art. 2.

<sup>389</sup> EU Council, 'Council Decision 2014/385/CFSP of 23 June 2014 extending the mandate of the European Union Special Representative for Human Rights', OJ L183/66, art. 1.

rights notably by providing input to the formulation of relevant policies of the Union' (Article 3 of the mandate of Special Representative on Human Rights)<sup>390</sup>

The US, by contrast, does not seem to approach human rights from a cross-cutting perspective, but rather focuses on sub-thematic priorities within the broader realm of human rights, including mandates on holocaust issues, anti-Semitism, international disability rights, and international labour affairs.

**Table 3: Comparison between EU Special Representatives and US Special Envoys**

EUROPEAN UNION (9)			UNITED STATES (23)	
Mandate	Name	Council Decision	Mandate	Name
<b>GEOGRAPHICAL MANDATES: AFRICA</b>				
<b>1.African Union,</b> double-hatted EUSR and HoD	Gary Quince	<a href="#">2012/390/CFSP</a>	African Union	No US Equivalent
<b>2.Horn of Africa</b>	Alexander Rondos	<a href="#">2013/527/CFSP</a>	Horn of Africa	No Current Appointment
Great Lakes	No Current Appointment		<b>1.Great Lakes and DR Congo</b>	Russell Feingold
Sudan	No Current Appointment		<b>2.Sudan and South Sudan</b>	Donald E. Booth
<b>3.Sahel</b>	Michel Dominique Reveyrand-de Menthon	<a href="#">2013/133/CFSP</a>	Sahel	No US Equivalent
<b>GEOGRAPHICAL MANDATES: AMERICAS</b>				
Haiti	No EU Equivalent		<b>3.Haiti</b>	Thomas C. Adams
<b>GEOGRAPHICAL MANDATES: ASIA</b>				
North Korea	No EU Equivalent		<b>4.North Korean Human Rights Issues</b>	Dr. Robert R. King
			<b>5.North Korea Policy</b>	Glyn Davies
			<b>6.Six-party talks on North Korea's nuclear programme</b>	Sung Kim
<b>GEOGRAPHICAL MANDATES: CENTRAL AND EASTERN EUROPE</b>				
<b>4.Bosnia and Herzegovina,</b> double-hatted EUSR and HoD	Peter Sørensen	<a href="#">2012/330/CFSP</a>	Bosnia and Herzegovina	No Current Appointment
<b>5.Kosovo,</b> double-hatted EUSR and HoD	Samuel Žbogar	<a href="#">2012/39/CFSP</a>	Kosovo	No Current Appointment
Macedonia (FYROM)	No Current Appointment		Macedonia (FYROM)	No Current Appointment

<sup>390</sup> Council Decision 2012/440/CFSP, *supra*, n. 388.



EUROPEAN UNION (9)			UNITED STATES (23)	
Mandate	Name	Council Decision	Mandate	Name
South East Europe	No Current Appointment		South East Europe	No US Equivalent
<b>GEOGRAPHICAL MANDATES: CENTRAL ASIA</b>				
Central Asia	No Current appointment		Central Asia	No US Equivalent
Moldova	No Current Appointment		Moldova	No US Equivalent
<b>6.South Caucasus and Georgia</b>	Vacant <sup>391</sup>	<a href="#">2012/326/CFSP</a>	South Caucasus and Georgia	No US Equivalent
<b>GEOGRAPHICAL MANDATES: MIDDLE EAST AND NORTH AFRICA</b>				
<b>7.Afghanistan, double-hatted EUSR and HoD</b>	Franz-Michael Skjold Mellbin	<a href="#">2013/393/CFSP</a>	<b>7.Afghanistan and Pakistan</b>	James F. Dobbins
Middle East Peace Process	No Current Appointment		<b>8.Middle East Peace</b>	David Hale
Organisation of Islamic Cooperation	No EU Equivalent		<b>9.Middle East Transitions</b>	Vacant
<b>8.Southern Mediterranean Region</b>	Bernardino León	<a href="#">2012/327/CFSP</a>	<b>10.Organisation of Islamic Cooperation</b>	Rashad Hussain
Southern Mediterranean Region				No US Equivalent
<b>THEMATIC MANDATES</b>				
<b>9.Human Rights</b>	Stavros Lambrinidis	<a href="#">2012/440/CFSP</a>	Human Rights	No US Equivalent
Climate Change	No EU Equivalent		<b>11.Climate Change</b>	Todd Stern
Holocaust issues	No EU Equivalent		<b>12.Holocaust issues</b>	Douglas Davidson and Stuart E. Eizenstat
International Energy Affairs	No EU Equivalent		<b>13.Monitoring and combating anti-Semitism</b>	Ira N. Forman
Guantanamo closure	No EU Equivalent		<b>14.International Energy Affairs</b>	Carlos Pascual
Commercial and business affairs	No EU Equivalent		<b>15.Guantanamo closure</b>	Clifford M. Sloan
Faith Based and Community Initiatives	No EU Equivalent		<b>16.Commercial and business affairs</b>	Lorraine Hariton
Muslim Communities			<b>17.Faith Based and Community Initiatives</b>	Shaun Casey
			<b>18.Muslim Communities</b>	Farah Pandith

<sup>391</sup> EEAS 'EUSR for the South Caucasus and the Crisis in Georgia Philippe Lefort steps down', Press Release, Brussels, 31 January 2014. [http://eeas.europa.eu/statements/docs/2014/140131\\_en\\_03.pdf](http://eeas.europa.eu/statements/docs/2014/140131_en_03.pdf) accessed 01/08/2014.

EUROPEAN UNION (9)			UNITED STATES (23)	
Mandate	Name	Council Decision	Mandate	Name
	No EU Equivalent			
International Disability Rights	No EU Equivalent		<b>19. International Disability Rights</b>	Judith E. Heumann
International Labor Affairs	No EU Equivalent		<b>20. International Labor Affairs</b>	Vacant
Nuclear non-proliferation	No EU Equivalent		<b>21. Nuclear non-proliferation</b>	Robert J. Einhorn
Biological and - toxin weapons convention (BWC) issues	No EU Equivalent		<b>22. Biological and - toxin weapons convention (BWC) issues</b>	Susan Burk
Proliferation and Arms Control	No EU Equivalent		<b>23. Proliferation and Arms Control</b>	Laura Kennedy

### 6.1.5 Recommendations

#### Recommendations on EU inter-institutional cooperation

- **Clarify appointment, financing and mandate of EU Special Representatives** Dubbed to be ‘free electrons’ in the institutional set-up of EU foreign policy, confusion prevails as to how they precisely fit into the post-Lisbon structures. Although the conclusion of the EEAS review has been accompanied by a revision of the guidelines on the appointment, mandate and financing of EU Special Representative, more clarity should nevertheless be provided on the cooperation between the EU Special Representative, the EU Institutions and the Member States.
- **Strengthen cooperation between EUSRs and EP** Alleviating concerns about the EUSR’s lack of democratic accountability in carrying out its mandate, the EP now has the power to review and adopt the EEAS budget, thereby holding the HR/VP politically accountable. In doing so, the EUSR on Human Rights might clarify the EU’s geographic and thematic priorities, thereby taking concerns raised by the EP into account and seeking synergies to feed into the EP’s Annual Report on Human Rights in the World.

#### Recommendations on integrating human rights into EUSR mandates

- **Strive for a balanced practice of ‘double-hatting’ whilst seeking synergies between geographic EUSRs and the EUSR for Human Rights** The coherence and effectiveness of diplomatic representation cannot be ensured by automatically merging all geographic mandates of the EUSR and the Head of Delegation into one double-hatted reference point, as it would be both unrealistic and practically impossible to impose such an encompassing mandate on one individual. Rather, the practice of double-hatting should be pursued in a balanced manner, whereby the decision to double-hat mandates in particular instances should be taken on a case-by-case basis. Regardless of whether they carry out a ‘single-hatted’ or a ‘double-hatted’ mandate, moreover, every mandate of geographic EUSRs should also include the requirement to

cooperate with the EUSR for Human Rights in order to ensure a systematic integration of human rights into all diplomatic output.

- **Ensure long-term and structural mandate for the EUSR for Human Rights** Echoing the post-Lisbon confusion about the appointment, role and financing of EUSRs, the future of too many mandates of EUSRs has remained uncertain. For example, faced with the uncertainty of having his mandate renewed by a Council decision on an annual basis, the EUSR for Human Rights is bound to lose credibility vis-à-vis external interlocutors. The EUSR should be given a longer term of mandate, one which ideally corresponds to the duration of the mandate the HR/VP.

## 6.2 Democracy Promotion

The EU and the US face similar **challenges when it comes to democracy promotion**, especially regarding the strategic choices the two actors have to make in a rapidly evolving world. In this regard, it has been argued that one of the fundamental choices in international relations is that between ‘democracy’ promotion (political rights, free and fair elections, plural party systems, etc.) and ‘stability’ (sponsoring stable autocratic regimes) on the other hand. Whereas the former foresees the support for democratization through civil society support and institutional reform, in the latter case, political reforms are avoided as they often imply unpredictable political outcomes.

Nevertheless, the **promotion of democratic norms and values is firmly embedded in both the EU and US external action**, as these are seen as the foundations of wealthy and peaceful societies. The democratisation of European and American societies (establishment of political participation rights), the establishment of national and international human rights regimes and functioning rule of law systems have been a major concern not only after the Second World War, but also in the wake of the revolutions of Central-Eastern European states in the late 1980s and 1990s. The **political transformation** of these states is until today a major narrative which feeds into the efforts of transforming other political systems in and outside Europe. Another theoretical foundation for the external promotion of democracy has been the ‘democratic peace theory’, which argues that consolidated democracies do not go to war. Starting with the EU itself, the peace theory is often challenged by pointing out to military action used by Member States (in and outside the EU) and the US. However, the key argument remains that not any military action, but military action of a democracy against other democracies can be ruled out according to the democratic peace theory. As such, the **EU itself can be seen as a model of ‘civilising’ the actions that democratic Member States use against each other**. Third, democratization is often closely linked to modernization theory and the idea that democracy is a milestone of political system transformation, as it generally contributes to the **implementation and advocacy of human rights and market capitalism**. Given these strong underlying rationales, both the EU and the US have consistently reiterated their commitment to democracy promotion. This is reflected in EU policy by the 2009 Council of the EU’s ‘Conclusions on Democracy Support in the EU’s External Relations’ and the Strategic Framework /Action Plan on Human Rights and Democracy. In the US, the ‘ADVANCE Democracy Act’ adopted by the US Congress in 2007 can be highlighted. Under the Obama administration the notion of ‘democracy promotion’ was not emphasized to signal a break with the rhetoric from the Bush era, but it has none the less remained a key dimension of US foreign policy.<sup>392</sup>

This case study provides a snapshot of EU and US democracy promotion, with a focus on democracy assistance efforts in third countries. First, it provides an overview of the different concepts behind

<sup>392</sup> Bibbins Sedaca, N., Bouchet, N., ‘Holding Steady? Us Democracy Promotion In A Changing World’, Programme Paper, Chatham House Americas Programme, February 2014.

democracy promotion (section 6.2.1), and the different approaches to democracy promotion (section 6.2.2). Secondly it focuses on EU and US democracy assistance (section 6.2.3), identifying different types of assistance, actors and implementing organizations, and geographic priorities. Third, how the EU and the US support 'grassroots' democratic reformers by adopting a 'bottom-up' strategy is discussed in more detail (section 6.2.4). The case study concludes with identifying certain challenges and opportunities for EU-US cooperation (section 6.2.5.) and tentative recommendations for EU action and policy-making (section 6.2.6.).

### 6.2.1 The concept of democracy promotion

Various forms of democracy have emerged throughout history, and today the debate on the diversity and adaptability of the democratic model is as salient as ever with new transitions taking place in North Africa and the Middle East. Hence, in looking at democracy promotion by the EU and the US, a key question is what model of democracy they intend to promote. Arguably, what characterizes Western democracy promotion actors is that they "promote what they know and admire most, which is almost always their own country's particular approach to democracy".<sup>393</sup> Hence, both the US and the EU are widely regarded to promote a liberal democratic model. This appears more explicitly in the case of the US,<sup>394</sup> and its democracy promotion seems to **export some of its party political models** (see *infra*, section 6.2.3). Despite certain nuances, at the core of the EU's democracy promotion a similar model of liberal democracy can be recognized – although as a supranational structure the EU does not represent a typical liberal democracy.<sup>395</sup> Accordingly, the 'liberal democratic discourse provides an almost universal backdrop to debates on democracy promotion'.<sup>396</sup> The **standard substance of liberal democracy** is understood as entailing 'free and fair elections and constitutional guarantees of individual political, civil, and associational rights' although broader interpretations also include equal voting rights for citizens, universal suffrage, freedom of conscience, information, and expression, etc.<sup>397</sup>

Despite a strong **convergence around a core of liberal democratic principles**, neither the EU nor the US advance one clear-cut definition of democracy promotion to steer their efforts, which are undertaken by a multitude of actors. Hence observers note several nuances and variations on the substance of democracy promotion both within and between the EU and the US. In addition to a 'political' form, Carothers distinguishes a 'developmental' form of democracy promotion which 'looks past political procedures to substantive outcomes such as equality, welfare, and justice', and puts economic and social rights on equal footing with political and civil rights.<sup>398</sup> Arguably, this understanding of democracy is more common to the EU, reflecting the idea that the 'European social model' has lead the EU to promote a more social-democratic model whereas this is absent in US democracy promotion.<sup>399</sup>

Based on conceptual work by several authors, Wetzel and Orbie develop a conceptual framework wherein this **'social democratic' dimension is integrated as part of the 'external conditions' of a**

<sup>393</sup> T. Carothers, 'Democracy Assistance: The Question of Strategy', *Democratization*, Vol. 4 (3), 1997, p. 121–122.

<sup>394</sup> Kurki, M., 'Democracy and Conceptual Contestability: Reconsidering Conceptions of Democracy in Democracy Promotion', *International Studies Review*, Vol. 12, 2010, p. 362–386.

<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.* at p. 365.

<sup>397</sup> Wetzel, A. and Orbie, J., 'Promoting Embedded Democracy? Researching the Substance of EU Democracy Promotion', *European Foreign Affairs Review*, Vol. 16, 2011, p. 565–588, p. 572.

<sup>398</sup> Carothers, T., 'Democracy Assistance: Political vs. Developmental', *Journal of Democracy*, Vol. 20, 2009, p. 8.

<sup>399</sup> *Ibid.*

**democratic system.**<sup>400</sup> They identify four possible democracy promotion agendas; a ‘full agenda’ covering all the essential political and institutional elements which constitute the architecture of a democratic model,<sup>401</sup> a ‘narrow agenda’ whereby the focus is often concentrated only on the electoral process, a ‘broad’ agenda which not only focuses on political structures but also on ‘external conditions’ such as the effectiveness of the state, the presence of an active civil society and a minimum level of socio-economic equality, and lastly a ‘shallow’ model which only focuses on the external conditions but not on the political architecture of a democracy. In discussing democracy promotion strategies, the EU and the US are criticized for leaning too much towards a ‘narrow agenda’ with a singular emphasis on elections.<sup>402</sup>

The EU has also been criticized for having a ‘shallow agenda’, reflecting its ‘developmental’ approach to democracy promotion whereby a gradual investment in ‘state effectiveness’ and ‘poverty reduction’ is prioritized over the core political elements of a liberal democratic model.<sup>403</sup> EU officials have advocated this approach as **‘giving people a voice’ through social development**, rather than attempting to ‘replicat[e] institutional patterns’.<sup>404</sup> The US on the other hand is said to be more forceful and less pragmatic in transferring its model of democracy, adopting a principled position on core civil and political liberties. The ‘replication’ of US political culture is also apparent in how a share of its democracy assistance is channelled through organizations reflecting party ideologies (see *infra*, section 6.2.3). In the EU, the newly established EED seeks to distance it from this approach, emphasizing that it does not promote ‘any single model’.<sup>405</sup> In characterizing this ‘transatlantic’ divide, some commentators argue that the EU is from Venus, more ‘understanding’ of alternative pathways to democratization, whereas the US is from Mars – forceful and principled in pushing its proper democratic model.<sup>406</sup> Rather than characterizing the substance of their democracy promotion, the analogy is used to describe the different approach and ‘posture’ of the EU and the US.

Despite such metaphors, it is clear that within the EU and the US themselves competing visions on democratization exist.<sup>407</sup> Rather than a clear-cut US or EU template, democracy promotion is given substance depending on the actors involved and the country-specific context in which it is undertaken. This adaptability has been highlighted as the EU and the US **aim to move away from a ‘one-size-fits-all’ strategy**.<sup>408</sup> The brief analysis above indicates the absence of a single monolithic ‘democracy agenda’. Given this adaptability, the next section clarifies the different strategies, instruments and tools which are used to put the democracy promotion agenda into practice.

<sup>400</sup> Wetzel and Orbie, *supra*, n. 397.

<sup>401</sup> The political architecture of a liberal democracy is composed of five regimes: “a democratic electoral regime, political rights of participation, civil rights, horizontal accountability, and the guarantee that the effective power to govern lies in the hands of democratically elected representatives”, see: Wetzel and Orbie, *supra*, n. 397., p. 573.

<sup>402</sup> *Ibid*, p. 570-571.

<sup>403</sup> Carothers, *supra*, n. 393, p. 8.

<sup>404</sup> As cited in Richard Youngs, ‘Democracy Promotion: The Case of European Union Strategy’, Working Document, No. 167, *Center for European Policy Studies*, Brussels, 2001, p. 10.

<sup>405</sup> Interview Jerzy Pomianowski, Executive Director of the EED, Euractiv Website, 15 April 2014. Available at <http://www.euractiv.com/sections/europes-east/jerzy-pomianowski-france-could-do-more-human-rights-301565> (accessed 26/05/2014).

<sup>406</sup> Risse and Börzel, *supra*, n. 122.

<sup>407</sup> See Melia, T., ‘The Democracy Bureaucracy’, *The American Interest* 1, no. 4, 2006.; Spence, M., ‘Policy Coherence and Incoherence: The Domestic Politics of American Democracy Promotion’, Paper presented at the Workshop on Democracy Promotion Center for Democracy, Development and the Rule of Law, Stanford University October 4-5, 2004.

<sup>408</sup> In the EU, the EC’s Agenda for Change calls for a tailor-made approach, (see EC COM(2011) 637final, 13 October 2011). In the US, the process of the Quadrennial Diplomacy and Development Review has similarly called for tailored responses and enhanced cooperation with local actors.

## 6.2.2 Strategies for democracy promotion

Both the EU and the US have a various means at their disposal to promote democracy, several of which are described in the chapters on foreign policy (section 3), trade policy (section 4), and development cooperation policy (section 5). The controversial 'modality' of democracy promotion, which is not discussed in this report, is **military intervention or democratization by force**. At the opposite spectrum of action is the 'intrinsic' external influence which the EU and the US project on the world stage as 'models' or 'examples',<sup>409</sup> inspiring democratic movements or reformers. Because this 'diffusion' of democratic values does not require direct activity - although the EU and the US amplify their meta-influence through various means - it is also not addressed as a separate policy in this report. The majority of the EU's and the US's instruments and tools for promoting democracy are located between this passive role as 'model' and the use of military force. They can include sanctions and embargos, various forms of positive and negative conditionality related to trade and development assistance, and a range of diplomatic efforts.<sup>410</sup>

In looking at how the EU and the US deploy their 'toolbox' in relation to a third country, there are several ways to categorize the various tools and instruments into broader strategies for democracy promotion.<sup>411</sup> In the context of this case study we adopt a distinction between the promotion of **top-down democratic reforms**, and efforts towards **bottom-up democratic reform**. The category of top-down efforts relates in first instance to all actions which aim to provide incentives or disincentives to governments. Often described as the 'sticks and carrots' approach and operationalized by different types of conditionality policies in tandem with diplomatic and political dialogues with partner governments, it relies on the use of external leverage to incentivize reforms.<sup>412</sup> It also can cover substantial amounts of democracy assistance funding for programmes in collaboration with governments or public institutions. The 'bottom-up' approach to democracy promotion covers all forms of support for non-state actors as the 'grassroots' of democracy, and relies on creating transnational linkages.<sup>413</sup> This can include support for political parties, but primarily covers a diverse category of civil society actors, including human rights defenders. The **distinction between top-down and bottom-up approaches is particularly useful in comparing US and EU strategies**. While it is acknowledged that the EU and the US combine top-down and bottom-up democracy promotion, several authors argue that the EU invests more in a 'top-down' state centric approach, whereas the US is said to be more committed to 'bottom up' support.<sup>414</sup> This would reflect a more careful and less antagonizing approach adopted by the EU, while the US is more confrontational towards governments and less concerned with the potential of worsening diplomatic relations. The remainder of this case study will focus primarily on **democracy assistance**, that is, the use of development funding to assist processes of democratic reform in other countries. The following sub-sections elaborate and

<sup>409</sup> E. Baracani, 'U.S. and EU Strategies for Promoting Democracy,' in Federiga, M. and Angelescu, I. (eds.), *The Foreign Policy of the European Union: Assessing Europe's Role in the World*, Brookings Institution Press, 2012, p. 307.

<sup>410</sup> Ibid, p. 308.

<sup>411</sup> See for example, Whitehead, L., *The International Dimensions of Democratization. Europe and the Americas*, 2nd ed., Oxford University Press Oxford, 2001; Lavenex, S. and Schimmelfennig, F., 'EU democracy promotion in the neighbourhood: from leverage to governance?', *Democratization*, Vol. 18 (4), 2011, p. 885-909.

<sup>412</sup> Lavenex and Schimmelfennig, *supra*, n. 411, p. 892.

<sup>413</sup> Ibid, p. 890-891.

<sup>414</sup> See Risse, T., 'Conclusions: Towards Transatlantic Democracy Promotion?' in Magen, A., Risse, T. and McFaul, M.A. (eds.), *Promoting Democracy and the Rule of Law. American and European Strategies*, Palgrave, Basingstoke, 2009, p. 244-271; Kopstein, J., 'The Transatlantic Divide over Democracy Promotion', *The Washington Quarterly*, Vol. 29(2), 2006, p. 85-98; Babayan, N., and Viviani, A., 'Shocking" Adjustments? EU Human Rights and Democracy Promotion', *Transworld Working Papers*, No. 18, 2013.

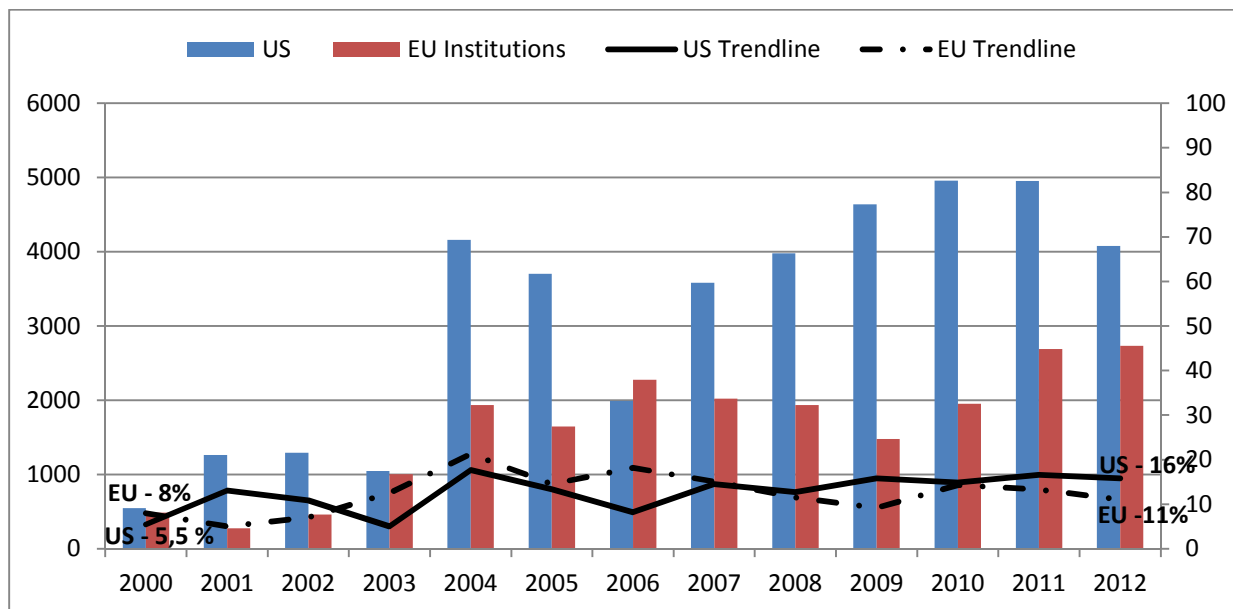
substantiate how the EU and the US carry out democracy assistance. Section 6.2.4 further looks more specifically into the implementation of ‘bottom up’ democracy assistance.

