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Conflicted Normative Power Europe: The European Union and Sexual Minority Rights

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Abstract

This paper will evaluate the extent to which the European Union (EU) manifests the ability to act as, and possesses the potential to develop into, a norm-setting bureaucracy in its external relations when it comes to the protection and promotion of sexual minority rights. In order to examine this, an extensive overview of the academic debate on the theoretical notion of Normative Power Europe, as developed by Ian Manners, is offered. Subsequently, the historical development of the Union's internal policies related to the rights of the lesbian, gay, bisexual and transgender (LGBT) community is briefly outlined. This is followed by an evaluation of the EU's international identity regarding LGBT rights. Ultimately it is concluded that the ability of the EU to shape international norms and values concerning this policy issue is severely undercut by a set of internal, institutional, instrumental and conceptual inconsistencies. Only by overcoming this confliction and inconsonance can the EU develop into a full-fledged, credible and effective normative power in the case of sexual minority rights. It is concluded that the recently launched LGBT toolkit could constitute an important step in this direction.

Die vorliegende Arbeit bemüht sich um ein Urtel darüber, inwieweit die Europäische Union (EU) fähig ist, in ihren Außenbeziehungen in Angelegenheiten des Schutzes und der Förderung der Rechte sexueller Minderheiten als normsetzende Bureakratie zu agieren, bzw. das Potential besitzt, sich dazu zu entwickeln. Um dies zu erforschen, wird ein breiter Überblick über die wissenschaftliche Debatte zur Theorie der Normative Power Europe (Normmacht Europa) von Ian Manners geboten. Danach wird die historische Entwicklung der Unionsinnenpolitik in Bezug auf die Rechte von lesbischen, homosexuellen, bisexuellen und transgender Personen (lesbian, gay, bisexual and transgender – LGBT) kurz umrissen. Darauf folgt eine Bewertung der internationalen Position der EU im Hinblick auf LGBT Rechte. Die Arbeit kommt zu dem Schluss, dass die Fähigkeit der EU, Normen und Werte der diesbezüglichen Politik auf internationaler Ebene zu gestalten, durch eine Reihe interner, institutioneller, instrumenteller und konzeptioneller Widersprüche schwer beeinträchtigt ist. Erst mit der Überwindung dieser Ungereimtheiten kann sich die EU zu einer vollwertigen, glaubwürdigen und effektiven Normmacht in Angelegenheiten der Rechte sexueller Minderheiten entwickeln. De jüngst beschlossene LGBT Maßnahmenkatalog schließlich könnte einen wichtigen Schritt in diese Richtung darstellen.

List of Abbreviations

ACP	Countries from Africa, the Caribbean and the Pacific
CAP	Common Agricultural Policy
CEE	Central and Eastern Europe
CFR	Charter of Fundamental Rights of the European Union
COHOM	Council Working Group on Human Rights
CPE	Civilian Power Europe
CSDP	Common Security and Defence Policy
EEAS	European External Action Service
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EIDHR	European Instrument for Democracy and Human Rights
ENP	European Neighbourhood Policy
ESDP	European Security and Defence Policy
ESS	European Security Strategy
EU	European Union
EUMC	European Monitoring Centre for Racism and Xenophobia
FRA	European Union Agency for Fundamental Rights
HR	High Representative
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDAHO	International Day against Homophobia and Transphobia
ILGA	International Lesbian, Gay, Bisexual, Trans- and Intersex Association
ILGA-Europe	The European Region of the International Lesbian, Gay, Bisexual, Trans- and Intersex Association
IO	International Organisation
IR	International Relations
LGB	Lesbian, Gay and Bisexual
LGBT	Lesbian, Gay, Bisexual and Transgender
LGBT-EP	European Parliament's Intergroup on LGBT Rights

MEP	Member of the European Parliament
MLG	Multi-Level Governance
NGO	Non-Governmental Organisation
NPE	Normative Power Europe
PROGRESS	Programme for Employment and Social Solidarity
RPE	Realist Power Europe
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TGEU	TransGender Europe
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
WHO	World Health Organization

Table of Contents

1. Introduction

On 17 May 2010, which marked the sixth International Day against Homophobia and Transphobia (IDAHO)[1], a chorus of high-ranking European Union (EU) officials formed to condemn discrimination on the basis of sexual orientation and gender identity in a series of similar-sounding statements, which simultaneously stressed the advances that had already been made in and by the EU:

> " The European Union can take some pride in being at the vanguard of combating homophobia and other forms of prejudice and discrimination."[2]

> "The European Union is deeply concerned by the violations of human rights and fundamental freedoms based on sexual orientation or gender identity wherever they occur [...]. This forms an integral part of the EU Common Foreign and Security Policy, where several measures have been taken [...]."[3]

> "The Lisbon Treaty consolidated our commitment to defending human rights and it allows the EU to speak with a single voice on the international scene. The European Parliament should continue to affirm its strong opposition to homophobia, no matter whether it takes place inside or outside the EU."[4]

> "The EU is also very active in the international arena, in bilateral as well as multilateral fora such as the United Nations. In these fora, it pursues a determined policy of opposing homophobic actions and campaigns for the decriminalisation of homosexual relations."[5]

Suggestive of a position of moral ascendancy, these statements give the impression that the EU is in the vanguard of institutionalising and promoting sexual minority rights. Not only do all EU representatives stress the importance of human dignity and how homophobia constitutes a breach thereof, their statements are also rife with references to the principles, articles and legal documents upon which the EU is founded. This form

[1] It also marked the twentieth anniversary of the decision of the World Health Organisation to remove homosexuality from its list of diseases. The date of IDAHO has been set to commemorate this decision made on 17 May 1990.
[2] European Council (2010)
[3] Council of the European Union (2010a)
[4] European Parliament (2010c)
[5] European Commission (2010a)

of declaratory politics might, therefore, lead one to conclude that Europe is playing, or aspiring to play, the role of a leading norm-setting bureaucracy in the global arena.

Furthermore, the EU's condemnation of the violation of the human rights of LGBT people seems to have received support on 1 December 2009, when the Charter of Fundamental Rights of the European Union (CFR) became legally binding upon all member states, when implementing Community legislation, with the entry into force of the Treaty of Lisbon[6]. Article 21 of the Charter expressly prohibits "any discrimination" based on, *inter alia,* sexual orientation[7]. Because the CFR forms an integral part of the Lisbon Treaty[8], the latter has become the first international treaty which explicitly prohibits this type of discrimination. As such, it appears that the EU has moved beyond empty rhetoric and is now leading by example.

This situates the EU's external policies on Lesbian, Gay, Bisexual and Transgender (LGBT)[9] issues within the framework of Normative Power Europe (NPE). Developed by Ian Manners in the early 2000s, NPE represents a move away from more conventional interpretations of Europe's international sway. According to this perspective, the EU's ability to get external actors to do what it wants is not derived from a military *force de frappe*, as is commonly argued by realist conceptions of power, nor is it entirely borne out of economic might, as is assumed by the Civilian Power Europe (CPE) concept. Instead, proponents of NPE postulate that, in some policy areas or issues, the EU plays a leading role because the norms and values it holds are morally persuasive in and of themselves. There is thus arguably no need for military or economic pressure in order to shape other countries' policies, suggesting a veiled form of power.

The controversial claim that "the EU has been, is and always will be a normative power in world politics" was put forward by Manners with the aim "to promote normative

[6] While the official name of this document is the 'Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community', the short version will be referred to throughout this thesis.
[7] European Communities (2000)
[8] This becomes clear from Article 6 of the Treaty of Lisbon, which states that "the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union […], which shall have the same legal value as the Treaties".
[9] Even though it could be argued that LGBT rights are not entirely synonymous with sexual minority rights, they will be used interchangeably throughout the text for the sake of simplicity. Whenever the two sets of rights are treated in a distinct way, this will be made explicit.

approaches to the study of the EU in world politics"[10]. The importance of research on the Union's normative role was underlined when fellow academics voted Manners' 2002 article as one of the most influential academic works ever published on European integration[11]. Whitman claims that Manners' thesis "needs to be complemented by more rigorous accounts of the capabilities of the EU"[12]. Taking up these calls, several scholars have critically appraised the core principles of NPE at the theoretical as well as the empirical level. The applicability of the framework to the EU's international role concerning sexual minority rights, however, has not yet been subjected to academic scrutiny. In fact, while a limited number of authors have written on the development and status of sexual minority rights within Europe[13], scholarly work that centres upon the external dimension of this policy area itself is wanting. As Kollman and Waites note, "the study of LGBT human rights politics" is "almost non-existent in the discipline of politics"[14].

This paper seeks to fill these lacunae by taking the intersection of ethics and policy-making *in casu* sexual minority rights as a the starting point. It is particularly inspired by Diez' plea to subject "the projection of European norms and values" to "continuous deconstruction through the exposition of contradictions within this discourse, and between this discourse and other practices"[15]. To this end, the objectives of this paper are threefold: to provide a comprehensive outline of the literature on Normative Power Europe, to capsulise the development of both internal and external LGBT policies at the European level, and to evaluate the applicability of the normative power label to the Union's external relations in the field of sexual minority rights. More concretely, this paper sets out to evaluate the extent to which the EU manifests the ability to act as, and possesses the potential to develop into, a normative power with regards to sexual minority rights. In order to answer this question, the text has been structured into three core parts.

In the first section, Ian Manners' theoretical framework of Normative Power Europe will be laid out. To begin with, NPE will be situated within the historical context out of which it

[10] Manners, I. (2008), p. 65.
[11] Peterson, J. (2008), p. 65.
[12] Whitman, R. (2002), p. 11.
[13] See, for example, Beger (2004), Kochenov (2007, 2009), Swiebel (2009), Swiebel & Van der Veur (2009), Waaldijk & Clapham (1993), Weyembergh & Cârstocea (2006).
[14] Kollman, K. & Waites, M. (2009), p. 2.
[15] Diez, T. (2005), p. 636.

sprang up. Manners' concept is a relatively recent addition to the scholarly debate on the international identity of the EU, which, until the 2000s, was eclipsed by the antagonism between the notion of Civilian Power Europe and more traditional realist views. Following this historical overview, the core tenets and propositions of NPE will be dealt with extensively. The section will be concluded by looking at the academic status quo related to the Union as a normative actor, which consists of an evaluation of critiques at both the theoretical and the empirical level.

The second section focuses on the EU's political discourses and actual policies regarding sexual minority rights. It will thus draw heavily from official documents, statements, speeches and policy papers. The chapter has been subdivided into two parts. While the first half centres upon the development of LGBT policies within the Union, the latter addresses the external dimension of this policy area. It is important to note here that the EU will not be treated as a monolithic entity. Instead, this paper agrees with Liesbet Hooghe and Gary Marks' perception of the EU as an exemplar of multi-level governance (MLG)[16], and thus assumes that the *sui generis* character of the Union is at odds with the conventional separation of the domestic from the international political realm. In lieu thereof, it is acknowledged that the two realms, together with local and regional levels as well as non-governmental actors, are enmeshed in such a way as to give rise to a complex network of interaction. Within this network, the nodes are made up by the institutional actors, which are located at different spatial levels. Concerning sexual minority rights, this means that the analysis will not be limited to the traditional centres of academic investigation (i.e. the Council, Commission, Parliament and the European Court of Justice), but will also incorporate actors such as the European Union Agency for Fundamental Rights (FRA), the European Parliament's Intergroup on LGBT Rights (LGBT-EP) and the International Lesbian, Gay, Bisexual, Trans- and Intersex Association (ILGA). In short, by being attuned to the "multiperspectival institutional forms" of the European polity[17], it becomes possible to analyse the differences and similarities in policy approaches to and statements on sexual minority rights across this vast spectrum of EU institutional actors.

[16] Hooghe, L. & Marks, G. (2001)
[17] Ruggie, J. G. (1993), p. 172

The third section will then combine insights from the preceding parts, by investigating the fit between theoretical conceptions of the EU as a principled Maecenas of sexual minority rights and the practical reality of policy-making. It will become evident that the ability of the Union to credibly shape international norms and values regarding sexual minority rights is severely undercut by four types of inconsistencies. Internally, the LGBT-related rights situation varies greatly across the member states, giving a bittersweet double meaning to the Union's motto of *Unity in diversity*. For example, while countries such as Sweden and the Netherlands are generally seen as clear frontrunners, LGBT people's right to freedom of assembly is consistently violated in Latvia, Lithuania and Poland[18]. Institutionally, the Union has failed to act as a cohesive organisation when it comes to safeguarding and promoting LGBT rights. Although the European Parliament is generally seen as a staunch ally of sexual minorities, the track record of the Commission, the Council and especially the European Court of Justice (ECJ) is considerably more equivocal. Instrumentally, the Union is not solely relying upon the convincing nature of its cosmopolitan arguments. Instead, normative reasoning is frequently combined with other, mostly economic forms of power, giving rise to a blend of NPE and CPE. Finally, the EU seems conceptually conflicted in its approach to LGBT rights, for it fails to adopt a consistent definition of sexual minorities. In some cases, references are made to LGBT as a whole, whereas at other times sexual orientation (i.e. Lesbian, Gay and Bisexual, or LGB) is differentiated from gender identity (transgender). It even occurs that bisexuals are treated differently in EU legislation and discourses from homosexual men and women. In short, the Union is internally, institutionally, instrumentally and conceptually conflicted in its approach to sexual minority rights.

From this, it can be concluded that the performance of the Union with regards to sexual minority rights is currently not in line with the tenets of Normative Power Europe. Moreover, the EU can only develop into a full-fledged, credible and effective norm-setting bureaucracy in this policy area if it manages to overcome the contradictions and inconsonance it is riddled with. In sum, while the EU manifests some aspects of NPE in the case of sexual minority rights, and while it could develop into a more mature normative actor, as is suggested by the recent launch of the LGBT toolkit, it is currently best described as a conflicted normative power[19].

[18] ILGA-Europe (2010a)
[19] Cf. Meunier and Nicolaïdis (2006), who describe the EU as a conflicted trade power.

2. Normative Power Europe

In theorising on the influence the European Union holds in international affairs, the notion of Normative Power Europe developed out of, and in reaction to, more traditional views that define the EU's international role in predominantly military or civilian terms. This is not to suggest a linear evolution from Realist Power Europe (RPE) into CPE and ultimately into NPE; these different conceptions of power not only overlap, but in practice frequently even interplay. Rather, while it is acknowledged that different conceptions of power continue to coexist, the idea behind the normative framework is that norms and values have become a relatively more eminent part of the EU's international identity. The emphasis has thus shifted away from security and defence matters onto the trade realm and subsequently onto "the ability to define what passes for 'normal' in world politics"[20]. It is this norm-setting ability that Ian Manners considers to be the defining feature of NPE, and what Nicolaïdis and Howse term "the ultimate form of soft power"[21].

This historical background of NPE forms the starting point of this chapter. After this normative perspective has been contrasted with its military and civilian counterparts, the framework's core tenets will be explored in order to uncover how the EU can have an ideational impact in the world. From this it will become clear exactly what norms are supposedly being upheld and promoted by the EU. That the notion of NPE is not without its detractors becomes clear from the concluding part of this chapter, which will distinguish between theoretical and empirical critiques.

The Historical Background to Normative Power Europe

That the framework of Normative Power Europe should be analysed in connection with the debate on the EU's military and civilian power which engulfed many scholars in the 1970s and 1980s is indicated by the title of the foundational article in which Ian Manners developed the idea of NPE, "Normative Power Europe: A Contradiction in Terms?" [22]. This title refers directly to the title of the 1982 article[23] in which Hedley Bull, the leading Australian academic of the English School of International Relations (IR), discredited

[20] Manners, I. (2002), p. 236
[21] Nicolaïdis, K. & Howse, R. (2002), p. 770.
[22] Manners, I. (2002)
[23] Bull, H. (1982)

François Duchêne's concept of Civilian Power Europe. In fact, it is Bull's claim that "'Europe' is not an actor in international affairs, and does not seem likely to become one"[24] that Manners ultimately sets out to disprove through conceiving of the EU as an ideational actor. By arguing that developments in world politics in the last decade of the millennium significantly shifted the balance between the military, civilian and normative dimensions of power in the latter's favour, Manners suggests that Bull's military focus and Duchêne's civilian conception have become outdated and that it is not, or no longer, a contradiction in terms to call the EU a normative power.

