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Policy Department External Policies

THE ROLE OF THE EUROPEAN UNION IN THE HUMAN RIGHTS COUNCIL

HUMAN RIGHTS

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EXECUTIVE SUMMARY

The European Union has and continues to place human rights and democracy at the heart of its external relations, namely through its activities in the UN human rights system. With the ongoing criticism about the inadequacies of the UN Commission on Human Rights Kofi Annan recommended that this ailing body be replaced with a new and more effective Human Rights Council. In light of the European Union's desire to further human rights and democracy across the globe it rapidly got involved in playing an active and visible role in the overarching UN human rights reform process.

Negotiations for establishing the Human Rights Council in addition to the deliberations of the mandated working groups outlining the details and modalities of the Council involved making difficult and demanding decisions. The different opinions and positions not only led to a delayed inception but also generated concerns that the new Council would not be any more efficient or credible than its predecessor. Many have claimed that its first operational year has produced disappointing results by not taking more concrete action regarding countries facing dire human rights crises such as Zimbabwe. In contrast, others argue that in its first year the Council did achieve a number of successes including the modalities of the Universal Periodic Review process, the review of UN Special Procedures, the adoption of the codes of conduct for mandate holders in addition to the adoption of a number of resolutions of great importance in the Council's plenary.

The European Union actively participated in each phase and in all areas of the Human Rights Council from the setting up process to engaging in the sometimes arduous negotiations of both procedural and substantive matters. While it has indeed been successful in the workings of some areas the EU's shortcomings have recently overshadowed its achievements. The following study explores the role of the EU in the Human Rights Council from the setting-up process to its contributions in the review of the UN Special Procedures, the UPR process and the plenary sessions since the Council's inception. Following the highlighting of both the EU's achievements and shortcomings the study concludes with five core recommendations that have the potential to help rectify the challenges currently faced by the European Union in the Human Rights Council.

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INTRODUCTION

“With the creation of the Human Rights Council a new era in human rights work of the United Nations has been proclaimed.” - Statement by Kofi Annan

Recognizing the drawbacks of the UN Commission on Human Rights Kofi Annan in his Report “In Larger Freedom: towards development, security and human rights for all” declared that the UN Commission on Human Rights suffered from a “credibility deficit”¹ and that its current form was undermined by the *politisization* and *selectivity* of its work. Accordingly the then Secretary General called for the establishment of a Human Rights Council, with the objective of rectifying the failures of the Commission. Most countries and NGO’s welcomed this initiative as it was markedly clear that in light of the contemporary human rights challenge and the shortcomings of the Commission it was vital that the UN human rights system be reformed. The European Union being a strong supporter and advocate of the initiative aspired to take on an active role in both the setting-up process and functions of the Council to ensure that it would be a strong and effective body².

Following the agreement to establish a Human Rights Council by heads of state at the 2005 UN Summit UN Member States immediately engaged in negotiation processes to outline the modalities of how the Council could operate, its mandate, functions and working methods in the hope of finalizing the negotiations and establishing the Council by the end of 2005. The task however was seemingly more difficult in practice, therefore, making it impossible to reach any form of agreement by the desired date. The European Union undertook a variety of lobbying and outreach activities with the aim of gaining support to create an effective mechanism at the earliest date possible, but continued to face disagreement by a number of delegations. Following various channels of effort by the European Union and likeminded states the UN General Assembly adopted Resolution 60/251 in March 2006 creating the new Human Rights Council. The adoption of the resolution however was merely the first building block.

The establishment of the Human Rights Council has frequently been heralded as the “dawn of a new era” for the protection and promotion of human rights in the UN System. Recently, many have challenged that notion claiming that the Council *could* and *should* do more to live up to its founding resolution. Since its inception Members of the Council have engaged in arduous and taxing discussions regarding a wide range of fundamental practical and substantive areas including membership criteria, special procedures, codes of conduct for mandate holders, complaint mechanisms, the creation of a universal periodic review, country specific sessions and many other areas, all of which have raised deep concern during the course of the Council’s first cycles. From the beginning the European Union declared that:

¹ UN Secretary General Kofi Annan’s Report “In Larger Freedom: towards development, security and human rights for all”, 21 March 2005, para 182.

² See General Assembly of the United Nations, EU Explanation of vote on the draft resolution on the Human Rights Council (L.48); Statement by Ambassador Gerhard PFANZELTER, Permanent Representative of Austria to the United Nations, on behalf of the European Union, 15 March, 2006.

“The EU will make every effort to ensure that the Human Rights Council will be able to fulfil its mandate responsibly and effectively. The European Union will work closely with all UN Member States in the implementation of the resolution in order to make sure that the Council will be able to start its work in such a way as to turn our expectations into reality.”³

Against this background, the study will examine how the European Union is living up to its declared commitments; from the setting up process of the Human Rights Council to turning ‘*expectations into reality*’. The structure of the study has respectively been set up as follows: Part One will elaborate upon the setting up process and the role the European Union played therein. Part Two will examine the role the European Union played in the work and deliverables of the Council, more specifically, in the review process of UN Special Procedures, the Universal Periodic Review process and the output of the Human Rights Council plenary sessions. Part Two will also highlight the EU’s achievements and shortcomings in the abovementioned working areas of the Council. The study will conclude with recommendations on how the EU can improve its role in the Human Rights Council so as to ensure that the new Human Rights Council can legitimately be hailed as the “dawn of a new era”.

³ Declaration by the Presidency on behalf of the European Union on the establishment of the UN Human Rights Council, Brussels, 16 March 2006.