### 6.2.3 EU and US democracy assistance

Both the EU and US invest a significant share of their official development assistance (ODA) budget in projects and programmes on ‘human rights and democracy’. This type of democracy/human rights assistance is part of a broader trend whereby development assistance is increasingly seen as a tool for shaping institutions and governance, in addition to its traditional focus on economic growth and poverty reduction. This subsection summarizes the main types, actors and characteristics of EU and US democracy assistance.

**Democracy and Human Rights Assistance as an increasing share of ODA** The amount of official development assistance (ODA) which the EU and the US allocate for the broad category of good governance-, democracy assistance- and human rights-projects and programmes has increased significantly over the past decade (see figure 4).

**Figure 4: : ODA commitments to ‘Government and Civil Society’ from the US and EU Institutions, 2000-2012, Total Amounts in USD million dollars and percentage as compared to total sector spending<sup>415</sup>**



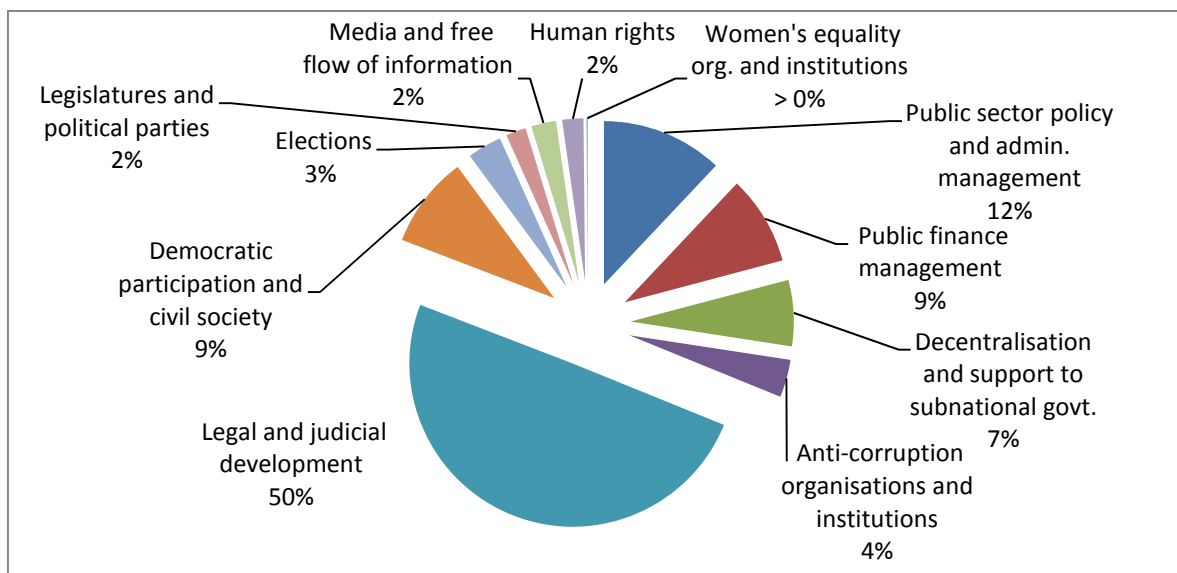
Despite this increasing investment in ‘governance’, this thematic sector of development assistance remains relatively small compared to other sectors such as education or health. Its share of total spending in all sectors has fluctuated over the last decade in both the EU and the US. In 2012, it accounted for 16% of the US’s sector ODA, and 11% of sector ODA managed by EU Institutions.

**Types of Democracy Assistance** The EU and the US fund a broad variety of activities which can be regarded as democracy assistance, covering support for different branches of government, political or civil society organizations, or individual citizens. This includes support for electoral processes and voter education campaigns, grants for individual human rights organizations or defenders, funding for public

<sup>415</sup> Data extracted on 20.5.2014 15:33 UTC (GMT) from OECD.Stat. The OECD’s Creditor Reporting System code ‘151: I.5.a. Government & Civil Society-general, Total’ was used. The total amounts omit funding under CRS code ‘152: I.5.b. Conflict, Peace & Security’, which can also cover certain forms of democracy assistance. The percentage trendlines are based on the share of the government-civil society sector (151:1.5.a) against total sector allocated ODA spending (1000: Total All Sectors) reported through the OECD’s CRS.

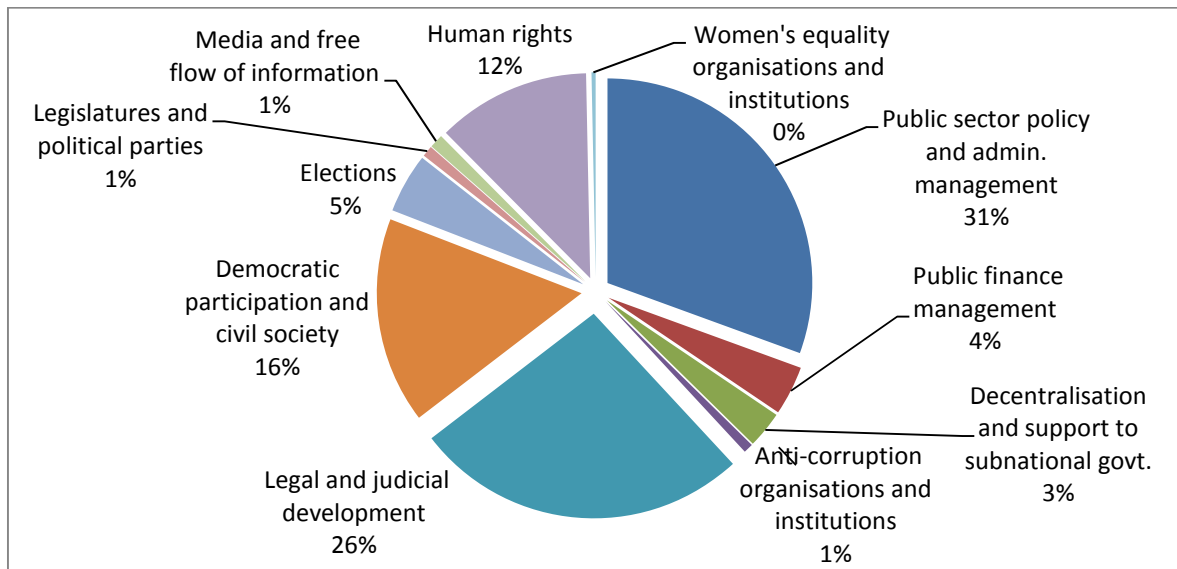
or semi-public accountability institutions, support for parliamentary institutions, etc. Numerous Washington- and Brussels- based institutions and agencies are engaged in democracy assistance and they reach out to a **broad range of actors at the national and supranational level**. The latter can include financial support for regional and international bodies who address human rights such as the UNOHCHR and the ICC. In looking into more detail of what this broad category of ‘governance’ and democracy assistance covers, certain **divergences can be found between the EU and the US as illustrated by figures 5 and 6 (infra)**. The OECD data suggest a much stronger emphasis of US democracy assistance to legal and judicial development, but a much smaller share dedicated to human rights organizations and actors. While initiatives on ‘Rule of Law’ and ‘Access to Justice’ are important in EU and US democracy assistance, this seems to indicate a difference in how the role of human rights actors is prioritized. In looking at other large sub-sectors, both the EU and the US dedicated roughly one third of their ‘governance’ budget to programmes which aim to improve effective governance and state-building (i.e. the sub-categories of public sector policy and administrative management, public finance management, decentralisation and support to sub-national governments, anti-corruption organisations and institutions). While it can be argued that an effective state is essential for the protection of human rights, such programmes often do not focus directly on improving human rights protection or democratic governance as such.

**Figure 5: US commitments for sub-sectors of ‘Government-Society’, 2012, as % of total sector**



Those assistance programmes which directly and explicitly have democratic accountability and participation as a primary goal fall under the sub-sectors of ‘Democratic participation and civil society’, ‘Elections’, ‘Legislatures and political parties’, ‘Media and free flow of information’, ‘Human rights’, and ‘Women's equality organisations and institutions’. In order to contrast this type of assistance with programmes which aim to state efficiency or the development of judiciary, the broad label of ‘bottom-up’ is applied. The following section (see *infra*, 6.2.4) provides a more detailed analysis of this type of democracy assistance.



**Figure 6: EU commitments for sub-sectors of 'Government-Society', 2012, as % of total sector**

**EU Instruments and Implementing Actors** In the EU, **DG DEVCO and the EEAS** dispose of several financial instruments to fund a broad range of activities in the field of democracy assistance. A key development in this regard was the creation of EIDHR in 1994, and its subsequent adoption as a specific thematic financial instrument in 1999.<sup>416</sup> It followed a push by the European Parliament for a more coherent and sustained EU effort at democracy promotion.<sup>417</sup> **EIDHR main objective is to provide support to human rights defenders and civil society organizations**, and is able to do so without the consent of a partner government allowing it to operate in repressive states. While support for human rights defenders and CSOs is at the core of EIDHR's mandate, a significant share of its budget is also used for supporting other actors, including the European Electoral Monitoring missions and institutions such as the UNOHCHR and the ICC. In addition, funding for democracy assistance is available to the EEAS and the Commission under several geographic financial instruments; at least 15% of the funding under the DCI's geographic programmes for 2014-2020 will be invested in 'human rights, democracy and good governance'.<sup>418</sup> Similarly, the ENPI and the EDF also foresee funding for democracy assistance in the European Neighbourhood and ACP-countries respectively. Besides DG DEVCO, other DGs also engage in democracy and human rights initiatives in coordination with the EEAS. The **Service for Foreign Policy Instruments** provides support through the Instrument for Stability (IfS), financing for example 'rule of law' reform programmes. In pre-accession countries, **DG Enlargement** further engages in human rights promotion and democracy assistance, as the 'promotion and protection of human rights and fundamental freedoms' is part of the specific objectives of the Instrument for Pre-accession Assistance (IPA).<sup>419</sup>

A notable development is the emergence of a new actor with the creation of the **European Endowment for Democracy (EED)** in 2012 under the auspices of the Polish presidency of the Council. Based on the US's National Endowment for Democracy (NED) (see *infra*), the EED is a private grant making institution with a mandate to "foster and encourage 'deep and sustainable democracy' within the EU

<sup>416</sup> The current regulation for EIDHR is the European Parliament and Council Regulation (EU) 235/2014 establishing a financing instrument for democracy and human rights worldwide (2014) OJ L77/85.

<sup>417</sup> REGULATION (EU) No 235/2014.

<sup>418</sup> Regulation (EU) No. 233/2014, *supra*, n. 266.

<sup>419</sup> Article 2, 1 (a) (ii), REGULATION (EU)231/2014.

neighbourhood.<sup>420</sup> Its board is composed of representatives of EU Member States, MEPs, and NGO representatives.<sup>421</sup> It receives a significant share of its funding from the European Commission to cover its operating budget, but relies primarily on contributions from Member States. Because it foresees less procedural requirements than other funding mechanisms, the EED's added value would lie in its flexible approach for providing grants to pro-democracy actors and human rights defenders, as is further discussed below.

**US Instruments and Implementing Actors** In the US context, several actors dispose of significant resources to carry out democracy assistance. The US Congress allocates its 'democracy fund' between **USAID** and the **USSD's Bureau of Democracy, Human Rights, and Labor** (DRL Bureau). The most recent Appropriations Act of 2014<sup>422</sup> reflects a gradual evolution whereby the USSD's budget for democracy assistance has increased significantly and USAID has lost its status as the main provider of US democracy assistance. Complementing its 'traditional' reporting activities, the USSD's DRL Bureau uses several funding mechanisms. It primarily grants contracts for programmes to US-based non-profit organizations to strengthen democratic institutions, promote human rights, and build civil society mainly in fragile democracies and authoritarian states. The DRL Bureau also has an emergency 'Human Rights Defenders' Fund' for quickly assisting individuals at risk and contributes to a similar mechanism, the 'The Embattled NGOs Assistance Fund' together with several other donor states. Additionally, large programmes such as the Middle Eastern Partnership Initiative also cover significant funding for democratic reform and civil society support. Despite a 'stagnation' under the GW Bush administration, democracy assistance and human rights have again been adopted as a visible priority for USAID with the establishment of its Center of Excellence for Democracy, Human Rights, and Governance in 2012, and its renewed strategy discussed above.<sup>423</sup>

In addition, a large share of funding for democracy assistance is allocated to the **National Endowment for Democracy** (NED), a private, non-profit foundation which operates largely independent from USAID and USSD. Established under the Reagan administration by the National Endowment for Democracy Act of 1983, the NED has since evolved into one of the key 'branches' of US democracy assistance. The NED is based on the German 'Stiftungsmodell'<sup>424</sup> and receives its funding via Congress for international projects in the field of human rights and democracy. The great majority of its budget is directed to its four core institutions: the National Democratic Institute (NDI), International Republican Institute (IRI), Center for International Private Enterprise (CIPE) and the Solidarity Centre. The NED's core institutes reflect party political and ideological components of the US' democratic model. They carry out a variety of democracy assistance programmes and initiatives relying on a network of partner organisations and disposing of field-based offices in a large number of countries. The **creation and expansion of the NED is considered a milestone in US democracy assistance.**<sup>425</sup> Its focus on supporting civil society and NGOs provides it with a distinct mandate, different from the democracy assistance efforts undertaken by USAID or the USSD. Although wholly dependent on government funding, the independence of the NED is presented as one its defining features. Its board members are not selected by the President, and

<sup>420</sup> Council Of The European Union, Declaration on the Establishment of a European Endowment for Democracy, 20.12.2011, Brussels.

<sup>421</sup> Škoba, L., 'European Endowment for Democracy: hopes and expectations', Briefing, Library of the European Parliament, 30/04/2013.

<sup>422</sup> Consolidated Appropriations Act, 2014, 113th Congress (2013-2014.) H. R. 3547—475.

<sup>423</sup> Under GW Bush administration, senior leadership of USAID did not prioritize democracy assistance. See T. Carothers, 'Revitalizing U.S. Democracy Assistance- The Challenge of USAID', Carnegie Endowment for International Peace, 2009.

<sup>424</sup> Magen, A., and McFaul, M.A., 'Introduction: American and European Strategies to Promote Democracy', in: Magen, A., Risse, T. and McFaul, M. (eds.), *Promoting Democracy and the Rule of Law: American and European Strategies*, London: Palgrave, 2009, p. 1-33.

<sup>425</sup> Interview with US official, Washington D.C., 13 March 2014.

those who are appointed to serve in the Executive Branch have to relinquish their board membership. The 'added value' of the NED in supporting 'grassroots' or 'bottom-up' democratic processes is discussed below (see *infra*, section 6.2.4).

Apart from the NED, USAID and the USSD, other governmental institutions can be engaged in programs that cover democracy and human rights promotion, including the Department of Defense, the MCC, and the Department of Justice.<sup>426</sup> Given the variety of actors involved in democracy promotion, **the coordination of democracy assistance has become a salient question within both the US and the EU**. In the US, a rapidly increasing budget for democracy assistance combined with a greater spread of this funding over different actors has led some authors to identify a sprawling 'democracy bureaucracy'.<sup>427</sup> Concerns regarding coordination were highlighted in the US Senate, where it was noted that USAID and the USSD did not have a 'common definition' of what a 'democracy program' is.<sup>428</sup> The multiplicity of actors and programmes presents a challenge for internal oversight, and the need for adequate coordination between USAID, State Department, NED, and other actors has been emphasized.<sup>429</sup> In the EU, the recent creation of the EED, and even more so the many Member-State-based donors and organizations engaged in democracy assistance, reflect a similar degree of high fragmentation.

**Geographic Priorities in EU and US Democracy Assistance** Due to the multitude of actors and funding instruments engaged in democracy assistance, little systematic data is readily available on where US and EU assistance is concentrated. Table 4 presents a snapshot comparison of the top 15 recipient countries of EU and US democracy assistance based on studies commissioned by the Commission (EU) and undertaken by the Government Accountability Office (US). While it should be highlighted that these studies adopt different timeframes and different methodologies for measuring democracy assistance, they do indicate interesting geographic overlaps and differences between EU and US efforts. Apart from Iraq and Afghanistan, countries such as Sudan, Indonesia, Ukraine, Colombia, Russia and the West Bank and Gaza Strip are among the overlapping top recipients.

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<sup>426</sup> Carothers, *supra*, n. 423.

<sup>427</sup> Melia, *supra*, n. 407.

<sup>428</sup> Senate Report 109-096 of June 30, 2005 on the Department of State, Foreign Operations, and related programs Appropriations Bill FY 2006.

<sup>429</sup> Government Accountability Office, 'Democracy Assistance: U.S. Agencies Take Steps to Coordinate International Programs but Lack Information on Some U.S.-funded Activities', Report to Congressional Committees, 2009.

**Table 4: Comparing recipients of EU and US democracy and human rights assistance<sup>430</sup>**

Top 15 Recipients of <b>EU</b> Human Rights and Democracy Assistance <sup>431</sup> , 2001-2010	Top 15 Recipients of <b>US</b> Human Rights and Democracy Assistance ('Governing Justly and Democratically') <sup>432</sup> , 2006-2008
1. Afghanistan (x)	1. Iraq (x)
2. Sudan (x)	2. Afghanistan (x)
3. West Bank and Gaza Strip (x)	3. Sudan (x)
4. Indonesia (x)	4. Egypt
5. Somalia	5. Mexico
6. Iraq (x)	6. Colombia (x)
7. DR Congo	7. Russia (x)
8. Russia (x)	8. Kosovo
9. Colombia (x)	9. Pakistan
10. Georgia	10. Liberia
11. India	11. Indonesia (x)
12. Bangladesh	12. West Bank and Gaza Strip (x)
13. Ukraine (x)	13. Ukraine (x)
14. South Africa	14. Cuba
15. Sri Lanka	15. Haiti

In looking at specific EU and US actors, some clear geographic priorities can be identified. The USSD's DRL Bureau for invests about half of its budget in Iraq, with the remainder of its programming budget spread over several regions.<sup>433</sup> A quick scan of current USAID projects for democracy and human rights

<sup>430</sup> Note: Countries appearing in both lists are marked (x)

<sup>431</sup> The numbers included here are based on an extensive evaluation of the Commission's support to human rights and fundamental freedoms, carried out by a consortium of research institutions. The measurement of financial support covers assistance managed by the Directorates-General for Development and Co-operation/EuropeAid (DEVCO), Enlargement (ELARG) and the European External Action Service (EEAS), provided to third countries (excluding OECD members and candidate countries) and 'filtered' to identify human rights-related interventions. The three funding instruments which dispensed most human rights-related funding are FED (26 %), DCI-ALA (18 %) and EIDHR (17 %), with a notable trend whereby geographic instruments now dispense more HR-related funds than the thematic funding instruments. See Consortium PARTICIP-ADE-DIE-DRN-ECDPM-ODI, Thematic Evaluation of the European Commission support to respect of Human Rights and Fundamental Freedoms (including solidarity with victims of repression), Volume 3: Inventory of Human Rights Interventions (2011).

<sup>432</sup> This table lists funding under the 'Governing Justly and Democratically' objective as set out in the Foreign Assistance Framework developed by the USSD and USAID in 2006. The strategic objective the 'Governing Justly and Democratically' has four program areas—'Rule of Law and Human Rights,' 'Good Governance,' 'Political Competition and Consensus-Building,' and 'Civil Society. See Government Accountability Office, Democracy Assistance: U.S. Agencies Take Steps to Coordinate International Programs but Lack Information on Some U.S.-funded Activities, Report to Congressional Committees (2009).

<sup>433</sup> US Department of State, Bureau of Democracy, Human Rights, and Labor, Website on Democracy, Human Rights and Law Programs, available at <http://www.state.gov/j/drl/p/index.htm> (accessed 12/05/2014).

based on its website indicates a high concentration in Afghanistan (30 projects) and Egypt (25 projects).<sup>434</sup> At the EU side, country's with a high concentration of EIDHR projects between 2007 and 2010 were Croatia, Bosnia-Herzegovina, Serbia, Kosovo, FYR Macedonia, Turkey, Georgia, Azerbaijan, Armenia, Russia, Israel, West Bank and Gaza Strip, Nepal, Venezuela, and DR Congo.<sup>435</sup>

These observations seem to indicate that foreign policy priorities, such as the international efforts in Afghanistan and Iraq, account for a large share of the EU's and the US's democracy assistance efforts.

#### 6.2.4 Supporting bottom-up democratic reform

In their assistance strategies, both **EU and US use a mix of tools**. Depending on the broader context of bilateral relations, democracy assistance will be used to support state institutions or the political society of a country, or it will be used to strengthen civil society, assist human rights defenders, or support opposition movements. In the case of USAID and DG DEVCO, this choice of engagement strategy runs parallel to their implicit or explicit 'categorization' of countries reflected in their development strategies (USAID), or budget support policy (DG DEVCO-EEAS), as described above (*see supra*, section 5.1).

Both the US and the EU see support for an active political and civil society as an essential component of democracy promotion.<sup>436</sup> However, democracy assistance covers a broad spectrum of activities, whereby support for non-state actors is not necessarily prioritized. What can be labelled as **'bottom-up' democracy assistance represents a small yet significant share of the EU's and the US's overall ODA budget for 'governance' assistance**; 18% for the US and 35% for the EU in 2012 (*see supra*, figures 5 and 6). This type of 'bottom-up' democracy assistance still covers a broad category of non-state actors. It is funded through several financial instruments or budget accounts allocated by different institutions/agencies, and often flows through various intermediaries which can be EU or US-based (e.g. the EED or NED) or international organizations (e.g. UN agencies or international networks of CSOs). In addition to direct and indirect (i.e. through intermediaries) support for non-state actors discussed in this section, the EU and the US can also use their 'top-down' leverage to address certain constraints states put on civil society actors, such as prohibitive laws, or specific cases.

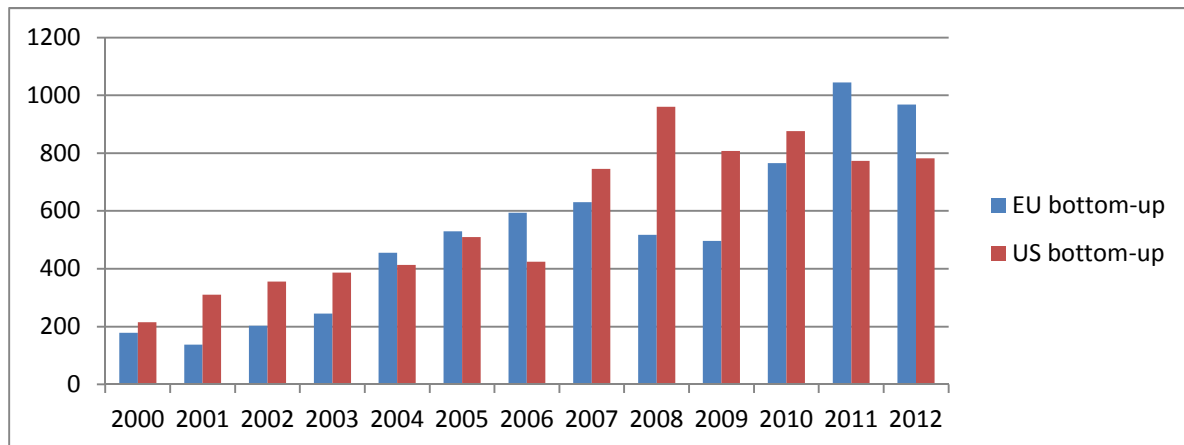
**Increasing budgets** Despite the fact that 'state-centric' democracy assistance accounts for the majority of 'governance' assistance, a strong upward trend in US and EU investment in bottom-up assistance can be identified between 2000 and 2012 using OECD data as a rough indicator (*see figure 7*).

<sup>434</sup> As presented on USAID Interactive Map, available at <http://map.usaid.gov/> (accessed 12/05/2014).

<sup>435</sup> See European Instrument for Democracy and Human Rights, 'Compendium of Projects 2007-2010', DG DEVCO Brochure, 2011.

<sup>436</sup> See COM(2012) 492 final, The roots of democracy and sustainable development: Europe's engagement with Civil Society in external relations, Brussels, 12.9.2012. For the US dimension, see the US-USAID Strategic Plan, *supra*, n. 272.

**Figure 7: EU and US financial commitments for bottom-up democracy promotion<sup>437</sup>, 2000-2012, in USD millions**



This data suggests that the **EU has overtaken the US in investing ODA in electoral processes, political parties, various types of CSOs, and other non-state actors such as media organizations.** Arguably, this nuances the view that the EU prioritizes state-centric democracy promotion. The rising level of funding also reflects several policy changes within the EU which foresee a more systematic engagement with civil-society actors, such as the scaling up of EIDHR funding, and the creation of other funding mechanisms such as the Neighbourhood Civil Society Facility (ENI), and the Civil Society Organisations and Local Authorities Programme (DCI). At the same time, as figures 5 and 6 illustrate (see *supra*, section 6.3.2) both the EU and the US invest considerably more in broader 'governance programmes' often in cooperation with governments or national judiciaries, which do not necessarily include a strong element of 'bottom-up' democratic participation. Furthermore, the quantitative data in figure 7 does not reflect the 'quality' of bottom-up assistance. At least two important and interrelated elements which determine the 'nature' of EU and US bottom-up support can be highlighted: the choice of non-state partners in a given country, and the funding channels used for providing support to democratic reformers.