In developing the concept of CPE, François Duchêne reconceptualised international power structures by stressing the pre-eminence of economic interdependence and, by implication, heralding in the decline of conventional power politics. His belief that "economic interests are in the driving seat"[25] betrays the journalist and political analyst's close relationship with Jean Monnet, the man who is commonly seen as the architectural visionary behind the process of European integration. The *sui generis* form of political co-operation that was continuously being shaped and intensified through the so-called Monnet method convinced Duchêne that economic entanglement had supplanted balance-of-power reasoning in world politics; his writings suggested the demilitarising of international political discourses by stressing mutual, often trade-based solutions to common problems, illustrating how the world was experiencing "a sea change in the sources of power"[26]. In fact, Duchêne's evident admiration for Monnet even caused *The Independent* to refer to him as the European statesman's "amanuensis" in its 2005 obituary of Duchêne[27], thus indicating the fuzziness of the boundary between political theory and praxis in the analyst's writing.

More concretely, Duchêne famously described the EU's predecessor, the European Community (EC), as a "civilian group of countries long on economic power and relatively short on armed force"[28]. He saw the domestication of international relations as one of the EC's core tasks. In less abstract terms, this meant that shared values should give rise to a form of collective action that would "bring to international problems the sense of common responsibility and structures of contractual politics which have in the past been

[24] Ibid., p. 151
[25] Duchêne, F. (1994), p. 388
[26] Duchêne, F. (1973), as cited in Orbie, J. (2008), p. 5
[27] Anon (2005)
[28] Duchêne, F. (1973), p. 19

associated almost exclusively with 'home' [...] affairs"[29]. Concerning the Union's external relations, this implied an externalisation of the same type of civilian policy instruments that had allowed the old continent to blossom out of a post-war landscape of emotional rubble and material devastation. This is captured by Carl Friedrich von Weizsäcker's notion of *Weltinnenpolitik,* which collapses the distinction between domestic and foreign policy[30], and which has been invoked by proponents of CPE[31]. CPE, in other words, called for the propagation of the European experience outside its borders.

Hanns W. Maull's definition of civilian power, which, unlike the concept developed by Duchêne, is not uniquely applied to the European Union[32], has also frequently been invoked in the debate on both CPE and NPE[33]. He elaborated upon the original notion and adapted it to the post-Cold War geopolitical environment of the 1990s and 2000s. According to Maull, being a civilian power implies three things: the "necessity of cooperation with others in the pursuit of international objectives" is accepted; the focus is on "non-military, primarily economic, means to secure national goals"; and actors manifest a "willingness to develop supranational institutional structures to address critical issues of international management"[34]. The structural implications of the third prong are akin to Duchêne's call for a domestication of world politics, in that a civilian power would transfer its novel decision-making structures to the international system[35].

Within Maull's definition, there remains room for military policy instruments, but these are seen merely as a "residual instrument serving essentially to safeguard other means of international interaction"[36]. Moreover, this definition does not force scholars to dichotomise military and civilian means. Instead, as is vividly illustrated by the impracticability of classifying peacekeeping forces as either military or civilian means[37], it

[29] Ibid., p. 20
[30] Even though the EU's external relations technically extend beyond foreign policy, the two terms will be used interchangeably throughout this paper and should be seen as capturing the Union's relations with governmental and non-state actors from third countries.
[31] Bachmann, V. & Sidaway, J. D. (2009), p. 97
[32] In fact, Maull developed his definition of a civilian power in response to intensified international alarmism over the growing power of Japan and Germany in a post-Cold War world order. Rather than seeing these World War II pundits as revanchist states, Maull envisioned them as "prototypes of a promising future" (1990, p. 93).
[33] See, for example, Smith (2000, 2005), Manners (2002), Bachmann & Sidaway (2009).
[34] Maull, H. W. (1990), pp. 92-93.
[35] Kirste, K. & Maull, H. W. (1996), p. 301.
[36] Maull, H. W. (1990), pp. 92-93.
[37] Smith, K. E. (2005), p. 64. Smith ends up solving this dilemma by not drawing the line between civilian and military means, but between civilian and non-civilian instruments instead.

allows them the more accurate option to place policy instruments along a military-civilian continuum.

Nonetheless, Maull's definition centres heavily on civilian means, while failing to distinguish them from civilian ends. That is to say, as argued by Smith, it is imperative to acknowledge that "*exercising* civilian power and *being* a civilian power" are two potentially different conceptions[38]. Consequently, while a political actor might mainly make use of non-military policy instruments, this could conceivably be done according to a realist rationale. Simply put, it is thus not sufficient to employ civilian means in order to be seen as a full-fledged civilian power.

In order to infer from the writings of Duchêne and Maull how the objectives of a CPE differ from that of more traditional policy actors, Smith invokes Arnold Wolfers' famous distinction between possession and milieu goals[39]. Possession goals are inextricably linked to national interests, and thus fit in neatly with conventional realist approaches to IR. Milieu goals "aim instead at shaping conditions beyond their national boundaries"[40]. While Wolfers acknowledges that milieu goals might constitute an indirect way of securing possession goals[41], such ulterior motives should not automatically be assumed.

As such, Smith argues that civilian powers are, at least partially, driven by milieu goals such as "international cooperation, solidarity, domestication of international relations [...], responsibility for the global environment, and the diffusion of equality, justice and tolerance"[42]. This is in tune with Duchêne's observation that security policies had come to revolve more and more around "shaping the international *milieu* often in areas which at first sight have little to do with security"[43]. That the EU can then be seen as a civilian power becomes evident from the "clearly civilian" nature of the "stated objectives of EU external action" [44]. This includes goals that would only feature indirectly on a conventional realist security agenda, such as the promotion of human rights and the support for regional co-operation.

[38] Ibid., p. 64, original emphases
[39] Ibid., pp. 66-67
[40] Wolfers, A. (1962), p. 73
[41] Ibid., p. 74
[42] Smith, K. E. (2005), p. 66
[43] Duchêne, F. (1972), p. 43
[44] Smith, K. E. (2000), p. 16

Combining insights from Duchêne, Maull and Smith, CPE can then be summarised as a European Union for which the pursuance of non-military objectives through non-military means is central. Within this perspective, economic policy instruments and diplomatic cooperation take centre stage. Furthermore, the Union must exhibit a willingness to sidestep unilateral or bilateral channels in favour of using "legally-binding supranational institutions to achieve international progress"[45]; there is a structural dimension to civilianising international relations. Principally, Civilian Power Europe implies the conjunction of civilian instruments with a civilian rationale; it assumes *acting* as, as well as intrinsically *being* a civilian actor.

Given the aforementioned nexus between policy-making and analysis in Duchêne's case, it is scarcely surprising that the concept of CPE has frequently been invoked by EU officials. For example, when Romano Prodi's tenure in office as Commission President began, Prodi argued that "Europe needs to project its model of society into the wider world" and that Europe "must aim to become a global civil power at the service of sustainable global development"[46]. Prodi's successor, José Manuel Barroso, even described it as his goal "to strengthen the European Union as a civilian power"[47]. In a similar vein, Olli Rehn, speaking as the Commissioner for Enlargement, described enlargement as the policy instrument that "reflects the essence of the EU as a civilian power"[48]. These examples are not isolated cases, but instead reflect how the Union, at least rhetorically, seems to perceive itself as along the lines of the notion of Civilian Power Europe.

Nonetheless, this close alignment between theory and practice is also a criticism that is often levelled at proponents of CPE, the argument being that theorists have been co-opted by their object of study to such an extent that objective scrutiny is impeded; drawing the line between political rhetoric and analysis has become well-nigh impossible. Connectedly, policy-makers gladly embrace the idea of CPE and perpetuate the Union's alleged civilian power status because its parameters are unclearly defined. This is what Orbie calls "the attractiveness of vagueness"[49]. Such ambiguity turns

[45] Manners, I. (2002), p. 237
[46] Prodi, R. (2000)
[47] Barroso, J. M. (2004)
[48] Rehn, O. (2007)
[49] Orbie, J. (2006), p. 123

'civilian power' into a buzzword which allows for different interpretations, without the need to enter into specifics. The logical upshot of the linkage between vagueness and co-optation is that appraising the validity of the conclusions drawn from CPE-guided academic research is made more difficult.

More importantly, from a historical perspective, critics argue that the genesis of Europe's civilian character after World War II was conditional upon a strategic environment that had been created through the use of military power. Moreover, the EC's emphasis on and prospering through trade diplomacy relied upon a security scenario within which the United States, or the "American protector" according to Hedley Bull[50], played the role of a military watchdog that was permanently on guard at a time when European countries themselves were, for a number of reasons, unable to provide the prerequisite defence and security to European integration. Robert Kagan even sees a European preference for a decidedly non-military form of foreign policy as a manifestation of the continent's weakness; acknowledging, in line with CPE, that Europe "is moving beyond power into a self-contained world of laws and rules and transnational negotiation and cooperation"[51], he argues that this move is made mostly out of necessity and not out of volition.

Thus, because of a transatlantic power divide within which Europe is dwarfed by the hectoring military hyperpower of the US, Europe's leaders in the second half of the twentieth century were forced to seek recourse to a trade-based, peaceful and institutionalised form of international diplomacy. While Duchêne depicted CPE as a largely progressive transformation of IR, Kagan's interpretation is entirely antithetical to this, remarking that European countries' "tactics, like their goal, are the tactics of the weak"[52]. Implied in his seminal article in *Policy Review* is the claim that if the US had not superseded Europe as military behemoth, Europe's worldview, and concomitantly its solutions to policy problems, would reflect the *Realpolitik* that has historically been more commonly associated with it; CPE is a back-up plan to RPE. Realist critics of CPE are thus of the opinion that any moralistic maxims that might be suggested by the EU's representation as, arguably, the most successful peace-building project in contemporary history will readily be discarded should Europe find itself in the military ascendancy. Any idealism emanating from the Union is therefore by necessity fleeting. In short, a

[50] Bull, H. (1982), p. 152
[51] Kagan, R. (2002)
[52] Ibid.

European civilian power represents a second-order form of power that is constituted through military disempowerment.

More recently, some scholars have argued that the label of a civilian power may at one point have been an accurate description of the EU's international identity, but that it has since become outmoded. The European Security and Defence Policy (ESDP), which has been renamed as the Common Security and Defence Policy (CSDP) in the Lisbon Treaty, and the European Security Strategy (ESS) are often drawn upon to indicate the intensifying military integration of the EU. While the failure of the 1993 Treaty on European Union (TEU)[53] to establish a European defence dimension famously led Christopher Hill to speak of a capability-expectations gap[54], such military paralysis appears to have been overcome a decade later. Because these recent developments are seen as running counter to CPE by some[55], the path to the notion has been declared closed off[56]. Statements from EU officials seem to underscore this volte-face[57]. Consequently, Bretherton and Vogler argue that the "conceptualization of the Union as a value-based community requires an alternative approach"[58].

The 'Normative Power Europe' Thesis

Although it will become clear that the idea of NPE is partially vulnerable to the same criticism as CPE, it in fact sprang up out of, and as an answer to, the civilian-military bifurcation that was arguably taking the theorisation on the EU's international identity in a stranglehold. Ian Manners, in an attempt to provide a way out of this conceptual cul-de-sac, places an emphasis on the ideational dimension of the Union's external role. According to him, proponents and critics of CPE are not polar opposites, but share a larger common ground than is commonly acknowledged. For example, both François Duchêne and Hedley Bull uphold "the centrality of the Westphalian nation-state"[59] and thus appear to be aligned with Stanley Hoffmann and consorts in the supranationalism-

[53] The TEU is also referred to as the Maastricht Treaty.
[54] Hill, C. (1993)
[55] There is no consensus about this, however, as authors such as Biscop & Coolsaet (2003), Larsen (2002), Sjursen (2006a), Stavridis (2001) and Whitman (2002) argue that the build-up of military capabilities transforms rather than undermines the EU's civilian power.
[56] Smith, K. E. (2000), p. 28
[57] See Prodi (2004), Rehn (2008) and Solana (2008).
[58] Bretherton, C. & Vogler, J. (2006), p. 42
[59] Manners, I. (2002), p. 238

intergovernmentalism debate. Both scholars also assume a prevalence of European interests over universal objectives. Perhaps most fundamentally, however, they both valorise physical forms of power, whether manifested militarily or economically, over the sway that values, norms and ideas might hold. Manners saw these attributes as no longer fully and adequately capturing European reality, and therefore introduced the normative power concept in order to advance the academic debate.

The notion of NPE should thus be seen as a constructivist response to the state-centric logic that underlies both military and civilian conceptions of Europe's influence in the world. Such an approach is akin to a Wendtian understanding of IR, in the sense that tangible, material structures become supplemented with, and dialectically related to, their intangible, intersubjective counterparts[60]. That is to say, the analytical gaze ought not to be confined to institutional actors and formal decision-making, but should be extended to account for the "cognitive processes, with both substantive and symbolic components"[61] that are at the heart of the Union's international identity.

Manners sees the normative difference that is at the heart of the Union's collective identity, which in turn enables the EU to shape what is 'normal' in the global realm, as flowing from three interconnected sources. Firstly, the Union emerged out of, as well as constitutes, an "explicit rejection of the divisive nationalisms, imperialism and war of Europe's past"[62]; it can be argued that the EU is inclined to act in a normative way because of its historical context. Secondly, the Union's *sui generis* character defies Westphalian conventions of statehood, while its parameters simultaneously frustrate attempts to typify it as a standard international organisation (IO); it is a hybrid polity that is unprecedented in world politics. Thirdly, arguing that the EU is a value-based community is not a mere declarative statement; the genesis and development of the EU as a collective entity that is founded in and guided by fundamental principles is reflected by its legal constitution. As a matter of illustration, Article 3 of the Lisbon Treaty stipulates that "in its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens"[63], after which these very values are enumerated. Comparable value statements can be found in the

[60] Cf. Zehfuss, M. (2006), p. 95
[61] Manners, I. (2002), p. 239
[62] Bretherton, C. & Vogler, J. (2006), p. 42
[63] European Union (2008)

Treaty establishing the European Community (TEC) and TEU[64]. References to international documents such as the European Convention on Human Rights (ECHR) and the Universal Declaration of Human Rights (UDHR) in EU legislation similarly echo the Union's normative difference. The norms that guide the EU's behaviour thus are not simply suggested by political practice, but have been firmly anchored in, and are made explicit by, its constitutive treaties. In conjunction with its unique historical roots and unparalleled, fluid institutional framework, this legal constitution accords a normative dimension to the Union that definitively sets it apart from other institutional actors.

Having established how the Union's normative difference is constructed, the question arises what the EU's normative basis actually consists of. Manners identifies nine core norms in the EU's *acquis communautaire et politique*: sustainable peace, social freedom, consensual democracy, associative human rights, the supranational rule of law, inclusive equality, social solidarity, sustainable development, and good governance[65]. While it is self-evident that these norms often overlap and impact upon each other, according to what Manners terms "contradictory multiplicity"[66], they were legally enshrined at different times, reflecting the norms' historical contingency. The expansion of this body of values also illustrates the politicisation of the European integration project, as values such as non-discrimination and good governance are not only intended to harness individuals against the downsides of economic integration, but are also meant to buttress the increasing socio-political character of the Union. The Charter of Fundamental Rights "restates and re-emphasizes"[67] all norms, save for good governance, and can therefore be regarded as the culmination of the legal articulation of the EU's normative difference. Moreover, while these principles might constitute a specifically *European* normative basis, they themselves transcend the EU; the specificity of the EU as a normative actor is in fact founded on norms that are taken to be "universally applicable"[68].

Even though this normative basis might establish the Union as a normative actor, the EU needs to actively promote these principles in order to be considered a normative power.

[64] See Articles 6 and 11 (TEU) and 177 (TEC).
[65] Even though Manners originally developed these nine principles in 2002, he slightly amended and qualified them in his 2008 article in *International Affairs.* This paper is written with the most up-to-date set of norms in mind.
[66] Manners, I. (2006a), p. 179
[67] Manners, I. (2002), p. 244
[68] Manners, I. (2008), p. 66

According to Manners, there are six ways through which the EU's norms can be diffused[69]:

- *Contagion*, or unintentional diffusion, such as when the EU leads by example;
- *Informational diffusion* as a result of "the range of strategic communications [...] and declaratory communications"[70];
- *Procedural diffusion* through the institutionalisation of the EU's relationship with a third party;
- *Transference* through the exchange of goods, trade, aid and technical assistance;
- *Overt diffusion* by virtue of the EU's physical presence in third states or IOs;
- *Cultural filter,* which Manners interprets as affecting "the impact of international norms and political learning in third states and organizations leading to learning, adaptation or rejection of norms"[71].

Such different pathways reflect how the Union's normative ethics variably revolve around living by example, being reasonable and doing least harm[72]. In more philosophical parlance, Manners describes the normative character of the EU as underlain by a tripartite admixture of virtue, deontological and consequentialist ethics[73]. The outcome of the multiplicative interaction between these different forms of normative ethics with the available methods of norm diffusion and the constitutionalised set of principles is thus a potentially highly variegated normative identity; there is not but one way in which the Union can behave normatively in its external relations.