PART I. Setting Up of the Human Rights Council and the Role of the European Union

The diplomatic initiative for the creation of a Human Rights Council originated in the Swiss Department of Foreign Affairs. It was primarily based on the idea that despite its great achievements the Commission on Human Rights needed to be reformed. In 2003, in order to identify precisely what reforms could be envisaged, the Swiss Department of Foreign Affairs asked Professor Kälin and Cecilia Jimenez, from the Bern institute of Public Law, to come up with concrete reform proposals. In their report they suggested the creation of a Human Rights Council to replace the Commission on Human Rights. In March 2004, during the 60th session of the Commission, the proposal was put forward by Micheline Calmy-Rey, the Swiss Minister for Foreign Affairs: “In the context of the overall process of reflection on the reforms of the United Nations, Switzerland also intends to propose to the Panel on Threats, Challenges and Change (...) some strong ideas on the creation of a Human Rights Council which could, for example, take the form of a fourth principal organ of the United Nations”⁴. At the same session, Ireland, speaking on behalf of the European Union, did not comment on that proposal⁵. On 4 October 2004, the Netherlands, speaking on behalf of the European Union before the General Assembly, insisted on “the importance of an effective Commission on Human Rights as the preeminent body for the protection and promotion of human rights”⁶, therefore did not seem to envisage its replacement by a Human Rights Council at this stage. However, the position of the European Union rapidly evolved.

In their report, released in December 2004, the High-Level Panel on Threats, Challenges and Change recommended the reform of the Commission on Human Rights and, in the longer run, the creation of a Human Rights Council⁷. The Report of the Secretary-General, *In Larger Freedom*, released in March 2005, called even more clearly for the replacement of the Commission on Human Rights by a Human Rights Council⁸. During the Commission on Human Rights’ 61st session, that same month, Micheline Calmy-Rey clarified further the intentions of the Swiss government by affirming: “In the longer term, Switzerland support[s] the idea of creating a Human Rights Council on an equal footing with the Security Council or the Economic and Social Council, so that the institutional status of human rights would correspond to their political importance for international peace and security throughout the year”⁹. The representative of Luxembourg, which held the presidency of the European Union at the time and therefore spoke on behalf of the European Union, underlined that “the European Union intended to participate actively in the process of reflection initiated

⁴ Commission on Human Rights, Sixtieth session, Summary Record of the 4th meeting, 16 March 2004, E/CN.4/2004/SR.4, “Statement by the Minister for Foreign Affairs of Switzerland”, para. 9.

⁵ Commission on Human Rights, Sixtieth session, Summary Record of the 3rd meeting, 15 March 2004, E/CN.4/2004/SR.3, “Statement by the Minister for Foreign Affairs of Ireland, on behalf of the European Union and the Acceding States and Candidate Countries”, para. 1-13.

⁶ A/59/PV.18, 4 October 2004, p. 5.

⁷ A/59/565, “A More Secure World: our Shared Responsibility”, Report of the High-level Panel on Threats, Challenges and Change, para. 291.

⁸ A/59/2005, Report by the Secretary-General, “In Larger Freedom: towards Development, Security and Human Rights for All”, para. 183.

⁹ Commission on Human Rights, Sixty-first session, 14 March 2005, Summary Record of the 3rd meeting, 18 March 2005, E/CN.4/2005/SR.3, para. 43.

by the report of the (...) High-level Panel on Threats, Challenges and Change (...) with a view to enhancing the Commission's potential"¹⁰. He further added that "the idea of universal membership of the Commission or, in the longer term, of the establishment of a Human Rights Council was interesting and should be considered in the broader context of United Nations reform"¹¹. Less than a month later, Luxembourg declared before the General assembly that the European Union "welcome[d] the presentation of a proposal reflecting the primacy of human rights by the creation of a Human Rights Council"¹².

It then took less than six months for the EU to fully endorse the idea of setting up a new UN body, entirely devoted to human rights protection, the Human Rights Council. Before and during the World Summit of 14-16 September 2005 the EU vigorously supported the creation of the Human Rights Council. In fact, it was actively involved in the preparation of the UN Summit and made its position very clear, notably through the adoption by the European Commission, three months before the actual summit, of a Communication on "The 2005 Summit-Addressing the Global Challenges and Making a Success of the Reformed UN"¹³. In this Communication, the European Commission outlined the main aspects of the EU's position regarding the setting up of the Council: its Members should be elected by the General Assembly, in this process their human rights records should be taken into consideration, the special procedures should be maintained, the new review mechanism should rest on both treaty obligations and non-binding commitments and the Human Rights Council should be established as soon as possible after the Summit¹⁴. More precisely, the Luxembourg representative, speaking on behalf of the EU, affirmed in a statement before the UN General Assembly on 21 June 2005 that the EU

"[ed] to establish the Human Rights Council as a main freestanding Charter body of the UN, linked to the General Assembly, reflecting, at the institutional level, the centrality and universality of human rights, and the EU's concern to put human rights on the same footing as issues of development and of peace and security. Pending a decision the General Assembly might take on the establishment of such a body, the HRC should be established as a subsidiary body of the General Assembly, thus creating a link with a universal body. A Human Rights Council, whose membership is elected at a two thirds majority of the General Assembly on the basis of equitable geographic representation, will gain in status and legitimacy. An equitable peer review mechanism could be established. The Human Rights Council should address urgent human rights violations in an effective manner and promote the mainstreaming of human rights, while maintaining the main tasks of the CHR. (...) We do not need to reinvent the wheel. Central features of the CHR, such as the special procedures and the very positive participation of NGOs as well as national

¹⁰ Ibid, para. 7.

¹¹ Ibid.

¹² EU Presidency, Statement by the Representative of Luxembourg to the United Nations, Formal Plenary Session of the UN General Assembly, PRES05-032EN, 6 April 2005.

¹³ European Commission, COM (2005) 259 final, 15 June 2005.

¹⁴ Ibid., 8.1.1.

human rights institutions in the proceedings of the CHR, are to be maintained and further strengthened”¹⁵,

It must be said that during the World Summit, not many decisions regarding the concrete work and shape of the future Human Rights Council were taken. Indeed, in Resolution 60/1 on the World Summit Outcome, adopted on 16 September 2005, States simply affirmed their will to create a Human Rights Council that would be “responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner”¹⁶ and “should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system”¹⁷. Finally, the Resolution urged the “President of the General Assembly to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council”¹⁸. In short, apart from the actual decision to create a Human Rights Council, the Summit did not produce any concrete result regarding the practicalities of the Council. This outcome came as a disappointment for the European Union. As the European Commissioner for External Relations and European Neighbourhood Policy put it on 16 September 2005 during the UN high-level meeting,

“the Commission on Human Rights has lost its ability to act effectively on behalf of victims, and thus its credibility. Forming a new, smaller and more functional Human Rights Council will help the UN become a real driving force behind human-rights protection. Unfortunately, we could not agree any of the necessary details ahead of this Summit. I confess being disappointed at this meagre outcome which does not meet our ambitions. Let us not lose the momentum and finish this important chapter by February 2006! I express our full confidence in President Eliasson's leadership to fulfil this mandate before us”¹⁹.