**Strategic choice of non-state partners** Support for bottom-up democratization can cover a range of actors, and various qualitative analysis suggest that both the EU and the US adapt their choice of non-state partners in light of a **strategic choice** between 'confrontational' or 'cooperative' democracy promotion.<sup>438</sup> The data used to compose figure 7 also covers projects and programmes with public- or semi-public institutions (e.g. election commissions, ministry of education) and with non-state actors (labour unions, chambers of commerce, etc.), which - depending on the country context - are not necessarily strong democratic reformers. It might also include funding for 'semi-governmental' NGOs, closely linked to politicians in power.<sup>439</sup>

Some authors argue that the US is more dynamic and less-risk averse in supporting strong democratic reformers, whereas the EU is said to prefer supporting a range of CSOs which are less concentrated on

<sup>437</sup> Data extracted on 21.5.2014 10:10 UTC (GMT) from OECD.Stat. The category of 'bottom-up support' aggregates the following reporting codes from OECD's Creditor Reporting System; 15150- Democratic participation and civil society, 15151- Elections, 15152- Legislatures and political parties, 15153- Media and free flow of information, 15160- Human rights, 15170- Women's equality organisations and institutions. It should be noted that within these categories certain programmes can also include significant financing for public- or semi-public institutions (e.g. election commissions).

<sup>438</sup> L. Bush, 'Confront or Conform? Rethinking U.S. Democracy Assistance', Project on Middle East Democracy, Policy Brief, March 2013.

<sup>439</sup> Bicchi, F., 'Democracy Assistance in the Mediterranean: An Overview', *Mediterranean Politics*, No.1, 2009, p. 61-78., p. 66.

straightforward political engagement. With regards to its Eastern Neighbourhood, it has been noted that past EU civil society support *'largely focused on vulnerable groups' rights promotion and sustainable development'* rather than enhancing the political influence or participation of CSOs.<sup>440</sup> Historical analysis of how the EU and US supported democratization in Indonesia also indicate that, while Brussels also provided some support for civil society, the **US was more effective and strategic in its choice of partners**.<sup>441</sup> In similar vein, during the political crises in Georgia preceding the 'rose revolution' of 2004, US support for democratic reformers was more direct and decisive than the EU's efforts.<sup>442</sup> More symbolic examples indicate a similar dynamic; in Angola the EU provided funding for a civil society forum in 2009, but refrained from sending a high-ranking representative in order to avoid tension with the Dos Santos Regime.<sup>443</sup> Other case-studies illustrate that the **US and the EU both prefer not to invest in confrontational support and prefer to provide only limited assistance** for selected non-state actors.<sup>444</sup> This dynamic was also apparent in both EU and US reactions towards the democratic movements in Tunisia and Egypt, where the initial response towards the reform movements was ambiguous.<sup>445</sup> Rather than an intrinsically different approach from each side of the Atlantic, country context and larger factors determine the level and intensity of support for bottom-up reform. However, findings from several case-studies do seem to indicate a particular difference; the US has been much more active in supporting democratic reformers before and during transitions phases, whereas the EU often has a delayed response and starts investing in civil society actors after a democratic transition has already taken place.<sup>446</sup> This difference is often ascribed to the nature of the different EU and US actors providing democracy assistance.

**Funding democratic change: state actors and political foundations** A variety of actors in both the US and the EU are engaged in different types of democracy assistance. The complex and multi-layered financing often makes it hard to determine what actors on the ground are receiving US or EU funding. This subsection highlights a key difference which sets the US approach to democracy promotion apart from the EU: the NED as a semi-governmental mechanism. While not necessarily illustrative for the full range of democracy assistance the US provides, the role of the NED is often highlighted to enforce the differences between EU and US democracy promotion.

With a small operational structure and specialized in providing grants to civil society actors, the **NED's modus operandi is considered more dynamic than USAID or the USSD**, which dispense large budgets and are primarily engaged in managing larger multi-stakeholders programmes. The notion that the US is more active and successful in supporting **bottom-up democratization** comes at least partly from the NED's ability to reach out to dissidents and strong reformers, notably its early support for the Polish underground during the 1980's. However, during its first two decades the NED's came under fire on various occasions, mainly due to fiscal conservatives in Congress.<sup>447</sup> None the less, it has since garnered wide bipartisan support and its funding has increased significantly, from 35 million USD

<sup>440</sup> See N. Shapovalova, and R. Youngs, 'EU democracy promotion in the Eastern neighbourhood: a turn to civil society?' FRIDE, WORKING PAPER 115, 2012.

<sup>441</sup> See R. Kleinfeld, U.S. and EU Strategies to Promote Democracy in Indonesia, in Magen and Risse, op cit., p. 216-243.

<sup>442</sup> T.A. Börzel, Y. Pamuk and A. Stahn, 'Democracy or Stability? EU and US Engagement in the Southern Caucasus', in Magen and Risse, op cit.

<sup>443</sup> T. A. Börzel and C. Hackenesch, 'Small carrots, few sticks: EU good governance promotion in sub-Saharan Africa', Cambridge Review of International Affairs 26 (2013) 3, 536-555.

<sup>444</sup> V. van Hüllen / Stahn A., 'Comparing EU and US Democracy: Promotion in the Mediterranean and the Newly Independent States' in Magen and Risse (eds.), 2009.

<sup>445</sup> AZIZ, S., 'U.S. Foreign Aid and Morsi's Ouster', Middle East Institute, July 31, 2013; Macqueen, B. 'Democracy promotion and Arab autocracies' Global Change, Peace & Security, 2009 21, 165-178.

<sup>446</sup> Risse, in Magen and Risse, op cit, p. 260.

<sup>447</sup> Interview with US official, Washington, D.C., 12 March 2014.

in 1993, to 135 million USD allocated in the 2014 Appropriations Act. For 2013, the Senate Committee proposed to double NED's budget to 236 million USD and foresee an 'equivalent decrease in the overall fiscal year 2013 budget request for democracy programs'.<sup>448</sup> The Senate Committee motivated this by underlining the '*comparative advantages*' of the NED, given its '*status as an NGO, unparalleled experience in promoting freedom during the cold war, and continued ability to conduct programs in the most hostile political environments*'.<sup>449</sup> The Committee stated that the NED is '*a more appropriate and effective mechanism to promote democracy and human rights abroad than either the Department of State or USAID*'.<sup>450</sup>

Experts agree that the NED's 'flexibility and capability to operate in political environments' allows it to engage certain actors which cannot be reached by other US democracy assistance initiatives.<sup>451</sup> Both USAID and the State Department rely heavily on a good working relationship with the local government for the majority of their activities in a given country, which inevitably constrains their ability to reach out to democratic reform movements.<sup>452</sup> The NED's modus operandi thus contrasts with USAID's 'bureaucratic' nature and makes it less risk-averse. For this reason, insiders note that the NED's role in picking up 'contentious cases' is appreciated by US government agencies which have to take into account bilateral relations.<sup>453</sup> At the same time, nuances should be made about the nature and impact of NED-funded initiatives or the programmes carried out by its partner institutions such as the NDI and IRI.<sup>454</sup>

**The EU on the other hand, is generally not considered to have a strong track-record in supporting democratic reform movements**, whereby its prior policy towards Northern Africa and the reaction to the Arab Spring movements often serves as a case in point. None the less, the EEAS and the Commission manage several funding instruments through which democracy assistance can be provided to non-state actors. Civil society actors receive EIDHR support through an EU-wide open-call for applications (macro-programmes) or via country-based support schemes (micro-projects). Whereas the latter was designed to reach out to local actors in partner countries, heavy procedural and administrative requirements are often cited as the reason why EIDHR has not been able to reach out to emerging local actors which dispose of little or no organizational capacity.<sup>455</sup> EIDHR's procedures requires its applicants to be registered organizations. As repressive governments can easily deny groups from registering, and are increasingly making it more difficult to do so,<sup>456</sup> its ability to support democratic reformers has been constrained. Characterizing **EIDHR's bureaucratic nature and its embedded role within the Commission**, one US interviewee mentioned that it was a 'creature of the system', and it has not been flexible enough to meet 'the needs of people on the ground engaged in democracy promotion'.<sup>457</sup> Other interviewees in Washington affirmed that in the area of democracy promotion, not the EU itself

<sup>448</sup> See U.S. Senate, Department of State, Foreign Operations, and Related Programs Appropriations Bill, 2013," U.S. Senate Report 112-172, 112th Congress, 2d Session, 24 May 2012, p. 34.

<sup>449</sup> Ibid.

<sup>450</sup> Ibid.

<sup>451</sup> Michael A. Cohen and Maria Figueroa Küpçü, Revitalizing U.S. Democracy Promotion: a Comprehensive Plan For Reform, the privatization of foreign policy initiative, New America Foundation, 2009.

<sup>452</sup> Interview with US official, Washington, D.C., 13 March 2014.

<sup>453</sup> Interview with US official, Washington, D.C., 13.3.2014.

<sup>454</sup> See for example, Haring (2013), p. 5-6. In this context, a dramatic increase in the NED's budget is cautioned by some observers, as this would affect its 'lean' and 'flexible' organizational model for which it has been lauded. See Carothers (2009), p. 46.

<sup>455</sup> Bicchi, *supra*, n. 439.

<sup>456</sup> Carothers, T., and Brechenmacher, S., 'Closing Space: Democracy and Human Rights Support Under Fire' Report, Carnegie Endowment for International Peace, February 20, 2014.

<sup>457</sup> Interview with US official, Brussels, 4 April 2014.



but the various political foundations of EU Member States are considered to be the main actors and strongest partners.<sup>458</sup>

**The EU catching up?** Given this understanding that the EU 'lags behind', the idea to establish a new foundation for EU democracy promotion, independent of the Commission, has been on the agenda since the revision of EIDHR in 2006.<sup>459</sup> This has crystallized into the establishment of the EED, as a new mechanism, similar to the US's NED, for rapidly providing support to grassroots movements and democratic reformers in the EU's neighbourhood. The EED's focus on flexible grant making and its ability to provide core-funding for grassroots actors is seen as its **main added-value to the existing EU mechanisms**.<sup>460</sup> At the same time certain authors have argued that the emergence of the EED could further fragment EU's democracy assistance funding and 'obstruct the emergence of a coherent approach', in particular given the financial instruments already in place, and the important role played by the various political foundations of EU Member States.<sup>461</sup> In this regard, the EP has underlined that the EED's activities should complement and not overlap with the EU's existing funding instruments, and that 'close coordination and consultation' with the EEAS, the Commission and Parliament should be undertaken.<sup>462</sup>

### 6.2.5 EU-US cooperation: challenges and opportunities

This case study on democracy promotion has featured several similarities and differences between the EU and the US. It identified that, despite the temptation of international actors to advocate stability over reform, **democratization remains a viable tool for both the EU and the US**, as it (a) features the promotion of values and principles, which have contributed much to their own creation; (b) fosters the peaceful international cooperation according to the democratic peace theory; and (c) strengthens transformations along the ideas of modernization theories. In this regard, both the US and the EU are widely regarded to promote a liberal democratic model, while the EU, given the diversity of its own Member States' democratic systems, is less keen to advocate a specific model vis-à-vis its international partners. **Focusing on bottom-up democracy promotion**, OECD data indicate a strong trend in US and EU investment in bottom-up democracy promotion between 2000 and 2012, and suggests the EU has overtaken the US in terms of total spending in recent years. In general, however, the EU's democracy promotion is seen as lagging behind from a US perspective, for example in terms of flexibility and the choice of local partners.

Realizing its own deficiencies, the establishment of a new foundation for EU democracy promotion, crystallized into the establishment of the EED, a more flexible mechanism for rapidly providing support to grassroots movements and democratic reformers in the EU's neighbourhood. The report showed that the EED's focus on flexible grant making as well as its ability to provide core-funding for grassroots actors is meant to overcome previous shortcomings. The EP has underlined that the EED's activities should complement and not overlap with the EU's existing funding instruments, and that 'close coordination and consultation' with the EEAS, the Commission and Parliament should be undertaken. In

<sup>458</sup> Interview with US official, Brussels, 4 April 2014.

<sup>459</sup> Řiháčková, V., 'Great Expectations: The launch of the European Endowment for Democracy should mark the beginning of a new era of EU democracy assistance', Policy Brief, Policy Association for an Open Society (PASOS), 31 January 2013.

<sup>460</sup> Kostanyan, H., and Nasieniak, M., 'Moving the EU from a Laggard to a Leader in Democracy Assistance: The Potential Role of the European Endowment for Democracy' Policy Brief, Centre for European Policy Studies, June 2012.

<sup>461</sup> Leininger, J., and Richter, S., 'Flexible and Unbureaucratic Democracy Promotion by the EU? The European Endowment for Democracy Between Wishful Thinking and Reality', SWP Comments, Stiftung Wissenschaft und Politik, August 2012.

<sup>462</sup> European Parliament recommendation of 29 March 2012 to the Council on the modalities for the possible establishment of a European Endowment for Democracy (EED).

other words, the EP advocates a coherent democracy promotion via the several available EU channels, including EIDHR and EED. One of the greater obstacles to EU-US cooperation in the field will not only be linked to an increased coherence of the EU's democracy promotion, but also its **engagement as a key partner for the US**. In this regard, the case study pointed interviewees to the observation that Washington often sees in the area of democracy promotion not the EU itself but the various political foundations of EU Member States as the main actors in the field.

## 6.2.6 Recommendations

### Recommendations on the EU's policy on Democracy Promotion

- **Developing and exploring the full scope of human rights and democracy promotion instruments** Although the EU has progressively developed and expanded its tools to provide democracy assistance, it has been characterized as a more risk-averse actor than the US, preferring stability and concentrating on gradual 'state-centric' governance reforms. With creation of the EED as a new EU-wide 'independent' actor, EU democracy assistance might enter a new era wherein support for grassroots processes is equally important. However, the landscape of actors is already dense, and intense coordination will be necessary to harmonize the use of EIDHR, the work of the EED, and the various democracy assistance actors based in the EU Member States. Developing and fine-tuning a division of work at the country level will be necessary to explore the potential synergies of combined EU democracy assistance efforts.
- **Ensuring inter-linkages between state-centric governance reforms and civil society support** The EU's success in democratization through incentivizing top-down reforms is only of limited relevance outside its immediate neighbourhood. Providing partner governments with incentives for reforms and the resources for specific reform programmes will continue to be an important dimension of democracy promotion and assistance. However, in each country context the EU delegation should identify the limits of externally induced top-down reform, and adjust the EU's approach to democracy promotion in this light. Coupling investments in government reforms with investments for developing the capacity of grassroots civil society actors is recommended, and is currently already undertaken in certain contexts. The choice of local partner organizations is crucial in this regard.

### Recommendations for EU-US collaboration on Democracy Promotion

- **Coordinating democracy assistance and human rights promotion** The EU and the US are the largest providers of democracy assistance. The increasing number of actors and channels in both the EU and the US also raises the issue of internal and external coordination. This should carry implications for a stronger transatlantic effort. In interviews with US officials and US-based organizations working on democracy assistance, the lack of knowledge of the EU as an actor in the field was symptomatic for the lack of mutual engagement. More can be done to explore how EU-based actors can engage more strategically with their US counterparts. At the level of state actors, USAID and DG DEVCO should compare portfolios and engage in a learning exercise of what democracy assistance can achieve. At the level of non-state actors, the EED and the NED, as well as the various other organizations involved, could benefit from similar exchanges.

## 6.3 Human Rights Council

### 6.3.1 Introduction

The HRC is a subsidiary body of the UN General Assembly (UNGA), composed of 47 elected UN Member States. It was established in 2006 to replace the Commission on Human Rights (CHR), which had become increasingly contested due to its alleged politicisation and ineffectiveness. Tasked with the promotion of human rights and fundamental freedoms, the **HRC should address human rights violations and make recommendations** thereon, it should contribute to the mainstreaming of human rights throughout the work of the UN, promote human rights education, technical assistance and capacity-building and serve as a platform for a comprehensive human rights dialogue.<sup>463</sup> Like its predecessor the HRC may appoint independent experts to serve as special rapporteurs on thematic or country-specific matters (special procedures).<sup>464</sup> In addition, the HRC has launched a universal periodic review (UPR) which aims to examine in a cooperative manner the human rights record of each UN Member State.<sup>465</sup>

The US was an early supporter of the reform of the CHR and actively participated in the negotiation process. Its disappointment with the final draft, however, led it to issue a negative vote and to abstain from running for membership in the newly established body. Instead, the US opted for observer status, which allowed it to remain engaged in the work of the Council. In 2008 the **US withdrew its mission altogether**, due to its dissatisfaction with the HRC, which it considered to be politicised and abused as a forum for attacks against the US. The Obama administration decided to reengage with the HRC, opting for a strategy of reform from within. The US subsequently was elected in a clean slate election as a member to the HRC in 2009, and re-elected in 2012 in an open slate election.

The EU on the other hand was not one of the **earliest supporters of a CHR reform**, due to the lack of a uniform position of its Member States towards the CHR and with regard to its potential successor.<sup>466</sup> Nevertheless, it quickly warmed to the idea of a new UN human rights body and even turned into a 'critical force'<sup>467</sup> in the negotiations on the HRC. Since then the EU has been actively involved in the Council as an observer. Other than in the UNGA **the EU enjoys no enhanced participatory rights in the HRC**, which means that it continues to be represented through its Member States. The EU has repeatedly endorsed the HRC as the main human rights body in the UN framework, underlining its 'leading role [...] in addressing urgent cases of human rights violations'<sup>468</sup> and declaring its commitment to 'contribute vigorously to the effective functioning of the Council'.<sup>469</sup> However, despite

<sup>463</sup> UNGA Resolution 60/251, 15.3.2006, 'Human Rights Council', para 2-5.

<sup>464</sup> HRC Resolution 5/1, 18.6.2007, 'Institution-building of the United Nations Human Rights Council', annex II.

<sup>465</sup> Ibid, annex I.

<sup>466</sup> Macaj, G./Koops, J., 'Inconvenient multilateralism: The challenges of the EU as a player in the United Nations Human Rights Council', in Wetzel, J.E. (ed.) *The EU as a 'Global Player' in Human Rights?*, Routledge, London/New York, 2011, p. 66-81, p. 72.

<sup>467</sup> Macaj/Koops, *supra*, n. 466, p. 73; Wouters, J./Meuwissen, K., 'The European Union at the UN Human Rights Council. Multilateral Human Rights Protection Coming of Age?', *European journal of Human Rights*, 2014, p. 135-172, p. 137; Wouters, J., Basu, S. and Bernaz N., 'The Role of the European Union in the Human Rights Council', Study for the European Parliament, Directorate-General External Policies of the Union, November 2008, p. 6-7.

<sup>468</sup> Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy* (11855/12), 25.6.2012.

<sup>469</sup> Ibid.

this political prioritisation and the EU's by now high degree of voting cohesion at the HRC, its overall impact on the work of the Council remains limited.<sup>470</sup>

### 6.3.2 Positions on the mandate of the HRC

This part analyses the respective positions of the US and the EU on prominent HRC issues, in particular concerning its institutional set-up and agenda, as shaped through the 2005/2006 negotiation process, the 2007 institution-building package, and the 2009-2011 review. Going beyond a mere comparison of EU and US approaches, we place the positions in the broader context of the negotiations and examine the way in which both actors deal with the perceived shortcomings of the Council.

**Establishment of the Human Rights Council** The establishment of the HRC highlights the differing positions of the US and the EU towards the creation of the new multilateral human rights body. The US had been highly critical of the CHR, particularly with regard to the composition of its membership and its ensuing lack of credibility. Controversy peaked when the US failed to be re-elected in 2001, while countries with questionable human rights records, such as Pakistan, Sudan and Uganda, were successful. The US therefore welcomed the initiative to replace the Commission with a new body. The Bush administration even ranked the **creation of the HRC as one of its key priorities in the framework of a general UN reform**.<sup>471</sup> During the negotiations on the HRC, the US advocated stronger membership criteria to bar the election of serious human rights violators, and requested a threshold of a two-thirds majority in the UNGA.<sup>472</sup> Amongst others, it was proposed that those countries that were subjected to UNSC sanctions for gross abuses of human rights should be barred from sitting on the Council.<sup>473</sup> The US also **supported a smaller sized,<sup>474</sup> 'action-oriented' Council, mandated 'to address human rights emergencies and the most egregious human rights abuses**, to provide technical assistance, and to promote human rights as a global priority'.<sup>475</sup> Other than the CHR, the HRC should 'meet through the year'<sup>476</sup> in order to allow for rapid reaction to human rights violations. The EU had similar visions for the new Council, and indeed **cooperation between the EU and the US during the negotiation process was close**.<sup>477</sup> The EU also envisaged a body that was smaller in size,<sup>478</sup> to admit only those UN Member States that were seriously committed to the promotion and protection of human rights. As with the US, the EU favoured a voting requirement of a two thirds majority in the UNGA.<sup>479</sup> Candidate countries should 'demonstrate their good faith by making voluntary commitments about the action they will take, domestically and internationally, in support of human rights during their

<sup>470</sup> Emerson, M. et al., 'Upgrading the EU's Role as Global Actor: Institutions, Law and the Restructuring of European Diplomacy', Centre for European Policy Studies (CEPS), Egmont – The Royal Institute for International Relations/European Policy Centre/Leuven Centre for Global Governance Studies, 2011, p. 94.

<sup>471</sup> United States Department of State, Bureau of Public Affairs, 'U.S. Priorities for a Stronger, More Effective United Nations', 08.9.2005, available at <http://2001-2009.state.gov/r/pa/scp/2005/52982.htm> (accessed 27.8.2014).

<sup>472</sup> UNGA, 'General Assembly Establishes New Human Rights Council by Vote of 170 in Favour to 4 Against, With 3 Abstentions', Press Release GA/10449, 15.3.2006, available at <http://www.un.org/News/Press/docs/2006/ga10449.doc.htm> (accessed 27.8.2014).

<sup>473</sup> Bolton, J., *Surrender Is Not an Option: Defending America at the United Nations*, Simon and Schuster, New York, 2007, p. 236.

<sup>474</sup> Bolton, *supra*, n. 473, p. 234.

<sup>475</sup> *Supra*, n. 471.

<sup>476</sup> *Ibid*.

<sup>477</sup> Bolton, *supra*, n. 473, p. 235.

<sup>478</sup> European Community Statement by Dr Benita Ferrero-Waldner, European Commissioner for External Relations and European Neighbourhood Policy, at the United Nations High Level Meeting (14-16.9.2005), New York, available at [http://www.eu-un.europa.eu/articles/en/article\\_5030\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_5030_en.htm) (accessed 27.8.2014).

<sup>479</sup> *Supra*, n. 472.

term of office'.<sup>480</sup> The HRC should possibly have the rank of a principal organ of the UN, and it should ideally be a standing body, but meet at least 4-6 times per year for an overall period of at least 12 weeks.

**EU compromise and US non-compromise positions** Both the EU and the US were disappointed with the final outcome of the negotiation process.<sup>481</sup> UNGA Resolution 60/251 contained only weak language on the eligibility criteria for HRC Members, stating that 'the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments thereto' 'shall [be] take[n] into account'. It also established merely a simple majority requirement for the election of new Members. The **HRC was not elevated to a principal UN organ**, but created as a subsidiary body of the UNGA, and its regular sessions were reduced to three per year, for a total duration of at least 10 weeks. Although the EU and the US were both thus unable to achieve important negotiation goals, the respective reactions to the final draft were different. The EU expressed its disappointment, stating that 'not everything that the EU had aimed for was reflected in the resolution'. Nevertheless it considered the HRC to be 'an improvement over the Commission on Human Rights' that would 'further strengthen the United Nations human rights machinery'.<sup>482</sup> The EU thus chose to support the resolution despite its perceived shortcomings because it still saw a gradual improvement compared with the previous institution. All EU Member States voted in favour of the Resolution 60/251. The **US on the other hand joined the small group of four countries that voted against the text**.<sup>483</sup> Expressing his goal for a 'true reform' of the CHR, US Ambassador Bolton had previously quipped during the negotiations: 'We want a butterfly. We're not going to put lipstick on a caterpillar and declare it a success'.<sup>484</sup> For the US, the negative vote therefore represented the consequent reaction to the discrepancy between envisaged goals and final outcome. These contrasting approaches are in line with the perception of one EU official interviewed for this study concerning the different 'styles' of the EU and the US at the multilateral level: 'The US is less afraid. They vote against what they don't like. [...] We try to integrate partners and find compromises'.<sup>485</sup> This *prima facie* stark juxtaposition between the EU and the US approach, however, risks overlooking the nuances that accompanied the negative vote of the US. While rejecting Resolution 60/251, the US did not opt for a strategy of full-fledged opposition, but instead maintained full funding for the newly established Council and actively participated in its work as an observer. Its vote was thus a 'soft no'<sup>486</sup> and its aim was similar to the EU's approach: to remain engaged and to keep working towards a stronger HRC.