However, this self-definitional form of identity politics does not reveal the complete picture. Role representations do not take shape in a vacuum, but are always, whether implicitly or explicitly, referential. Even though the Union might wish to carve out a certain image for itself, this identity-building is thus intersubjective; the way that the EU wants to portray itself might well be at odds with external interpretations and expectations. While the focus in this paper is on what Manners and Whitman term

[69] Manners, I. (2002), pp. 244-245
[70] Ibid.
[71] Ibid.
[72] Manners, I. (2008), p. 80
[73] Ibid.

"active identity"[74], or the EU's conscious identity project, it is thus imperative to realise that the construction of the EU's international identity is continuously "created and re-created in processes of interaction"[75].

In order to concretise the six different pathways of norm diffusion, as well as to substantiate his claim that the Union is a normative power, Manners looked at the EU's norm advocacy in abolishing the death penalty. He argues that the EU successfully managed to frame capital punishment as a human rights issue that falls within the scope of the international community, and as such uncoupled it from the realm of the sovereign state. Following this reframing, the EU, according to Manners, contributed significantly to the abrogation of death penalty statutes in Cyprus, Poland, Albania, Ukraine, Azerbaijan, Turkmenistan, Turkey and Russia[76]. He further illustrates how the method(s) of norm diffusion varied per case, ranging from (pre-)accession negotiations to awareness campaigns and from common strategies to partnership agreements, thus illustrating the wide set of policy tools that the Union can make use of in the pursuance of its core and subsidiary norms. Partly replicating Manners' analysis, Lerch and Schwellnus concur with his findings, claiming that "the EU and its member states" are able to "make coherent human rights arguments externally without being accused of hypocrisy"[77].

Nonetheless, while fundamental rights such as the right to life are considered to be among the Union's founding principles, Smismans observes that this narrative is caught up with mythmaking: fundamental rights are retrospectively portrayed as being inherent to the EU and part of a collective European culture[78]. This also holds true for the EU's normative role in the death penalty case. This norm had to be constructed craftily and gradually, and, as Manners acknowledges, is "rooted firmly in the human rights discourses of the late 1980s and early 1990s"[79]; it would thus be a blatant anachronism to assume that this norm has been present from the EC's inception onward. Instead, the EU's international policy leadership on this issue, which it has manifested multifariously since the late 1990s, is the outcome of an incremental process which firmly embedded abolition of the death penalty within the Union's normative framework. In short, the EU

[74] Manners, I. J. & Whitman, R. G. (1998), p. 238
[75] Zehfuss, M. (2006), p. 95
[76] Manners, I. (2002), pp. 249-251
[77] Lerch, M. & Schwellnus, G. (2006), p. 312
[78] See Smismans (2010)
[79] Manners, I. (2002), p. 246

can only be "the lighthouse of fundamental rights"[80] by purposely and proactively making the denouncement of capital punishment a visible marker of its external identity; such a conscious effort negates the assumption that the EU is a pure, intrinsic promoter of fundamental rights.

This does not, however, undermine Manners' claim that, because of its historical roots, its distinctive institutional features and its catalogued body of values, the EU is favourably positioned, or in fact even predisposed, to stipulate what is 'normal' in world politics[81]. More importantly, the abolition of the death penalty is only one illustration of how the Union has increasingly displayed this ability to act as a normative power by projecting its values and by "promoting the establishment of related norms for the governance of international behaviour"[82]. Szymanski and Smith see the Union's successful effort to insert a human rights suspension clause into the EU-Mexico Global Agreement as lending support to Manners' thesis. They even argue that the EU "seemed quite willing to abandon the agreement rather than violate" its principles of democracy and human rights, thus substantiating the view that normative beliefs can take precedence over economic interests[83]. Other research indicates that the EU's championing of the International Criminal Court (ICC) and the Kyoto Protocol in the international arena largely derives from universalist moral arguments and political convictions. Importantly, Scheipers and Sicurelli emphasise how the EU's normative power in both cases hinges on a progressive self-representation that is constructed in credible opposition to American laggardness and on creating binding rules[84]. Groenleer and Van Schaik see unitary European actorness in the same cases as contingent on "the internationalization of values [...] and norms"[85]. These examples thus indicate how the Union has apparently been able to set international standards in several cases spanning different policy areas, thus lending support to the NPE-thesis.

[80] Smismans, S. (2010), p. 54
[81] Manners, I. (2002), pp. 252-253
[82] Bretherton, C. & Vogler, J. (2006), p. 42
[83] Szymanski, M. & Smith, M. E. (2005), pp. 175, 189
[84] Scheipers, S. & Sicurelli, D. (2007), pp. 451-452
[85] Groenleer, M. L. P. & Van Schaik, L. G. (2007), pp. 989-990

Empirical Criticism

In spite of these favourable assessments of the Union's normative track record, NPE has also attracted considerable criticism from an empirical vantage point. For example, Scheipers and Sicurelli's original enthusiasm for NPE concerning the ICC and the Kyoto Protocol was tempered in their investigation of EU-Africa relations, because "material resources of influence" were found to be at play[86]. The authors consequently argue that an assessment of the Union's normative power "leads to mixed results"[87]. Zimmermann's observed pervasiveness of "geostrategic and mercantilist interests" in the EU's trade negotiations about the accession of China and Russia to the World Trade Organization is clearly dismissive of the normative power argument[88]. Similarly, concerning the Russo-Chechen conflict, "the EU's 'softly-softly' policy" was found wanting as human rights concerns were subjugated to conventional interests[89]. A double standard has also been observed in the EU's external policies regarding minority protection[90], as has a chasm between rhetoric and policy action concerning the European Neighbourhood Policy (ENP)[91]. In analysing the EU's policies towards the Western Balkans[92], Noutcheva notes how the absence of a strong normative justification grounded in a universalist discourse inspires third actors to engage in "the politics of compliance" in which the Union's normativity is exposed as a mere legitimacy-starved veneer that is laid upon predominantly rational interests[93]. Orbie *et al.* understand the EU's international promotion of labour standards and its social model as primarily driven by "market-making objectives" that overshadow its "social aims"[94]. Falkner's interpretation of the Union's leadership role in international biotechnology regulation as "a peculiar balancing act amidst competing principles and domestic interests" rather than a "normative stance" echoes this line of reasoning and highlights the Union's embeddedness in both a domestic and a broader political economy[95]. Finally, focusing on the EU's alleged international environmental leadership, Lenschow and Sprungk reveal this is a mere

[86] Scheipers, S. & Sicurelli, D. (2008), p. 620
[87] Ibid., p. 619.
[88] Zimmermann, H. (2007), p. 828
[89] Forsberg, T. & Herd, G. P. (2005), p. 473
[90] Lerch, M. & Schwellnuss, G. (2006), p. 314
[91] Jones, A. & Clark, J. (2008), p. 562
[92] More specifically, Noutcheva (2009) addresses the cases of Serbia and Montenegro, Bosnia and Herzegovina, and Serbia-Kosovo.
[93] Noutcheva, G. (2009), p. 1066
[94] Orbie, J., Tortell, L., Kissack, R. *et al.* (2009), p. 102
[95] Falkner, R. (2007), p. 520

mythicised brand attribute that is not organically rooted in common values, but was in fact intentionally constructed in order to overcome an internal legitimacy gap[96]. In sum, while the Union is often (self-)represented as an idée force, the extent to which this is borne out by reality is questionable.

A different angle in this debate is provided by Bicchi, who seeks to break away from a norm- and interest-based dualism. While most case studies point out the prevalence of economic or security concerns over values, she, when analysing the promotion of regionalism in the Euro-Mediterranean Partnership, interprets the EU's norm-setting as an almost institutionally automated attempt to replicate the European experience outside the Union's borders, thus invalidating the claim that European foreign policy is primarily driven by intrinsic values[97].

Furthermore, the EU's institutional set-up provides ample opportunity for both institutional overlap and competition. Due to its structure as a multi-actor constellation, in which political authority has, often confusingly, been dispersed over various actors, a discordant cacophony is more likely to be heard than harmonious agreement. Additionally, actors might want to monopolise certain issues, thus creating tensions between and within the Union's institutions[98]. Lightfoot and Burchell's analysis of the Union's efforts to advance the sustainable development norm at the 2002 World Summit on Sustainable Development in Johannesburg evidences how a lack of organisational cohesion negates the belief that the EU can speak credibly with one voice in its external relations. In particular, they observe how the ambiguity of shared competences in environmental policy has resulted in a half-hearted norm diffusion, as the Union acted unitarily on some environmental issues, while facing structural difficulties "in ensuring the norm is supported by all" on other subtopics[99].

A final set of empirically-based critical remarks takes issue with NPE's Eurocentrism. By centring the analysis on the actors at whom the vectors of norm diffusion are directed, the agency of these actors is acknowledged. From this it becomes clear that these

[96] Lenschow, A. & Sprungk, C. (2010)
[97] Bicchi, F. (2006)
[98] Cf. Pace (2007), p. 157. Even though Pace concerns herself only with conflict cases, the argument can also be extended to non-security issues.
[99] Lightfoot, S. & Burchell, J. (2005), p. 91

actors are not merely "awaiting transformation by the EU"[100], but that norm internalisation "depends on how these norms resonate with domestic culture and are filtered by national political institutions and processes"[101]. Kratochvíl, for example, observes a "discursive incompatibility"[102] between Russia and the EU, which accounts for a lack of Europeanisation among high-ranking Russian officials. Jones and Clark note that "widening contradictory positions and conflicting multi-interpretability" between Europe and the ENP countries undercut this policy's normative persuasiveness[103]. On a different note, Storey, while in fact partly affirming the Union's role as a norm-influencing and -setting bureaucracy on the global stage, argues that this norm dissemination might have detrimental consequences in third countries. In the case of Economic Partnership Agreement negotiations with African countries, the EU is promoting specific norms that "may not correspond to the developmental needs of African economies"[104]. In short, the Union's norm advocacy is invariably mediated by its addressees.

Conceptual Criticism

The previous section indicated that the normative power argument lacks explanatory power in a vast array of instances. Nonetheless, most of these cases shied away from discarding Manners' thesis altogether and this, by implication, leaves the door open for the use of NPE in different studies. That is, they merely pointed out the inapplicability of NPE to certain contexts, but did not offer the more general criticism that is needed to invalidate the framework in its entirety or to subject it to conceptual changes. It is this second, conceptual level of critique that forms the focus of this section.

Firstly, Manners' thesis has been attacked for its woolliness, and for having been insufficiently problematised in academic circles. Despite having generally been positively received, Merlingen observes that "a lack of conceptual clarity" surrounds NPE[105]. He employs a Foucauldian post-structuralist approach in order to critically examine the concepts of norms and power. By unveiling the tensions that are at the heart of norm

[100] Kratochvíl, P. (2008), p. 399
[101] Checkel, J. T. (1999), as cited in Kollman, K. & Waites, M. (2009), p. 9
[102] Kratochvíl, P. (2008), p. 397
[103] Jones, A. & Clark, J. (2008), p. 565
[104] Storey, A. (2006), p. 343
[105] Merlingen, M. (2007), p. 437

diffusion, he highlights its "Janus-faced character"[106]: norms are simultaneously constructive and disruptive, political and apolitical, while power is both emancipatory and restraining. Merlingen as such renders visible the often undetected and more Cimmerian side of normative politics, ultimately arguing that any attempt "to promote the good life abroad [...] is not only an act of other-regarding ethical conduct, but also a claim to superordination"[107]. This ties into Zielonka's contention that normative politics "is clearly an imperial politics"[108]. In short, a conceptually blindfolded analysis might lead one to overlook NPE's inherent ambiguity; a lack of theoretical reflexivity runs the risk of unfoundedly deifying the Union as a benevolent actor in international affairs.

Another unfortunate upshot of such an uncritical acceptance of the notion is that it is taken to be a positive truism, while, as Pace argues, the way NPE is constructed might in fact be disempowering the EU in the global political arena[109]. Based on a case study of the EU's involvement in the conflict between Israel and Palestine, which has been grossly ineffective from a normative standpoint, she concludes that "we can speak of the power of the construction of NPEU [sic] as a matter of degree"[110]. Connectedly, Nicolaïdis and Howse, though treating Manners' thesis favourably, stress the nexus between internal practices and external objectives. Not only is consistency pivotal, but "the goals that the EU sets itself externally need in turn to constitute the main benchmarks for internal policies"[111]. Put simply, the effectiveness of NPE is fully dependent upon the EU practising what it preaches. If the Union's normative representations, or "narratives of projection"[112], are imperfectly constructed, attempts to shape the world in EU's own image will prove counterproductive, because the European rhetoric is exposed as a mere facade.

In conjunction with this, Diez calls for greater self-reflexivity in studying the Union's normative ethics. He postulates that the Union's constructions of the self are intricately connected to constructions of the Other; "identities are seen always to require an other against which they thus construct at the same time"[113]. Cases such as the death penalty,

[106] Ibid., p. 440
[107] Ibid., p. 443
[108] Zielonka, J. (2008), p. 484
[109] Pace, M. (2007), p. 1043
[110] Ibid., p. 1059
[111] Nicolaïdis, K. & Howse, R. (2002), p. 788
[112] Ibid., p. 769
[113] Diez, T. (2005), p. 627

climate change and the ICC show that this Other frequently takes the form of the US. While representations of third actors take different forms, Diez argues that the EU largely constructs the Other against a European experience that holds universal validity and that thus ought to become "the standard for the world"[114]. Correspondingly, Bicchi argues that the Union's purported normativity is merely an unreflexive, routine-based example of institutional isomorphism[115]. She puts forward the argument that the EU merely seeks to export its own model in a manner that is inherently amoral, yet outwardly dressed in a mantle of morality. The obvious implication is that the Other's moral deficiency is highlighted, as judged against a seemingly objective measuring stick of universalism.

Less clear, however, is that "the problematic issues within the EU" are neglected due to a lack of self-reflexivity[116]. The Union's aim to present a common front in its external relations as such obscures internal imbalances regarding norm socialisation, compliance and implementation. Illusions of homogeneity hide the EU's multifaced character. As a consequence, due attention is only paid to the external and not the internal dimension of Europeanisation. Noting the differentiated member state strategies of pace-setting, foot-dragging and fence-sitting, Börzel poignantly uncovers the intra-European differences of interpretation that are at the heart of allegedly common values and principles[117]. Equivalently, Jones and Clark see the "contradictory demands of negotiating order at the 'internal' level and the 'external level' both operationally and normatively" as undermining the sway of the Union's foreign policy[118]. Though depictions of the EU as a Lernaean Hydra might seem platitudinous, many studies of the Union's normative power fall short of acknowledging this internal fragmentation and take European coherence for granted. The paradox that is revealed here, of a Union that outwardly projects a carefully crafted harmonious image while continuously dishonouring this very craftsmanship through internal norm violations, echoes the aforementioned allegations of window-dressing.

The inconclusive construction of normative power is also addressed by both Eriksen and Sjursen, who want to overcome NPE's definitional ambiguity by developing clear standards on the basis of which the normative power argument can properly be evaluated. They suggest that a normative power can best be distinguished from

[114] Ibid., p. 629
[115] Bicchi, F. (2006), p. 287
[116] Diez, T. (2005), p. 631
[117] Börzel, T. A. (2002)
[118] Jones, A. & Clark, J. (2008), p. 546

conventional power politics through an entrenchment in a Kantian "higher ranking" or cosmopolitan law[119]. Such a legal anchoring of universal individual rights, as opposed to the emphasis on state sovereignty that is more common in standard international law, would "alleviate suspicions of hypocrisy and ensure consistency in the application and pursuit of norms"[120]. Concomitantly, and notwithstanding the herculean challenge of institutionalising the "threat of force" that is needed to make cosmopolitics effective[121], such an approach would endow the EU's foreign policy with greater legitimacy.

A substantial part of the faultfinding focuses on the alleged primacy of the Union's normative principles. Adrian Hyde-Price is foremost among the commentators that question the sincerity of the EU's supposed farsighted self-interest or even political altruism. Taking a neorealist position[122], he acknowledges that states might also be moved by ethical considerations, but that these merely amount in "quixotic moral crusades"[123] that are the outcome of a political agenda in which *ethoi* are permanently relegated to a status of auxiliary or secondary importance. As is cogently illustrated by Europe's relations with Russia and Iran[124], its constituent countries "will only allow the EU to act as the repository for shared ethical concerns as long as this does not conflict with their core national interests"[125]. In a similar neorealist vein, the EU is argued to have been instrumentalised by the member states, who conduct their self-serving behaviour under a guise of shared and selfless morality. If one assumes that the Union itself also possesses what Gunnar Sjöstedt termed actorness[126], something that most neorealists would vehemently oppose, the same logic could also be applied to the EU: when its values are overridden by economic or security interests, the Union either remains silent on its rhetorical pledges, or even violates them outright. The Common Agricultural Policy (CAP) is perhaps the clearest illustration of this[127].