A day later, the UK representative, speaking in the General Assembly about the Summit on behalf of the European Union, stated that the EU “welcome[d] the Outcome as a whole”²⁰ but noted that “like the Secretary-General, the EU had hoped for greater progress in some areas”²¹, in particular had hoped for “a more substantial terms of reference for the new Human Rights Council”²². Following the relative failure of the World Summit regarding the setting up of the future Council, energy was then devoted to working on the more practical aspects of the Human Rights

¹⁵ EU Presidency, Statement by the Representative of Luxembourg to the United Nations, General Assembly, PRES05-079EN, 21 June 2005, para. 25-26. The substance of this declaration was reaffirmed on 22 July 2005 in the document outlining the European Union Priorities for the 60th Session of the United Nations General Assembly.

¹⁶ UNGA Res. 60/1, para. 158.

¹⁷ *Ibid.*, para 159.

¹⁸ *Ibid.*, para 160.

¹⁹ European Community Statement by Dr Benita Ferrero-Waldner, UN High Level Meeting, 16 September 2005.

²⁰ Statement by the Foreign Secretary of the United Kingdom, General Debate of the 60th Session of the UN General Assembly, 17 September 2005, para. 4.

²¹ *Ibid.*, para. 5.

²² *Ibid.*

Council so as to ensure that it could be set up as early as possible. As the UK representative stated on 4 October 2005, work

“must begin within the next few weeks on a standing Human Rights Council with a strong mandate. We should aim to finish our work by the end of the year in order to facilitate a smooth transition between the Commission on Human Rights and the Human Rights Council. Expectations of our public opinions are high in this regard. We should live up to the resolve of our Heads of States and Governments to further strengthen the UN human rights machinery. In our further work, we might benefit by drawing on suggestions for the main elements of the new Council that evolved during the lengthy preparatory process leading to the Summit. The EU looks forward to working with partners to make the vision a reality as soon as possible. It is of utmost importance that the Human Rights Council has the appropriate tools to promote and protect all human rights. We have to achieve a genuinely effective and credible Council if we want to give substance to the principle that human rights is at the very heart of the UN's work on peace, security and development”²³

As planned, a period of consultation began after the Summit. The President of the General Assembly appointed the Ambassadors Arias of Panama and Kumalo of South Africa as leaders of the negotiations. During the consultations, it was not always easy to reconcile the different EU Member States' positions in order to present a unified position. However, Austria, who held the Presidency of the European Union from January to June 2006, was “able to bring through skills and persistence the EU into supporting compromise”²⁴. During this period, the positions of the EU were very pragmatic. Conscious of the practical difficulties entailed by the creation of a new body in an area as sensitive as human rights, Ambassador Jones Parry, representative of the United Kingdom, that held the EU Presidency from July to December 2005, noted:

“The creation of a new body is complex. I believe that we must first aim for agreement on the main points which would give us the shape and function of the new body: status, size, mandate, composition etc. We have been discussing these issues for many months, (...) resulting in the World Summit Outcome document. And I believe with a real effort, we can conclude discussions and reach agreement on these issues relatively quickly, preferably as many have said by the end of the year, allowing us to set a date for elections to the Council and its establishment. Other issues, such as detailed methods of work and the relationship with the Third Committee, we can discuss at a later date. (...) The European Union is ready to engage proactively in these consultations and to play a constructive part in subsequent negotiations. We are prepared to listen to ideas of others and to come to agreement with all delegations on a Council which will be the effective and efficient body this organisation needs. But we are not prepared to enter into fruitless debate on a process that is

²³ EU Presidency, Statement by the Permanent Representative of the United Kingdom to the United Nations, General Assembly, PRES05-238EN, 4 October 2005.

²⁴ Peter Maurer, “About the Negotiation Process in New York (from 2005 until 2006): Of Ants, Caterpillars and Butterflies”, in Lars Müller (ed), *The First 365 Days of the United Nations Human Rights Council*, Swiss Department of Foreign Affairs, 2007, p. 35.

designed to delay rather than progress. The issues before us are clear; the goal is clear, and the action we need to take is clear”²⁵.

Numerous informal meetings followed the Summit, in which the EU outlined its position on a few key issues. To begin with, it insisted on several occasions on the fact that the details of the Council’s work should be left open for further discussions and that current discussions should focus on the main issues²⁶. The EU strongly supported the Human Rights Council as a standing body and as a main organ of the United Nations, while recognizing the difficulties entailed by this last point and favouring the creation of the Council as a subsidiary body of the General Assembly to begin with. The EU also favoured a body of the same size or smaller than the Commission on Human Rights, that would be made of States that are “genuinely interested in the promotion and protection of human rights”²⁷. The EU also encouraged the election of the Council’s Members by a 2/3 majority in the General Assembly and the idea that “prospective members 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 term of office”²⁸. The EU reiterated its views on these key issues on several occasions²⁹ and only when faced with insurmountable obstacles did it finally adopt more consensual positions. For instance, on the issue of making the Council a standing body, it conceded that “at a very minimum the Council should have no fewer than 4 to 6 meetings per year and it must have a total duration of no less than 12 weeks”³⁰.

At the end of the negotiation process, the Human Rights Council was officially created by the UN General Assembly Resolution 60/251 of 15 March 2006. Gerhard Pfanzelter, Permanent Representative of Austria to the United Nations, speaking on behalf of the European Union, after having voted in favour of the resolution, noted that “not everything that the EU had aimed for is reflected in the resolution. However, (...) it represents an improvement over the Commission on Human Rights”³¹.

²⁵ EU Presidency, Statement by the Representative of the United Kingdom, General Assembly, PRES05-249EN, 11 October 2005.

²⁶ For instance, EU Presidency, Statement, PRES05-264EN, 18 October 2005.

²⁷ EU Presidency, Statement, PRES05-275EN, 24 October 2005.

²⁸ Ibid.