**Institution-building process** The first year of the newly created Council was primarily devoted to 'institution-building', i.e. the development of workable procedures and rules based on the general provisions of UNGA Resolution 60/251. Both EU and US delegations invested considerable diplomatic efforts to ensure a strong HRC. In particular, both delegations aimed to maintain the capacity of the Council to address country-specific situations. While many other states contended that this function was now incorporated in the UPR, the **EU and US argued that the consideration of country**

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<sup>480</sup> Statement by the United Kingdom on Behalf of the European Union, Informal meeting of the General Assembly Plenary, Follow-up to the World Summit, 'The Human Rights Council: Status, Size, Composition & Membership of the Council', New York, 24.10.2005, PRES05-275EN, available at [http://www.eu-un.europa.eu/articles/en/article\\_5178\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_5178_en.htm) (accessed 27.8.2014).

<sup>481</sup> Wouters/Meuwissen, *supra*, n. 467, p. 138; Freedman, R., *The United Nations Human Rights Council: A Critique and Early Assessment*, Routledge, London/New York, 2013, p. 56.

<sup>482</sup> *Supra*, n. 472.

<sup>483</sup> The other three countries were Israel, the Marshall Islands and Palau.

<sup>484</sup> Bolton, *supra*, n. 473, p. 234.

<sup>485</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>486</sup> Maurer, P., 'About the Negotiation Process in New York (from 2005 until 2006): Of Ants, Caterpillars and Butterflies', in Mueller, L. (ed.), *The First 365 Days of the United Nations Human Rights Council*, Baden, 2007, p. 35.

**situations through the HRC and the UPR were complementary tools** with distinct functions. Against voices that held that country resolutions were counterproductive as they merely named and shamed selected countries, the Western states argued that they were an important tool to highlight grave human rights violations. The EU and the US supported the maintenance of all existing CHR thematic and country specific mandates of Special Rapporteurs, however, they could not prevent the termination of the mandates on Cuba and Belarus. An especially **thorny issue was the creation of item 7 on the HRC's permanent agenda**, which deals with the 'human rights situation in Palestine and other occupied Arab territories' and thus singles out Israel as the only country to which a separate agenda item is explicitly devoted. The US consequently questioned the 'Council's institutional priorities, its ability to make unbiased assessments of human rights situations and whether it will take seriously its responsibility to protect and promote human rights around the world with particular attention to the most serious violations of human rights'.<sup>487</sup> Due to its particularly strong bilateral ties with Israel the US is frequently the most vocal advocate of Israel at the international level. Though taking a more moderate stance, the EU agreed that the 'issue should not have been singled out in the agenda'.<sup>488</sup>

As in 2006, the EU and the US suffered a similar defeat in the negotiations. Both the explanation of the US's vote and the EU Presidency statement deplored the termination of the country-mandates for Cuba and Belarus, and the creation of agenda item 7. Again, however, the US subsequently opted for a negative vote on **UNGA Resolution 62/219**, while all EU Member States voted in favour.<sup>489</sup> The US stated that it was 'compelled to vote 'no' on the institution-building package', stating that the HRC had 'fallen short of [the US's] limited expectations'.<sup>490</sup> The EU again made a conscious effort to highlight the perceived – if modest – progress made, declaring that '[a]lthough not all of the EU's objectives could be achieved, the EU joined this agreement in the spirit of necessary compromise'.<sup>491</sup>

**The HRC review process** In line with the requirements of Resolution 60/251, the HRC underwent a review of its status and its work and functioning between 2009 and 2011. The Western states aimed for a strengthening of the Council, in order to enable it to fulfil its mandate to promote human rights and fundamental freedoms for all. The EU in particular advocated for a **reinforcement of the UPR and the special procedures**, for a complete reform of the Advisory Committee and the complaint procedure, as well as for the creation of an independent procedure to address urgent human rights situations. The US equally supported the strengthening of the UPR and the special procedures. With regard to the latter, the US advocated *inter alia* for increased support for the dissemination of their findings and for the creation of public records on the degree of cooperation by states.<sup>492</sup> A key negotiation goal of the US was the establishment of procedures that barred gross human rights violators from being elected to the Council. In particular the US advanced a proposal that sought to ensure open slate elections, and, when this idea failed to gain support, the US advocated an interactive dialogue between candidate states,

<sup>487</sup> United States Department of State, Ambassador Zalmay Khalilzad, U.S. Permanent Representative to the United Nations, 'Explanation of Vote on the Human Rights Council Institution Building Package', Remarks to the Third Committee of the General Assembly, 16.11.2007, available at <http://2001-2009.state.gov/p/io/rls/rm/95294.htm> (accessed 27.8.2014).

<sup>488</sup> Council of the European Union, 'Human Rights Council – Declaration by the Presidency on behalf of the EU on the outcome of the Institution Building Process', Doc. No. 11074/07, 21.6.2007.

<sup>489</sup> The resolution was adopted with 150 votes in favour, seven votes against (Australia, Canada, Israel, Marshall Islands, Micronesia, Palau, US), and one abstention (Nauru).

<sup>490</sup> UNGA, 62nd session, 79th plenary meeting, Friday, 21 December 2007, 3 p.m. (resumed Saturday, 22 December 2007, 4.10 a.m.), Official Records, A/62/PV.79.

<sup>491</sup> EU Presidency, 'Human Rights Council – Declaration by the Presidency on behalf of the EU on the outcome of the Institution Building Process', 21.6.2007, available at [http://www.eu2007.de/en/News/CFSP\\_Statements/June/0621Menschenrechtsrat1.html](http://www.eu2007.de/en/News/CFSP_Statements/June/0621Menschenrechtsrat1.html) (accessed 27.8.2014).

<sup>492</sup> Smith, K.E., 'The European Union and the Review of the Human Rights Council', EXPO/B/DROI/2010/06, February 2011, p. 42.

Members and civil society, about the human rights records of the former.<sup>493</sup> Furthermore, the US strongly advocated for the abolishment of item 7 of the HRC agenda ('Human rights situation in Palestine and other occupied Arab territories'), a position that was supported by the EU. Both endorsed merging agenda items 4 ('Human rights situations that require the Council's attention'), 7 and 10 ('Technical assistance and capacity-building').<sup>494</sup> The objectives of the EU and the US ran contrary to the positions of the Non-Aligned Movement (NAM), the Organisation of the Islamic Conference (OIC) and the African Group, which prioritised state sovereignty and consequently opposed larger reforms, opting instead for a heightened control of the Council through its Members. **The final outcome of the Review Process** was again a disappointment for the EU and the US. HRC Resolution 26/21 was characterized by 'vague compromise language'<sup>495</sup> and did not include the main objectives of the Western states. The independent procedure dealing with urgent cases completely dropped out of the final draft despite considerable negotiating efforts of the West. Neither the strengthening of the UPR and the special procedures, nor the restructuring of the Advisory Committee and the complaint procedure was achieved. Item 7 was maintained on the HRC agenda, and the **US proposals on the election of Council Members were rejected**. In a pattern similar to previous negotiation defeats at the HRC, the EU and the US chose to express their discontent with the outcome of the Review Process in very different ways. The US disassociated itself from the consensus on HRC Resolution 26/21 and voted against the subsequent UNGA Resolution 65/281.<sup>496</sup> The EU joined the consensus and voted in unison for the UNGA resolution. While the US spoke of a 'race to the bottom', the **EU saw no 'significant improvement'** but expressed its hope for future opportunities 'to further discuss some of the good ideas that were raised during this exercise'. Again, the US was more straightforward in its rhetoric, unconcerned to demonstrate its disagreement through a negative vote.

Throughout the negotiations on the creation, the institution-building and the review of the young HRC, the EU and the US mostly shared similar convictions on the role and structure of the institution. Both actors have declared their **support for a strong Council**, which focuses on the gravest human rights violations around the globe and enjoys the necessary powers to fulfil its mandate as the primary human rights body worldwide. Yet, they both frequently failed to garner the necessary support for their proposals or to block unwelcome proposals from third states. Faced with a dominance of OIC, NAM and African Group states, the EU and the US had difficulties to avoid a weak Council architecture, a singular focus on Israel, and the membership of states with records of human rights violations. Despite these shared defeats in the negotiation processes, the EU and the US displayed different reactions. While the EU always ensured to value the modest progress that had been achieved, the US's rhetoric clearly denounced the flaws of the outcome. Consequently the EU consistently joined the consensus and voted in favour of the final resolutions, while the US disassociated itself from the consensus and opted for a negative vote.

This highlights a significant difference in how the EU and the US perceive their roles at the multilateral level. In light of its preeminent position at the global level the US is less ready to compromise on issues which it assigns high importance. The **US pushes for its positions** as an adamant negotiator, preferring to join the opposition to yielding on the subject matter. EU positions on the other hand already represent a compromise of multiple different views and are therefore more susceptible to taking the

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<sup>493</sup> U.S. Mission to the United Nations, 'Explanation of Vote by John F. Sammis, Deputy Representative to the Economic and Social Council, in the General Assembly on the Human Rights Council Review', 17.6.2011, available at <http://usun.state.gov/briefing/statements/2011/166477.htm> (accessed 27.8.2014).

<sup>494</sup> Smith, *supra*, n. 492.

<sup>495</sup> Wouters/Meuwissen, *supra*, n. 467, p. 150.

<sup>496</sup> 154 countries voted in favour, the US, Canada, Israel and Palau voted against.

approaches of third countries into consideration. Knowing that **EU unity is a frail good which might break under pressure**, the EU avoids intransigent stances and instead searches for compromises, dialogue and exchange. Small progress is valued even if important goals have to be given up on and engagement is preferred to opposition.

### 6.3.3 Priorities at the HRC

This part examines the respective country-specific and thematic priorities of the EU and the US at the HRC, analyses where priorities overlap or differ and draws conclusions. Due to the limited scope of this study, the analysis focuses on the priorities for the sessions held in 2013 and 2014.

**Country-specific Priorities** The EU has opted for a focus on a selected number of countries at the HRC. Country-specific priorities included in 2013 and 2014 are: Syria, the Democratic People's Republic of Korea (DPRK), Iran, Sri Lanka, Myanmar/Burma, Belarus, the Central African Republic, as well as DR Congo, Eritrea, Mali and Sudan.<sup>497</sup> In the 22<sup>nd</sup>-26<sup>th</sup> sessions held in 2013/2014 the **EU sponsored two successful resolutions** each on the DPRK (together with Japan) and on Myanmar/Burma, as well as two successful resolutions on Belarus. **EU Member States sponsored and co-sponsored successful resolutions** on Sri Lanka, Syria and Iran. The US sponsored five successful resolutions on Syria, two on Iran and one on Sri Lanka. It co-sponsored resolutions on DR Congo, the Central African Republic and Somalia as well as the EU-led resolutions on the DPRK and Myanmar/Burma. It is noteworthy that the US is consistently the only Member of the HRC voting against the multitude of resolutions dealing with the situation in Israel, the Occupied Palestinian Territories (OPT) and the Golan. In the past five regular sessions and the 21<sup>st</sup> special session of the HRC on 'the human rights situation in the Occupied Palestinian Territory, including East Jerusalem',<sup>498</sup> 12 resolutions on these issues were adopted. EU Member States mostly voted in favour but abstained on the resolutions dealing with the Golan Heights and on Resolution S-21/1. In the 22<sup>nd</sup> session a split vote occurred when the Czech Republic decided to abstain while all other EU Member States voted in favour of Resolution 22/25.<sup>499</sup>

This brief overview of the past two years shows a **significant overlap of country-specific priorities** of the EU and the US. In most cases, resolutions were either sponsored by the EU or the US and co-sponsored by the latter or the Member States of the former. Except with regard to the resolutions on Israel, voting cohesion is high. There are, however, two recent and notable divergences in country priorities. Firstly, in the 25<sup>th</sup> session of the HRC, the US delivered on behalf of 42 states a Joint Statement on the Situation in Ukraine, ranking it as one of the key US outcomes of the session. While EU Member States had joined the statement, Ukraine is conspicuously absent from the EU's list of priorities for 2014 at the UN human rights fora, formulated only a few weeks before.<sup>500</sup> This corresponds to the frequently made observation that the EU lacked a strategy on Ukraine.<sup>501</sup> Secondly and similarly, the **US issued during the 25<sup>th</sup> session a series of national statements on the human rights situation** in Venezuela,

<sup>497</sup> Council of the European Union, Council conclusions on EU priorities at the UN Human Rights Fora, Brussels, 10.2.2014; Council of the European Union, Council conclusions on EU priorities at the UN Human Rights Fora, Brussels, 18.2.2013.

<sup>498</sup> The 21st special session was held on 23 July 2014.

<sup>499</sup> HRC Resolution 22/25, 22.3.2013, 'Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict'.

<sup>500</sup> See *supra*, n. 497.

<sup>501</sup> See for example Tost, D., 'Die allerletzte Chance der Ukraine', Euractiv, 27.9.2012, <http://www.euractiv.de/ukraine-und-eu/interview/die-allerletzte-chance-der-ukraine-006764> (accessed 27.8.2014); Rachman, G., 'Why Europe can't think strategically', Financial Times Blogs, 03.4.2014, <http://blogs.ft.com/the-world/2014/04/why-europe-cant-think-strategically> (accessed 27.8.2014); Schmitz, G.P., 'EU-Russland-Gipfel zur Ukraine: Putin handelt, Europa zaudert', Spiegel online, 28.1.2014, <http://www.spiegel.de/politik/ausland/putin-in-bruessel-eu-russland-gipfel-zur-ukraine-a-945882.html> (accessed 27.8.2014).



which was one of the priority countries for the US in the session. Again, Latin American countries are absent from the EU's list of priorities, supporting the view that the EU has abandoned its formerly strong role as a promoter and protector of human rights in Latin America, where its 'voice is [now] rarely heard'.<sup>502</sup>

**Thematic Priorities** Thematically, EU priorities for the 2013 and 2014 sessions included the rights of women, children and indigenous people, freedom of association and assembly, LGBT rights, the promotion of a rights based approach for the post-2015 agenda, as well as the fight against the death penalty, torture and racism. In line with item 9(a) of the 2012 **EU Action Plan on Human Rights and Democracy** (Action Plan), the EU has included economic, social and cultural (ESC) rights as a priority for the 2014 sessions. The EU's strained relationship with ESC rights had frequently given rise to criticism by third countries.<sup>503</sup> However, the practical implementation at the HRC is still lacking. Responding to item 23(b) of the Action Plan the EU has also put a special focus on the freedom of religion or belief, sponsoring two resolutions in the 22<sup>nd</sup> and 25<sup>th</sup> session. **The US has traditionally been a strong advocate of the freedom of expression**, co-sponsoring respective resolutions and championing the maintenance of the mandate of the Special Rapporteur for the promotion and protection of freedom of opinion and expression.<sup>504</sup> It has played an equally strong role with regard to the support of human rights defenders, civil society and freedom of assembly, as expressed through its support for thematic mandates and resolutions.<sup>505</sup> Like the EU, the US also lists the rights of indigenous people as one of its priorities and supported the extension of the mandate of the Special Rapporteur.<sup>506</sup>

One of the main **differences between the EU and US** with regard to thematic priorities is the position towards the death penalty. The EU describes itself as a 'firm advocate of the abolition of the death penalty' and lists the expression of 'strong and principled opposition to the death penalty' as one of its priorities for its participation in UN human rights fora.<sup>507</sup> Another **important divergence between the EU and the US** is the extent to which the freedom of expression is protected. The US had entered a declaration to the International Covenant on Civil and Political Rights (ICCPR or Covenant) in which it declared that State Parties 'should wherever possible refrain from imposing any restrictions or limitations' on the rights recognised by the ICCPR even if they were permitted by the Covenant, referring in particular to Article 19(3) which allows for restrictions on the right to freedom of expression,

<sup>502</sup> Mónica del Carmen Serrano Carreto, 'Human Rights, Democracy and the Rule of Law: Viewpoints on Challenges to the EU Normative Trinity', FRAME International Advisory Board Panel Debate, 19 December 2013, Faculty of Law, KU Leuven, available at [http://ghum.kuleuven.be/ggs/events/2013/12\\_2013/frame-iab-panel-summary.pdf](http://ghum.kuleuven.be/ggs/events/2013/12_2013/frame-iab-panel-summary.pdf) (accessed 27.8.2014).

<sup>503</sup> Macaj/Koops, *supra*, n. 466, p. 74.

<sup>504</sup> Cf. US Department of State, Office of the Spokesperson, 'Key U.S. Outcomes at the UN Human Rights Council 25th Session', 28.3.2014, available at <http://www.state.gov/r/pa/prs/ps/2014/03/224138.htm> (accessed 27.8.2014); US Department of State, Office of the Spokesperson, 'Key U.S. Outcomes at the UN Human Rights Council 23rd Session', 19.6.2013, available at <http://www.state.gov/r/pa/prs/ps/2013/06/210893.htm> (accessed 27.8.2014).

<sup>505</sup> Cf. US Department of State, Office of the Spokesperson, 'Key U.S. Outcomes at the UN Human Rights Council 22nd Session', 25.3.2013, available at <http://www.state.gov/r/pa/prs/ps/2013/03/206606.htm> (accessed 27.8.2014); US Department of State, Office of the Spokesperson, 'Key U.S. Outcomes at the UN Human Rights Council 24th Session', 01.10.2013, available at <https://geneva.usmission.gov/2013/10/02/key-u-s-outcomes-at-the-un-human-rights-council-24th-session/> (accessed 27.8.2014).

<sup>506</sup> US Department of State, Office of the Spokesperson, 'Key U.S. Outcomes at the UN Human Rights Council 24th Session', 01.10.2013, available at <https://geneva.usmission.gov/2013/10/02/key-u-s-outcomes-at-the-un-human-rights-council-24th-session/> (accessed 27.8.2014).

<sup>507</sup> In the UNGA, the EU secured support for a resolution calling for a moratorium on the death penalty in 2007 (UNGA Resolution 62/149, 18.12.2007, 'Moratorium on the use of the death penalty'), reaffirmed in 2008 (UNGA Resolution 63/168, 18.12.2008, 'Moratorium on the use of the death penalty'), 2010 (UNGA Resolution 65/206, 21.12.2010, 'Moratorium on the use of the death penalty') and 2012 (UNGA Resolution 67/176, 20.12.2012, 'Moratorium on the use of the death penalty'). The US consistently voted against the resolutions.

if necessitated by the respect of the rights or reputations of others, national security, public order, or public health and morals. While the US stated that it would 'continue to adhere to the requirements and constraints of its Constitution' in this respect, the EU recognises certain limitations to the right of expression. EU and US positions also differ with regard to children's rights. The **EU has been a strong advocate of the rights of the child**, frequently listing it as a priority for its participation in UNGA sessions<sup>508</sup> and the work of the HRC.<sup>509</sup> This policy has received constitutional backing since the entry into force of the Lisbon Treaty, which listed the protection of the rights of the child prominently as one of the foreign policy objectives of the Union.<sup>510</sup> The US has a more difficult relationship with the international regime of children's rights, being one of only three countries in the world which have not ratified the Convention on the Rights of the Child.<sup>511</sup> Lastly, the EU and the US show different approaches with regard to **ESC rights, which the US does not recognize as human rights**.<sup>512</sup> While the EU's commitment to ESC rights is weaker than that to civil and political rights, it has listed them as a priority for the 2014 sessions of UN human rights fora, based on item 9(a) of the Action Plan which obliges the EU to '[c]ontribute to shaping the agenda on economic, social and cultural rights with specific focus on the UN Human Rights Council'. This may indicate 'a policy shift with an important potential since it plays into the interests of the Council Member States appertaining to the South',<sup>513</sup> though the practical implementation is still lacking.

The brief analysis of the respective EU and US priorities at the HRC shows a significant amount of overlap, both in terms of country-specific and thematic issues. This could be interpreted as evidence that the EU and the US share similar convictions of which **countries should be singled out as the gravest human rights violators world-wide** and thus be addressed through HRC resolutions. Critics might, however, counter that both actors merely consider it politically expedient to address certain states instead of others.<sup>514</sup> In particular it could be argued that all country-specific priorities listed above concern economically insignificant and/or poorly connected states, while those states that are of strategic or economic importance for the EU and US do not feature on the respective lists of priorities, despite sometimes equally dismal human rights records. The analysis also reveals similar goals with regard to civil and political rights, but a broader scope of the EU concerning ESC rights. The different positions towards the death penalty permeate EU-US bilateral relations and are equally present in multilateral fora, in particular in the UNGA, but also in the HRC.

#### 6.3.4 Enabling and hindering factors

Based on their respective political, diplomatic and economic power, the EU and the US should be well placed to play leading roles in multilateral fora in general and in the HRC in particular. Both place human rights at the core of their internal and external policies and have been instrumental in shaping the international human rights framework as it stands today. Despite their numerical inferiority both actors should be expected to have sufficient clout to successfully forge cross-regional coalitions and secure majorities for their positions. Nevertheless, the above **analysis has shown that neither the EU nor the US could achieve major negotiation goals** concerning the institutional set-up and working agenda of the HRC. Numerous studies have highlighted the marginal impact of the EU at the HRC,

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<sup>508</sup> Cf. the lists of priorities available at [http://www.eu-un.europa.eu/articles/articleslist\\_s27\\_en.htm](http://www.eu-un.europa.eu/articles/articleslist_s27_en.htm) (accessed 27.8.2014).

<sup>509</sup> See *supra*, n. 497.

<sup>510</sup> TEU art. 3(5).

<sup>511</sup> See *supra*, section 3.3.

<sup>512</sup> Whelan, D.J., *Indivisible Human Rights: A History*, University of Pennsylvania Press, Philadelphia, 2010, p. 110.

<sup>513</sup> Wouters/Meuwissen, *supra*, n. 467, p. 160.

<sup>514</sup> Cf. Macaj/Koops, *supra*, n. 466, p. 79.

focusing on the EU's failures to build majorities for its initiatives, its tendency to pre-emptively water-down its initiatives in order to aim for the lowest common denominator, or its inability to prevent counterproductive developments.<sup>515</sup> A frequently cited example is HRC Resolution 7/20, which terminated the expert mandate for the DR Congo, and was adopted by consensus with the votes of the EU, although it had previously intensively lobbied for a renewal.<sup>516</sup>

**EU and US: Lack of credibility** One of the major hindering factors of the EU and the US at the HRC lies in a **lack of credibility as self-declared human rights champions**, due to a widespread reproach of a lack of internal-external and external-external consistency. Concerning the former, the EU and the US have been frequently criticised for not 'practising what they preach'. The US's human rights reputation has significantly suffered under its 'war on terror', with contentious practices such as the use of drones for targeted attacks, the detention of **terrorist suspects in Guantanamo** or in black sites around the world, the controversial use of 'enhanced interrogation techniques' such as waterboarding, and the practice of extraordinary renditions.<sup>517</sup> The EU has been criticised for participating or condoning these practices; in particular, **several EU Member States hosted black sites and participated in extraordinary renditions.**<sup>518</sup> The EU and the US are equally under fire for their treatment of immigrants and minorities and for issues of xenophobia and racism.<sup>519</sup> Furthermore, ESC rights, which play an especially important role for the global South, are not recognized by the US<sup>520</sup> and enjoy only lukewarm support from the EU.<sup>521</sup> Both the EU and the US have been perceived as demonstrating a clear lack of self-reflection and openness to criticism concerning their own records. In the same vein, both actors have been criticised for a lack of **external-external consistency**, in particular based on the reproach that country priorities are selected based on political expediency and not on the perceived gravity of the human rights violations.<sup>522</sup> In this context, the US is particularly under attack for its strong and consistent support for Israel, which is considered to neglect the HRC's values of impartiality and objectivity. The EU has been criticised for its inconsistent stance on the issue of clean slate elections. It had initially positioned itself as a strong advocate of open slate elections, urging all regional groups to ensure elections in which the number of candidates exceeds the number of available seats. However, it remained silent when the US decided to run for membership in 2009 and New Zealand withdrew its candidacy, thus creating a clean slate election.<sup>523</sup>

<sup>515</sup> See Smith, K.E., 'The European Union at the Human Rights Council: speaking with one voice but having little influence', *Journal of European Public Policy* Vol. 17, 2010, p. 224-241; Smith, *supra*, n. 492; Wouters/Meuwissen, *supra*, n. 467.