Richard Youngs adopts a more subtle stance, seeing overlap rather than antagonism between constructivist and rationalist approaches. In his analysis of the EU's external

[119] Eriksen, E. O. (2006), p. 253
[120] Sjursen, H. (2006a), p. 244
[121] Eriksen, E. O. (2006), p. 266
[122] For an authoritative account on neorealist analysis, see Waltz (1979)
[123] Hyde-Price, A. (2008), p. 29
[124] Hyde-Price, A. (2006), p. 223 and Ibid., pp. 34-35
[125] Hyde-Price, A. (2006), p. 223
[126] Sjöstedt, G. (1977)
[127] Cf. Vogler, J. (2005), p. 846 and Stern, N. (2002)

human rights policies, he claims that "norms are woven into material interests"[128]. For him this represents more of a compromise between the ideational and the rational dimension than an instrumental logic veiled in a Samaritan language. Diez takes this reasoning one step further, by advancing the claim that the distinction between norms and interests is highly fluid[129].

Notwithstanding their vastly different standpoints, Hyde-Price and Youngs would ultimately most probably agree that, while the Union's phraseology might frequently suggest "a curious blindness to own interests" [130], both a failure to follow through and the intermixing of strategic calculation and norm diffusion leave the member states and the Union open to charges of arbitrariness, unprincipled self-aggrandisement and even hypocrisy. Because these points partly reiterate the criticism levelled at NPE by Pace, Nicolaïdis and Howse, and Diez, it becomes evident that issues of consistency and actualisation are crucial to the credibility of the EU as a normative actor.

On top of debunking the EU's normative principles as little more than subsidiary concerns, critics also question the softness of the European policy toolkit. Thus, while authors such as McCormick argue that the EU's reliance on the exercise of soft power has turned it into a new sort of superpower[131], largely constructed in contradistinction to an American militarist zeal, others observe that such an overemphasis on dialogue, partnership, co-optation and the power of attraction is out of touch with reality. In other words, while purportedly acting in a non-coercing and benign manner, the Union in reality makes use of a wide range of policy instruments which span the hard- and soft-power spectrum. Hyde-Price points to the EU's transformative role in projecting stability into post-Cold War Central and Eastern Europe (CEE) as a potent indication of this, noting how the EU's civilising role is limited to the member states' intention "to *impose* their common values and norms"[132]. The Union thus brandishes carrots as well as sticks in conducting its foreign policy. Given the hyperdependency of neighbouring economies upon European markets, even apparently straightforward carrots such as preferential market access, association and partnership agreements and the ultimate 'golden carrot'

[128] Youngs, R. (2004), p. 420
[129] Cf. Diez, T. (2005), p. 625
[130] Jørgensen, K. E. & Laatikainen, K. V. (2004), p. 15
[131] McCormick, J. (2007)
[132] Hyde-Price, A. (2006), pp. 226-227, emphasis added. Not unimportantly, Hyde-Price also argues that the feasibility of the EU's soft power approach to the CEE-countries hinged upon the "'hard' security guarantees" provided by the US and the North Atlantic Treaty Organization (ibid.).

of accession are not wholly remunerative and exhibit a coercive iron lining. As Zielonka pointedly puts it, "one wonders how much actual freedom" third countries possess in the face of a gaping "discrepancy of power"[133]. Even though this is not irreconcilable with Manners' thesis, as he explicitly stated that the EU should be considered a normative power not instead of but in addition to civilian and military conceptions[134], the logical consequence of this type of criticism is that NPE's relevance, *vis-à-vis* CPE and RPE, in analysing the Union's international identity is downplayed considerably.

Inextricably connected to this line of reasoning are the processes of securitisation and militarisation, which, as was mentioned before, have significantly diluted the case for civilian power perspectives on Europe. Whereas the EU's policy mix has arguably invariably contained both hard and soft measures, some scholars now invoke similar arguments in their attempts to deconstruct a normative role representation of Europe. They do so by referring to recent developments such as the ESDP and ESS. Hyde-Price, for example, interprets the ESDP as "an instrument for coalitional coercive diplomacy"[135], whose creation constitutes an immediate reduction in valence and importance of value-based conceptions of the EU's international identity. Manners himself does not believe that the build-up of military capabilities inevitably entails the attenuation of NPE. Despite acknowledging that the EU has recently "taken a sharp turn away from the normative path of sustainable peace towards a full spectrum of instruments for robust intervention"[136], he argues that this is merely indicative of a prioritisation of military over civilian objectives; if the Union were to engage in reflexive militarisation, implying that military means are subservient to a civilian agenda, this "misdirection"[137] could be corrected. Nonetheless, it appears that NPE's proponents and critics are in agreement that the Union's normative influence will be enduringly undercut if the current militarising trend is not reversed.

Even if the polemic of the Union as a force for good is taken to be true, the universality of its normative principles is subject to debate. That is to say, the EU risks succumbing to "the fallacy of assuming that one's own values and interests are of universal

[133] Zielonka, J. (2008), p. 476. Zielonka made this comment in relation to enlargement, but it has broader applicability.
[134] Manners, I. (2002), p. 253
[135] Hyde-Price, A. (2006), p. 231
[136] Manners, I. (2006b), p. 189
[137] Ibid., p. 192

applicability"[138]. An additional and connected danger is that principles which were central to the alleged European success story are brought to bear on external actors in an a-contextual manner. Despite its genuinely benign aims, the EU might thus unconsciously engage in practices of moral imperialism as it sets out to shape the world in its own image. As Sjursen argues, normative power indubitably entails "the EU promoting its own norms in a similar manner to historical empires and contemporary powers"[139]. Consequently, even a scrupulous Union is likely to arrive at policy outcomes that are "tragically at variance with the original good intentions"[140].

Moreover, referring to the Union's *sui generis* character has become such a commonplace in academic literature, that a label of idiosyncrasy might now almost habitually be attached to its ethos as well. Nonetheless, the normative behaviour of other actors negates the uniqueness of a European ethics in international relations. Even though the EU is "often described as a 'normative' power *in contrast* to the US", Sjursen argues that it is beyond question that Manners' thesis can be applied to the US, and even to the former Soviet Union[141]. Retorting to this, Manners effectively claimed that the EU is exceptional precisely because of a lack of exceptionalism. That is to say, while Manners does not see normativity as a solely European phenomenon, the particularity of NPE is accounted for and contributed to by the EU's "historical context of reflexive humility and attempts to build non-hierarchical relationships"[142]. Furthermore, the Union, according to Manners, does not seek to be perpetually superior. Instead, borrowing from Etienne Balibar, he argues that an effective normative power is in fact a power in decline; a "vanishing mediator" whose interventions in international politics are aimed at universalism rather than uniqueness[143]. Despite Manners' interjection, studies on China[144], India[145], Russia[146] and, again, the US[147] reveal that other countries are also increasingly asserting their morality in the global arena. The Union undoubtedly manifests its ethics in a singular manner, but the importance of heeding contextuality applies to other budding normative players as well. Cautioning against arguments of

[138] Hyde-Price, A. (2008), p. 35
[139] Sjursen, H. (2006a), p. 247
[140] Hyde-Price, A. (2008), p. 44
[141] Sjursen, H. (2006a), p. 240, original emphasis
[142] Manners, I. (2006a), p. 174
[143] Ibid., pp. 174-175
[144] Womack, B. (2008)
[145] Kumar, R. (2008)
[146] Makarychev, A. S. (2008)
[147] Diez, T. (2005) and Hamilton, D. S. (2008)

unidirectionality in the NPE debate, Zielonka even observes a change in the vectors of ideational power, as "numerous global actors are increasingly able to shape Europe's normative agenda"[148]. Barbé *et al.* similarly warn against conceptual blinkers and note that the EU is both a norm-maker and –taker[149]. On the basis of an analysis of patterns of policy convergence between the EU and its neighbours, they put forward the argument that a focus on European dynamics leads to a blind spot for internationally and bilaterally developed norms. In short, it might be more accurate to speak of a general trend towards normative politics than of *l'Europe extraordinaire*.

Lastly, the notion of NPE is open to the same criticism as CPE when it comes to the independence of academia from policy-making. The two have arguably become conflated to such an extent, that it has become unclear whether Eurocrats have constructed the Union as a force for good, with scholars subsequently investigating this claim, or whether academic debates have given rise to a discourse within which normative power is ascribed onto the EU, and "through which EU actors construct themselves as "'model reference points' for other parties to emulate"[150]. Concurringly, Hyde-Price argues that it is difficult for proponents of NPE to "achieve any critical distance" from their object of study[151].

In conclusion, the panoply of criticisms that has been levelled at Normative Power Europe, both from an empirical and a conceptual vantage point, illustrates how this field of study is "at constant risk of moral hyperbole"[152]. These critiques forewarn against an uncritically sympathetic use of NPE in case studies. It is thus of paramount importance to incorporate these points of concern in the remainder of this paper, and to conduct an analysis of the EU's normative power regarding the external protection and promotion of sexual minority rights that pays due attention to issues of reflexivity, contextuality and historicism. Before such a synthesis of theory and praxis can be reached, however, it is necessary to trace the development of the Union's policy action, concerning both the internal and external planes, in this issue area. It is to these LGBT policies that the attention now shifts.

[148] Zielonka, J. (2008), p. 481
[149] Barbé, E., Costa, O., Herranz, A. *et al*. (2009), p. 382
[150] Pace, M. (2007), p. 1050
[151] Hyde-Price, A. (2006), p. 218
[152] Falkner, R. (2007), p. 522

3. Sexual Minority Rights in the European Union

Throughout the history of the EU the provision of sexual minority rights has been, and until this day remains, mostly a matter arranged at the level of the member state. In other words, few competences have been conferred upon the Union concerning issues which are of relevance to the LGBT community. When it comes to recognising same-sex unions or to granting of adoption rights, for example, member states remain firmly in the driver's seat. Despite this institutional arrangement, the Union's informal as well as formal involvement in the politics of sexual minority rights has greatly increased throughout the decades. This owes much to the diffuse nature of LGBT interests; because sexual minority rights are linked to a vast spectrum of policy areas, it would be a non sequitur if EU bodies, including the Council of Ministers and the European Council, concluded that sexual minorities should only be dealt with at the level of the member state. From a neofunctionalist perspective[153], European integration with regard to LGBT-related topic should thus be seen as a spill-over effect of the Europeanisation of issues that, *prima facie*, seem to have little to no bearing on sexual minorities.

As a case in point, while the free movement of persons constitutes one of the cornerstones of the common market, an awareness of its gendered and sexualised character was not evident from the 1957 Treaty establishing the European Economic Community[154]. Following this, the need to combat discrimination on the basis of sexual orientation and gender identity in the exercise of this freedom was originally also not recognised. In fact, the founding treaties only mentioned discrimination on the basis of nationality[155]. From Article 2 of the Lisbon Treaty, which reads that one of the Union's objectives is to "combat social exclusion and discrimination"[156], the dynamism of the EU's rights framework for sexual minorities becomes apparent: treaty amendments and additions, as well as removals, have paved the way for a greater inclusion of LGBT people in legal articles that do not explicitly refer to them.

This is not to suggest that the Union, with its corpus of official statements, non-binding resolutions and recommendations, and legislative acts, is only of indirect relevance to

[153] See Haas (1958)
[154] European Union (2007a)
[155] Ibid., Article 12.
[156] European Union (2008)

sexual minorities. On the contrary, the number of examples in which sexual orientation and/or gender identity are clearly stated has been on the increase in the last two to three decades, showing how issues affecting LGBT people have progressively become recognised as a genuine cause of concern for the EU. This section outlines the development of European-level policies that are specifically aimed at, or take into account the situation of, sexual minorities. While the initial focus is on policies internal to the common market, the chapter concludes with a résumé of the Union's significantly deepening external engagement with LGBT rights.

The 1994 Roth Report

The European Parliament (EP) is generally seen as the motor behind this trend towards greater recognition of sexual minorities within the EU. This is due largely to the groundbreaking role played by the 1994 Roth Report. Named after Claudia Roth, a German Member of the European Parliament (MEP) for the Greens (Bündis 90/Die Grünen), this report led to the adoption of resolution A3-0028/94 on equal rights for homosexuals and lesbians in the European Community (EC). Even though it would be fallacious to interpret the resolution as the first time that the Parliament openly spoke out against the imbalanced rights situation of LGBT people in the EU, its influence was unparalleled. Beger, for example, regards the Roth Report as the "most decisive step in this direction"[157], while the European Region of the International Lesbian, Gay, Bisexual, Trans- and Intersex Association (ILGA-Europe) sees it as a "cornerstone in the Parliament's work for LGB rights"[158]. It has thus been described by both academics and activists as a firm mission statement that contributed greatly to the incorporation of sexual minority rights into human rights considerations in and of the Union

The significance of the report largely derives from its wide-ranging character. Starting from the premise that gay men and women have become more publicly visible, together with the "pluralization of lifestyles", the equal rights resolution calls for social change and corresponding legal measures in order to ensure the equal treatment of citizens, "irrespective of their sexual orientation"[159]. To this end, the EP enumerated a vast array of initiatives at both the European and the member state level. Concerning its general

[157] Beger, N. J. (2004), p. 23
[158] ILGA-Europe (2010b)
[159] European Communities (1994)

considerations, the resolution calls for, among other things, the institutional reform of the Union's human rights framework by erecting a new institution that would ensure and monitor equal treatment[160]. At the national level, the Parliament's smorgasbord included putting an end to the criminalisation of, as well as discrimination against, sexual activity between people of the same sex; equalising the age of consent for homo- and heterosexual activities alike; implementing measures to put a halt to an observed quantitative increase in violence against homosexuals; starting campaigns seeking to counter homophobia; and ensuring that lesbian and gay social and cultural non-governmental organisations (NGOs) are not financially and administratively discriminated against by governmental bodies. The EP further urged the Commission to draft an equal rights recommendation which should aim at ending discriminatory practices in a number of fields. Such practices include unequal age of consent, unauthorised data storage, labour law, same-sex marriages and adoption rights.

In summary, the Roth Report constituted an unprecedentedly progressive document in the history of LGBT rights in the EU. This holds true both because of the wide range of topics that are covered by the resolution, and for the fact that the EP's recommendations went beyond the status quo of the human rights situation of homosexuals in the vast majority of member states. In this light, the Parliament's outspoken position on providing lesbians and gay men full and equal rights concerning marriage should be considered particularly path-breaking, seeing as the only member states in which some form of common-law marriage or registered partnership was in place at the time of the resolution's adoption, were the Netherlands, Denmark and Sweden[161]. The parliamentary resolution is even more revolutionary from a family law perspective, given the paucity of gay adoption rights in Europe in 1994. Even though Ashman observes that "the absence of political will in the other organs of the EC has led these to ignore the views of Parliament"[162], meaning that the report's direct legal implications were by and large negligible, the Roth Report can be interpreted as a firm avowal of support of LGBT people in their struggle for sexual minority rights.

[160] Even though the European Monitoring Centre for Racism and Xenophobia (EUMC) was established in 1997, the EUMC's sphere of competence was limited to racism, xenophobia and anti-Semitism. It was not until 2007, when the EUMC was transformed into the European Union Agency for Fundamental Rights (FRA) that its scope was expanded to include sexual orientation.
[161] ILGA-Europe (2010c)
[162] Ashman, P. (1993), p. 4

Developments prior to 1994

Even though parliamentary LGBT-related positions taken prior to the Roth Report were not nearly as influential, they are still worth taking note of, in order to illustrate how the equal rights resolution was by no means an eccentricity in the Parliament's stance towards sexual minority rights. On the contrary, it fit in with the Parliament's increasing commitment to the active promotion of these very rights.

The first real instance that the EP displayed such a budding commitment regarding sexual minority rights was through a report on sexual discrimination at the workplace in 1984. More commonly referred to as the Squarcialupi Report, after the Italian rapporteur Vera Squarcialupi (Partito Comunista Italiano), this report spoke out strongly against discrimination on the basis of sexual orientation at a time when the World Health Organization (WHO) still classified homosexuality as a mental illness[163]. More specifically, through adopting the resolution based on the Squarcialupi Report, the EP indicated that it "deplores all forms of discrimination based on an individual's sexual tendencies" and that it considered it "impossible to ignore or passively to accept de facto or de jure discrimination against homosexuals"[164]. The report therefore urged member states to undertake a series of steps, including the abolition of any laws that make homosexual acts between consenting adults illegal[165]; the equalisation of the age of consent for homo- and heterosexual acts; and the declassification of homosexuality as a mental illness. The parliamentary resolution largely confined the role of the Commission to ensuring the combating of and reporting on discrimination with regard to employment and housing, but also encouraged it to take the lead in inducing the WHO to revise its position on homosexuality. In spite of the unequivocal character of the Parliament's message, the role of the Squarcialupi Report, much like that of the Roth Report a decade later, was mostly advisory.