²⁹ EU Presidency, Speaking Points-Human Rights Council, PRES06-002EN, 11 January 2006; EU Presidency, Statement by the Permanent Representative of Austria to the UN, PRES06-017EN, 6 February 2006.

³⁰ EU Presidency, Statement by the Permanent Representative of Austria to the UN, PRES06-017EN, 6 February 2006.

³¹ UNGA, EU Explanation of vote on the Draft Resolution on the Human Rights Council (L.48), 15 March 2006.

PART II. The Role of the European Union in the Human Rights Council

Following its establishment the elected Members of The Human Rights Council (HRC) at last received the opportunity to utilize the Council's new features to its greatest extent. The new body - currently embracing a higher institutional status, a more credible membership system, frequent meetings, a 1/3 endorsement for special sessions, and most significantly, a Universal Periodic Review Mechanism that will examine the fulfillment of human rights commitments and obligations of all UN Member States independent of the existing treaty body reporting system- were put to the test in its first year between 19 June 2006 and 18 June 2007. The primary foci of the first year were to carry out its institution building activities in a quick and efficient manner. In addition to these activities a wide range of substantive human rights issues (60 thematic and geographical issues) were addressed in the given time period. In the context of standard setting noteworthy achievements include the adoption of two human rights standard-setting texts: the International Convention for the Protection of All Persons from Enforced Disappearances³² and the UN Declaration on the Rights of Indigenous Peoples³³. Further, there were continuous efforts aimed at establishing complementary standards on combating all contemporary forms of racism, efforts towards the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and towards setting up concrete norms in the area of the right to development.

The work of the Human Rights Council following its first year was severely scrutinized and criticized leading many to argue that it was a "disastrous first year"³⁴ based primarily on the "Council failing to take action regarding countries facing human rights crises such as Burma, Colombia, Somalia, Turkmenistan, and Zimbabwe, ended the mandates of human rights experts on Belarus and Cuba, and rolled back its consideration of the deteriorating situations in Iran and Uzbekistan"³⁵. The efforts of the European Union therein have and continue to be criticized notably with respect to the renewal of mandates and its "hamstrung desire to first achieve consensus"³⁶ rather than speaking "sooner and more forcefully on the issues that they care about"³⁷. While the EU has been successful in some areas of the Council's work

³² The text was adopted by the UN General Assembly on 20 December 2006 and opened for signature on 6 February 2007, (A/HRC/1/L.2).

³³ The Declaration was adopted by the UN General Assembly on 13 September 2007. The final result of the discussions regarding its amendments and revised resolution can be found in UN General Assembly Resolution 61/178 entitled Working Group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of UN General Assembly resolution 49/214 of 23 December 1994.

³⁴ The Heritage Foundation, statement made by Brett D Schaefer at the Subcommittee on International Operations and Organizations, Democracy and Human Rights of the Committee on Foreign Relations of the United States Senate on July 26, 2007.

³⁵ Human Rights Watch, statement made by Peggy Hicks at the Subcommittee on International Operations and Organizations, Democracy and Human Rights of the Committee on Foreign Relations of the United States Senate on July 26, 2007.

³⁶ Human Rights Watch, Peggy Hicks "How to Put the UN Rights Council Back on Track" Human Rights Watch Commentary can be found at: <http://hrw.org/english/docs/2006/11/03/global14503.htm>

³⁷ Ibid.

it has arguably fallen short in others. The following section will examine the role of the European Union in the Human Rights Council with an emphasis on a) the UN Special Procedures; b) the Universal Periodic Review mechanism and process; and c) the output of Human Rights Council plenary sessions- a general overview. Recognizing that in the Council's first operational cycles a variety of other practical and substantive areas were addressed, the authors selected these three aspects on the basis that they exemplify areas of great magnitude for the Human Rights Council to live up to resolution 60/251.

A. The United Nations Special Procedures

United Nations special procedures have long been seen at the heart of the UN human rights system. ECOSOC's landmark resolution 1235(XLII) of 1967 created the path for annual public debates in all countries "to examine information relevant to gross violations of human rights and fundamental freedoms" and "in appropriate cases make a thorough study of situations which reveal a consistent pattern of violations of human rights"³⁸. This very resolution is what set the foundations for the creation of special country and thematic procedures. It was not until 1993 at the World Conference on Human Rights that the special procedures mandate holders all met for the first time and presented themselves as a 'system of human rights protection'³⁹. From that point on meetings of mandate holders would take place on a regular basis to discuss common areas of concern. Following the negotiations on replacing the UN Commission on Human Rights with the Human Rights Council, Resolution 60/251 decided that the Council shall "(...) review and, where necessary, improve and rationalize all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights in order to maintain a system of special procedures, expert advice and a complaint procedure (...)"⁴⁰. In view of that, at the 2005 special procedures annual meeting, mandate holders agreed to create a "Coordination Committee" composing of five mandate holders, with the aim of representing the "special procedures", as such, in the review process.

With the ever increasing number of special procedure mandates since the early 1990's concerns generated over funding, staff and a "system overload" leading to the danger of: "you water all plants, but each plant gets just too little water and they all die"⁴¹. Other challenges within the system including the selection process of mandate holders, the need to strengthen cooperation of States being visited, methods and codes of conduct, also raised concerns, therefore stimulating a need for a review. Furthermore, in light of the new Universal Periodic Review mechanism, the role of special procedures and the cooperation therein needed to be clarified. The European Union took an active role in both the consultative process leading up to the establishment of the Working Group on Special Procedures and in the debates of the

³⁸ ECOSOC Resolution 1235 (XLII), 6 June 1967, paras1-3. Also see Jeroen Gutter, Special Procedures and the Human Rights Council: Achievements and Challenges Ahead. 7 Human Rights Law Review 93, 2007.

³⁹ *ibid*

⁴⁰ UN General Assembly Resolution 60/251 establishing the Human Rights Council, 3 April 2006, A/RES/60/251, para 6.

⁴¹ See intervention by Toine van Dongen, Preparatory Committee of the World Conference on Human Rights, 12 September 1991, quoted from *supra* 1.

Working Group itself, mainly, by voicing opinions and suggestions in the deliberations.