<sup>516</sup> HRC Resolution 7/20, Technical cooperation and advisory services in the Democratic Republic of the Congo, 27.3.2008; cf. Basu, S., 'The European Union in the Human Rights Council', in Wouters, J., Bruyninckx, H., Basu, S., Schunz, S. (ed.), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental Fora*, Palgrave Macmillan, Basingstoke, 2012, p. 86-102, p. 91 et seq.

<sup>517</sup> Hilde, T.C., 'Beyond Guantanamo: Restoring U.S. Credibility on Human Rights', Study commissioned by the Heinrich Böll Foundation, 2009; Ralph, R., 'With a friend like this...', *Human Rights* Vol. 35, 2008, p. 21; Shattuck, J., 'Restoring U.S. Credibility on Human Rights', *Human Rights* Vol. 35, 2008, p. 2; Nyer, A., 'How not to promote democracy and human rights', in Wilson, R.A., *Human Rights in the 'War on Terror'*, Cambridge University Press, Cambridge, 2005, p. 137-143, p. 141.

<sup>518</sup> Smith, 'The European Union at the Human Rights Council: speaking with one voice but having little influence', *supra*, n. 515, p. 235 et seq.

<sup>519</sup> *Ibid*; Freedman, *supra*, n. 481, p. 170-187. Note however, that the EU has cooperated with the Special Rapporteur on the human rights of migrants whose 2013 report focused on the 'management of the external borders of the European Union and its impact on the human rights of migrants' (HRC Resolution 23/46).

<sup>520</sup> Interview with an EU official, Brussels, 2.4.2014.

<sup>521</sup> Macaj/Koops, *supra*, n. 466, p. 75 et seq.

<sup>522</sup> Smith, K.E., 'The European Union and the Politics of Legitimization at the United Nations', *European Foreign Affairs Review* Vol. 18, 2013, p. 63-80, p. 78; Macaj/Koops, *supra*, n. 466, p. 79.

<sup>523</sup> Macaj/Koops, *supra*, n. 466, p. 79.

**US: the advantage of diplomatic flexibility** In comparison with the EU, the US enjoys the advantage of a higher degree of diplomatic flexibility. While the US disposes of a well-staffed foreign service and a clear institutional hierarchy allowing for rapid decision-making, the EU – even after the reforms of the Lisbon Treaty – spends a considerable part of its diplomatic resources on internal coordination in order to ensure a uniform position and voting cohesion. It thus not only has less free **capacities for outreach and coalition building**, but is also more inflexible regarding the negotiation process and concerning reactions towards new developments. On the other hand, the EU has the advantage of being able to draw on the connections and expertise of its Member States, which may prove crucial to build cross-regional coalitions. Nevertheless, the US uses the full range of its policy and diplomatic instruments more efficiently than the EU in order to attain its objectives in multilateral fora.

**Different EU-US negotiation styles** Interviewees have also highlighted the different negotiation styles and approaches of the EU and the US towards the HRC, resulting primarily from the different institutional architectures. The US is generally perceived to be a strong and straightforward negotiator because of its pre-eminent position at the international level.<sup>524</sup> This results in a more confrontational strategy, as evidenced through the abovementioned readiness to issue negative votes if important negotiation goals could not be achieved, or through its approach to demonstrate its discontent, e.g. by leaving the room during sessions with the Special Rapporteur on the situation of human rights in the OPT.<sup>525</sup> Respondents have remarked that the EU would be unable to pursue a similar negotiating style because of its internal structure. First, EU positions have to accommodate a multitude of opinions of different EU Member States and are therefore usually less trenchant.<sup>526</sup> Secondly, respondents commented that the EU has to be **more conciliatory** because otherwise it would be ‘crushed’, given that external actors ‘would pit the different Member States against each other’.<sup>527</sup> The EU’s unity is frailer than US unity, making the EU a softer and more unwieldy force and reducing its ‘actorness’ within the HRC. The EU refrains from issuing negative votes, seeking to maintain a constructive engagement. It remains in the room in order to use the time and present its position.<sup>528</sup>

**Special nature of the EU** While both actors thus suffer from a similar credibility problem at the HRC, the EU’s unique nature as a supranational Union of many Member States entails different challenges in terms of internal coordination and external representation. Its striving for internal cohesion not only turns it into a slower and more inflexible negotiator, but also tends to soften its stances and often prevents it taking clear positions on contentious issues. This does not mean, though, that the EU should not invest more in effectively using all the policy instruments and tools at its disposal to attain its objectives.

### 6.3.5 EU-US cooperation at the HRC

According to an EU official interviewed for this study, cooperation between the EU and the US is very close, both in the capitals and on the spot in Geneva and New York.<sup>529</sup> Exceptions include those issues where **EU and US positions differ significantly**, e.g. the death penalty.<sup>530</sup> In light of the foregoing

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<sup>524</sup> Interview with an EU official, Brussels, 27.3.2014.

<sup>525</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>526</sup> Interview with an EU official, Brussels, 8.4.2014; EU Member States’ positions have differed in the past e.g. with regard to the use of drones, the US ‘war on terror’, the Durban Review Conference on racism, the human rights scrutiny of China in the HRC, and several issues concerning Israel, in particular the Goldstone Report and the Mavi Marmara incident.

<sup>527</sup> Interview with an EU official, Brussels, 27.3.2014.

<sup>528</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>529</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>530</sup> Interview with an EU official, Brussels, 8.4.2014.

analysis of the different negotiating styles, one respondent commented that cooperation with the US can help the EU to argue for harder positions and to deliver strong arguments.<sup>531</sup> It was remarked that 'sometimes the US is the essential partner to seal a deal'.<sup>532</sup> Referring to the US perspective, one respondent stated that the US frequently commented on the inflexibility of the EU as a negotiating partner, remarking that it was 'a heavy partner to deal with'.<sup>533</sup> Nevertheless, the US's engagement with the EU was also perceived as 'slightly contradictory' by certain EU officials. Several respondents commented that while the US wished to have a united and action-oriented EU at its side whenever EU and US goals corresponded, the US would not hesitate to undermine EU unity whenever the EU position was perceived as less favourable: 'The US will try to break up EU union if they don't like the EU position. They will end up undermining the unity and the common position'.<sup>534</sup> The US would then resort to working with preferred partners among the EU Member States, or try to influence Member States towards adopting the US position.<sup>535</sup>

EU respondents also commented that for the **EU the cooperation with the US was a 'double-edged sword'**.<sup>536</sup> While on the one hand the US could prove indispensable to achieve certain negotiation outcomes, to build coalitions and to advance harder positions, the weak human rights credibility of the US, in particular due to its selectivity, 'undermined' the 'joint moral credibility'.<sup>537</sup> Therefore the EU regularly tried to keep its dialogue with the US 'behind the scenes' and tried to avoid to 'appear in public together'.<sup>538</sup>

In general, the key for successful participation at the HRC was seen in cross-regional initiatives, rather than in a strong EU-US bloc. This would entail a broadening of EU-US cooperation and dialogue to include third partners. Respondents also perceived a trend towards 'smaller core groups', in which a few EU partners participated, rather than the 'overwhelming EU bloc'.<sup>539</sup>

### 6.3.6 Comparison and concluding remarks

A comparative analysis of the EU and the US engagement with the HRC shows that both actors have similar visions concerning the institutional set-up and mandate of the Council, and that their priorities, both concerning country situations and thematic human rights issues, overlap to a large extent. The analysis also shows that both actors have experienced considerable difficulties in impacting upon the shape and work of the Council, due to their numerical inferiority and lack of external credibility as human rights champions. But this is where similarities end. Both actors differ in the approaches they use to participate in the negotiations at the HRC, and in the way they react to negotiation defeats. While the US is a strong and unyielding negotiator, due to its pre-eminent role at the international level, its diplomatic capacities and fast decision-making, the EU avoids intransigent stances and instead searches for compromises, dialogue and exchange, given that its positions are already the product of intense internal negotiations between a multitude of actors with different views, and therefore more susceptible to taking the approaches of third countries into consideration. EU-US cooperation at the HRC is very close and can mobilise a high degree of political, diplomatic and economic clout in order to

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<sup>531</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>532</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>533</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>534</sup> Interview with an EU official, Brussels, 8.4.2014, Interview with an EU official, Brussels, 2.4.2014.

<sup>535</sup> Interview with an EU official, Brussels, 8.4.2014, Interview with an EU official, Brussels, 2.4.2014.

<sup>536</sup> Interview with an EU official, Brussels, 27.3.2014.

<sup>537</sup> Interview with an EU official, Brussels, 8.4.2014.

<sup>538</sup> Interview with an EU official, Brussels, 27.3.2014.

<sup>539</sup> Interview with an EU official, Brussels, 8.4.2014.

achieve a negotiation goal. Despite this strong EU-US collaboration, officials noted that the key for future successful participation at the HRC lies less in a strong EU-US bloc, and more in cross-regional initiatives in which fewer, flexible partners participate as smaller core groups.

### 6.3.7 Recommendations

#### *Recommendations on the EU's policy towards the HRC*

- **Ensure internal-external consistency in EU human rights policy** The EU's lack of credibility as a champion of human rights is one of the major hindering factors of effective EU participation at the HRC. In order to avoid the criticism that it does 'not practice what it preaches', the EU should ensure consistency between its internal and external human rights policies. It should demonstrate openness to criticism on the weaker aspects of its human rights record and engage constructively on these issues in the multilateral arena.
- **Ensure external-external consistency in EU human rights policy** EU credibility at the HRC suffers additionally from the widespread perception that it does not sufficiently speak out against human rights violations committed by its allies viz. strategic partners and that it selects its country priorities based on political expediency and not on the perceived gravity of the human rights violations.
- **Ensure a uniform EU position and voting cohesion while avoiding a monolithic approach** Due to its unique nature as a supranational Union of 28 Member States, the EU faces considerable challenges in terms of internal coordination and external representation. The EU should avoid turning into a monolithic bloc. This includes that the EU should make better use of the many voices, the large networks and the expertise of its Member States. Avoiding the image of an 'overwhelming EU bloc' may prove crucial to building cross-regional coalitions.
- **Ensure a more efficient use of the full range of policy and diplomatic instruments** Like the US the EU should make more efficient use of the entirety of instruments and tools at its disposal in order to realize its priorities at the HRC. This includes the Union's bilateral relations with third states and its participation in other multilateral fora, spanning the whole range of EU external action, including trade and development cooperation.

#### *Recommendations for the EU-US relationship*

- **Forge a stronger transatlantic partnership on human rights** The EU and the US share similar visions concerning the institutional set-up and mandate of the HRC and their country-specific and thematic priorities overlap to a large extent. A stronger partnership with regard to those matters where EU and US policies converge can be beneficial and mobilize a high degree of political, diplomatic and economic clout. Closer cooperation during negotiations, in particular the assignment of roles or stances, can help the EU to deliver stronger arguments and to play a more assertive role.
- **Aim for cross-regional initiatives and avoid the perception of an 'EU-US bloc'** Given that the EU and the US together assume a minority position at the HRC, their success depends on their ability to forge cross-regional partnerships. The EU should work jointly with the US to broaden their cooperation and dialogue with third country partners.
- **Ensure an open EU-US dialogue on contentious human rights issues and take a clear stance in the HRC** Despite significant similarities in their respective human rights policies, a few salient contentious issues remain. The EU-US partnership on human rights should be strong enough to

allow for an open dialogue on these practices (e.g. death penalty, ‘war on terror’ on the part of the US, treatment of immigrants and minorities on the part of the EU).

## 6.4 International Criminal Court

### 6.4.1 Introduction

While both the EU and the US were initially staunch supporters of the concept of a permanent international criminal court, a deep divide formed during the negotiations of the Statute of the International Criminal Court (ICC) at the 1998 Rome Conference.<sup>540</sup> The US’s failure to achieve important negotiation goals, in particular concerning the **ICC’s competence to exercise territorial jurisdiction**<sup>541</sup> and its **relationship with the UN Security Council (UNSC)**,<sup>542</sup> transformed its initial support into a negative vote on the final draft of the Statute.<sup>543</sup> The rift was particularly deep during the Bush administration, when the US Government not only refused cooperation with the ICC, but also took hostile measures, aimed to isolate and undermine the Court. The relationship between the US and the ICC has thawed under the Obama administration, but not enough to make the prospect of US ratification of the Rome Statute appear realistic at present. While the US stance towards the ICC thus shifted over the course of the past three administrations, the **EU has consistently acted as a supporter** of the Court. Commentators have even praised the Union’s ICC policy as one of the most successful examples of EU foreign policy to date.<sup>544</sup> Nevertheless, its relationship with the ICC has not been entirely without difficulties, in particular due to its internal structure and division of competences, under which the Member States remain solely responsible for ratifying and implementing the provisions of the Rome Statute.

### 6.4.2 Positions on the mandate of the ICC

The ICC served in the past as a prime example of opposing EU and US foreign policy objectives. Established on 1 July 2002 after the entry into force of the 1998 Rome Statute,<sup>545</sup> the ICC is an international organisation independent from the UN framework. As the first permanent international criminal tribunal, it **exercises jurisdiction over the ‘most serious crimes of concern to the international community as a whole’**,<sup>546</sup> namely genocide,<sup>547</sup> crimes against humanity<sup>548</sup> and war crimes.<sup>549</sup> Additionally it will become competent to try perpetrators of the crime of aggression,<sup>550</sup> once

<sup>540</sup> The United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court (‘Rome Conference’) took place between 15.6. and 17.7.1998.

<sup>541</sup> Birdsall, A., ‘The ‘Monster That We Need to Slay’? Global Governance, the United States, and the International Criminal Court’, *Global Governance* Vol. 16, 2010, p. 451-469, p. 453 et seq.

<sup>542</sup> Schabas, W.A., ‘United States Hostility to the International Criminal Court: It’s All About the Security Council’, *European Journal of International Law* Vol. 15, 2004, p. 701-720.

<sup>543</sup> The Rome Statute was adopted with a majority of 120 to 7 and 21 abstentions. The vote was unrecorded, however the US, China, Israel and India made their negative vote public; du Plessis, M., ‘Seeking an international International Criminal Court – Some reflections on the United States opposition to the ICC’, *South African Journal of Criminal Justice* Vol. 15, 2002, p. 301-320, p. 305, n. 20.

<sup>544</sup> Keukeleire, S. and MacNaughtan, J., *The Foreign Policy of the European Union*, Palgrave Macmillan, Basingstoke, 2008, p. 172-3.

<sup>545</sup> Rome Statute of the International Criminal Court (adopted 17.7.1998, entry into force 1.7.2002), 2187 UNTS 90 (hereinafter referred to as ‘Rome Statute’).

<sup>546</sup> Rome Statute, Preamble.

<sup>547</sup> Rome Statute art. 5(1)(a), 6.

<sup>548</sup> Rome Statute art. 5(1)(b), 7.

<sup>549</sup> Rome Statute art. 5(1)(c), 8.

the ratification requirements are fulfilled.<sup>551</sup> Today the ICC counts 122 State Parties. Neither the EU nor the US is among them. The first is due to the fact that the Rome Statute does not contain a so-called 'regional economic integration organization (REIO) clause' which would allow for membership of regional international organisations. The US on the other hand signed the Rome Statute but later notified that it would not ratify under the Bush administration.

### ***United States positions on the ICC under three administrations***

The relationship between the US and the ICC has been subject to considerable policy shifts under the three administrations in power since the preparatory works for the negotiation of the Court's Statute began. The fault lines can be situated particularly with the changes of government (2001 and 2009), where significant turns in the political stance have occurred. However, it should not be overlooked that even within the terms of office of the respective US Presidents, perceivable alterations in the position towards the ICC have taken place.

***Promoting international criminal justice*** The US has been a strong proponent of international criminal justice ever since the first *ad hoc* military tribunals in Nuremberg and Tokyo laid the groundwork for international criminal law. Propelled by its convictions about the promotion of human rights and the rule of law, the US not only actively supported these first international criminal tribunals, but also used its influential position in the UNSC to lead the process towards the creation of the *ad hoc* tribunals for the former Yugoslavia and for Rwanda.<sup>552</sup> It was therefore only consistent that the **Clinton administration** (1993-2001) would also support the plans for a permanent international criminal tribunal. This was initially backed by strong Congressional support, as evidenced in two joint resolutions (1993 and 1997) urging the US Delegation and the President to promote the establishment of an international criminal tribunal which was deemed to 'greatly strengthen the international rule of law' and 'thereby serve the interests of the United States and the world community'.<sup>553</sup>

***Diminishing US support for the ICC*** The US delegation played a leading role at the Rome Conference on the establishment of the ICC, which was held between 15 June and 17 July 1998. However, support began to dwindle when it emerged that the US could not build a majority for its goal to include stronger safeguards for the State Parties into the draft Statute. In particular the **Court's competence to exercise territorial jurisdiction, the *proprio motu* powers of the Office of the Prosecutor (OTP), and the weak role of the UNSC were regarded as dangers to US national interests** (see *infra*, table 5). Therefore, when the Rome Statute was adopted on 17 July 1998 with 120 votes in favour, the US belonged to the group of seven states which issued a negative vote. This was in line with the strong domestic opposition to the Rome Statute in the Republican-dominated US Senate,<sup>554</sup> where Senators

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<sup>550</sup> Rome Statute, newly inserted art. 8bis, cf. art. 5(1)(d), (2).

<sup>551</sup> The 2010 Review Conference in Kampala paved the way for the Court's jurisdiction over the crime of aggression, however the amendments still await ratification or acceptance by thirty State Parties (Rome Statute art. 15bis(2), 15ter(2)). The exercise of jurisdiction is furthermore conditioned upon an additional 'activating' decision of a two-thirds majority of State Parties to be taken not before 2017 (Rome Statute art. 15bis(3), 15ter(3), 121). By August 2014 15 State Parties have ratified the Kampala amendments, among them nine EU Member States (Luxembourg, Estonia, Germany, Cyprus, Slovenia, Belgium, Croatia, Slovakia and Austria).

<sup>552</sup> Birdsall, *supra*, n. 541, p. 453; Lim, D.H., 'Beyond Kampala: The U.S.' Role in Supporting the International Criminal Court's Mission', *Syracuse Journal of International Law and Commerce* Vol. 39, 2011-2012, p. 441-468, p. 447.

<sup>553</sup> 103d Congress, 1st Session, Joint Resolution Calling for the United States to support efforts of the United Nations to conclude an international agreement to establish an international criminal court, S. J. Res. 32, section 2; 105th Congress, 1st Session, Joint Resolution Calling on the President to continue to support and fully participate in negotiations at the United Nations to conclude an international agreement to establish an international criminal court, H. J. Res. 89.

<sup>554</sup> Lim, *supra*, n. 552, p. 448.



welcomed the decision not to become a signatory of the Statute, and requested the administration to take measures against the Court.<sup>555</sup>

**Table 5: Overview of US Criticism of the ICC**

<b>TERRITORIAL JURISDICTION</b> <sup>556</sup>	
Enables the ICC to prosecute nationals of non-Member States for crimes committed on the territory of a State Party.	
<b>US position:</b>	<ul style="list-style-type: none"> <li>• Amounts to universal jurisdiction and constitutes the Court’s ‘primary flaw’</li> <li>• Threat for US nationals, particularly for US service-members who are deployed in missions around the globe: could find themselves faced with an investigation before a tribunal to which the US is not a party</li> <li>• Limitation of US sovereignty: US would be bound by the rulings of an international organisation without having consented to be bound</li> </ul>
<b>RELATIONSHIP WITH THE UNSC</b> <sup>557</sup>	
UNSC has only limited powers: Can temporarily postpone investigations or prosecutions of the ICC, cannot halt them indefinitely.	
<b>US position:</b>	<ul style="list-style-type: none"> <li>• Lack of UNSC control increases risk of politicised prosecutions</li> <li>• US service-members are particularly vulnerable; threat to the ‘independence and flexibility of US military forces’<sup>558</sup></li> </ul>
<b>PROPRIO MOTU POWER OF THE OTP</b> <sup>559</sup>	
OTP has the authority to independently initiate investigations upon receipt of information on Statute crimes. The continuation of the investigation beyond a preliminary examination requires authorisation by the Pre-Trial Chamber, but there is no political control through the UNSC or the State Parties.	
<b>US position:</b>	<ul style="list-style-type: none"> <li>• Concerns about politicised proceedings, not only against US service-members but also against the political elite</li> <li>• A ‘zealous’ OTP could have ‘enormous political impact’, simply by ‘launching massive criminal investigations’</li> </ul>
<b>CRIME OF AGGRESSION</b> <sup>560</sup>	
ICC jurisdiction over and first definition of the crime of aggression.	
<b>US position:</b>	<ul style="list-style-type: none"> <li>• Concern about the ‘lack of a generally accepted definition’ under customary international law<sup>561</sup></li> <li>• Definition would have the potential to ‘redefine or modify both the concept and conduct of warfare’<sup>562</sup></li> <li>• Encroaches on the UNSC’s monopoly to determine the existence of aggression and to decide on measures to take concerning acts of aggression</li> </ul>

<sup>555</sup> Senator Grams, for example, highlighted the importance to ‘ensure’ that the Rome Statute would not receive the necessary number of ratifications for its entry into force. Failing that he advocated a ‘firm policy of total non-cooperation, no funding, no acceptance of its jurisdiction, no acknowledgement of its rulings, and absolutely no referral of cases by the Security Council’, Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105th Congress, 2nd Session, 23.7.1998.

<sup>556</sup> Rome Statute art. 12(2)(a).

<sup>557</sup> Rome Statute art. 16.

<sup>558</sup> Birdsall, supra, n. 541, p. 454.

<sup>559</sup> Rome Statute art. 15.

<sup>560</sup> Rome Statute art. 8 bis.

<sup>561</sup> Congressional Research Service, The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns, Report RL30020, 6.1.1999, <http://crs.wikileaks-press.org/RL30020.pdf> (accessed 27.8.2014).

<sup>562</sup> Congressional Research Service, The International Criminal Court Treaty: Description, Policy Issues, and Congressional Concerns, Report RL30020, 6.1.1999, <http://crs.wikileaks-press.org/RL30020.pdf> (accessed 27.8.2014).

Nevertheless the US remained active in the subsequent work of the Preparatory Commission<sup>563</sup> which was tasked with the preparation of the practical arrangements for the Court. On 31 December 2000 **President Clinton signed the Rome Statute**, stating that the US wished both to reaffirm its support for international justice and to remain engaged in shaping the nascent Court. However, he also underlined the persisting concerns about 'significant flaws in the Treaty' referring in particular to the concept of territorial jurisdiction.<sup>564</sup>

**From cautious engagement to staunch opposition** US policy towards the ICC shifted from cautious engagement to staunch opposition under the **Bush administration** (2001-2009). Going **beyond mere passive non-membership**, the US launched a series of active measures intended to isolate the Court and to undermine its legitimacy. This corresponded to the 'Policy of the three Noes', formulated in 1998 by John Bolton who served as Under Secretary of State for Arms Control and International Security in the Bush administration:

[N]o financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute. This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective.<sup>565</sup>

US opposition intensified after the terrorist attacks of September 11, 2001, and on 6 May 2002 the **Bush administration informed the UN Secretary-General that it did not intend to become a party to the Statute**. Participation in the work of the Preparatory Commission was discontinued and the US not only threatened to veto UNSC resolutions on the extension of peacekeeping missions unless US forces were granted complete immunity (which gave rise to UNSC Resolutions 1427 and 1487), but President Bush also signed into law the American Service-Members' Protection Act (ASPA), intended to protect US military personnel and government officials against criminal prosecution by international tribunals. In addition the Bush administration launched its practice to conclude Bilateral Immunity Agreements (BIAs or so-called 'Article 98 Agreements') with third states to prevent detention, arrest or extradition of US citizens to the ICC.<sup>566</sup>

**Pragmatism rediscovered** Policy shifted towards a more pragmatic stance during the second term of the Bush administration. When it became apparent that the ICC could not be brushed aside as easily as expected, concerns about the loss of influence on the evolution and workings of the Court rose. Furthermore, some measures of active opposition, in particular the BIAs and the ASPA, were increasingly regarded as harmful to US national interests. The US support for the ICC's investigation in the Darfur conflict is frequently cited as a salient example of the policy shift **towards pragmatic US engagement with the Court**.<sup>567</sup> Nevertheless, the Bush administration did not cease to conclude BIAs even in the later years of its second term, and it remained non-involved in the discussion on the definition of the crime of aggression in the run up to the 2010 Review Conference.<sup>568</sup>

**Multilateralism and the promotion of the ICC** A more substantial policy shift seemed to be on the horizon under the **Obama administration**. In line with a stronger commitment to multilateralism, then

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<sup>563</sup> Established by Resolution F of the Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 17.7.1998, UN Doc. A/CONF.183/10.

<sup>564</sup> Statement by President Clinton, 31 December 2000, available at <http://clinton6.nara.gov/2000/12/2000-12-31-statement-by-president-on-signature-the-icc-treaty.html> (accessed 27.8.2014).