Another noteworthy example of parliamentary activism predating the Roth Report concerns a 1989 resolution on discrimination against transsexuals. Following from an understanding of the difficulties that transsexuals undergoing a sex change face in the

[163] Homosexuality was only removed from the WHO's International Statistical Classification of Diseases and Related Health Problems in 1990.
[164] European Parliament (1984)
[165] This clause was implicitly directed at Ireland, which was the only member state in which homosexuality between consenting adults in private was punishable.

workplace, this resolution centres simultaneously on the employment sector and on the medical branch. Among other things, the Parliament called upon member states to grant transsexuals the right to change sex, as well as to have the costs thereof reimbursed by health care institutions, and to secure equal treatment in the workplace[166]. Other illustrations of the importance that Parliament attaches to the human rights situation of sexual minorities are the specific condemning of harassment of lesbians and gay men in a 1991 report on a code of practice to combat sexual harassment in the workplace[167], and the denunciation of the discrimination of children on the basis of sexual orientation in its 1992 resolution on a European Charter of Rights of the Child[168]. These examples, once more, evidence the EP's focus on the intersection of human rights and non-discrimination in its approach to sexual minorities.

Concerning the European Commission, the first real involvement in LGBT matters, apart from the occasional funding of LGBT organisation and activities, came in 1991 after pressure from ILGA[169]. The Commission consequently commissioned an in-depth study into the impact of the single market on gay men and women. The resultant report, *'Homosexuality: A Community Issue'*, concluded with a call for action, arguing that the EC "cannot go on shunning responsibility, looking away, keeping mum"[170]. The time had come for both the Council and the Commission to face its responsibility, and to cease shifting the burden "to the Council of Europe, to the Member States, to private organizations"[171]. Despite the unambiguous wording of the report's recommendations, however, the authors failed to induce the Commission to make any substantive policy changes or implementations.

Post-Roth Report developments

Without trying to downplay the significance of these manifestations of institutional support for sexual minority rights at the European level before 1994, the comprehensive Roth Report signified a real watershed moment in the Europeanisation of LGBT issues.

[166] European Parliament (1989), as cited in Council of Europe (2000), pp. 82-83
[167] Van der Veen, E., Hendriks, A. & Mattijssen, A. (1993), pp. 501-502
[168] European Parliament (1992)
[169] Ashman, P. (1993), p. 4. The ILGA was then still known as the International Lesbian and Gay Association.
[170] Clapham, A. & Weiler, J. H. H. (1993), p. 397
[171] Ibid.

Illustratively, as Beger notes, Parliament "has since then included the issue of sexual orientation in all its annual human rights reports about the situation in the Union as well as in the rest of Europe"[172]. It has also made discrimination against homosexuals a point of concern in membership negotiations with candidate countries. The report thus played a crucial role in ensuring that issues of sexual minority rights are addressed at the European level. Ever since, the number of references to LGBT people in EU documents and discourse has spiralled upwards. Exemplifying this, the European Union Agency for Fundamental Rights (FRA) observed a marked increase in the number of parliamentary resolutions related to homophobia, "reflecting the increasing importance attached to this issue"[173]. In short, the Roth Report has been instrumental in firmly placing sexual minority rights onto the agenda of the Union.

Together with social change in the member states, these policy developments prepared the way for what Beger considers to be "the most significant manifestation of the commitment to anti-discrimination on the part of the European Union before the new Constitution"[174], namely the expansion of the Union's scope regarding social affairs through Article 13 of the 1997 Treaty of Amsterdam[175]. While a cursory glance at the treaty suggests that sexual orientation is merely one among, or even the last of, many grounds of discrimination that ought to be combated, the empowering effect of the treaty becomes clear from a closer reading:

> "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation"[176].

In other words, Article 13 should be seen as the first authorisation of Community action against discrimination on the grounds of sexual orientation beyond the occupational realm. Though the Treaty fell short of meeting its full potential, for its failure to in fact

[172] Beger, N. J. (2004), p. 23
[173] European Union Agency for Fundamental Rights (2009a), p. 10
[174] Beger, N. J. (2004), p. 23
[175] The complete title is the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.
[176] European Union (1997)

"prohibit these forms of discrimination prevents it from producing direct effect"[177], Article 13 already prompted the Commission into action the year after the Treaty of Amsterdam came into effect.

More specifically, the article formed the legal basis for the 2000 Directive establishing a general framework for equal treatment in employment and occupation. This Employment Directive obliged all member states to take legal measures in order to ban discrimination in employment on the basis of, among other grounds, sexual orientation. People that perceive they have been discriminated against should also be given access to adequate means of legal protection. The rationale behind the directive is that discrimination on a stated number of grounds is at odds with the Union's objectives. In this light a particular mention is made of "the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons"[178]. Contemporaneously, the Commission launched a five-year Community Action Programme to Combat Discrimination, which awarded funding to a number of LGBT organisations[179].

Despite the apparent progressive nature of the Employment Directive, it was greeted with disillusionment by the EP, ILGA-Europe and by the Social Platform, an overarching alliance of European social NGOs. They decried the directive's vertical character, meaning that it only addressed discrimination in the employment realm. The Commission's decision to split Article 13 into different directives reflected the decision-making structure in the Council, where the requirement for unanimity was highly likely to prevent a more general directive from being passed. Consequently, the Race Equality Directive was the only horizontal directive issued in 2000, illustrating how the "Commission considered racism to be the only safe ground to be covered beyond employment"[180]; it was deemed highly unlikely that such a directive regarding sexual orientation would be equally well-received in the Council of Ministers. This is thus suggestive of a hierarchisation of grounds of discrimination, in which sexual orientation is seemingly undervalued in comparison with race- and ethnicity-based discrimination[181].

[177] Arnull, A. (1999), p. 111
[178] Council of the European Union (2000)
[179] This action programme spanned the years between 2001 and 2006. It was superseded by the Programme for Employment and Social Solidarity (PROGRESS) for the period 2007-2013.
[180] Beger, N. J. (2004), p. 24
[181] Cf. European Union Agency for Fundamental Rights (2009a) , p. 35

The sense of disillusionment also partly derived from a clause in the directive which justifies "a difference of treatment" in cases where a characteristic such as sexual orientation "constitutes a genuine and determining occupational requirement"[182]. This would enable religious employers to discriminate on the basis of sexual orientation. Practical faultfinding has augmented this content-related criticism, as it has become apparent that the directive's implementation "has been variable across the Member States"[183]. Thus, the significance of the Employment Directive notwithstanding, it was considered to be a limited achievement by both Parliament and LGBT activists.

In the same year that the Employment Directive took effect, the Charter of Fundamental Rights was signed by the Council. An awareness of the need for such a document dates back to 1993, when the Treaty on European Union (TEU), alternatively referred to as the Maastricht Treaty, entered into effect. Because the TEU introduced the concept of European citizenship, it became evident that the European Convention on Human Rights (ECHR) was no longer a sufficient vehicle for dealing with fundamental rights and non-discrimination matters. Instead, the consensus arose in Parliament that these issues should be dealt with explicitly in EU law. The Union's powers in the social domain were also broadened considerably under the Maastricht Treaty, because the Social Protocol was attached to it. Consequently, the EP demanded in 1995 "that the Council draft a catalogue of citizenship rights beyond the economic dimension"[184]. After a protracted process, this finally resulted in the Council's signing of the Charter at the Nice Summit of 2000. Concerning sexual minorities, the Charter's main relevance is located in Article 21, which expressly prohibits discrimination on a number of grounds, including sexual orientation[185].

Despite the lobbying efforts of ILGA-Europe, no mention was made of discrimination on the grounds of gender identity. On top of this, the CFR has limited applicability, as it only affects "the actions of the EU institutions and the member states' authorities"[186]. De Búrca also downplayed the Charter's transformative potential, arguing that it has not "altered anything significant within the existing legal, political and constitutional

[182] Council of the European Union (2000)
[183] European Union Agency for Fundamental Rights (2009a), p. 13
[184] Beger, N. J. (2004), p. 25
[185] European Communities (2000)
[186] Eriksen, E. O. (2006), p. 258

framework"[187]. These limitations notwithstanding, the CFR is the first international charter to explicitly apply the non-discrimination principle to sexual orientation.

Even though no real *pièce de resistance* resembling the Roth Report, Article 13 of the Amsterdam Treaty or the Employment Directive was issued by any European institutional body between 2000 and 2009, the Union's institutional bodies became increasingly attuned to the plight of sexual minorities in this period. This is evidenced by a series of parliamentary resolutions on rampant homophobia and homophobic violence within the Union's confines[188] and on potentially discriminatory legal developments in Lithuania[189]. In a 2008 report on the situation of fundamental rights in the Union between 2004 and 2008, the EP also called for a stronger involvement of the Commission in ensuring that member states apply the principle of mutual recognition of same-sex unions, and that they grant asylum to persons fleeing from persecution on the grounds of sexual orientation[190].

Moreover, a 2004 green paper launched by the Commission revealed a need for greater public awareness of European non-discrimination legislation. To this end, 2007 was made into the European Year of Equal Opportunities for All, with a focus on rights, representation, recognition and respect: activities and events aimed at making people aware of their rights not to be discriminated against, at increasing the participation of marginalised groups, at facilitating and celebrating diversity and equality, and at promoting a more cohesive society. Even though the initiative's focus on equal treatment and non-discrimination was intentionally broad, sexual orientation formed an integral part of it and several LGBT NGOs were awarded funding. Significantly, in a follow-up to the initiative, the Council expressed its commitment to build on and to strengthen the efforts made during the European Year of Equal Opportunities for All[191].

Furthermore, a particularly significant stride regarding the rights of transgender persons was made in 2006 with the adoption of the Gender Recast Directive[192], which seeks to consolidate the provisions on the implementation of the principle of equal treatment

[187] De Búrca, G. (2001), 129
[188] European Parliament (2006a, 2006b and 2007)
[189] European Parliament (2009a)
[190] European Parliament (2008)
[191] Council of the European Union (2007)
[192] European Union (2006a)

between men and women in employment and occupation matters. Basing themselves on jurisprudence of the European Court of Justice (ECJ), Council and Parliament state in the directive's preamble that the principles of equal treatment also apply to people that have undergone gender reassignment. In other words, the directive goes beyond enshrining the right to equal treatment irrespective of one's sex at birth, by also denouncing discrimination on the basis of acquired gender. This is the first time that "an explicit reference in relation to discrimination based on 'gender reassignment'" can be found in EU legislation[193].

In 2008, following pressure from Parliament and NGOs, the Commission paid heed to the criticism of the Employment Directive by putting forward a proposal for a Council directive that would extend the principle of equal treatment to all areas of social life mentioned in the Racial Equality Directive[194]. Even though the Spanish Presidency of the Council made a series of drafting suggestions on the basis of the proposal[195], no new directive has yet been agreed upon by the member states. For the time being the equality hierarchy that is symbolised by the 2000 directives, and which the Commission proposal essentially seeks to flatten, is thus kept in place.

A final significant development concerns the waning declaratory character of the CFR. At the time of signing it was contested whether the Charter would amount to anything more than empty rhetoric, because its legal status was "infamously" to be "determined at a later stage"[196]. On 1 December 2009, however, the Lisbon Treaty came into effect. While it is important to note that the United Kingdom and Poland, later joined by the Czech Republic[197], annexed a protocol to the Lisbon Treaty that effectively constitutes an opt-out from the Charter[198], the entering into force of the treaty made the CFR legally binding upon the institutions of the Union and upon all other member states when implementing Community legislation. Consequently, Eriksen's verdict that "the institutionalization of a human rights policy in the EU is weak" should be, at least partly, revised[199].

[193] Fabeni, S. & Agius, S. (2009), p. 3
[194] European Commission (2008b)
[195] Council of the European Union (2010c)
[196] Hervey, T. K. (2003), p. 203
[197] Council of the European Union (2009b)
[198] The protocol states that "the Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms" (European Union, 2007b).
[199] Eriksen, E. O. (2006), p. 259

Sexual Minority Rights in the EU's External Relations

Even though the upholding and promoting of its values and interests "in its relations with the wider world" has been an EU objective since the TEU[200], the outlined maturation of the Union's internal human rights approach to sexual minorities has only recently started to find itself increasingly reflected in the EU's external relations. Without trying to claim causality, it can be argued that this is a logical extension of recent developments such as the extension of the mandate of the Council Working Group on Human Rights (COHOM, 2003), the erection of the FRA (2007), the now binding character of the CFR (2009), the explicit inclusion of fundamental rights in the name of a Commission portfolio (2010)[201] and the on-going establishment of the European External Action Service (EEAS). Significantly, discrimination on the ground of sexual orientation is explicitly included within the scope of the European Instrument for Democracy and Human Rights (EIDHR)[202]. This financing instrument was launched in 2006 as the Commission's support tool in the promotion of democracy and human rights. More generally, the maturing process is in line with the Europeanisation of foreign policy-making[203]. Such changes undoubtedly enhance both the Union's savoir-faire and confidence regarding fundamental rights, and, thereupon, feed into its ability to address the human rights situation of sexual minorities in third countries.

The European Parliament, as holds true for the inward-oriented development of LGBT policies, is evidently the multi-actor constellation's most vocal and committed promoter of sexual minority rights outside of the Union's borders. A particularly prominent role is played by the European Parliament's Intergroup on LGBT Rights (LGBT-EP), which is an informal platform that consists of MEPs from different member states and different political groups who share an interest in LGBT issues[204]. Members of LGBT-EP often cooperate when putting forward proposals and amendments, and join together to address officials of the Council, Commission and European Council with parliamentary questions on LGBT-issues. Additionally, the intergroup's MEPs engage in the

[200] European Union (2008), p. 17
[201] This novelty was established under the second cabinet of José Manuel Barroso, which saw Viviane Reding taking up the portfolio of Justice, Fundamental Rights and Citizenship.
[202] European Union (2006b)
[203] Cf. Gross, E. (2009)
[204] It is important to keep this distinction between the LGBT-EP and the EP as a whole in mind.

organisation of internal and public meetings, attend conferences and Pride marches, issue statements on LGBT affairs, and send letters regarding sexual minority rights to an array of authorities at the (sub)national, European as well as at the extra-European and international level. This informal institutional arrangement also facilitates contact with civil society, although the close working relationship between intergroups and lobbying interest groups has been a laden point of discussion[205].

Even though Parliament's limited competences in foreign policy matters largely explain why LGBT-EP's work is guided by priorities that have a clear inward focus[206], the EP, and the intergroup in particular, has also been highly visible regarding external LGBT affairs. For example, LGBT-EP MEPs have pronounced their indignation over the harassment of sexual minorities in a number of countries, ranging from Malawi[207] to Turkey[208], as well as over the violation of the freedom of assembly in cases such as Belarus[209], Moldova and Ukraine[210]. These are merely a few recent examples of the intergroup's history of monitoring human rights abuses against LGBT people outside of the EU's borders. While these statements carry no legal implications, which could lead to talking-shop allegations, the respective parliamentarians do customarily call upon the Union to act in accordance with its values in its diplomatic ties with third countries.

On other occasions, the EP takes a more pronounced stance against LGBT-related human rights violations. A case in point is the parliamentary outrage over anti-homosexual draft legislation by a Member of Parliament in Uganda in 2009. This bill purported to "protect the [...] legal, religious, and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda"[211] by introducing measures such as imprisonment for life and capital punishment for engaging in specific forms of homosexual activity. The draft legislation also proposed penal action against people who promote or recognise same-sex behaviour[212]. The European Commissioner for Development, Karel De Gucht, spoke out against the bill and reminded the Ugandan

[205] Cf. Tanasescu, I. (2009), pp. 50-51
[206] The European Parliament's Intergroup on LGBT Rights (2010a)
[207] The European Parliament's Intergroup on LGBT Rights (2010b)
[208] The European Parliament's Intergroup on LGBT Rights (2010c)
[209] The European Parliament's Intergroup on LGBT Rights (2010d)
[210] The European Parliament's Intergroup on LGBT Rights, ILGA-Europe & Amnesty International (2010)
[211] Bahati (2009)
[212] Ibid.

government of its obligations under the Cotonou Agreement. The draft constitutes a violation of this agreement between the EU and a large group of countries from Africa, the Caribbean and the Pacific (ACP), which represents a commitment of both the EU- and the ACP-countries to "promote and protect all fundamental freedoms and human rights"[213]. Other than this verbal reprimand, however, the Commission remained silent, while the Council did not put forward any joint statement whatsoever[214].