It was not until the second session of the Human Rights Council in October 2006 that Special Procedures were discussed and considered in depth. Finland on behalf of the European Union emphasized the importance of identifying ways to strengthen and improve the Special Procedures, in particular the capacity and effectiveness of the system to protect victims of human rights violations. The European Union also highlighted the importance of ongoing engagement between the Human Rights Council and the Special Procedures. Further, it suggested that expert advice from mandate holders be drawn in new ways and accordingly explore different options in this regard⁴². While most States agreed with their position, the main challenge at hand was how to materialize it.

Four working group sessions were held between February and June 2007 to discuss more detailed procedural and technical aspects of the special mandates including working methods, review process, and the rationalization and harmonization of the existing system. The European Union had a strong presence in all of the discussion areas and made solid statements and suggestions regarding each, notably in reference to working methods where it suggested and received the Council's endorsement on:

“That if no reply to requests for visits or no concrete schedule for the visit was agreed upon within a reasonable period of time (e.g. 12 months), special procedures could consider issuing reports on a country situation without visiting the country but after informing the concerned State. Further a compilation of principles or best practices for government cooperation may be considered focusing on full, free and timely access for mandate holders in accordance with the standard terms of reference and to ensure protection of persons who have cooperated with special procedures.”⁴³

Much of the debates in the Working Group sessions revolved around ‘regulating the work of the special procedure mandate holders’⁴⁴. Accordingly the primary foci were on drafting a “code of conduct” vis-a-vis the adoption of Council resolution A/HRC/2/L.2/Rev.1 in its November 2006 session⁴⁵. The European Union from the off-set was against imposing stringent measures and voiced its position in the various sessions. Germany (on behalf of the EU) stated that “in light of the already existing documents, in particular the Manual of Special Procedures (the Manual), the EU did not see any added value in an additional document. Further, the work of the special procedures should be a matter of self-regulation and the special procedures should continue elaborating their own Manual through the Coordination Committee⁴⁶.” The last Working Group Session in June 2007, which focused solely on the Code of

⁴² EU intervention in Debate on Future of Special Procedures, Expert Advice and Complaint Mechanism. 3 October 2006.

⁴³ See EU intervention (Finland on behalf of the EU) in The Working Group on Review of Mechanisms and Mandates, 21 November, 2006.

⁴⁴ This was a result of the numerous proposals submitted by the OIC and African Group wishing to regulate the work of the mandate holders. Commonly referred to as the “negative reform agenda” it was nevertheless supported by 30 of the 45 members of the Council.

⁴⁵ A/HRC/2/L.2/Rev.1, 27 November 2006.

⁴⁶ See EU intervention in Human Rights Council Working Group on Review of Mechanisms and Mandates, 2nd sessions, 5-16 February, 2007.

Conduct for Special Procedures,⁴⁷ was in spite of opposition from various WEOG members, adopted without a vote in the Council on 18 June 2007. Moreover, and more importantly, in the same Council session Resolution 5/1 on Institution Building of the Human Rights Council was also adopted, which included provisions on the selection of mandate holders and the review of all special procedures mandates.

The review process of the special procedures was regarded as a very important agenda item in the Council's sessions. The European Union took a very active role therein and at times was viewed as a chief and influential player in the processes such as in the segment on Special Rapporteur Ms Asma Jahangir's mandate on freedom of religion or belief. As the main co-sponsor of the mandate's resolution the EU's principal tool that enabled it to gain the support needed were the numerous informal consultations it held in the September 2007 session. At the time of submitting the final text however some states argued that it did not focus exclusively on the "review, rationalisation and improvement" of the given mandate. Accordingly, the EU recalled now paragraph 61 of Resolution 5/1, which states "Mandates (...) will be renewed until the date on which they are considered by the Council according to the programme of work". In light of the opposition the EU faced in the latter phase of the process the renewal of this mandate highlighted the EU's capacity, even with only 7 EU Member States as Members of the Human Rights Council, to shape and follow through on important special procedures. However, there have been review processes in which the EU was not regarded in the same manner, namely the occasion where the Council failed to renew the Expert Mandate on the Democratic Republic of Congo (DRC). Following the EU's statement "that it was joining the consensus but was disappointed to see the mandate of the Independent Expert go (...)"⁴⁸, many NGO's and other international actors were quick to criticize its position and efforts and claimed "European Union Member States agreed to abandon it for a weak compromise"⁴⁹. Further, in view of it not calling for a vote the EU was criticized for not having a "backbone"⁵⁰, because it "wouldn't stand up and be counted"⁵¹. Equally, in the review of the country mandates, the EU could not prevent the termination of the mandates on Belarus and Cuba in spite of all of their efforts. The EU did however nevertheless endorse alongside other Members of the Council the continuation for all other mandates.

B. The Universal Period Review Process

"A State under review is like a beautiful woman at a wedding: both want to look their best."

- Ambassador Loulichki – WG Facilitator on UPR (September 2007)

In efforts to reform the United Nations human rights machinery and rectify the stigmas attached to the former Human Rights Commission, such as "politicization"

⁴⁷ Human Rights Council Resolution 5/2, 18 June 2007.

⁴⁸ See ISHR Daily Update 27 March 2008, pp.8.

⁴⁹ See Statement made by Human Rights Watch 'UN: Rights Council Fails Victims in Congo', 27 March 2008

⁵⁰ Ibid.

⁵¹ Ibid.

and “erode credibility”, the Universal Periodic Review (UPR) mechanism was pioneered. With the criticisms over “naming and shaming” whilst staying silent in “selected” cases of gross human rights violations an increasing “shadow was being casted on the reputation of the United Nations system as a whole”⁵². Accordingly, the UN General Assembly in Resolution 60/251 mandated the Council to

" undertake a universal periodic review, based on objective and reliable information, of the fulfillment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies. "