<sup>565</sup> Hearing before the Subcommittee on International Operations of the Committee on Foreign Relations, United States Senate, 105th Congress, 2nd Session, 23.7.1998.

<sup>566</sup> For more detail see below, section 6.4.3.

<sup>567</sup> UNSC Resolution 1593, 31.3.2005; cf. Rome Statute art. 13(b). See below, section 6.4.3, for more detail.

<sup>568</sup> Fairlie, M.A., 'The United States and the International Criminal Court Post-Bush: A Beautiful Courtship but an Unlikely Marriage', Berkeley Journal of International Law Vol. 29, 2011, p. 528-576, p. 540.

Secretary of State Nominee Hillary Rodham Clinton declared support for the ICC and willingness to promote the work of the Court during the Confirmation hearings in mid-January 2009.<sup>569</sup> President Obama had already stated in 2004 as a Senatorial Candidate that the US should ratify the Rome Statute.<sup>570</sup> Concrete plans to become a party or even a signatory of the Statute did however not emerge and US Ambassador-at-Large for War Crimes Issues Rap declared in 2010 that there would be no US ratification of the Rome Statute in the 'foreseeable future'.<sup>571</sup> The US policy was summed up in the 2010 National Security Strategy which stated:

'Although the United States is not at present a party to the Rome Statute of the International Criminal Court (ICC), and will always protect U.S. personnel, we are engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.'<sup>572</sup>

The US thus cooperates with the ICC on a 'pragmatic, case-by-case'<sup>573</sup> basis, within the confines of those provisions of US law which restrict support for the ICC<sup>574</sup> and in line with national interests and values. This included firstly **diplomatic engagement with the Court**, both through the Assembly of State Parties (ASP) – in which the US participated continuously since 2009 – and at the 2010 Review Conference in Kampala. Furthermore, the US supported the UNSC's 2011 referral of the situation in Libya to the ICC, and it has repeatedly endorsed the work of the Court and encouraged cooperation with it.<sup>575</sup> While direct assistance to the ICC is still prohibited by US law, the US delegation has pledged at the Review Conference to lend support to the Court's investigation of the Lord's Resistance Army as well as to assist countries through rule-of-law and capacity building projects in order to enable domestic criminal proceedings.<sup>576</sup>

### **The EU's position on the ICC**

The EU has since long been an advocate of international criminal justice, lending its financial and political support among others to the *ad hoc* tribunals for the former Yugoslavia and Rwanda. In line with this **commitment the EU was quick to endorse plans to establish a permanent international criminal tribunal**. It played a key role during the establishment of the Court, both in diplomatic and financial terms.<sup>577</sup> The EU Presidency participated in the Rome Conference, and has represented the EU Member States on numerous occasions during the Conference and since then in the ASP. The cooperation with the ICC has been lauded by commentators as one of the most successful examples of EU foreign policy.<sup>578</sup>

<sup>569</sup> Birdsall, *supra*, n. 541, p. 464.

<sup>570</sup> AMICC, 'Statements of U.S. Presidential Candidates on the International Criminal Court, 26.8.2008, available at <http://www.amicc.org/docs/2008%20Candidates%20on%20ICC.pdf> (accessed 28.4.2014).

<sup>571</sup> Belczyk, J., 'US war crimes ambassador says US unlikely to join ICC in 'foreseeable future'', *Jurist*, 28.1.2010, <http://jurist.org/paperchase/2010/01/us-war-crimes-ambassador-says-us.php> (accessed 27.8.2014).

<sup>572</sup> The President of the United States, National Security Strategy, May 2010, p. 48.

<sup>573</sup> Koh, H.H., 'International Criminal Justice 5.0', Remarks delivered as the Justice Address 2012 at the Vera Institute of Justice, New York, 8.11.2012, and as a keynote lecture at Leiden University, Campus The Hague, 16.11.2012, available at <http://www.state.gov/s/l/releases/remarks/200957.htm> (accessed 27.8.2014).

<sup>574</sup> In particular ASPA (see below, section 6.4.3) and the Foreign Relations Authorization Act (H.R. 3427), Public Law No. 106-113, §§ 705-706 which bars US financing of the ICC.

<sup>575</sup> UNSC Resolution 1970, 26.2.2011.

<sup>576</sup> ICC, Review Conference of the Rome Statute, Pledges, Doc. No. RC/9, 15.7.2010.

<sup>577</sup> Kemmerer, A., 'Like Ancient Beacons: The European Union and the International Criminal Court – Reflections from afar on a Chapter of European Foreign Policy', *German Law Journal* Vol. 5, 2004, p. 1449-1467, p. 1458.

<sup>578</sup> *Supra*, n. 544.

**Full EU support of the ICC** The EU ranks among the **strongest supporters of the ICC**. As Chris Patten, then Commissioner for External Relations, stated before the EP in 2002:

'The European Union fully supports the ICC. The Principles of the Rome Statute, as well as those governing the functioning of the Court, are fully in line with the principles and objectives of the Union. The consolidation of the rule of law and respect for human rights, as well as the preservation of peace and the strengthening of international security, in conformity with the Charter of the United Nations and as provided for in Article 11 of the EU Treaty, are of fundamental importance to the Union.'<sup>579</sup>

On 20 June 2002 the Council adopted its Common Position 2001/443/CFSP in which it stresses the fundamental importance of the Rome Statute and emphasises **the determination of the EU and the Member States to contribute to its full implementation**. Multiple Council Decisions, EP Resolutions, and statements by high-level officials of the EU have since reaffirmed the EU's strong commitment to the ICC. The Court is regarded as 'an essential means of promoting respect for international humanitarian law and human rights, thus contributing to freedom, security, justice and the rule of law as well as contributing to the preservation of peace, the prevention of conflicts and the strengthening of international security'.<sup>580</sup> It is regarded as a Court of last resort, in which States have the primary responsibility to bring perpetrators of Statute crime to justice. Therefore international criminal justice would be 'most successful if the national justice systems of each State function effectively'.<sup>581</sup>

**Lack of formal status and quest for coherence** While all EU Member States are Parties to the Rome Statute, the **EU itself does not hold a formal status at the ICC**, due to the absence of a so-called REIO clause in the Rome Statute. Nevertheless, the EU holds a special position within the ICC. In 2006 the EU concluded an Article 87(6) 'Agreement on cooperation and assistance' with the ICC. It was the first regional organisation to do so.<sup>582</sup> On 31 March 2008 the 'Security arrangements for the protection of classified information exchanged between the EU and the ICC' entered into force.<sup>583</sup> The EU has participated as an observer in the 2010 Review Conference and committed in its pledges among others to promote the universality and integrity of the Rome Statute and to fight against impunity. Its external track record of ICC promotion is strong. ICC policy is mainstreamed throughout EU external action and formalised through the negotiation of so-called 'ICC clauses'.<sup>584</sup>

To achieve coherence in its ICC policy, an intricate institutional structure has been established at the EU level. Given that the EU acts alongside its Member States when it comes to cooperation with the ICC, there is a need to coordinate a common position. In 2002, COJUR ICC, the ICC sub-format of the Public International Law Working Party in the Council was established. It meets 4-5 times a year in Brussels, and once in The Hague to prepare the annual ASP. In addition, a network of EU and national focal points supports the coordination, consistency and preparation of EU activities. Focal points have been

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<sup>579</sup> Statement by Chris Patten, Commissioner for External Relations, on the ICC, at the Plenary Session of the European Parliament (Strasbourg), 25.9.2002, available at [www.europa-euun.org/article.asp?id=1640](http://www.europa-euun.org/article.asp?id=1640) (accessed 27.8.2014).

<sup>580</sup> Council Decision 2011/168/CFSP of 21.3.2011 on the International Criminal Court and repealing Common Position 2003/444/CFSP, O.J. L 76/56, 22.3.2011, art. 1(1). See further Wouters, J. and Basu, S., 'The Creation of a Global Criminal Justice System: the European Union and the International Criminal Court', in Ryngaert, C. (ed.), *The Effectiveness of International Criminal Justice*, Antwerp – Oxford, Intersentia, 2009, p. 117-142.

<sup>581</sup> Declaration by the High Representative, Catherine Ashton, on behalf of the European Union on the occasion of the fifteenth anniversary of the adoption of the Rome Statute of the International Criminal Court, 17.7.2013, available at [http://www.eu-un.europa.eu/articles/en/article\\_13776\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_13776_en.htm) (accessed 27.8.2014).

<sup>582</sup> Council Decision of 10.4.2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115, 28.4.2006, p. 49.

<sup>583</sup> Council of the European Union, Security arrangements for the protection of classified information exchanged between the EU and the ICC, Council Doc. No. 8349/1/08, 15.4.2008.

<sup>584</sup> Bekou, O., Chadwick, M., 'The EU commitment to international criminal justice – Achievements and possibilities', in Wetzel, J.E. (ed.), *The EU as a 'Global Player' in Human Rights?*, Routledge, London/New York, 2011, p. 82-96, p. 91.

established by each EU Member State as well as by the General Secretariat of the Council. The **EEAS and the Commission are tasked with mainstreaming and coordinating ICC policy**. The EP is to be kept informed of the developments regarding the ICC and its views 'should be taken into account, as appropriate'.<sup>585</sup>

**Uneasy vertical and horizontal EU coordination** While EU engagement with the ICC is therefore predominantly regarded as a success story, the past has also shown that that coordination between the EU institutions and the EU Member States is not always easy. As will be explained in more detail below,<sup>586</sup> the **EU has sometimes experienced difficulties to keep its ranks closed**, due to diverging opinions of its Member States. In particular, a number of Member States showed sympathy for the US practice of concluding BIAs and were inclined to participate in bilateral negotiations. Other conflicts have arisen from the **division of powers within the EU**. Ratification and implementation of the Rome Statute fall exclusively within the competence of the EU Member States. The EU has little if any power to enforce its policy of universal ratification internally. While it thus pressured and encouraged third countries in its external relations towards accession and implementation of the Statute, internally uniform ratification was only achieved as late as 2009, and several **Member States still lag behind with the implementation** of the Statute's provisions. Consequently a 'double standard' problem exists, when the EU exerts pressure on third countries in order to promote the work of the ICC, whereas it is powerless to enforce ratification and implementation among its own Member States. The constitutional structure of the EU can also lead to the curious situation whereby a Member State, which has not ratified the Rome Statute, nevertheless finds itself bound by EU law which gives effect to the Statute. The EU's leading role in the promotion of international criminal justice has therefore sometimes been regarded as controversial, given the **EU's complete dependence on the Member States' cooperation** and on their national criminal justice systems.

**Conclusions: Sharing overarching policy goals despite EU-US difference** The comparative analysis of US and EU positions on the ICC shows that, despite their frequently diametrically opposed approaches towards the Court, both actors share the same overarching policy goals. Both the EU and the US are staunchly committed to **the promotion of international criminal justice and to the fight against impunity**. Both have a strong record of support for earlier international criminal tribunals and both have entered the Rome Conference with the same constructive ambitions. The EU and the US have not ceased to adopt measures aimed at bringing perpetrators of international crimes to justice, and they have invested considerable political and diplomatic capital in the success of these initiatives. While both actors thus agree on the goals, **they disagree on the means to achieve them**. The EU has endorsed the ICC as an institution that has the potential to contribute successfully to the strengthening of international criminal justice. In line with their strong commitment to multilateralism and based on their own positive experiences with international integration, the **EU Member States were ready to delegate some of their sovereign powers** to an international organisation and to thus cede a degree of control. The US on the other hand considers the Court to be unfit to prevent impunity of the worst crimes. The primary concern stems from the **UNSC's lack of control over the ICC's docket**, which bars the US despite its permanent member status to retain an element of oversight over the work of the Court. This in turn generates fears of politically motivated prosecutions, which would have doubly detrimental effects by targeting the innocent and obstructing their valuable work, and by binding resources which could otherwise have been used to prosecute the most serious crimes.

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<sup>585</sup> Council of the European Union, Action Plan to follow-up on the Decision on the International Criminal Court, 12.7.2011, Council Doc. No. 12080/11.

<sup>586</sup> Section 6.4.4.

The US does not share the **EU's confidence**, because its unique position as the world's only remaining superpower makes it particularly vulnerable. It has been argued that it is 'precisely America's great power that makes it the primary target, and often the only target'.<sup>587</sup> The **US today 'plays the role of ultimate enforcer'**,<sup>588</sup> and its troops are deployed around the globe. This demonstration of strength frequently causes resentment and can and does lead to politicised debates and decisions in multilateral organisations. The **EU as a comparatively weaker actor** does thus not trigger the same amount of controversy. It is not the 'primary target'<sup>589</sup> at the international scene. This may help to explain why the US is considerably more reluctant to cede power to international institutions. It may explain why the US was a staunch supporter of the ICC project as long as the draft Statute contained a high degree of UNSC control and thus veto power for the US. It may also explain why the US raises objections in particular concerning the principle of territorial jurisdiction, the independent power of the OTP and the ICC's potential jurisdiction over the crime of aggression. The former two might open doors for abuse through politicised prosecutions, the latter limits the power of the UNSC further by encroaching on its monopoly to define and deal with aggression.

It may nevertheless not be overlooked that **US policy has shifted towards a more favourable stance on multilateralism** under the Obama administration. While the ICC is still not being fully endorsed, a multitude of different avenues have been employed to indirectly strengthen the institution and to directly support international criminal justice in general.

### 6.4.3 Strategies, methods and tools with regard to the ICC

Both the EU and the US employ a variety of strategies, methods and tools at the unilateral, bilateral and multilateral level in their direct or indirect relations with the ICC. In light of the policy shift on the US side the analysis will illustrate, both, the approach of active opposition under the Bush administration and the consequences for US foreign policy today, as well as the current engagement with the ICC under the Obama administration. The findings will be juxtaposed with the key aspects of the EU's policy towards the ICC.

#### 6.4.3.1 Unilateral measures

##### **United States**

Since the establishment of the ICC, the US Congress has passed several acts with regard to the Court that have subsequently been signed into law by the President. While initial measures were aimed to restrict US cooperation with the ICC and to obstruct the work of the Court, many provisions were subsequently repealed or not renewed, and recent examples show Congressional support for the mandate of the ICC.

**American Service-Members' Protection Act** The epitome of US opposition towards the ICC is frequently exemplified by the **American Service-Members' Protection Act (ASPA)**, signed into law by former President Bush on 2 August 2002.<sup>590</sup> The ASPA was quickly dubbed as the 'Hague Invasion Act'<sup>591</sup> due to a provision which authorises the President 'to use all means necessary and appropriate to bring about the release of any person [...] who is being detained or imprisoned by, on behalf of, or at the request of

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<sup>587</sup> Kagan, R., 'Power and Weakness', Policy Review No. 113, 2002, p. 3-28.

<sup>588</sup> Ibid.

<sup>589</sup> Ibid.

<sup>590</sup> American Service-Members' Protection Act, HR 4775, signed into law 2.8.2002 (hereinafter referred to as 'ASPA').

<sup>591</sup> Snellen, J., 'Toward a new beginning with the International Criminal Court', Naval Law Review Vol. 60, 2010, p. 167-188, p. 167.

the International Criminal Court'.<sup>592</sup> **The Act prohibits US entities from cooperating with the ICC**, in particular by responding to requests for cooperation, transmitting letters rogatory, extraditing persons from the US or supporting the transfer of US citizens or permanent residents to the ICC, and supporting the Court or using funds to assist it.<sup>593</sup> Exceptions can only be made pursuant to a Presidential waiver<sup>594</sup> or under the Dodd Amendment which authorises US assistance 'to international efforts to bring to justice Saddam Hussein, Slobodan Milosovic, Osama bin Laden, other members of Al Qaeda, leaders of Islamic Jihad, and other foreign nationals accused of genocide, war crimes or crimes against humanity'.<sup>595</sup> Furthermore, the Act initially prohibited the provision of any form of military assistance to State Parties of the ICC, unless the state in question signed a BIA.<sup>596</sup> These sanctions soon attracted criticism and were regarded as harmful for US national interests, in particular concerning the support of allies in the fight against terrorism. Two amendments passed in 2006 and 2008 repealed the prohibitions of International Military Education and Training (IMET) and Foreign Military Financing (FMF).<sup>597</sup> All other provisions of ASPA remain in force to date. While US cooperation with the ICC thus remains possible on a limited basis, '[a]n institutionalized and systematic program of cooperation by the United States will require the repeal of ASPA'.<sup>598</sup>

**Emerging US cooperation with the ICC** In line with a new sense of US cooperation with the ICC, and corresponding to the US's pledge at the 2010 Review Conference to bring to justice the leaders of the **Lord's Resistance Army** (LRA), President Obama signed into law the Lord's Resistance Army Disarmament and Northern Uganda Recovery Act on 24 May 2010.<sup>599</sup> It provides, among other things, for the development of a strategy to facilitate the disarmament of the LRA, humanitarian assistance for the DR Congo, Southern Sudan, and the Central African Republic as well as for assistance for recovery, reconstruction, reconciliation and transitional justice in Northern Uganda. One hundred special operations soldiers were sent to the Central African Republic in order to assist the local forces in search for ICC fugitive Joseph Kony in October 2011.<sup>600</sup> Another 150 soldiers as well as military aircraft followed in March 2014.<sup>601</sup> The US Ambassador to the African Union Battle stated that 'we need to capture [Joseph Kony] militarily. He needs to go before the international criminal court. He needs to be prosecuted'.<sup>602</sup>

Another example of increased support for the ICC, is 'The Department of State Rewards Program Update and Technical Corrections Act of 2012',<sup>603</sup> adopted by the US House of Representatives on 3 January 2013 and signed into law by President Obama on 15 January of the same year. It expands the **Rewards for Justice** program, under which rewards are offered by the US State Department for

<sup>592</sup> ASPA, Sec. 2008.

<sup>593</sup> ASPA, Sec. 2004.

<sup>594</sup> ASPA, Sec. 2003.

<sup>595</sup> ASPA, Sec. 2015.

<sup>596</sup> ASPA, Sec. 2007. Further exceptions applied to NATO members, major non-NATO allies and Taiwan. In addition the President was given the authority to waive the prohibition for reasons of national interest.

<sup>597</sup> John Warner National Defense Authorization Act for Fiscal Year 2007, HR 5122, S.2766, signed into law 17.10.2006; National Defense Authorization Act for Fiscal Year 2008, HR 4986, signed into law 28.1.2008.

<sup>598</sup> Snellen, *supra*, n. 591, p. 168 et seq.

<sup>599</sup> Lord's Resistance Army Disarmament and Northern Uganda Recovery Act of 2009, S.1067.

<sup>600</sup> Gettleman, J., 'In Vast Jungle, U.S. Troops Aid in Search for Kony', The New York Times, 29.4.2012, <http://www.nytimes.com/2012/04/30/world/africa/kony-tracked-by-us-forces-in-central-africa.html> (accessed 27.8.2014).

<sup>601</sup> DeYoung, K., 'U.S. sends Osprey aircraft, more Special Operations forces to hunt Ugandan warlord', The Washington Post, 24.3.2014, [http://www.washingtonpost.com/world/national-security/2014/03/23/aa468ca6-b2d0-11e3-8020-b2d790b3c9e1\\_story.html?tid](http://www.washingtonpost.com/world/national-security/2014/03/23/aa468ca6-b2d0-11e3-8020-b2d790b3c9e1_story.html?tid) (accessed 27.8.2014).

<sup>602</sup> US Department of State, Conversations With America: U.S. Engagement With the African Union, 16.3.2012, available at <http://www.state.gov/r/pa/pl/cwa/186035.htm> (accessed 27.8.2014).

<sup>603</sup> The Department of State Rewards Program Update and Technical Corrections Act of 2012, S.2318.

information on wanted terrorists or terrorist activities,<sup>604</sup> to include crimes under ICC jurisdiction. Providing for the payment of rewards for 'the transfer to or conviction by an international criminal tribunal [...] of any foreign national accused of war crimes, crimes against humanity, or genocide, as defined under the statute of such tribunal' it allows the US to support the work of the ICC through offering rewards for the Court's most wanted fugitives while avoiding any direct funding. Still, the Act also contains two provisions which illustrate that US concerns regarding the ICC have not been entirely allayed. Firstly, every offer of an award for a crime under ICC jurisdiction must be preceded by a report, submitted at least 15 days in advance by the Secretary of State to the responsible Congressional Committee, in which the relevance for the US national interest is explained. Secondly, the Act explicitly provides that it shall not 'be construed as authorizing the use of activity precluded under the American Service Members' Protection Act of 2002'. Nevertheless, US Ambassador-at-Large for War Crimes Issues Rap stated that '[t]he offer of rewards for I.C.C. fugitives will be the biggest step we've taken toward engagement and support' of the Court.<sup>605</sup>

### **European Union**

While ratification and implementation of the Rome Statute remains the sole responsibility of the EU Member States, the EU has undertaken several measures to enhance cooperation with the ICC.

**Council Decision 2011/168/CFSP** On 21 March 2011 the Council of the EU adopted **Council Decision 2011/168/CFSP** which replaced and updated Common Position 2003/444/CFSP in line with pledge No. 4 made at the 2010 Review Conference of the Rome Statute. Its objectives are the promotion of the universality and integrity of the Rome Statute, support for the independence, effectiveness and efficiency of the ICC, as well as the strengthening of the cooperation with the Court and of the implementation of the complementarity principle.<sup>606</sup> Based on this Decision, on 12 July 2011 the Council adopted a new **Action Plan**,<sup>607</sup> replacing its 2004 predecessor.<sup>608</sup> It contains provisions on the internal co-ordination of EU activities, as well as concrete measures to achieve the abovementioned objectives of the Council Decision. The Council Decision and the Action Plan together form the backbone of EU action towards the ICC.

**Other decisions** In addition, the Council has adopted a series of Decisions aimed at strengthening EU-wide cooperation in the field of international criminal justice. **Council Decision 2002/494/JHA** set up a European network of contact points to exchange information with regard to investigations of genocide, crimes against humanity and war crimes. **Framework Decision 2002/584/JHA** established the European arrest warrant and **Council Decision 2003/335/JHA** aimed at strengthening cooperation between the EU Member States concerning the investigation and prosecution of genocide, crimes against humanity and war crimes, through information exchange, periodic meetings and organisational restructuring.

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<sup>604</sup> See the website of the program <http://www.rewardsforjustice.net> (accessed 27.8.2014).

<sup>605</sup> Simons, M., 'U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned', The New York Times, 2.4.2013, <http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html> (accessed 27.8.2014).

<sup>606</sup> Council Decision 2011/168/CFSP, *supra*, n. 580, art. 1(2).

<sup>607</sup> Council of the European Union, Action Plan to follow-up on the Decision on the International Criminal Court, 12.7.2011, Council Doc. No. 12080/11.

<sup>608</sup> Council of the European Union, Action Plan to follow-up on the Common Position on the International Criminal Court, 28.1.2004, Council Doc. No. 5742/04.



### 6.4.3.2 Bilateral measures

#### **United States**

An important part of the Bush administration's ICC strategy was the conclusion of **Bilateral Immunity Agreements** (BIAs) with a large number of countries worldwide. Based on a controversial interpretation of Article 98(2) of the Rome Statute,<sup>609</sup> the US sought to prevent States from detaining, arresting or extraditing US nationals to the ICC. In total, 102 agreements were signed by the end of the Bush administration, 52 of them with State Parties to the Rome Statute.<sup>610</sup> Support for the BIAs already declined during the Bush administration. Several influential US politicians considered BIAs to be harmful for US national interests. Nevertheless, the practice to conclude BIAs was continued throughout the two terms of the Bush administration. As late as 2007, a BIA was agreed on with the newly independent Montenegro.<sup>611</sup> While the Obama administration did not pursue the negotiation of additional BIAs, 95 of the previously concluded BIAs remain in force to date.<sup>612</sup> Nevertheless, high-level US representatives have repeatedly made statements to **encourage cooperation with the Court**. With regard to the situation in Kenya, President Obama 'urge[d] all of Kenya's leaders, and the people whom they serve, to cooperate fully with the ICC investigation'.<sup>613</sup> Similar requests were made with regard to the situation in Sudan.<sup>614</sup>

#### **European Union**

Mainstreaming ICC policy in its external relations, the EU promotes the inclusion of so-called '**ICC clauses**' in its agreements with third countries. The first binding instrument to contain an ICC clause was the 2005 Cotonou Agreement, which provides in Article 11(7):

'In promoting the strengthening of peace and international justice, the Parties reaffirm their determination to:

- share experience in the adoption of legal adjustments required to allow for the ratification and implementation of the Rome Statute of the International Criminal Court; and
- fight against international crime in accordance with international law, giving due regard to the Rome Statute.

The Parties shall seek to take steps towards ratifying and implementing the Rome Statute and related instruments.'