The reaction in Parliament, however, was considerably more fervid. A large number of MEPs, spanning six political groups, thought the issue so contentious that they put forward a joint motion for resolution that was adopted rather straightforwardly[215]. The resolution reflects a strong adherence to international and, in particular, cosmopolitan law. It emphasises that sexual orientation falls "within the remit of the individual right to privacy as guaranteed by international human rights law" [216]. Parliament further reminds the Ugandan government of its human rights obligations under international law, and explicitly refers to the Cotonou Agreement, as well as to statements made by the African Commission on Human and Peoples' Rights and the United Nations (UN) Human Rights Committee. Significantly, the resolution also transcends the specificity of the Ugandan case by calling:

> "on the Council, Commission and member states to analyse the situation in third countries in relation to executions, criminalisation or discrimination on grounds of sexual orientation and to take concerted international action to promote respect for human rights in those countries through appropriate means"[217]

As such, the resolution reaffirms the profundity of Parliament's commitment to the universality of LGBT rights in a dual way: through references to cosmopolitan law, and by making clear that it feels itself morally obliged and *de facto* politically authorised, in spite of its limited competence, to address human rights violations against sexual minorities irrespective of where they are taking place.

[213] European Commission (2006a)
[214] It has to be noted that several member states did express their concern unilaterally, with Sweden even pledging to revoke its development aid to Uganda if the bill were to pass.
[215] European Parliament (2009b)
[216] European Parliament (2009c)
[217] Ibid.

This dualism is similarly evident whenever MEPs table parliamentary questions directed at EU officials. For example, when addressing the homophobic violence and concomitant incompetent police intervention that plagued a regional conference of ILGA in Indonesia in March 2010, five MEPs reminded the Commission of the "universality and indivisibility of human rights", as well as of how the incident was in contravention of the recently-signed Partnership and Cooperation Agreement between the EU and Indonesia[218]. The reply of the High Representative (HR), with references to an upcoming EU-Indonesia Human Rights Dialogue, the EIDHR and the EEAS, likewise indicated how discrimination on the grounds of sexual orientation has become firmly established as a key point in the Union's external relations[219].

LGBT concerns have featured particularly prominently in the EU's relations with neighbouring countries, whether through enlargement, via the ENP or bilaterally. Regarding membership, Parliament adopted a resolution in 1998 which states that it "will not give its consent to the accession of any country that, through its legislation or policies, violates the human rights of lesbians and gay men"[220]. Because parliamentary assent is a requirement for accession, this resolution effectively professes to veto EU membership of countries whose governments exhibit homophobia, whether *de jure* or *de facto.* Whereas respect for and the protection of human rights and minorities have been part of the Union's Copenhagen accession criteria since 1993[221], thus suggesting that the resolution is superfluous, the initiative constitutes an unequivocal proclamation that the EP will remain especially attuned to the rights of sexual minorities in the candidate countries. In other words, Parliament will not allow their plight to be muffled by other membership criteria. This commitment is put into practice by ensuring that LGBT rights are mentioned in the Commission's progress reports. As a matter of illustration, Parliament condemned the homophobic violence that surrounded the Gay Pride parade in Zagreb in the 2009 report on Croatia[222]; and expressed its concern about the omission of discrimination based on sexual orientation and gender identity in proposed anti-discrimination in the Former Yugoslav Republic of Macedonia[223]. It would be wrong to assume that the EP only animadverts on the rights situation of LGBT people; a 2002

[218] Cashman, M., Lunacek, U., Romeva i Rueda, R. *et al.* (2010)
[219] European Commission (2010b)
[220] European Parliament (1998)
[221] European Council (1993)
[222] European Parliament (2010a)
[223] European Parliament (2010b)

resolution, which welcomed the amendment of certain discriminatory provisions of the Romanian penal code[224], illustrates that it also underlines policy advancements that bring candidate countries closer to accession. In short, through the adoption of such resolutions, Parliament thus ensures that sexual minority rights remain on the radar in the enlargement process.

Concerning its approach to non-candidate neighbouring countries, the EU's policy is very similar in the importance that it attaches to human rights. Within the ENP, the Commission's action plans generally make the strengthening of respect for human rights and fundamental freedoms a priority area and stress the international commitments that these partner countries are bound by. In monitoring the progress made by the ENP-countries, including in the field of human rights, the Commission makes use of contributions from civil society. Although Parliament's legal involvement in the EU's relations with neighbouring countries is essentially arm's-length, especially in comparison with enlargement, its approach regarding sexual minority rights is very similar. That is, through its communications and questions, it hopes to stimulate rights reform and to ameliorate the situation of LGBT people more generally. Because the Commission seeks to involve civil society organisations directly under the neighbourhood policy, MEPs, in particular those that are part of LGBT-EP, work closely together with ILGA-Europe. Via parliamentary questions they, for example, try to make sure that the NGO's contributions find their way into the progress reports that are compiled for each country separately[225]. The same holds true for the parliamentary input on EU-Russian relations, with concerns centring mostly on the breach of the freedom of assembly[226]. Outrage over the Russian authorities' policies regarding Gay Pride manifestations even filtered into a parliamentary resolution[227].

In short, while the Commission's engagement with third actors suggests a tepid concern for sexual minority rights through human rights provisions and references to international commitments, it is Parliament that proactively aims to firmly place, and keep, LGBT issues on the Union's foreign policy agenda, whether on a bilateral basis, through membership candidacy, or via other partnership arrangements.

[224] European Parliament (2002)
[225] See, for example, Cashman, M., Lunacek, U., In 't Veld, S. *et al.* (2010)
[226] Cashman, M., Lunacek, U., Pietikäinen, S. *et al.* (2010)
[227] European Parliament (2006b)

The LGBT Toolkit

The previous subsection delineated that the Union's involvement in LGBT affairs in third countries, though increasing in quantity as well as vocality, has always been embedded in policy instruments and resolutions that have a scope that extends well beyond issues concerning sexual minorities. Despite Parliament's unrelenting efforts to keep the interests of this frequently marginalised group on the centre stage, this inevitably puts LGBT rights at a risk of being diluted or overridden by other points of concern. In this sense, it mirrors the aforementioned hierarchised interest representation that became evident with the Employment Directive.

Nevertheless, the creation of a *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People* has the potential to clear the way for a heightened international actorness expressly fine-tuned with a view to the universality of LGBT rights. It was developed and subsequently adopted by the Council Working Group on Human Rights in June 2010. COHOM is composed of experts from the member states and has been tasked with shaping the EU's human rights policy in its external relations since 1987. Its mandate was reinforced in 1999 and 2003, and it is the second extension that brought social policies, and by implication LGBT rights, under its purview[228].

The LGBT Toolkit represents the first occasion on which COHOM specifically acknowledges that LGBT people constitute a "vulnerable group" that merit a special focus within the EU's human rights policy[229]. Its broadly formulated objective is to:

> "provide staff in the EU Headquarters, EU Member States' capitals, EU Delegations, Representations and Embassies with an operational set of tools to be used in contacts with third countries, as well as with international and civil society, in order to promote and protect the human rights enjoyed by LGBT people within its external action"[230].

[228] Council of the European Union (2003)
[229] Council of the European Union (2010d)
[230] Ibid.

Furthermore, the instrument is both conflict- and structure-oriented: it should empower EU actors to simultaneously respond to cases in which human rights violations have already occurred, and to address the root causes of such violations in order to prevent rights infringement from taking place altogether.

In terms of content, the toolkit lays out three priority areas. Firstly, the criminalisation of consenting same-sex relations is found to be incompatible with international human rights law. Here the EU should focus in particular on those countries where "the death penalty, torture or ill-treatment" is practised[231]. Secondly, the principles of equality and non-discrimination should be promoted in accordance with international agreements and by providing initiatives geared towards these objectives with financial or political support where appropriate. Thirdly, the EU should work towards supporting and protecting human rights defenders in LGBT-related contexts. From these priorities it could be inferred that the Union is careful to avoid accusations of political two-facedness by focusing on critical issues that have already reached a certain level of institutionalisation and legal entrenchment within the Union: homosexuality has been decriminalised throughout the EU, equality and non-discrimination have become constitutionalised values, and civil society organisations such as ILGA-Europe receive financial support from the Commission.

In order to substantiate the initiative's objectives, COHOM's communication on the toolkit is replete with references to existing international documents and agreements within which the principle that "LGBT people have the same human rights as all individuals" is said to be embodied[232]. In particular, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) are referred to. Even though neither document makes an express mention of sexual orientation or gender identity, COHOM's note on the toolkit seems to suggest that it understands the words "or other status" of Article 26 of the ICCPR[233] and Article 2 of the ICESCR[234] to apply to sexual minorities[235].

[231] Ibid.
[232] Ibid.
[233] United Nations General Assembly (1966a)
[234] United Nations General Assembly (1966b)
[235] Council of the European Union (2010d)

By the same token, the toolkit reflects the Union's support of a statement on the nexus between human rights and sexual orientation and gender identity adopted by the United Nations General Assembly (UNGA) in December 2008. The statement reaffirms that the principle of non-discrimination "requires that human rights apply equally to every human being regardless of sexual orientation or gender identity"[236]. By backing the statement, 68 countries, including all EU member states, strongly condemned human rights violations on these grounds. Furthermore, the statement is a plea for the universal decriminalisation of homosexuality and non-conforming gender identities. A final call made by the letter to the President of the UNGA is to "ensure adequate protection of human rights defenders"[237]. In summary, all three of the LGBT toolkit's priority areas of action are mentioned in the statement. This lends support to Sheill's argument that it is important that the letter was submitted "as an official UN document"[238], because it illustrates how cosmopolitan principles filter into actual policy measures. Analogously, the toolkit attempts to add weight to its priority area concerning human rights defenders by citing a declaration[239] adopted by the UNGA in 1998 that places a particular emphasis on the freedom of association[240], which is of the essence in the support and protection of LGBT rights.

As both the ICCPR and ICESCR were adopted in 1966 by the UNGA[241], and given the 2008 statement's status as an official document of the UN, these should all be taken as instances of "higher ranking" or cosmopolitan law that reflect supposedly universal principles[242]. Additional authority is derived from the symbolic fact that the covenants, together with the UDHR, form the International Bill of Human Rights. Furthermore, in writing up the policy toolkit, the Council working group also sees potential relevance in five other international legal instruments, as well as in a number of regional documents, in the protection promotion and protection of human rights enjoyed by LGBT people[243]. The policy instrument is thus portrayed as a logical outgrowth of international human rights law rather than as an anomalous case of European Messianism.

[236] United Nations General Assembly (2008)
[237] Ibid.
[238] Sheill, K. (2009b), p. 318
[239] The International Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms.
[240] United Nations General Assembly (1999)
[241] However, both treaties only entered into force in 1976.
[242] Eriksen, E. O. (2006), p. 253
[243] Council of the European Union (2010d)

The toolkit also stresses that the EU itself is bound by the very principles it seeks to promote. This is evident not only from the fact that all of its member states ratified the aforementioned covenants, but is made even more manifest via references to the Treaty on the Functioning of the European Union (TFEU)[244] and the CFR. Additionally, the instrument specifies that action should be guided by the EU Guidelines on Human Rights and International Humanitarian Law, which are "practical tools to help EU representations in the field" to improve the advancement of EU policy[245]. Of particular relevance in the case of LGBT rights are the guidelines on the death penalty; on torture and other cruel, inhuman or degrading treatment or punishment; on human rights defenders; and on violence against women and girls and combating all forms of discrimination against them[246].

The toolkit's cosmopolitan accent also becomes evident from the operational tools that are at the disposal of EU actors in their attempts to accomplish the aforementioned aims. While varying greatly in character, including fact sheets, reports, démarches, information exchange, close cooperation with civil society and even prison visits and court attendance, the weight that is attached to the EU's representations at multilateral platforms is particularly significant. The instrument stipulates that EU actors should promote the support of and compliance with the UDHR and the aforementioned statement made at the UNGA in 2008. LGBT concerns should further be incorporated into "statements and in questions during interactive dialogues at the UN"[247] as well as into the quadrennial review of the human rights situation of the UN member states[248]. Moreover, concerning political dialogue, an emphasis is placed on encouraging third countries to sign and/or ratify the ICCPR and the ICESCR and "to invite UN Human Rights Special Procedures to conduct country and thematic missions"[249]. References to the Organization for Security and Co-operation in Europe and the Council of Europe further indicate how significant COHOM perceives multilateralism to be in supporting and protecting sexual minority rights.

[244] The Lisbon Treaty renamed the Treaty of Rome as the TFEU.
[245] Council of the European Union (2009a), p. 3
[246] Council of the European Union (2010d)
[247] Ibid.
[248] This is the so-called Universal Periodic Review of the UN's Human Rights Council in Geneva.
[249] Ibid.

The abundance of references to international human rights law, and to cosmopolitan law in particular, seem to imply that the fundamental rights of individuals are of paramount importance to the Union. This is suggestive of a shift away from the "exclusive emphasis on the rights of sovereign states within a multilateral order" to a cosmopolitan order[250]. From this perspective, the toolkit represents the materialisation of the EU's awareness that the violation of LGBT rights is in contravention of the Union's normative roots; refraining from being proactively and structurally involved in LGBT issues in its external relations would thus be at variance with the universal values upon which the Union is founded.

In conclusion, this section has made clear that the Charter of Fundamental Rights and the LGBT toolkit constitute the zeniths, respectively from an internal and external focal point, in the Union's promotion and protection of the human rights of LGBT people. It has further become evident that meaningful intra-European policy developments, having their roots in groundbreaking parliamentary reports and culminating in the first binding international document that expressly prohibits discrimination on the basis of sexual orientation, progressively find themselves reflected in the EU's engagements with third countries. The incorporation of sexual minority rights into the Union's external relations is a relatively new phenomenon, which could potentially flourish into a powerful trademark of a European human rights policy by the adoption of the LGBT toolkit. With a view to properly evaluating this potential, however, it is important to analyse the outlined policy developments more critically, both from a *de jure* and a *de facto* perspective, in order to lay bare any conflictions and incoherence that might prevent the Union from acting as a full-fledged, credible and effective normative power in the case of sexual minority rights.

[250] Sjursen, H. (2006a), p. 246

4. Conflicted Normative Power and Sexual Minority Rights

In conceptualising the Union's international identity it has become almost prosaic to stress its singularity and how this defies classification of the EU as a monolithic entity. The formulation of the EU's external policies instead derives from the interactivity between the national and EU levels, with an increasing openness to, and embeddedness in, regional and subnational levels, other multilateral institutions and non-governmental policy actors. The EU is thus an exemplar of multi-level governance. Rejecting the state-centric "separation between domestic and international politics"[251], the MLG-framework instead speaks of "a range of mutually dependent actors across different policy levels, with multiple powers and interests, complementary functions and overlapping competences"[252]. Furthermore, the distribution of these competences across different actors is inevitably variable across different issue areas in as diffuse a policy field as external relations. In short, domestic and international politics are intricately entangled in a network of interrelations.

However, there is a downside to this multilevel and multilocation nature of the EU's foreign policy. The fluidity and dispersiveness of the Union's institutional arrangements make coherence, congruence and consistency particularly difficult to attain. According to Bretherton and Vogler, "there are numerous areas where the hybrid identity of the Union is associated with tensions and inconsistencies between roles and associated practices"[253]. This in turn negatively impacts upon the EU's external projection of power.

As an illustration of this, Meunier and Nicolaïdis, focusing on the EU's endowments on the global marketplace, note that the EU is indubitably a "power *in* trade", but that this does not automatically translate into being a "power *through* trade"[254]. The conclusion of their deconstructive analysis of the image, as well as self-representation, of the Union as an economic powerhouse was rather sobering to Europhiles: the EU was a "conflicted trade power" that could only be made to act both effectively and legitimately through "strategies of reconciliation"[255].

[251] Hooghe, L. & Marks, G. (2001), p. 4
[252] Keukeleire, S. & MacNaughtan, J. (2008), p. 32
[253] Bretherton, C. & Vogler, J. (2006), p. 59
[254] Meunier, S.& Nicolaïdis, K. (2006), p. 907
[255] Ibid., p. 915

Such an uncovering of the conflictions that flow from hybrid governance is especially critical at a time when the EU is arguably stepping up its efforts as a normative foreign policy actor, as the LGBT toolkit suggests it has been preparing to do with respect to sexual minority rights, for it opens the door to charges of organised hypocrisy[256]. That is to say, while the Union might aspire to the global propagation of long-held values such as equality and non-discrimination, it frequently violates these very principles due to the complex nature of its internal and institutional dynamics. This contradiction of outward saintliness and internal noncompliance might consequently hamstring the Union in its exercise of normative power. This section investigates this concern by placing the argument made by Meunier and Nicolaïdis in a normative context. Whereas their emphasis on trade recalls the notion of CPE, with its similar stress on economic might as the source of the EU's influence in international relations, Manners' argument that Duchêne's concept, like RPE, is incapable of capturing the growing significance of non-physical forms of power suggests the need for such a transposition.