Against this background, a number of preparatory meetings took place to discuss the operative foundations of the new mechanism and the methods of how to proceed at the nascent stages of its inception. In early deliberations of the UPR mechanism it was initially stated that the UPR should not *interfere* with the system of reporting to treaty bodies, this notion however shifted in course of negotiations to that of a more cooperative approach. Throughout the many preparatory and ad hoc meetings it was expressed by many of the delegates that there was a need to circumvent further reporting burdens. EU Member States agreed with that position and highlighted the existing heavy workload already deriving from treaty body obligations⁵³ and felt that “to avoid overburdening the Council with the new mechanism separate inter-sessional working groups be established⁵⁴”. To operationalise it as a cooperative and complementary mechanism to the existing system, perplexity arose on how it could “complement and not duplicate” the work of the human rights treaty bodies. Finland, on behalf of the European Union, in its August 2006 Written Contribution suggested that “the mechanism not conduct a second substantive assessment of compliance with treaty obligations so as to ensure that the work of the treaty bodies is not duplicated, notably in light of the fact that many of the same rights and obligations of those treaty bodies will be examined⁵⁵”. The deliberations on complementarity and duplication spurred further debate on reviewing countries even on the basis of treaties that they are not a party to. While this would help ensure that the review would be conducted “based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States”⁵⁶ and therefore making it distinct from individual treaty body activity, many argued, notably African States, that states should only be held accountable on “*commitments and obligations*”, thus only treaties and conventions that have been ratified. The European Union as a

⁵² In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary General, 26 May 2005. A/59/2005/Add.3. para 182

⁵³ For example see The Netherlands Written Contribution in the Updated Compilation of Proposals and Felice Gaer “A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System”, 7 Human Rights Law Review 109, 2007.

⁵⁴ See Statement by HE Ambassador Wolfgang Petritsch on behalf of EU in the Human Rights Council, 28 June, 2006.

⁵⁵ *ibid*

⁵⁶ UN General Assembly Resolution 60/251 establishing the Human Rights Council, 3 April 2006, A/RES/60/251, para 5(e)

compromise suggested that the UPR be complemented by the treaty bodies by way of providing a forum to discuss treaties not ratified by a given state in addition to human rights compliance, as such, based upon the information gathered within the OHCHR. These debates amongst others surrounding the UPR mechanism seemingly attracted a lot of attention, generating the most enthusiasm and dedication compared to that of any other Human Rights Council mandated Working Group⁵⁷. The European Union correspondingly assumed an active role through its public statements and proposals.

The formal Working Group (WG) on the UPR mechanism was established by Council Decision 2006/103 with the objective of developing the modalities of the mechanism. The first Working Group session in November 2006 focused specifically on the sources of information the review will be based upon. Treaty body reports, country assessments by UN agencies, NGO reports, etc. were all considered as possible sources. The EU suggested that the OHCHR create a database compiling information from such sources while augmenting the role of the OHCHR. The first session did not conclude with any substantive results. However, it facilitated both practical and conceptual dialogue to set the foundations for the February 2007 session.

The second WG session addressed the deeply debated outstanding question of whether the level of development of a country should have an impact on a country's review. In line with the universal nature which the review is intended to have the European Union in its intervention stated "that consideration of a country's level of development must not compromise the universality of the standards on which the review was based, and should relate only to the outcome phase of the review." It further went on to state "that 'equal treatment' meant treating each country equally during the process of review". The African Group however remained obstinate on accounting for development considerations and gained majority support. In the last days of the second session a notable outcome was achieved: the presentation and discussion of potential models for the UPR mechanism. Three different models were explored; the main difference between the first and the other two was the introduction of working groups serving as a bridge between the compilation of information on a given country and the Council session itself. The European Union was very much in favour of the latter and argued its position on the basis of the system being more of a "manageable workload"⁵⁸. In efforts to avoid *politicization* in plenary debates, the EU defended its stance on the inclusion of working groups by claiming that smaller working group discussions would detract away from such kind of debates in the Council's plenary.

The deliberations over the conduct of the UPR, of taking place either in the form of working groups or plenary, went well into the UPR Working Group session of April 2007. The European Union continued to maintain its position in spite of opposition received from the majority of the Council's Members. The issue of 'plenary vs. working group' in addition to the role of experts in the UPR; level of participation of NGOs and other stakeholders; and the involvement of the concerned State in the making and taking of decisions, were the four core outstanding issues that raised the most concerns. Negotiations continued on and it was not until 18 June 2007 that the modalities of the UPR mechanism were formally adopted in Resolution 5/1

⁵⁷ See ISHR Report on Working Group to Develop Modalities of the UPR, 12-15 February, 2007.

⁵⁸ The EU underlined that their preference would be Option 2 on the grounds that 12 countries would be reviewed per annum/per working group.

“Institution Building of the United Nations Human Rights Council”. The Resolution emphasizes the nature of the UPR as “a cooperative mechanism based on objective and reliable information and on interactive dialogue”⁵⁹ and of “representing an added value”⁶⁰ to the overarching UN human rights system. Much to the dismay of the European Union, the Human Rights Council decided that the review would be conducted in one working group composed of the 47 Members of the Council similar to that of a plenary. This was the very proposal submitted by the Facilitator of the UPR Working Group to the Council that the EU was strongly against as it felt that it “essentially constituted a plenary review with a different title”⁶¹. The UPR architectural framework was nevertheless adopted and in the sixth Human Rights Council Session on 21 September 2007 the Council drafted and adopted a calendar on the consideration of Member States to be considered for the first four year cycle of the UPR mechanism and the order in which the countries will be reviewed. This was seen as one of the major milestones of the workings of the first year of the Council.

The first two cycles of the UPR process reviewed 32 countries of which seven were EU Member States. The European Union welcomed the process and claimed that it can lead by example in respects to both being “reviewed” and “reviewing” others and dedicated itself to “strive for maximum transparency and efficiency of the process (...) because the manner in which the review is conducted will have significant repercussions on the overall credibility of the Human Rights Council”⁶². In both the UPR Working Group and Plenary deliberations on SuR’s no common EU statements were made, further to an agreement made by COHOM⁶³. It is arguable that the primary reason behind this decision is that of wishing to keep the integrity of the UPR as an individual State review process and thus yielding to individual State interventions⁶⁴. However, when looking in plenary in the consideration of the UPR reports one would observe the “continuing decline of the number of states taking the floor to comment”⁶⁵, including those of EU Member States both as Members and observers of the Council. Thus questions arise on why EU Member States are not being more proactive when given the chance to orally address country-specific human rights practices. The Members of the Council in June 2008 adopted all 32 UPR reports, leading many from the international community to commend the process as a whole including the EU who stated “The first 32 reviews undertaken in April and May and the outcome documents adopted last week by the Human Rights Council – on the whole - have not disappointed”⁶⁶.