The clause focuses on three aspects: the ratification and the implementation of the Rome Statute as well as the domestic adjudication of Statute crimes, in line with the principle of complementarity. Similar clauses have also been included in a series of bilateral agreements, namely in Partnership and

<sup>609</sup> 'Editorial Comments: The European Union, the United States and the International Criminal Court', *Common Market Law Review* Vol. 39, 2002, p. 939-944, p. 941 et seq.

<sup>610</sup> Birdsall, *supra*, n. 541, p. 461.

<sup>611</sup> Exchange of diplomatic notes between the US Embassy in Podgorica and the Ministry of Foreign Affairs of the Republic of Montenegro, 17 and 19.4.2007, available at <http://www.amicc.org/docs/US-Montenegro.pdf> (accessed 27.8.2014).

<sup>612</sup> United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2013*.

<sup>613</sup> The White House, Office of the Press Secretary, Statement by President Obama on the International Criminal Court announcement, 15.12.2010, available at <http://www.whitehouse.gov/the-press-office/2010/12/15/statement-president-obama-international-criminal-court-announcement> (accessed 27.8.2014); see also US Department of State, Kenya: Confirmation of International Criminal Court Charges, Press Statement, 23.1.2012, available at <http://www.state.gov/r/pa/prs/ps/2012/01/182349.htm> (accessed 27.8.2014).

<sup>614</sup> The White House, Office of the Press Secretary, Interview of the President by South African Broadcasting Corporation, 13.7.2010, available at <http://www.whitehouse.gov/the-press-office/interview-president-south-african-broadcasting-corporation> (accessed 27.8.2014); Statement by Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations on the ICC's Arrest Warrant for Sudanese President Bashir, 4.3.2009, available at <http://usun.state.gov/briefing/statements/2009/march/126539.htm> (accessed 27.8.2014).

Cooperation Agreements (PCAs), Trade Cooperation and Development Agreements (TDCAs) and Agreements Establishing an Association (AAs). Their focus depends on the specific circumstances of the partner country. The 2010 EU-Korea Framework Agreement, for example, focuses on support for the ICC and the fight against impunity, both at the domestic and international level, given that all parties to the Agreement had already ratified the Rome Statute. The 2012 PCA between the EU and Iraq, on the other hand, contained a clause referring to the non-membership of Iraq and the possibility of accession.<sup>615</sup> The ICC clauses in bilateral agreements aim to strengthen the ICC by establishing bilateral dialogues and cooperation, in particular concerning the exchange of best practices. The EU has furthermore included ICC clauses in a number of Action Plans with partner countries in the framework of the European Neighbourhood Policy (ENP).<sup>616</sup>

In addition, the EU seeks to promote the universal ratification and implementation of the Rome Statute through **demarches** and bilateral dialogue. Between 2002 and 2010 the EU carried out more than 340 demarches in over 100 countries or international organisations.<sup>617</sup> For example on 3 April 2007 a troika demarche was carried out in Armenia, highlighting that 'for the European Union the ratification of the Rome Statute by Armenia was not negotiable'.<sup>618</sup>

#### 6.4.3.3 Measures at the multilateral level

##### **United States**

The opposition stance of the Bush administration towards the ICC has found expression in a variety of measures at the multilateral level.

**UNSC resolutions** Symptomatic is the US's 2002 **veto of the UNSC resolution** on the extension of the UN peacekeeping mission in Bosnia and Herzegovina (UNMIBH) – a country which had become a State Party of the Rome Statute a few months earlier. Unwilling to subject its service-members to 'the additional risk of political prosecution before a court whose jurisdiction the government of the United States does not accept'<sup>619</sup> the US requested immunity for its peacekeepers. In order to settle the conflict and enable the continued operation of UNMIBH, the UNSC eventually adopted UNSC Resolution 1422 (2002) which contained a deferral under Article 16 of the Rome Statute for crimes perpetrated by members of UN missions which are not citizens of a State Party to the Statute.<sup>620</sup> The Resolution was renewed for another year by UNSC Resolution 1487 (2003).<sup>621</sup> Attempts for a second renewal in May 2004 failed, however, after the incidents in Abu Ghraib had triggered fierce opposition towards the US request.<sup>622</sup> The US finally decided to withdraw its request and announced its intention to rely on

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<sup>615</sup> Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, O.J. L 204, 31.7.2012, p. 0020-0130, art. 7(2).

<sup>616</sup> EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, Speech on the report on Human rights in the world and the EU's policy on the matter, SPEECH/12/270, European Parliament, Strasbourg, 17.4.2012.

<sup>617</sup> General Secretariat of the Council, The European Union and the International Criminal Court, Expert Series, May 2010, p. 10.

<sup>618</sup> Council of the European Union, Declassified COREU CFSP/PRES/BER/0993/07: Armenia-Demarche to promote the universality of the Rome Statute of the International Criminal Court (ICC), 22.2.2010, Council Doc. No. 6762/10.

<sup>619</sup> Burkeman, O., 'US veto puts Bosnia mission in jeopardy', The Guardian, 1.7.2002, <http://www.theguardian.com/world/2002/jul/01/usa.eu2> (accessed 27.8.2014).

<sup>620</sup> UNSC Resolution 1422, 12.7.2002, art. 1.

<sup>621</sup> UNSC Resolution 1487, 12.6.2003.

<sup>622</sup> Birdsall, *supra*, n. 541, p. 460.

continued negotiations of BIAs instead.<sup>623</sup> Since then, there have been no similar approaches by the US in the UNSC.

Similarly, already in 2002 the US had threatened to **withdraw its service-members** deployed in peacebuilding and peacekeeping missions around the globe. When the renewal of UNSC Resolution 1487 failed in 2004, the Department of Defense withdrew 9 soldiers from UN peacekeeping missions in Ethiopia, Eritrea and Kosovo.<sup>624</sup> All three territories were not covered by BIAs at the time and had therefore been determined to pose a disproportionate risk for the service-members.<sup>625</sup>

In the **Organization of American States** (OAS) the US did not join the consensus on the annual General Assembly Resolutions concerning the 'Promotion of the International Criminal Court' continuously since 2003.<sup>626</sup> In statements and reservations, the US referred to its concerns about the 'seriously flawed' Court while reaffirming its strong commitment to accountability for international crimes.

The US support for the **referral of the Darfur situation to the ICC** has sometimes been regarded to 'signal a major change in the U.S.'s relationship with the Court'.<sup>627</sup> The US participated in the drafting of UNSC Resolution 1593 and abstained in the final vote. However, it had previously achieved the inclusion of several contentious provisions. First, the preamble's reference to 'agreements referred to in Article 98-2 of the Rome Statute' has been regarded as a US effort to legitimise the BIAs.<sup>628</sup> More problematically, para. 6 of the Resolution exempts nationals of States which are not parties to the Rome Statute from ICC jurisdiction and para. 7 precludes any UN funding of the expenses resulting from the referral.

**Policy shift and return to multilateralism?** Policy shifted under the Obama administration. Despite the legal provisions still in force, which restrict full-fledged support for the ICC, US cooperation with the institution has been increasing. Since 2009 the US has participated as an observer in the annual **ASP**. It also sent a sizeable delegation to the 2010 **Review Conference** in Kampala, where it not only participated actively in the negotiations of the definition of the crime of aggression, but also pledged to support rule-of-law and training projects in third States to strengthen domestic judicial systems, as well as to increase efforts to protect civilians from the LRA and to bring its leaders to justice.<sup>629</sup> High-level US representatives have furthermore repeatedly **expressed support** for the work of the ICC. On the occasion of the conviction of rebel leader Thomas Lubanga Dyilo in March 2012 – the first conviction in the history of the Court – the State Department recognised the decision as a 'historic and important step in providing justice and accountability for the Congolese people'.<sup>630</sup> Commenting on the Court's conviction of Germain Katanga on 7 March 2014, the State Department declared that 'the ICC's DRC

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<sup>623</sup> United States Mission to the United Nations, Press Release No. 110 (04), Remarks by Ambassador James B. Cunningham, Deputy U.S. Representative to the United Nations, on the ICC, at the Security Council Stakeout, 22.6.2004, available at [http://www.amicc.org/docs/CunninghamJune22\\_04.pdf](http://www.amicc.org/docs/CunninghamJune22_04.pdf) (accessed 27.8.2014).

<sup>624</sup> Lynch, C., 'U.S. to Pull 9 From U.N. Peacekeeping Missions', The Washington Post, 3.7.2004, <http://www.washingtonpost.com/wp-dyn/articles/A24820-2004Jul2.html> (accessed 27.8.2014).

<sup>625</sup> Ibid.

<sup>626</sup> See the list of General Assembly Resolutions on the website of the Organization of American States, [http://www.oas.org/en/sla/dil/international\\_criminal\\_court\\_GA\\_resolutions.asp](http://www.oas.org/en/sla/dil/international_criminal_court_GA_resolutions.asp) (accessed 27.8.2014).

<sup>627</sup> Cf. Fairlie, *supra*, n. 568, p. 539.

<sup>628</sup> Ibid.

<sup>629</sup> International Criminal Court, Review Conference of the Rome Statute, 31 May-11.6.2010, Pledges, RC/9, 15.7.2010, p. 18.

<sup>630</sup> US Department of State, 'ICC Conviction of Thomas Lubanga Dyilo', Press Statement, 16.3.2012, available at <http://www.state.gov/r/pa/prs/ps/2012/03/185964.htm> (accessed 27.8.2014).

cases represent a significant step toward delivering justice for victims in the DRC'.<sup>631</sup> Going beyond verbal support, in March 2014, the US **facilitated the transfer of ICC suspect Bosco Ntaganda**, who had surrendered in the US Embassy in Kigali and requested to be sent to The Hague.<sup>632</sup>

In the UNSC, the US supported the 2011 **Resolution referring the situation in Libya to the ICC**, voting for the first time in favour of a referral. With the exception of the reference to the BIAs, the language however resembles the previous referral of the Darfur situation and again includes an exemption of jurisdiction over nationals of non-state parties, as well as a prohibition of UN funding for the investigations and prosecutions. The US furthermore drafted and voted in favour of **Resolution 1888 (2009)** on sexual violence in armed conflicts, which contains a reference to the 'inclusion of a range of sexual violence offences in the Rome Statute of the International Criminal Court'.<sup>633</sup> A few weeks earlier, then US Ambassador to the United Nations Rice had indicated that the US would 'no longer oppose mentions of [...] the International Criminal Court'.<sup>634</sup>

Furthermore, in 2012, the US for the first time since 2003 did not enter a reservation to the **annual OAS resolution on the ICC**. Instead, it merely included a clarification stating that 'The United States understands that any OAS support rendered to the International Criminal Court will be drawn from specific-fund contributions rather than the OAS regular budget'<sup>635</sup>, in line with its domestic restriction on ICC funding.

### **European Union**

Different to the US ambiguous action throughout the Bush and Obama administration, the EU has supported the work of the ICC from the very beginning.

**EU Participation and Cooperation Agreement** The EU regularly participates in the annual **ASP**, represented by the EU Presidency. A delegation was also present at the 2010 **Review Conference** in Kampala, where the EU pledged to promote the universality and integrity of the Rome Statute, to further its practice of negotiating ICC clauses, to lend financial support and to review and update its instruments supporting the Court.<sup>636</sup> The EU and the ICC concluded an Article 87(6) '**Agreement on cooperation and assistance**' on 10 April 2006, which entered into force on 1 May 2006.<sup>637</sup> The EU was thereby the first regional organisation to sign a cooperation agreement with the ICC. The agreement contains a general obligation of cooperation and assistance, as well as provisions on information and documentation exchange. Furthermore, on 31 March 2008 the '**Security arrangements** for the protection of classified information exchanged between the EU and the ICC' entered into force.<sup>638</sup>

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<sup>631</sup> US Department of State, 'The Verdict in the Germain Katanga Trial at the International Criminal Court', Press Statement, 7.3.2014, available at <http://www.state.gov/r/pa/prs/ps/2014/03/223152.htm> (accessed 27.8.2014).

<sup>632</sup> Simons, M., 'U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned', The New York Times, 2.4.2013, <http://www.nytimes.com/2013/04/03/world/europe/us-assists-international-criminal-court-but-still-has-no-intention-of-joining-it.html> (accessed 27.8.2014).

<sup>633</sup> UNSC, S/RES/1888 (2009), 30.9.2009.

<sup>634</sup> US Permanent Representative to the United Nations Susan E. Rice, 'A New Course in the World, a New Approach at the UN', Remarks delivered at New York University's Center for Global Affairs and Center on International Cooperation, 12.8.2009, available at <http://usun.state.gov/briefing/statements/2009/august/127953.htm> (accessed 27.8.2014).

<sup>635</sup> OAS, AG/RES. 2728 (XLII-O/12), Promotion of the International Criminal Court, 4.6.2012.

<sup>636</sup> *Supra*, n. 576.

<sup>637</sup> Council Decision of 10.4.2006 concerning the conclusion of the Agreement between the International Criminal Court and the European Union on cooperation and assistance, O.J. L 115, 28.4.2006, p. 0049.

<sup>638</sup> Council of the European Union, Security arrangements for the protection of classified information exchanged between the EU and the ICC, Council Doc. No. 8349/1/08, 15.4.2008.

**Financial Support** The EU also lends significant **financial support** to the Court. It covered more than 60% of the costs of the ICC Advance Team which was tasked with setting up the institution, and has since then contributed funding for, amongst others, the Internship and Visiting Professionals' Programmes, the Legal Tools Project, training programmes for those lawyers that are included on the ICC List of Counsel, as well as for infrastructure and library expenses. EU high-level representatives have repeatedly **expressed support** for the work of the ICC. On the occasion of the 15<sup>th</sup> anniversary of the adoption of the Rome Statute, High Representative Ashton stressed that 'The European Union and its Member States are strongly committed to preserving the independence of the ICC and to promoting the universality and integrity of the Rome Statute'. She lauded the Court's judgment in the Thomas Lubanga Dyilo case as a 'milestone for international criminal justice', and valued it as 'a significant achievement for the Court'.<sup>639</sup> A similar declaration was issued after the sentencing of Germain Katanga in March 2014.<sup>640</sup>

**Promotion at the UN level** At the **UN level**, the support for the work of the ICC, the promotion of the universality of the Rome Statute and the fight against impunity have consistently been part of the EU's priorities for the UN General Assembly (UNGA) sessions.<sup>641</sup> EU representatives regularly issue statements in the UNGA commenting on the annual report of the Court and support the annual UNGA resolution on the ICC.

#### 6.4.3.4 Comparison between the EU and the US

Since the ICC came into existence, the EU and US have explored multiple avenues of cooperation, support or opposition, ranging from unilateral initiatives to measures taken at the multilateral level. EU and US strategies differed most starkly during the years under the Bush administration, which pursued a policy of open hostility towards the Court. This included the signing into law of domestic legislation which prevented US cooperation with the Court and restricted financial support for ICC-friendly third countries. It also entailed the conclusion of a large number of BIAs in order to protect US citizens from ICC jurisdiction. At the multilateral level this policy resulted among others in the vetoing of UNSC peacekeeping mission resolutions, two deferral resolutions of the UNSC and the withdrawal of US service-members deployed with certain missions.

**Different EU-US approaches on various levels of engagement** While US policy towards the ICC has shifted towards an approach of limited support under the Obama administration, the strategies, tools and methods employed by both actors still differ. The EU, whose Member States have all ratified the Rome Statute, has adopted a series of measures aimed to enhance the EU-wide cooperation in the area of international criminal justice and with the Court. In the US, which is not a State Party to the Rome Statute and in which provisions of the ASPA and other laws prohibit cooperation with the ICC, such legislative action is absent. However, the US adopted acts providing military and financial support for the capture of ICC fugitives, thus supporting the work of the Court while avoiding any direct funding. At the bilateral level, the EU demonstrates a strong record of including ICC clauses in its agreements with third countries, and raising the matter through demarches and dialogue. The US has not equally formalised its approach, but high-level officials have repeatedly expressed their verbal support for the Court and encouraged third states to cooperate with the ICC. Measures aimed at strengthening domestic justice systems around the world, as well as the financial and military support in the fight

<sup>639</sup> Declaration by the High Representative, Catherine Ashton, on behalf of the European Union on the occasion of the fifteenth anniversary of the adoption of the Rome Statute of the International Criminal Court, 12482/1/13 REV1, 17.7.2013.

<sup>640</sup> Déclaration du porte-parole de Catherine Ashton, Haute Représentante de l'UE, sur le jugement rendu à l'encontre de M. Germain Katanga, 7.3.2014, available at [http://eeas.europa.eu/statements/docs/2014/140307\\_03\\_fr.pdf](http://eeas.europa.eu/statements/docs/2014/140307_03_fr.pdf) (accessed 27.8.2014).

<sup>641</sup> See list of priorities on [http://www.eu-un.europa.eu/articles/articleslist\\_s27\\_en.htm](http://www.eu-un.europa.eu/articles/articleslist_s27_en.htm) (accessed 27.8.2014).

against the LRA similarly indirectly support the work of the ICC. At the multilateral level both the US and the EU participate in the ICC's annual ASP, both were present at the 2010 Review Conference and have made voluntary pledges to further the work of the Court. The EU and US verbally express their support for the ICC in international fora and vote in favour of respective resolutions. Nevertheless, both actors differ in that the EU additionally formalised its relationship with the ICC through the conclusion of an Article 87(6) Agreement and contributes considerably to the ICC's budget.

**Different points of departure** While EU and US strategies, tools and methods towards the ICC have thus gradually converged under the Obama administration they still differ considerably. This is firstly due to the different points of departures of both actors. The EU is a Union of 28 State Parties to the Rome Statute, and thus has a staunch political interest and mandate to support the Court and to strengthen internal and external cooperation. Although its policies towards the ICC have altered over the course of the past three administrations, the **US on the other hand is not a party** to the Statute and additionally has laws in force that prohibit any form of direct support for the Court. US interest to support the Court is thus not only naturally limited, it also meets legal restrictions. Secondly, strategies differ because both actors, EU and US, play on their own distinct strengths. The EU places a strong emphasis on technical and financial assistance, mobilising its considerable economic weight. The US indirectly makes funding available, but also has the distinct advantage of significant military capacity, which allows it to support the search for fugitive ICC suspects with personnel, material and know-how. Although both actors today still differ with regard to the strategies, tools and methods they employ, their direction of impact has largely converged, therefore permitting a higher degree of cooperation for the benefit of the Court than in the past.

#### 6.4.4 EU-US cooperation with regard to the ICC – past, present and future

While both the EU and the US initially supported the project of a permanent international criminal tribunal, the transatlantic positions drifted apart during the Rome Conference and have not yet entirely converged since then. While the US voted against the Rome Statute, which it deemed fundamentally flawed for the abovementioned reasons, the EU supported the final draft,<sup>642</sup> considered the principles of the Statute and the Court to be fully in line with the principles and objectives of the Union, and invested considerable resources towards achieving a speedy entry into force of the Statute.<sup>643</sup> When the US indicated in May 2002 that it would not ratify the Statute, the **EU expressed its disappointment**, commenting that US 'anxieties [...] are unfounded' and expressing 'the hope that the United States will continue to work together with friends and partners in developing effective and impartial international criminal justice and will not close the door to any kind of cooperation with the ICC'.<sup>644</sup>

**Complicated transatlantic relationship** Relations deteriorated and tested the EU's internal cohesion when the US used its role in NATO as a leverage to achieve the conclusion of BIAs with EU Member States. The European Commission had previously requested the Member States in a confidential document not to conclude BIAs, which it considered to be not covered by Article 98(2) of the Rome Statute, and to take a united stand on this matter. On 16 August 2002, then US Secretary of State Powell addressed a letter to European governments, in which he urged them to 'ignore the European Union's request to wait [...] and instead to sign separate agreements with the United States *as soon as*

<sup>642</sup> Austrian Presidency, 'Statement at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, held in Rome from 15 June to 17 July 1998', 17.7.1998, available at <http://www.consilium.europa.eu/uedocs/cmsUpload/ICC3EN.pdf> (accessed on 27.8.2014).

<sup>643</sup> Council Common Position on the International Criminal Court, Doc. No. 2001/443/CFSP, 11.6.2001.

<sup>644</sup> Council of the European Union, Statement of the European Union on the position of the United States towards the International Criminal Court, Doc. No. 8864/02, 14.5.2002.

*possible*.<sup>645</sup> Opinions among EU Member States were divided. While some **Member States refused to sign BIAs**, others showed sympathy for the US policy. Romania, a candidate country for EU membership at that time, signed a BIA, although it never ratified it. The Council was therefore initially unable to come to a common conclusion, which was seen as 'a sure source of great embarrassment for the European Union, which has always shown itself determined to speak with one voice in this matter and to refuse to give in to U.S. pressure for granting exemptions for its soldiers involved in peace keeping operations'.<sup>646</sup> The **EP finally adopted a resolution on the ICC on 26 September 2002**, stating that it '[e]xpects the governments and parliaments of the Member States to refrain from adopting any agreement which undermines the effective implementation of the Rome Statute' and 'considers in consequence that ratifying such an agreement is incompatible with membership of the EU'.<sup>647</sup> The Council subsequently adopted a decision on 30 September 2002, in which it reaffirmed the EU's commitment to the ICC, and provided guiding principles concerning BIAS, thus formulating a unified EU response against them.<sup>648</sup> In the end, no EU Member State concluded a BIA with the US; however, the differences in opinion between the Member States had become apparent and hindered a swift EU reaction.

**Re-aligning transatlantic partners: more coherence** EU and US policies on the ICC have shown more consistency under the Obama administration. Within certain limits the US has started to support the work of the Court and the domestic justice systems of its State Parties. As one of the respondents to the interviews conducted for this study remarked, **cooperation between EU and US on the ground can be quite strong**. As an example he cited the cooperation between the US and Italy concerning the transferal of Bosco Ntaganda from Rwanda to The Hague.<sup>649</sup> It has been stated above that the US will likely not become a member of the ICC in the foreseeable future. That, however, does not have to stand in the way of an ever closer cooperation between the EU and the US in the field of international criminal justice. The analysis of the respective transatlantic approaches towards the Court has revealed that **both actors face very different legal and political constraints**. It has also revealed a multitude of techniques employed by both sides to foster international criminal justice within these boundaries. The challenge and the opportunity consists in coordinating these efforts to ensure greatest possible consistency and an efficient use of resources. The EU should therefore seek an increasingly close contact with the US on the issue of the ICC, so that the possibilities for future cooperation can be explored. This cooperation will not only benefit the work of the Court in terms of finance and clout, but also boost its credibility.

#### 6.4.5 Conclusions

Though both starting from a strong commitment to international criminal justice, EU and US policies towards the ICC have taken very different directions over the past 15 years. Concerned about the Court's independence, the US voted against the Rome Statute, reluctantly signed it but subsequently notified its intention that it would not ratify the Statute. Active measures intended to undermine and isolate the Court during the first years of the Bush administration (in particular the BIAs, ASPA and action within the UNSC), gave way to a more pragmatic stance in the later years of the administration and since then to a policy of limited support under the Obama administration. The EU on the other hand fully supported the ICC from the beginning and has pursued an active policy of promoting the

<sup>645</sup> Paraphrase of the original letter in Becker, E., 'U.S. Issues Warning to Europeans in Dispute Over New Court', The New York Times, 26.8.2002.

<sup>646</sup> 'Editorial Comments: The European Union, the United States and the International Criminal Court', *supra*, n. 609, p. 941.

<sup>647</sup> European Parliament resolution on the International Criminal Court (ICC), 26.9.2002, P5\_TA(2002)0449.

<sup>648</sup> General Affairs and External Relations Council, Conclusions, 2450th Council session, 30.9.2002, Doc. No. 12134/02.

<sup>649</sup> Interview with an EU official, Brussels, 28.2.2014.

universality and integrity of the Rome Statute as well as the work of the Court. A look at the current approaches towards international criminal justice reveals a multitude of measures, from direct financial support for the Court by the EU, to military assistance for the capture of ICC fugitives by the US. These varying strategies allow for an encompassing and effective fight against impunity – if the EU and the US achieve to cooperate in order to ensure consistency and efficiency.

#### 6.4.6 Recommendations

##### Recommendations on the EU's policy towards the ICC

- **Ensure EU-wide implementation of the Rome Statute** The EU should work towards EU-wide implementation of the Rome Statute, e.g. through measures of peer pressure, including a continuous and public comparison of the implementation records of all EU Member States.
- **Maintain a strong and open partnership with the ICC** The EU should continue its strong support for the Court, while continuously striving to improve the performance of the institution, in particular through weighing in on the more problematic aspects of its work, such as the length of proceedings and internal turf battles.

##### Recommendations for the EU-US relationship

- **Ensure an open EU-US dialogue on issues of international criminal justice** The EU should ensure a continuous and open dialogue with the US on issues of international criminal justice in general and the ICC in particular. It should address these issues in bilateral dialogues, official statements and through multilateral fora and work towards a stronger engagement of the US with the ICC.
- **Coordinate EU and US measures in the field of international criminal justice** In order to increase consistency and the efficient use of resources the EU should ensure a higher degree of coordination with US measures. It should aim to explore in what way EU and US measures can complement each other in order to strengthen international criminal justice.