This is certainly true in the case of sexual minority rights, where the rhetoric of EU actors has revealed a strong preference for value- and rights-based, non-coercive action, both with respect to the internal and the external dimensions. Concerning Manners' typology of normative principles, the "reinforcement and expansion" of which "allows the EU to present and legitimate itself as being more than the sum of its parts"[257], the norm of associative human rights is evidently preeminent in the LGBT-related parts of its foreign policy. Inseparable from the human rights norm is the principle of the supranational role of law. Here cosmopolitanism is emphasised, as becomes clear from Article 21 of the Lisbon Treaty, which reads that the EU "shall promote multilateral solutions to common problems, in particular in the framework of the United Nations"[258]. A third normative principle that has a bearing on the external protection and promotion of LGBT rights is inclusive equality, which is epitomised by Article 21 of the CFR. Of auxiliary importance are the norms of social solidarity, especially through combating social exclusion, and good governance, by virtue of "the participation of civil society and the strengthening of multilateral cooperation"[259]. It is the interplay of these five principles that underlies the EU's norm entrepreneurship regarding sexual minority rights.

[256] Cf. Krasner, S. D. (1999)
[257] Manners, I. (2002), p. 244
[258] European Union (2008)
[259] Manners, I. (2008), p. 74

By replicating the approach of Meunier and Nicolaïdis in a normative setting, the remainder of this section will examine the extent to which this interplay is plagued by contradictions and fault lines that undermine the Union's credibility and, concomitantly, reduce the EU to a conflicted normative power with regards to the human rights of LGBT people. Four sets of contradictions will be addressed: internal, institutional, instrumental and conceptual.

Internal Inconsistencies

For the Union to be an effective and legitimate normative power it is of the essence that it exercises consistency between its internal and external policies. As Nicolaïdis and Howse note, this requires "a constant checking of the EU's narratives of projection on to its own internal goals and [...] deficits"[260]. Put differently, it is imperative that "leading by example" is made into "the *leitmotif* of a new European Union human rights policy"[261]. If the Union wants to speak authoritatively on LGBT-related human rights issues in its international relations, it must thus not only reach a certain "value consensus of *acquis éthique*"[262], but this *de jure* situation must also be reflected in the lived experiences of LGBT people in the EU itself.

However, a closer look at the intra-European dimension reveals that it would be fallacious to describe the human rights situation of LGBT people in the member states as a level-playing field. In 2006 and 2007 the European Parliament adopted a series of resolutions in which it remarked upon the surge of homophobia in Europe[263]. Such intolerance took a broad number of forms, ranging from:

> "banning gay pride or equality marches to the use by leading politicians and religious leaders of inflammatory or threatening language or hate speech, failure by police to provide adequate protection or even breaking up peaceful demonstrations, violent demonstrations by homophobic groups, and the

[260] Nicolaïdis, K. & Howse, R. (2002), p. 771
[261] Alston, P. & Weiler, J. H. H. (1998), p. 663, original emphasis
[262] Lerch, M. & Schwellnus, G. (2006), p. 312
[263] European Parliament (2006a, 2006b and 2007)

> introduction of changes to constitutions explicitly to prohibit same-sex unions"[264].

Notwithstanding a series of positive legal developments at both the member state and EU level, Parliament saw this bleak picture as evidence for the need for further action "to eradicate homophobia and promote a culture of freedom, tolerance and equality among citizens and in legal systems"[265]. References were made to individual cases, such as the bullying-inspired suicide of an Italian teenager[266], in order to vividly underscore the urgency of the matter.

Parliamentary resolutions reveal that homophobia is notably rampant in the eastern member states, in particular in Poland and Lithuania. In Poland, leading politicians incited hatred and violence against LGBT people and the government announced a number of discriminatory measures in the field of education, such as drafting legislation "punishing 'homosexual propaganda' in schools"[267] and firing openly homosexual teachers. In 2009, the Lithuanian Parliament amended a law that prohibits the dissemination of public information to minors through which "homosexual, bisexual or polygamous relations are promoted" because of the "detrimental effect on the development of minors" that this information would have[268]. The involvement of governmental actors in both countries hints at an institutionalised form of homophobia.

In conjunction with the discussion on the Commission proposal for a directive that extends the scope of the non-discrimination principle regarding sexual orientation beyond the grounds that are covered in the Employment Directive, these developments inspired the EP to ask the Union's fundamental rights agency "to launch a comprehensive report on homophobia and discrimination based on sexual orientation" in the member states[269]. This resulted in two separate legal and social reports.

The results of the exhaustive legal analysis were mixed. FRA partly lauded the many member states that have gone beyond the minimal legal requirements, but was

[264] European Parliament (2006a)
[265] Ibid.
[266] European Parliament (2007)
[267] Ibid.
[268] European Parliament (2009a)
[269] European Union Agency for Fundamental Rights (2009a), p. 3

particularly critical of the legal uncertainty surrounding transgender people in the EU, owing to the fact that discrimination of this group is not treated as either sex- or sexual orientation-based discrimination in almost half of the member states. Moreover, a number of EU legislative instruments "do not take explicitly into account the situation of LGBT persons", which could hamper "legal certainty and equal treatment"[270]. Such legislation concerns, among other issues, the freedom of movement, asylum and family reunification. In sum, the legal situation of LGBT people in the member states is described as calling "for serious considerations"[271].

These legal sore spots are compounded by the "worrying" and "not satisfactory" social situation[272]. The Agency argues that "discrimination, bullying and harassment" are pervasive throughout the Union and across a wide range of areas of social life, including the freedom of assembly, the labour market, education, the health sector, religious institutions, sports, the media and asylum[273]. The report further notes that LGBT people are predisposed to encountering multiple discrimination because they constitute a highly diverse group. More generally, a Eurobarometer study cited in the report reveals that "openness towards homosexuality tends to be quite limited"[274]. A later survey showed that discrimination on the basis of sexual orientation is the most widespread form of discrimination in the EU, apart from ethnic origin-induced discrimination[275]. The analysis also reveals the particular vulnerability of transgendered people, who, as a minority within a minority, "face more negative attitudes" than lesbians, gays and bisexuals (LGB)[276]. More generally, the Agency concludes that it is "unacceptable", in a Union that prides itself on being founded on values that should obviate this very behaviour, that many LGBT people adopt a strategy of invisibility in order to avoid being discriminated against and suffering unequal treatment[277].

Perhaps the most significant conclusion of the report, however, is how greatly attitudes towards LGBT people vary across the member states. Eurobarometer surveys, for example, indicate that "cultural attitudes" are an important factor "particularly with

[270] Ibid., p. 4
[271] Ibid.
[272] European Union Agency for Fundamental Rights (2009b), p. 3
[273] Ibid., p. 8
[274] European Commission (2006b), p. 41
[275] European Commission (2008a), p. 52
[276] European Union Agency for Fundamental Rights (2009b), p. 15
[277] Ibid., p. 4

regards to homosexuality"[278]. As such, an attitudinal chasm can be observed between relatively open-minded countries such as the Netherlands, Sweden and Denmark and less tolerant states such as Romania, Bulgaria and Latvia[279]. Such differentiation is also evident in the *de facto* treatment of sexual minorities. As a case in point, while some countries consider homophobic intent an aggravating factor in the practice of hate speech or hate crimes, thirteen member states treat it as "neither a criminal offence nor an aggravating factor"[280]. The variance also becomes visible with respect to gay pride marches: while leading politicians in some EU member states actively take part in such parades, the freedom of assembly has in recent years in fact been infringed in several Baltic and Eastern European states. These findings, in short, unveil the EU's motto of *Unity in diversity* as a double entendre and are suggestive of an ethical divide between the older, western member states and the more easterly located newcomers.

These sobering conclusions are corroborated by a policy paper of ILGA-Europe of 2004, which marked the year that ten new countries joined the EU[281]. This accession followed membership negotiations within which, as was addressed in the subsection on the role of sexual minority rights in the EU's external relations, respect for human rights was a membership criterion. Nonetheless, the policy paper concluded that LGB people in the accession countries face widespread discrimination that "affects all spheres of life" and that is on occasion is marked by governmental involvement[282].

Two main conclusions can be drawn from this. Most optimistic is the assumption that the unsatisfactory human rights situation of LGB people could best be redressed once the new members were firmly bound by the Union's *acquis*. O'Dwyer rejects this interpretation in an interview, however, by noting how "the ability of the EU to impose pressure [...] has drastically diminished" following accession and how the EU must now rely on "methods that are based on voluntarism"[283]. Correspondingly, Kochenov describes the EU's actions in the 2004 and 2007 enlargements[284] as "timid, ill-focused, and stopped short of realising the potential for change"[285]. More bleakly, ILGA-Europe

[278] European Commission (2008a), p. 5
[279] European Commission (2006b), p. 41
[280] European Union Agency for Fundamental Rights (2009b), p. 37
[281] Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.
[282] ILGA-Europe (2004), p. 42
[283] Stenqvist, T. (2009), p. 7
[284] Bulgaria and Romania acceded to the Union in 2007.
[285] Kochenov, D. (2007), p. 460

claims that sexual orientation "has received limited attention in the EU enlargement process"[286], suggesting that the rights of LGBT people were firmly at the bottom of the hierarchical pyramid of concerns and criteria that marked the accession talks. Whichever conclusion is drawn, it is clear that the 2004 enlargement is more indicative of the Union's moral relativism than of normative ascendancy with respect to LGBT rights.

Tangentially, the legal situation pertaining to the existence of same-sex unions, whether through actual marriages, registered partnerships or other arrangements, and their recognition in other Member States varies considerably as well. Coupled with one of the core principles underpinning the common market, namely the freedom of movement, this gives rise to "an entirely chaotic situation with marriage recognition"[287]. Here, again, a generalised difference between western and eastern member states can be observed. Because same-sex unions do not fall under the purview of Community law, and irrespective of the Roth Report's recommendation that gay couples should be guaranteed "the full rights and benefits of marriage"[288], this topic is only mentioned in passing in order to further evidence the disparities that exist across the EU when it comes to the rights of LGBT people.

Finally, the opting out of the CFR by the United Kingdom, Poland and the Czech Republic probably is most illustrative of legal incongruence at the EU-level. The opt-outs prevent the ECJ, as well as national courts and tribunals in the three member states, from finding the countries' laws and regulations to be in violation of the fundamental rights and freedoms declared by the Charter. As a consequence, the non-discrimination principle cannot be held to be binding with respect to sexual orientation. Even though the British and Czech exceptions were secured for reasons that were not directly related to sexual orientation, the opt-outs do impact negatively upon LGBT people. The same cannot be said for Poland; the Polish political elite considered the CFR's provisions on moral and family issues, especially with respect to the legal recognition of same-sex unions, to be contrary to Polish culture[289]. Resultantly, this display of *Europe à la carte* eats away at the Union's credibility in its foreign policy on sexual minority rights.

[286] ILGA-Europe (2004), p. 7
[287] Kochenov, D. (2009), p. 182
[288] European Communities (1994)
[289] Anon (2007b)

To conclude this subsection, it has become clear that the Union's potential to lead by example on rights-related issues concerning LGBT people is severely compromised by the observation that *de facto* and *de jure* homophobia and discrimination on the grounds of sexual orientation and gender identity remain rife, or may even be on the rise, within the member states. Even though such intolerance is all-pervading in the EU, recent enlargements appear to have led to the incorporation of a moral east-west chasm with respect to sexual morality and ethics. Greatly informative in this respect is the reflection of Lerch and Schwellnus that "arguments justifying minority protection with reference to universal rights or particular values [...] run the risk of exposing the discrepancies between the internal and external application of the minority norm"[290]. In other words, the need to address the incongruous human rights situation of sexual minorities at home robs the Union of its ability to address LGBT rights in its foreign policy without being accused of double standards.

Institutional Inconsistencies

Following from the understanding that the Union is a multi-actor constellation rather than a monolith, and given the fact that several institutional actors have been invested with at least some sort of political authority over or say in sexual minority affairs, it becomes possible to compare the positions that different EU bodies have taken in the protection and promotion of LGBT human rights. Such a comparison reveals that institutional arrangements not only make it difficult for the Union to speak with one voice, but that they, at times, appear to reach little more than cacophonous disagreement.

The overview of LGBT-related policy developments has already illustrated that even though its relative powerlessness might suggest a rather modest human rights role, the European Parliament has in fact frequently acted as a patron of human rights, and of the LGBT community in particular. As Bradley notes, this is especially true with respect to the Parliament's active involvement in the human rights situation in third countries, which can almost be read as an attempt "to compensate through the quantity and scope of its activity for its lack of formal clout"[291]. The parliamentary resolution on the Ugandan Anti-Homosexuality Bill should be recalled in this light.

[290] Lerch, M. & Schwellnus, G. (2006), p. 314
[291] Bradley, K. S. C. (1999), p. 840

Minor internal divisions notwithstanding, Parliament's positions on human rights issues, including those relating to LGBT people, are remarkably often consensual despite being made up of groups that span the entire political spectrum. Even when some issues might prove contentious, Beger notes how "human rights rhetoric appears on a very regular basis and is considered pivotal to all MEPs and parties"[292]. Such a view is corroborated by Kochenov[293] as well as by the Fundamental Rights Agency, which describes Parliament as having been "consistently supportive of gay and lesbian rights"[294].

The record of the European Commission concerning LGBT human rights is mixed. On the one hand, it has been ascribed a role of "political entrepreneurship"[295]. This partly accounts for the Europeanisation of social policy, which has brought matters of sexual orientation and gender identity under a European purview, especially in relation to employment. The Commission also funds NGOs such as ILGA-Europe, first under the Community Action Programme to Combat Discrimination and then under PROGRESS, with a view to maintaining a social dialogue with civil society. As ILGA-Europe's largest donor, the Commission has contributed to the professionalisation of LGBT interest representation. Furthermore, following the entering into force of the Amsterdam Treaty, Commission entrepreneurialism was at the heart of the 2000 Employment Directive. It has already been documented how this constituted a watershed moment in the development of LGBT rights in the EU. On top of this, a 2008 proposal revealed the Commission's wish to "implement the principle of equal treatment [...] outside the labour market"[296] in order to address allegations that some grounds of discrimination are treated as being "more equal than others"[297]. In this light, the Commission thus seems to be a driving force behind the European-level institutionalisation of LGBT rights.

On the other hand, this apparent political avant-gardism needs to be put in perspective. Concerning the aforementioned directives, Swiebel notes that the Commission could only be persuaded to act "after strong lobbying" from NGOs and Parliament, and then

[292] Beger, N. J. (2004), p. 80
[293] Kochenov, D. (2007), p. 479
[294] European Union Agency for Fundamental Rights (2009a), p. 9
[295] Swiebel, J. (2009), p. 22
[296] European Commission (2008b)
[297] Waddington, L. & Bell, M. (2001), p. 587

did so with a considerable delay[298]. Kochenov is even more scathing. In his review of the Commission's role in the enlargement process leading up to the 2004 and 2007 accessions, he notes how the Commission was "unwilling to acknowledge and criticise the candidate countries' numerous problems" in the domain of sexual minority rights, eventually being forced to address them due to Parliament's tireless advocacy[299]. As a case in point, in summarising Romania's compliance with the political subset of the Copenhagen criteria, the Commission in 1997 remained entirely silent on the human rights situation of LGBT people[300] at a time when Romania "*de facto* criminalised consensual, same-sex relations between adults, had criminal legislation establishing different ages of consent [...], and did not outlaw discrimination on the basis of sexual orientation"[301]. This calls to mind earlier criticisms of a hierarchy of concerns, even though the Romanian situation was redressed pre-accession in 2001, and shows how the Commission has been infirm of purpose when it comes to sexual minority rights.

The Union's institutional set-up accounts for the rather passive role that the Council has played in the promotion and protection of LGBT rights. Because it is comprised of government representatives from the different member states, many of which are rather indifferent to or even "uncomfortable with the idea of gay rights protection"[302], it has seldom played a leading role. On the one hand, this reflects the aforementioned differences in attitudes and the social status quo between member states. On the other hand, it should be connected to the Council's consensus-seeking tendency, which is based on the doctrine "that 'all states are equal'"[303]. The two intersect: because such an institutional culture generally results in lowest-common-denominator policies, this fits poorly with how contentious LGBT rights are considered to be in certain member states. A meaningful exception to this is the role that the Spanish Presidency, in cooperation with other member states, had in jumpstarting the creation of the LGBT toolkit.