⁵⁹ Institution-Building of the United Nations Human Rights Council, 18 May 2007. A/HR/RES/5/1 para 3(b)

⁶⁰ Ibid para 3(f)

⁶¹ See ISHR minutes on Working Group to Develop Modalities of the UPR, 11 April, 2007.

⁶² See Discussion on a motion for a resolution of the European Parliament on the Seventh session of the UN Human Rights Council- Statement by State Secretary Janez Lenarcic on behalf of the EU Council. 20 February 2008.

⁶³ As expressed by a member of COHOM in a discussion on the EU in the Human Rights Council, July 2008.

⁶⁴ Ibid.

⁶⁵ See ISHR Daily Update, Human Rights Council 8th Session, 11 June 2008, pp.1.

⁶⁶ Item 6 Statement by Slovenia on behalf of the EU, 8th Human Rights Council Session plenary, June 2008.

C. EU Output in Human Rights Council Plenary Sessions- A General Overview

The European Union in the Human Rights Council has strived hard to present itself as a unitary actor. Through its numerous coordination meetings in both Brussels and *in situ* it is not surprising, since the Council's inception, that the EU Member States who are also Members of the Council have had a strong record in voting cohesion. As a matter of fact, they have hitherto only had one split vote. This was on the resolution on human rights violations emanating from Israeli military incursions in the Occupied Palestinian Territory, on which France abstained and all EU Member States represented in the Council voted against⁶⁷. Through the various coordination mechanisms at its disposal, such as the "burden-sharing mechanism", the European Union has managed successfully to be present and active in all deliberations of Council resolutions in addition to procedural matters that arise on an ad hoc basis. While the EU has had success in voting cohesion internally it has struggled to gain the same support needed 'externally' from non-EU bloc Members on various agenda items. The current pattern of adopting resolutions in the Human Rights Council, as it may be observed, has been consensus driven. However, in instances where the EU does call for a vote, it is not uncommon to see the majority of the Members of the Council voting against the EU's vote. While its numerical inferiority may be one explanation, questions do arise on why the EU struggles in this regard. When revisiting the Council's failure to renew the mandates on DRC, Cuba and Belarus in this context, paralleled with the EU's consistent efforts for their continuation, generates an added layer of concern and questions.

With regard to formally introducing resolutions the EU has equally not been perceived as a frontrunner. Some argue that the EU "speaks more often than any other single grouping- and on a much wider range of issues- but is less active in sponsoring resolutions than the OIC and African Group⁶⁸". When only considering EU Presidency resolutions⁶⁹ that is indeed true. In contrast, when exploring the initiatives of the composite EU and the co-sponsorship received by fellow-EU-Member States the conclusion would contest the initial argument. Taking the most recent Council session as an example, while there was only one EU Presidency sponsored resolution on Burma/Myanmar, there were eight EU Member State initiatives, presenting a total of nine resolutions sponsored by the EU and EU Member States out of the thirteen resolutions introduced in the whole session. Further, the EU continues to aptly demonstrate its presence and position throughout each Council plenary session. In the first six sessions for example the EU made a total of 124 statements and interventions in interactive debates and dialogues⁷⁰ leading it to be a very visible actor in the Council. Moreover, every time an EU Member State takes the floor in either full member or observer capacity it always aligns itself with the statement made by the EU thus providing more oral weight to the EU's position.

⁶⁷ See Karen Smith 'Speaking with One Voice but Having Little Impact: The EU at the UN's Human Rights Council' presented at the ISA Conference, San Francisco, March 2008. See also Katie Verlin Laatikainen and Karen Smith, eds, 'The European Union at the United Nations: Intersecting Multilateralism' (2006) New York: Palgrave.

⁶⁸ *Supra* 67 pp. 15.

⁶⁹ In the first six regular Human Rights Council sessions there were only nine EU sponsored resolutions. *Ibid.*

⁷⁰ *Supra* 67 pp.12.

Through this very oral weight the EU has been noticeably successful in initiating important Special Sessions.

The Human Rights Council has thus far held seven Special Sessions, two of which were at the initiative of the EU. In December 2006 the EU, joined by the African Group, held a Special Session on Darfur which was seen by many as exemplary⁷¹ due to the all encompassing efforts of not only Council Members but also relevant Special Rapporteurs and Special Representatives. Further, a dependable cross-regional dialogue and coordination was established between the diplomats of the EU and African Group⁷², an important step for receiving future support in other areas of the Council. The much needed Special Session on Burma/Myanmar in October 2007 was also held at the initiative of the EU. Cross regional support for the session was attained and following only one full day of deliberations consensus was reached and resolution S-5/1 was adopted.

In sum, while the European Union has been a prominent actor in some areas of the Council it has in other areas demonstrated critical shortcomings which have consequently overshadowed its successes in the Council. This as a result has situated the EU as a subject of scrutiny. The following section will accordingly address some of its shortcomings and will provide corresponding recommendations.

⁷¹ See Martin Frick 'The Role of the European Union in the Negotiations on the Human Rights Council' in Lars Muller 'The First 365 Days of the UN Human Rights Council, Eidgenossisches, Department fur Auswartige Angelegenheiten. Politische Abteilung IV. Switzerland: 2007, pp. 173.

⁷² Ibid.

III. RECOMMENDATIONS

Pursuant to the previous sections, it may be observed that the European Union on occasion has not fared in the Human Rights Council as one would expect of an actor that possesses the economic and political clout it does worldwide. Many had high expectations for the EU to take a leadership role in the area of human rights and to “fill the void” the US left behind⁷³. This however has not been the case. Since the inception of the Human Rights Council the African Group and OIC, comprising a greater part of membership to the Council, have arguably taken a greater role than anticipated and thus as a result has also had the capacity to shape the Council’s institutional and procedural framework in addition to much of the output of the plenary sessions. The question which thus arises is, bearing in mind its numerical inferiority, why has the EU been successful in certain areas of the workings of the Council and not in others?