## 7. CONCLUDING REMARKS

The purpose of this study was to provide a comparative analysis on how human rights are practically integrated and mainstreamed into external policies of both the EU and the US, using selected case studies to contextualise the argument.

To this end the study has examined not only the general making and promotion of human rights policies in the broader context of the EU's and the US's external policies, but also various parts of EU external action, including foreign policy, trade policy, development cooperation and case studies, such as the EU and US usage of Special Representatives / Special Envoys, EU and US Democracy promotion as well as the policies of the EU and the US in the context of multilateral institutions, such as the Human Rights Council and the ICC.

In a first step, the study focused on the legal frameworks regarding the human rights policies in the EU and the US. With a firm emphasis on human rights in the EU Treaty, the EU has further emphasized human rights in its post-Lisbon framework by means of the 'Communication on Human Rights and Democracy' by the Commission and the High Representative in 2011. Adopting the communication, they affirmed that 'respect for human rights and fundamental freedoms is at the core of the European Union [and] the protection and promotion of human rights is a silver thread running through all EU action both at home and abroad'. Moreover, with a detailed list of 36 outcomes and 97 action points, the Council subsequently adopted a '**Strategic Framework and Action Plan on Human Rights and Democracy**' in order to 'promote human rights in all areas of external action without exception'. Comparing the EU to the US, the study finds that the legal framework in the US differs from the EU in that the basis for human rights in foreign policy lies in various acts of Congressional legislation, rather than in the Constitution itself. The study found that the US Constitution, while recognizing a variety of 'individual' human rights and determining the allocation of competences with regard to foreign policy decision-making, is silent on the objectives of US external action. At the same time, the study concluded that this ought to be understood in light of the 'constitutional limitation' which was placed on the US government from its very inception.

With regard to the institutional set-up of the EU and the US in external human rights policies, the study emphasized the need to take into account **the multiplicity of institutional actors in EU and US foreign affairs who evidently impact on the promotion of human rights** of both the EU and the US. The study found that interests of various legislative and executive actors have to be taken into account when identifying the EU's and the US's stance towards human rights and the role which human rights play in the conduct of external policies. In view of this multi-actorness and policy diversity, the Lisbon Treaty foresees that EU external action needs to be coordinated. The study pointed to the functions of the HR/VP in EU external action which are seen to be designed to guarantee the singleness of the EU's external approach, despite a diverse policy-making structure and multiplicity of policy objectives. As such, the **HR/VP's role is to mainstream human rights coherently into the various external actions of the EU**. At the same time the study identified other relevant actors, such as Commission DGs and COHOM, to integrate human rights into their respective actions and decisions. It also pointed to the special role of the European Parliament, which has been portrayed as a champion of human rights and democracy promotion. Compared to the EU, the US also shows features of multiple actorness. But the study also found that the presidential office has become the gravity centre of US foreign policy, and presidential administrations important actors, in determining the role of human rights in US external action. Congress is often seen as having lost out as against the presidential powers in US foreign affairs, but the study emphasized that it should not be overlooked that Congress does introduce human-rights

related legislation, holds the power of the purse and is able to invest and contribute to parliamentary diplomacy.

With regard to the many instruments of foreign policy which aim to set in place action to achieve EU and US foreign policy objectives, it becomes evident that the EU and the US can make use of several similar, but also distinctive tools to promote human rights (EU-US sanctions and EU enlargement policy). While it may be too simple to state the US as being from 'Mars' and Europe as being 'from Venus', the sharpest difference between the two is that the US is militarily equipped and more advanced to take 'ultimate action', while the EU has struggled in building field capacity with regard to civilian or military missions in the context of CSDP. The study found that the **EU's focus on civilian missions can be seen as a complementary tool for EU-US security cooperation**, e.g. in the field of rule of law missions which have a direct impact on human rights. Regarding foreign policy in general, the study emphasized that both the EU and the US will have to invest in soft power, the power of enticement to persuade other actors to follow their examples and a policy of universal human rights. In this context, both the EU and the US face challenges as they both have to ensure the coherence of their own actions, be it internally or externally.

Regarding trade policy, the study found that the EU is a more reluctant enforcer of human rights provisions through FTAs than the US. The study showed that in the EU's case, the **enforcement of human rights provisions tends to be rather weak, even in those cases where complaint mechanisms are available**. At the same time the US was seen as taking a more proactive approach. The study concluded that this divergence might be explained by the FTA model used by the EU and the US and by the different political processes underlying EU and US decision-making in trade.

Human rights and the broader question of democratisation have become intensely intertwined with development assistance frameworks of both the EU and the US. The study found that both actors see **development assistance as a tool to discourage human rights violations through suspending development aid**. Moreover, they try to incentivize performance on human rights and democracy through increasing assistance. The study also concluded that support for strengthening democratic governance and human rights promotion has increased significantly over the last decade in the EU and the US alike. Finally, the understanding that human rights, and in particular the rights of vulnerable groups such as children and women, permeate all areas and sectors of development assistance, has become an EU and US priority in the management of development projects and programmes. Despite this overall similarity in development cooperation, the study also demonstrated that the effective use of development cooperation differs from country to country.

In four case studies the study has emphasized further similarities and differences across EU and US human rights action. Regarding the usage of **Special Representatives in the EU and Special Envoys in the US**, it is interesting to note that the EU has opted for an explicit and transversal Special Representative whose mandate was 'based on the policy objectives of the Union regarding human rights as set out in the Treaty, the Charter of Fundamental Rights of the European Union, as well as the EU Strategic Framework [and] Action Plan on Human Rights and Democracy'. The study showed, by contrast, that **the US does not seem to approach human rights from a cross-cutting perspective when mandating Special Envoys**, but rather focuses on sub-thematic priorities within the broader realm of human rights, including mandates on holocaust issues, anti-Semitism, international disability rights, and international labor rights.

The case study on democracy promotion identified that despite the temptation of international actors to advocate stability over reform, democratisation policy remains a viable tool for both the EU and the US, as it is seen as a) featuring the promotion of their own values and principles, b) fostering peaceful

international cooperation and c) as strengthening transformations along the ideas of modernization theories. In this regard, the study showed that **both the US and the EU are widely regarded as promoting a liberal democratic model**, while the EU, given the diversity of its own Member States' democratic systems, is less keen to advocate a specific model vis-à-vis its international partners. Moreover, both actors have over time invested more and more in the field of democracy promotion. However, in terms of their implementation, the study demonstrated that the EU's approach is seen as being less flexible than that of the US – at least from a US perspective. However, the EU has also invested in adapting to greater flexibility and effectiveness by enabling the creation of the EED under the auspices of the Polish presidency of the Council in 2012.

By focusing on the EU and the US in their practices towards the HRC, the study found that the **respective EU and US priorities at the HRC show a significant amount of overlap**, both in terms of country-specific and thematic issues. This, the study pointed out, could be interpreted as evidence that the EU and the US share similar convictions of which countries should be singled out as the gravest human rights violators world-wide and thus be addressed through HRC resolutions. At the same time the study made clear that critics might argue that both actors merely consider it politically expedient to address certain states instead of others. The analysis also revealed similar goals with regard to civil and political rights, but a broader scope of the EU concerning ESC rights. Moreover, the different positions towards the death penalty permeate EU-US bilateral relations and are equally present in multilateral fora, in particular in the UNGA, but also in the HRC.

Finally, looking at **EU and US policies towards the ICC**, the study found that US policy during the first years of the Bush administration intended to actively undermine and isolate the Court. The EU on the other hand fully supported the ICC from the beginning and has pursued an active policy of promoting the universality and integrity of the Rome Statute as well as the work of the Court. Looking at the current approaches towards international criminal justice revealed a multitude of measures, from direct financial support for the Court by the EU, to military assistance for the capture of ICC fugitives by the US. The study argued that these varying strategies would allow for an encompassing and effective fight against impunity, if the EU and the US are able to achieve greater cooperation in order to ensure consistency and efficiency.

## 8. GENERAL RECOMMENDATIONS FOR THE EU

The entry into force of the Lisbon Treaty has firmly anchored the EU's commitment to integrate human rights into all areas of its internal and external actions and policies. Several new institutional actors, policy tools and financial instruments were established, which were highlighted in this study. Most notably, the Council adopted its landmark Strategic Framework and Action Plan on Human Rights and Democracy in June 2012, in which it pledged to implement its human rights agenda by working towards 36 outcomes and 97 action points.

In light of the Strategic Framework/Action Plan and its follow-up, it is of high value to draw on the lessons learned from (i) both the EU's and US's policy experiences in integrating human rights into their respective foreign policies, as well as (ii) their collaborative efforts in establishing a transatlantic approach towards the promotion and protection of human rights. Further to the preceding comparative analysis, this study formulates three sets of recommendations: on (i) EU-inter-institutional cooperation on human rights, on (ii) the strengthening of EU human rights policies, and (iii) on greater EU-US collaboration on human rights. These suggestions advocate for a more coherent, consistent, and effective pursuit of human rights objectives in the EU's external action.

### *Recommendations for EU inter-institutional co-operation on human rights*

#### **Recommendation 1: Ensure effective implementation of the Strategic Framework/Action Plan**

The Strategic Framework and Action Plan on Human Rights and Democracy has created fertile grounds for a coherent and effective implementation of the EU's external human rights agenda. However, the EU still faces a considerable amount of inter-institutional fragmentation in this respect. In order to ensure coherent and effective implementation, therefore, all EU institutional actors should take up their responsibility as allocated by the Action Plan, whilst also forging more systematic collaboration amongst each other. In particular the HR/VP, with support of the EEAS, should guarantee the implementation of human rights in all the EU's external policies. In doing so, the various EU actors, in particular the EEAS and the European Council will need to play a leading role in formulating EU-wide action on human rights issues by interacting with and mobilizing Member States. Crucially, the European Council will need to consistently provide the political weight in placing human rights at the centre of the Member States' foreign policies.

#### **Recommendation 2: Encourage the European External Action Service (EEAS) to take up its role as the 'guardian of consistency'**

The EEAS should take up a more prominent role as the EU's 'guardian of consistency', by systematically mainstreaming human rights into all areas of EU external action. To this end, the HR/VP and EEAS should take the lead in providing strategic guidance on human rights mainstreaming, as well as in coordinating human rights policies between the European Commission, Council and Parliament. The European Parliament, in turn, should strengthen its role as the 'human rights watchdog', by holding the EEAS accountable in this regard (*see also Recommendation 5*).

#### **Recommendation 3: Encourage the Council's Human Rights Working Group (COHOM) to galvanize support from Member States to mainstream human rights in all areas of EU external action**

The credibility of the EU's external action largely depends on the extent to which it is able to 'practice what it preaches'. Conversely, the human rights track record of Member States can be both an enabler and a hindrance to more coherent and effective EU human rights policies. Further to its enhanced

mandate to ensure that human rights concerns are systematically addressed in the EU's external action, COHOM should therefore continue to forge a bridge between the EU and its Member States. To this end, it should continue to mobilize Member States to provide their respective capacities and expertise in order to further elaborate a substantive and comprehensive EU human rights agenda during the designated Human Rights Working Groups.

**Recommendation 4: Encourage the Commission to take up its role as the 'guardian of the Treaties'**

The Commission occupies a pivotal position in both EU decision-making and policy implementation. As the executive branch of the EU, it disposes of a wide spectrum of policy instruments and tools to ensure that human rights are effectively promoted in third countries. As such, it retains the primary room for manoeuvre to integrate human rights into the EU's external action and, in particular, into its trade and development policies. As the 'guardian of the Treaties', the Commission should ensure that both the design, implementation and enforcement of EU legislation is in full compliance with human rights standards. Developing a strong, 'symbiotic' relationship with the EEAS, the EP and the Council will be a pre-requisite for effective EU external action. In order to foster greater transparency and to adequately address challenges and achievements in integrating human rights in trade and development policies, the Commission together with the EEAS should present annual reports on the trade-development-human rights nexus to the EP and the Council. In turn, these reports could then feed into the EP's annual reports on human rights in the world.

**Recommendation 5: Mobilize the European Parliament (EP) and its members to assertively take on the role of 'human rights watchdogs' of the EU's external action**

Further to the aforementioned role of the EP to act as human rights watchdog, MEPs should seize the opportunities created by the Lisbon Treaty and mobilize to take their role as human rights actors in external action to heart. The EP's competence to review and adopt the EEAS budget, to hold the HR/VP politically accountable and to use its veto / consent power for the adoption of EU legislation or the conclusion of international agreements should be put to effective use to scrutinize commitments in the area of human rights. Moreover, the EP should remind the EU Special Representative for Human Rights to take its concerns into account, and explore further synergies, such as cooperation in the elaboration of the EP's annual reports on human rights in the world (see also Recommendation 6). With regard to the trade-development-human rights nexus, in which the empowered EP has gained considerable room for manoeuvre, the EP should watch over the effective implementation of the Strategic Framework/Action Plan. To this end, it should ensure that all relevant EU decision-making in the trade-development nexus 'works in a way that helps human rights'. In collaborating with the EEAS, a permanent representation of the HR/VP in parliamentary settings may be considered to this end. This could consist of a mandate to carry out a liaising function between the EP and the EEAS, in order to be able to respond swiftly to any human rights-related inquiries raised by the EP.

**Recommendation 6: Clarify the appointment, financing and mandate of EU Special Representatives**

Dubbed 'free electrons' in the institutional set-up of EU foreign policy, confusion still prevails as to how the EU Special Representatives precisely fit into the post-Lisbon structures. In particular with regard to the EU Special Representative on Human Rights, who occupies the only thematic mandate and is thereto mandated to pursue transversal policies, the need to ensure a coherent and effective implementation of EU policy-making is all the more important. Without clarity on their appointment, financing and mandate, however, EU Special Representatives are likely to continue to be subject to the

turf battle between the EEAS and the Council in this regard. The conclusion of the ongoing EEAS review should therefore integrate the revised guidelines on the appointment, mandate and financing of EU Special Representative, and provide more clarity on inter-institutional cooperation with the EU institutions and the Member States. Given that it would be both unrealistic and practically impossible to impose a wide-ranging mandate such as human rights on one individual, the EU could learn from the US experience in appointing a wide range of different Special Envoys mandated to tackle specific human rights themes. In addition, the EUSR for Human Rights should have the competence to establish human rights task forces with a temporary mandate, aimed at tackling the most pertinent human rights issues of the day. By focusing on specific human rights questions and issues, the EU would be able to better flag what it considers to be its top priorities in the promotion of human rights abroad.

### ***Recommendations for strengthening EU human rights policies***

#### **Recommendation 7: A comprehensive foreign policy strategy on human rights should ensure greater cohesion between the various tools and instruments at hand**

This study has highlighted several unique tools the EU has at its disposal through which it can strengthen human rights promotion and protection. In contrast with the US, an explicit focus on human rights mainstreaming is more pronounced, and is embedded in the legal framework provided by the Treaties. However, effective external action on human rights will need to overcome the ‘pillar’ divide between CFSP/CSDP on the one hand, and other external policies, such as trade and development cooperation policies, on the other. The ‘comprehensive approach to external conflict and crises’ is a good example of how the EU can bring together instruments and formulate coherent actions. Such comprehensive approach should not be limited to security matters or crisis situations. The EU should be aware that only the coordination of several tools will lead to effective output in the field of human rights. The various outcomes and actions for EU external action as laid out in the Strategic Framework/Action Plan should be reassembled into one policy approach covering all EU actors as well as Member States. At the level of EU Delegations, the elaboration of ‘Human Rights Country Strategies’ is already a step in this direction. However, currently little is known about the content and follow-up of these policies, or how they constitute a comprehensive approach which also entails input and action by Member States. More transparency on their impact and implementation would be necessary to build on this experience. In this sense, the EU could learn from the US in having public Human Rights Country Reports which contribute to internal strategic planning while at the same time serving as a ‘naming and shaming’ tool.

#### **Recommendation 8: Ensure greater consistency, coherence and harmonization in the use of conditionality frameworks to incentivize the human rights performance of partner governments**

The study illustrated how both the US and the EU provide incentives and disincentives to partner countries based on their human rights track record. In the area of trade and development cooperation, the EU has in place various conditionality frameworks which integrate human rights. However, in both the formulation and application several levels of incoherence and inconsistency should be addressed. Like the US, the EU could consistently apply human rights conditionality in trade by employing the same standard clauses in all EU international agreements. There is also a lack of coherence in how human rights are included as an essential element in cooperation agreements, and how human rights are integrated as a substantive condition for providing more or less EU development assistance. In this area, the EU should foster greater coherence between EU institutions and Member States in providing different types of assistance, in particular budget support. As set out in the Strategic Framework/Action

Plan, the Commission, EEAS and the Member States should develop criteria for the application of the human rights clauses included in the EU's partnership agreements to ensure the 'effective use and interplay of EU external policy instruments', given that currently this action has not yet been realized.

**Recommendation 9: Consistent monitoring and reporting to ensure both EU actors and Members States**

Current self-reporting on human rights policies should be complemented by a structurally embedded accountability mechanism, for example through the establishment of an agency, tasked with monitoring the EU's conditionality policies which emulates the FRA's function in the area of external action. Given the range of human rights considerations stemming from the EU's international agreements, the need to foster an 'institutional memory' in devising human rights-sensitive policies, can also be highlighted.

**Recommendation 10: Further develop coherent EU action for effective democracy promotion**

Although investment in democracy assistance has increased, the EU has been characterized as a more risk-averse actor than the US, preferring stability and concentrating on gradual 'state-centric' governance reforms. More comprehensive engagement with civil society actors and the establishment of flexible funding mechanisms such as the European Endowment for Democracy (EED) indicate that the EU is keen on engaging with 'bottom-up' democratic reformers. To adequately provide such support, coordinating the interplay between EU actors will become more crucial. Moreover, strategically linking conditionality policies, state-centric reform programmes and support for bottom-up democratic reformers will require the EU to be equipped adequately.

**Recommendation 11: Develop and strengthen the coordination of EU-wide action in relation to the Human Rights Council and the International Criminal Court**

Unlike the US, the EU has positioned itself as a strong supporter in developing international and multilateral institutions which address human rights accountability on a global scale. Despite this commitment, the EU's position and capacity to support such mechanisms remains hampered by a lack of strategic cooperation between EU Member States and a lack of internal consistency. In this regard, the implementation of the Rome Statute by all EU Member States should be a priority. Concerning the HRC, the EU should strategically exploit its capacity to bring forth a clear EU-wide position, while continuing to make use of each individual Member State's voice. The difficult challenge of coming to diverse, cross-regional coalitions within the HRC might be achieved more effectively if the EU avoids to profile itself as an 'overwhelming bloc'. The question of internal consistency is also crucial in enhancing the EU's overall credibility as a player in the HRC.

***Recommendations for EU-US collaboration in human rights***

**Recommendation 12: the EU and the US need to coordinate more effectively on their external policies in the field of human rights at various levels of decision-making**

Despite both embracing the notion that the promotion of human rights is a key aspect and objective of foreign policy/external action, a lack of knowledge and engagement characterizes how the EU and the US interact with each other in this area. Although both have similar tools and instruments at their disposal, the study found little evidence of well-embedded strategic coordination between Brussels and Washington with regards to human rights. At the level of policy formulation, more could be done to substantiate their common commitment to addressing human rights in third countries. Various levels of interaction could be explored to develop complementary actions and priorities. The EP and the US

Congress could use the transatlantic 'legislators' dialogue, a forum of open dialogue about differences and future cooperation based on common objectives, to foster their common understanding and coordination of human rights policies. At the level of the executive branch, the EEAS and US State Department (as well as other US departments) could interact more systematically on their respective instruments, strategies and policies on human rights. Furthermore, greater coordination and exchange of information between US missions and EU Delegations can be considered essential in the 'downstream' implementation of policies on human rights. In a similar vein, the EU Special Representative on Human Rights should establish a recurring dialogue with its thematic counterparts amongst the US Special Envoys. The EU could also consider learning from the US experience in placing more emphasis on thematic mandates, and highlight specific human rights priorities it would like to promote on the world scene by establishing a designated EU Special Representative thereto.

**Recommendation 13: Aligning EU and US conditionality frameworks can enhance joint leverage and provide greater incentives for partner governments to respect and protect human rights**

Both the EU and the US condition the provision of development assistance and the adoption or granting of beneficial trade arrangements to partner countries on their human rights track record. Although coherence and consistency is often lacking in terms of implementation at both sides, there is ample room for exploring synergies in this area. Forging a stronger partnership on human rights-related trade policies and aligning conditions on the amount and type of development assistance the EU and US provide to partner countries, could lead existing efforts to have a much greater impact. Both in responding to human rights violations by diminishing trade and assistance benefits, or in efforts to set positive conditionalities for incentivizing compliance and progressive realization of human rights, the EU and the US could consult and coordinate in a more systematic manner.

**Recommendation 14: Coordinate EU and US democracy assistance and human rights promotion within third countries**

The EU and the US are the largest providers of democracy assistance worldwide. None the less, between the two there seems to be little systematic coordination in terms of global or country level strategies. In addition to internal coordination between EU mechanisms and coordination with EU Member States, fostering greater inter-linkages with US democracy assistance actors seems timely as the EU seeks to become a more prominent supporter of democratic reformers. At the country level, greater stocktaking of each other's actions and exploring potential connections between various initiatives would be a first step. Concerning the various countries which currently find themselves in a fragile transition period (e.g. Libya, Myanmar, among others), the need to harmonize and step up joint EU-US efforts is pertinent.

**Recommendation 15: Explore greater EU-US coordination and complementary action within the Human Rights Council and with regards to the International Criminal Court**

Clear and consistent support from the EU and the US are essential to the functioning of both the HRC and ICC as global human rights accountability institutions. At the same time, divergent positions have weakened these mechanisms. Concerning the HRC, the EU and the US have overlapping priorities and share a similar vision on its institutional set-up and mandate. Closer cooperation during negotiations can help the EU to play a more prominent role. However, rather than consolidating an 'EU-US bloc', both should coordinate strategically and tactically to foster cross-regional partnerships within the HRC. In addition, the credibility of the EU and the US suffers when they turn a blind eye to each other's human rights record. Given their strong partnership, both the EU and the US should be willing to openly address sensitive human rights issues such as the US's use of the death penalty, or each other's policies



towards minorities and the treatment of immigrants. Regarding the ICC, Joint EU-US cooperation remains problematic, although the more constructive approach of the Obama Administration has cleared the way for greater synergies. To build on this development, the EU should engage in a continuous and open dialogue with the US on the ICC and issues of international criminal justice more generally. Concretely, a higher degree of coordination between EU and US on measures in the field of international criminal justice can increase consistency and the efficient use of resources.

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## 10. ANNEX

#	Country /Region	EU Agreement (status)	Human Rights Language	US Agreement (status)	Human Rights Language	Outcome and Concerns
1	<b>Australia</b>	N/A	N/A	US-Australia FTA (entered into force, 2005)	FTA Chapter 18: Labor <sup>650</sup>	N/A
2	<b>Bahrain</b>	EU-GCC FTA (negotiations suspended by GCC in 2008)  <i>Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and United Arab Emirates</i>	N/A	US-Bahrain FTA (entered into force, 2006)	FTA Chapter 15: Labor <sup>651</sup>	Protection against anti-union discrimination reinforced <sup>652</sup>
3	<b>Canada</b>	EU-Canada Comprehensive Economic and Trade Agreement (political agreement reached in 2013)	No final text published	US-Canada-Mexico NAFTA/NAALC (entered into force, 1994)	FTA Chapter 15: Labor <sup>653</sup>	N/A
4	<b>Central America</b>	EU-Central America Association Agreement (provisionally entered into force, 2013)  <i>Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama</i>	No final text published	US-Central America-Dominican Republic FTA (entered into force, 2004)  <i>Costa Rica, El Salvador,</i>	FTA Chapter 16: Labor <sup>654</sup>	N/A

<sup>650</sup> US-Australia FTA, text available online: [http://www.ustr.gov/sites/default/files/australia\\_FTA\\_Labor.pdf](http://www.ustr.gov/sites/default/files/australia_FTA_Labor.pdf), accessed on 28.8.2014.

<sup>651</sup> US-Bahrain FTA, text available online: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset\\_upload\\_file73\\_6297.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file73_6297.pdf), accessed on 28.8.2014.

<sup>652</sup> International Institute for Labour Studies, supra, n. 234, p. 37.

<sup>653</sup> US-Bahrain FTA, text available online: [http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset\\_upload\\_file73\\_6297.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/fta/bahrain/asset_upload_file73_6297.pdf), accessed on 28.8.2014.

<sup>654</sup> US-CAFTA FTA, Chapter 16: Labor, available online: [http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset\\_upload\\_file320\\_3936.pdf](http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file320_3936.pdf), accessed on 28.8.2014.

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