The very first dimension that needs to be accounted for in addressing the abovementioned question is that of ‘coordination’⁷⁴, at both the ‘*internal*’ and ‘*external*’ levels. As it may be deduced from the previous sections, the EU has been very effective in its ‘internal coordination’ activities and as such has had a strong record in voting cohesion, EU Member State co-sponsorship resolution initiatives, addressing procedural and institutional matters as a unitary actor, etc. The EU’s shortcomings in respect to coordination are in its ‘*external*’ activities. This has consequently hindered the EU from following through on important human rights issue areas which it would initially support, such as the expert mandate on DRC, but then would yield to reach consensus. Accordingly, the first recommendation for the EU in this regard is to establish a concrete coalition building strategy and to identify tools to help facilitate effective external coordination activities. The coalition building exercise used in the special session on Darfur may be used as a model. Further, the EU needs to utilize its internal instruments (political and financial) which remain at its disposal to their greatest extent so as to have a positive domino effect in its external relations in the Human Rights Council; the ACP framework may be considered in this regard⁷⁵. Leverage needs to be established through the use of such tools in order to demonstrate the EU’s solid commitment to resolving important human rights issues in addition to instituting its clout in international human rights affairs, more specifically, in the Human Rights Council.

Coordination needs to be equally strong between the EU institutions, and in parallel, the roles of the European Commission and European Parliament need to be enhanced when the Human Rights Council is concerned. The Commission Delegation to the UN in Geneva should create a specialized human rights unit and hire staff that has expertise in the field of human rights. The staff can then also help support the work of

⁷³ Kenneth Roth, Human Rights Watch World Report 2007 ‘Filling the Leadership Void: Where is the EU’ pp.1-32.

⁷⁴ See J. Wouters, F. Hoffmeister and T. Ruys, (eds) ‘The United Nations and the European Union: An Ever Stronger Partnership’ (2006) The Hague: T.M.C. Asser Press.

⁷⁵ Richard Gowan and Franziska Brantner in their September 2008 policy paper “A Global Force for Human Rights? An Audit of European Power at the UN” suggests creating a “Cotonou Group” in Geneva and NYC to focus specifically on human rights, pp.65.

the Member State delegations, which at times are overburdened with the increased number of sessions and working groups⁷⁶. The European Parliament on the other hand can provide the stage for an annual general debate on Human Rights Council related proposals as to clarify the positions and help unify the EU's stand in addition to being the facilitator of regular dialogue between all actors involved, including non-state actors. This could take the form, e.g., of a widely publicized Human Rights Hearing, and become the functional equivalent of a State of the Union type of address.

A third dimension that needs to be taken into account when addressing the EU's shortcomings in the Council is its internal/external human rights credibility. Here it is important to highlight the functions of the three main EU institutions working in the field of human rights (The Council of the EU, the European Commission and the European Parliament). Each institution has a significant role to play in increasing the EU's credibility in the eyes of third party states. The EU has on many occasions been accused of applying double standards in human rights by not taking a critical stance when its own Member States' are concerned⁷⁷. Paralleled with its external human rights activities the EU needs to ensure that all relevant Commission DG's, relevant committees of the European Parliament and the Council of the EU are equally placing efforts to enhance the human rights situation within its borders. The European Parliament has the largest role to play in this regard, as MEPs serve as the primary link between the EU and national levels. The concerted efforts of all three institutions will then as a result provide the EU with the external credibility needed for not only coalition building purposes but also for EU initiatives to be taken seriously by other Members of the Human Rights Council.

Fourth, the EU needs to take a more proactive approach in initiating resolutions that are not only consensus driven. The EU should ensure that important human rights issues receive the attention it deserves in a timely manner; accordingly, it should find ways and means to better shape the Council's agenda items. NGO's and civil society may also play a role in this context as they not only have eyes on the ground where human rights abuses are occurring but also have valuable reports which may be useful in defending EU positions. Thus, it is vital for all EU actors to establish a strong and mutually-respecting relationship with NGOs and civil society and to involve them in identifying dire human rights situations that require attention. The EU must also be open to their feedback on the "cause and effect"/root causes of human rights abuses in the given territories. The suggested European Parliament Human Rights hearing may serve as a platform to strengthen and establish a different level of partnership.

Lastly, the EU needs to make use of the UPR mechanism for not only credibility purposes – to demonstrate to the international community that it is indeed an exporter of internal human rights values and principles- but also as a tool for drafting future human rights policies. The recommendations generated from the UPR process of EU Member States' can be of great value to the Commission in drafting human rights related communications and to the Council in drafting human rights policies. Furthermore, in view of the EU not making statements on behalf of its 27 Member States in the UPR process, Member States need to beyond aligning their interventions,

⁷⁶ Alternatively, the experts can serve as a think tank on resolutions and deepen dialogue with civil society members, as expressed by Gowan and Brantner. *Ibid* p. 64.

⁷⁷ See statement by Irene Khan "Amnesty International criticizes EU for double standards in human rights" at the University of Ghent, Belgium, 24 March, 2007.

and ensure that at least one Member State makes an intervention on every SuR, which thus far has not been the case⁷⁸. A form of presence, in this case the form of the ‘composite EU’, needs to be exhibited in each phase of the UPR process to ensure that it is a visible actor to all third party states and that EU Member States are taking the process very seriously.

⁷⁸ Supra 75 pp.45.

IV. CONCLUDING REMARKS

The aim of the study was to provide an overview of the role of the European Union in the Human Rights Council with an emphasis on the EU's contribution to the setting up process, the UN Special Procedures, the UPR process and plenary sessions of the Council. The study via its observations unveiled both the EU's achievements such as its special session initiatives; and its shortcomings such as failing to receive the endorsement needed for the continuation of certain special procedure mandates. Much of the EU's shortcomings in the Human Rights Council are a result of not having a concrete strategy for 'external' coordination, the lack of 'internal' credibility and the need to expand the role of EU institutions, particularly the European Parliament and European Commission. In view of such shortcomings the last section of the study offered five core recommendations that have the potential to help rectify the challenges currently faced by the EU in the Human Rights Council. While these are only provisional recommendations based on the preliminary observations made above, it is believed that should these dimensions be considered in depth that the role of the EU can only be enhanced in the Human Rights Council; thus in effect legitimizing the new body as the "dawn of a new era".

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