The High Representative of the Union for Foreign Affairs and Security Policy is emblematic of the Union's hybridity. While the post was originally closely affiliated to the Council, the Lisbon Treaty amended it so that the HR is now also the Commission's first

[298] Swiebel, J. (2009), p. 23
[299] Kochenov, D. (2007), p. 479
[300] European Commission (1997)
[301] Kochenov, D. (2007), p. 474
[302] Kochenov, D. (2009), p. 186
[303] Sherrington, P. (2000), p. 175

vice-president. This double-hatted post is envisioned to increase the Union's coherence and visibility in its external relations, as the HR speaks on behalf of the Union as a whole, rather than as a representative of either the Council or the Commission. Even though the reformed post has only been in existence for a short period, the HR's statement on human rights violations against LGBT people in Malawi[304] and the IDAHO-declaration that was cited in the introduction already promise greater involvement, compared to the original position, in the upholding and protecting of LGBT human rights.

Finally, the ECJ has been astoundingly conservative in its rulings on the rights of sexual minorities. Whereas the Court has generally been accused of engaging in judicial activism, persistently promoting its "own political agenda of European integration"[305], such behaviour has been conspicuously absent regarding LGBT-issues. This is surprising, because court rulings could have brought this issue area, which by and large remains a member state competence in spite of greater European-level involvement in sexual minority rights, within a supranational scope[306]. The case of *P v. S and Cornwall County Council,* dealing with sex discrimination in employment concerning transsexuals, is a notable exception[307]. The ECJ's general reluctance to advance LGBT rights at the European level has resulted in "a conjugal hierarchy" topped by heterosexual married couples that can freely exercise the freedom of movement, while same-sex couples find their rights restricted[308]. In the light of this paper's political focus, this legal point need not be elaborated upon. It is, however, important to note that this conservatism has also had a decelerating effect on the development of sexual minority rights at the European level, because cases at the Court impact upon the policy behaviour of the Community at large. A demonstration of this is how the Commission's behaviour in the case of the EU's eastern enlargement was informed by the Court's orthodoxy[309]. In sum, the fact that the ECJ has at times "simply refused to protect sexual minorities"[310] leads Kochenov to conclude that it has a "questionable gay rights record"[311].

[304] Council of the European Union (2010b)
[305] Kapsis, I. (2007), p. 198
[306] This possibility exists because the ECJ is authorised to draw upon the European Court of Human Rights' interpretation of the ECHR. For a more elaborate explanation, see Kochenov (2007, pp. 480-488).
[307] Beger, N. J. (2004), p. 126
[308] Kochenov, D. (2009), p. 201
[309] Kochenov, D. (2007), p. 460
[310] Kochenov, D. (2009), p. 187
[311] Kochenov, D. (2007), p. 460

In short, the EU's involvement in LGBT matters has shown considerable institutional fragmentation and differentiation. While this might present civil society actors such as ILGA-Europe with the opportunity to engage in venue shopping[312], and as such could have a marked ameliorative effect on the rights situation of LGBT people within the Union itself, its influence on the Union's external sway is mostly disempowering. That is to say, the Union's institutional inability to streamline its viewpoints and policy actions with regard to sexual minority rights strips it of its authority and credibility in the EU's external relations.

Conceptual Inconsistencies

Coherence and consistency are also found wanting in the EU's policies towards sexual minorities from a conceptual level. That is to say, both the Union's definition and application of the 'LGBT' concept evidence a lack of parallelism. Fundamentally, most European-level policies referring to sexual orientation and gender identity fail to define these concepts altogether. In the light of the academic debate surrounding these concepts, this lack of reflexivity is bewildering. Such debate, for example, has displayed a growing tendency to describe these terms as located on a spectrum rather than as categorical identity markers. In a similar fashion, it is increasingly acknowledged that these concepts are made up of several components[313]. These insights suggest against straightforward classification and thus point to the need for clear and consistent definitions when they are put to policy use. This is, however, disregarded by most EU documents, including the Amsterdam Treaty, the Employment Directive and the CFR, as well as parliamentary reports and resolutions. Consequently, such a lack of definitional clarity prepares the ground for arbitrariness and legal uncertainty.

Nonetheless, an upward trend appears to have been set into motion recently, because the FRA's social analysis, the LGBT toolkit and a recent policy paper on transgender persons' rights in the EU requested by Parliament[314] to some extent define the different components of which the LGBT-concept is made up. The Agency has based itself on existing conceptualisations and has, where possible, aligned itself with accepted international principles. This is illustrated by its definitions of sexual orientation and

[312] Cf. Baumgartner, F. & Jones, B. (1993)
[313] Savin-Williams, R. C. (2009), pp. 7-11
[314] Castagnoli, C. (2010), p. 3

gender identity, which have been directly taken from the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. The Yogyakarta Principles constitute an attempt on behalf of "a coalition of human rights organisations" to rectify the "fragmented and inconsistent" international response to human rights violations based on sexual orientation and gender identity[315]. Drafted by a group of human rights experts from across the globe, these principles are derived from existing legal instruments in order to illustrate how the violation of LGBT human rights is already in contravention of binding international human rights law. In other words, because the universal adoption of a new human rights framework would doubtlessly be highly controversial, the Principles engage with the legal status quo. The parliamentary policy paper also cites the Yogyakarta Principles. In conceptualising transgenderism, FRA draws from a definition used by TransGender Europe (TGEU), an umbrella organisation that works towards establishing full social and legal equality of transgender people in Europe[316]. Similarly reflective of the Agency's task to engage in networking and stakeholder cooperation[317] is its reference to the International Gay and Lesbian Human Rights Commission in defining gender expression[318]. The LGBT toolkit's interpretation of sexual orientation, gender identity, homosexuality, bisexuality, and transgenderism and -sexualism largely corresponds to these references.

Thus, the instances of the social analysis, the toolkit and the policy paper illustrate how different EU actors have started to carefully embed their communications into the existing civil society dialogue on LGBT rights with a view to enhancing their authoritativeness. Because these definitions, as the Agency acknowledges, "have not as yet been identified in EU or in international standard setting instruments and do not necessarily have legal value"[319] they should not be interpreted as showcases of cosmopolitanism. Claiming authority from them thus runs the risk of turning into an *argumentum ad verecundiam.* It also needs to be borne in mind that all three communications were drafted by policy experts rather than high-level political actors. Nonetheless, and in spite of how the definitions could be conceptually deconstructed[320],

[315] Anon (2007a), pp. 6-7
[316] Cf. TransGender Europe (2006)
[317] European Union Agency for Fundamental Rights (2009c)
[318] European Union Agency for Fundamental Rights (2009b), p. 24
[319] European Union Agency for Fundamental Rights (2009b), p. 24
[320] Swiebel (2009, p. 32) argues, for example, that the Yogyakarta Principles tend to "reify sexual preferences into solid, essentialist identities". Also see Kollman, K. & Waites, M. (2009), p. 5.

drawing upon the Yogyakarta Principles and applying terminology used by NGOs prepares the ground for a conceptual blueprint upon which future EU involvement in LGBT matters could be based, so as to improve the Union's coherence and consistency.

The scattered approach that the Union has taken to sexual orientation and gender identity is another grave cause for concern. Sometimes EU policies and statements box people of different non-mainstream sexual orientations and gender identities together, treating 'LGBT' as a unitary if not homogeneous concept, whereas such indivisibility is done away with on other occasions. At face value this might appear to be the case because LGBT people constitute a highly diverse group, and such heterogeneity inevitably brings about different challenges. Perhaps the most important distinction that has to be made here is between sexual orientation, defined by the Yogyakarta Principles as a person's "capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender", and gender identity, which can be summarised as a person's "deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth"[321]. It is important to note here that transgender issues are considered to be issues of gender identity rather than sexual orientation. Differentiated policy solutions thus imply a Union that is attuned to the specific needs of lesbians, gay men, bisexuals, transsexuals, transgendered people, intersex people and other sexual minorities that are frequently collapsed under the heading 'LGBT people'.

According to Swiebel, however, the real cause of the Union's conceptual inconsistency can be found in its "lack of competence" to fully take transgender and other gender identity issues on board[322]. This explains why the Amsterdam Treaty, the Employment Directive and the Charter only apply the non-discrimination principle to sexual orientation. EU regulations also account for the fact that ILGA-Europe can only use Commission funding for its LGB-related advocacy and not for matters concerning gender identity[323]. In consideration of the FRA's findings that attitudes towards transgender persons are significantly more negative compared to LGB people[324] and that they might face very low acceptance by other LGBT people[325], this legal imbalance is particularly

[321] European Union Agency for Fundamental Rights (2009b), pp. 24-25
[322] Swiebel, J. (2009), p. 25
[323] Cf. Beger, N. J. (2004), p. 34
[324] European Union Agency for Fundamental Rights (2009b), p. 10
[325] Ibid., p. 125

distressing. That is to say, instead of paying due attention to a particularly vulnerable group, EU legislation makes transgender people more likely to being doubly marginalised.

In fact, in the cases that the Union does address transgenderism, such as in the Recast Directive, this is done with respect to equal treatment and non-discrimination on the basis of sex. The Union's provisions then only apply when the process of gender reassignment has been completed. According to a parliamentary policy paper, this covers only roughly ten percent of the transgender population[326]. By implication, this leaves a large number of people with a non-conforming gender identity in legal limbo. This is in spite of the FRA's observation that "there is no reason not to extend the protection" to those transgendered persons that are currently not covered by EU legislation, including pre-operative transgender people, as well as those who are not willing or able to undergo gender reassignment, intersex people, and transvestites[327]. While the Union thus verbally proclaims to be a staunch advocate of LGBT people as a whole, its legal incapacity to adequately address the component of gender identity exposes such language as inherently flawed, revealing a gross mismatch between rhetoric and reality.

Correspondingly, European-level communications on sexual minority rights are conspicuously silent on issues concerning bisexuality. As Swiebel pointedly remarks, "bisexuality was simply ignored"[328]. There is an apparent "incompatibility of 'sexual orientation' with 'bisexuality'"[329] that is reflective of an assumed "naturalness of the homo-hetero binary"[330]. In other words, sexual orientation is reduced to either heterosexuality or homosexuality. In connection with EU-level LGBT politics, this effectively forces bisexuals in the Union to identify with, or conform to, one of these two categories in order to be recognised.

Of relevance, because policy- and law-makers tend to define LGBT identities in essentialist terms, and therefore to compartmentalise them, people who do not associate with the conventional categories of lesbian, gay, bisexual and transgender generally lose

[326] Castagnoli, C. (2010), p. 5
[327] European Union Agency for Fundamental Rights (2009a), p. 131
[328] Swiebel, J. (2009), p. 25
[329] Waites, M. (2009), p. 145
[330] Morgan, W. (2000), p. 215, as cited in Waites, M. (2009), p. 214

out at the intersections. Some authors also argue that treating gay men and lesbian women in a conceptually equal manner is to deny the power relations and inherent tensions that exist between these two groups. As the noted feminist Adrienne Rich reflects, "to equate lesbian existence with male homosexuality [...] is to erase female reality once again"[331]. This statement is corroborated by FRA's social analysis, which reveals that lesbian and bisexual women generally endure discrimination to a greater extent than their male counterparts[332]. While Beger rightly observes that the belief that legal reality can accommodate the fluidity of sexual and gender identities is "a fantasy never to be fulfilled"[333], and without trying to embark on a post-structuralist reading of LGBT politics at the level of the EU, this does illustrate anew the importance of bearing in mind the heterogeneity of the alleged LGBT 'community' as well as how political discourse is invariably informed by the politics of identity.

A final, important conceptual contradiction concerns the relationship between Eurocentrism and cosmopolitanism. This already becomes clear from the LGBT toolkit, which is replete with references to EU documents as well as higher-ranking international human rights law. More precisely, even though European rhetoric contains many references to universal principles such as equality and non-discrimination, the accuracy of this universalism is questioned by some scholars. According to Kollman and Waites, "a key cost of the rigid universalism of the human rights lexicon is that it can impede dialogue, and risks being perceived as part of Western imperialism"[334]. Such perceptions of moralistic empire-building are clearly at odds with the operations of a legitimate NPE, which relies on diplomacy and persuasion rather than on "indoctrination and subjugation"[335]; a truly normative actor convinces third country representatives in a non-coercive manner of the moral supremacy of its arguments.

This is especially applicable when sexual minority rights are introduced into the international political arena, because of the contentiousness of sexual politics, especially in many non-Western settings, and because of the leading role that European institutions have played in defining "the rights of LGBT people as human rights"[336].

[331] Rich, A. (1980), p. 649, as cited in Sheill, K. (2009a), p. 60
[332] European Union Agency for Fundamental Rights (2009b)
[333] Beger, N. J. (2004), p. 71
[334] Kollman, K. & Waites, M. (2009), p. 7
[335] Zielonka, J. (2008), p. 484
[336] Kollman, K. (2009), p. 38

Sexual minority rights are often perceived of as a specifically European social construct that is completely alien to many countries' domestic culture. In this light, same-sex behaviour has sometimes been denounced as a "European"[337] or "Western disease"[338] and LGBT rights activism has even resulted in a backlash in some countries[339]. Studies on Sub-Saharan Africa, India and Iran also reveal how the incompatibility of supposedly international LGBT rights norms with non-Western contexts can have a disempowering effect on sexual minorities[340]. Furthermore, the way in which these norms conceptualise the different components of 'LGBT' is insufficiently inclusive and heavily centred on the West. As Kollman and Waites claim, sexual minority rights thus potentially "curtail the recognition of many non-Western understandings of sexual behaviour and gender"[341]. Promoting LGBT rights through a cosmopolitan rhetoric runs the dual risk of further obscuring this power imbalance in defining sexual minority rights and of perpetuating the marginalisation of non-Western categories of sexual orientation and gender identity. This underlines the potentially paradoxical constraining impact of the politics of liberation and false universalism. The irony is thus that such a Western bias, whether real or perceived, will likely be strengthened by the Union's universalising norm-setting objectives regarding LGBT rights.

This dialectical tension between European values and universalism is reflective of a Habermasian paradox according to which "the common denominator for Europeanness is the universalist meaning of human rights"[342]; for a norm to be a norm propagated by the EU, it must be universal, which automatically erodes its uniquely European character. Consequently, even though the Union might present LGBT rights as universal human rights through making references to a plethora of cosmopolitan frameworks such as the UDHR, ICCPR and ICESCR, the very fact that it must actively frame sexual minority rights as a universal issue in its external relations puts a question mark over this very universality and, by implication, suggests a more Eurocentric ethics.

In conclusion, the Union's conceptualisation of LGBT people, and the way that this has been translated into actual policies, is fraught with disjunctures, definitional slippages

[337] Henderson, E. M. (2000), p. 38
[338] Shah, N. (1998), p. 484
[339] Long, 2005, as cited in Kollman & Waites, 2009, p. 7
[340] See Seckinelgin (2009) on Sub-Saharan Africa and India, and Long (2009) on Iran.
[341] Kollman, K. & Waites, M. (2009), p. 13
[342] Beger, N. J. (2004), p. 80

and omissions of definitions. These inconsistencies notwithstanding, several recent developments, most notably the launch of the LGBT toolkit, appear to constitute a significant turnabout. Especially promising are the toolkit's clarification of terminology, its awareness that "transgender persons are a particularly vulnerable group within LGBT people"[343] and the importance that it attaches to multilateral fora and cosmopolitan legal instruments. These suggest an awareness of the need to address the three forms of conceptual inconsistencies uncovered in this subsection, namely issues of definitional clarity, an inconsonant treatment of the different groups of LGBT people, and the tension between Eurocentrism and universalism. The Union will only be able to act as an effective and legitimate normative power in its relations with third countries if the volte-face results in the proper handling of these critical points.

Instrumental Inconsistencies

A fourth and comparatively minor set of inconsistencies that should briefly be mentioned here concerns the nature of the policy tools that the Union has used in its external relations when it comes to the promotion and protection of LGBT rights. It thus refers back to the distinction between hard and soft policy instruments that is a defining feature of NPE. Issues of state sovereignty and limited competence naturally prevent EU actors from intervening directly in the human rights situation of sexual minorities. As a consequence, the Union's involvement rarely extends beyond declaratory diplomacy and dialogue within which the presumed universalism of LGBT rights is consistently accentuated. The Parliament's resolution on Uganda, which cannot do more than call on, remind and urge other authorities[344], and the non-authoritarian character of the LGBT toolkit's operational tools exemplify this. A critical reading of this would, much akin to Bull and Kagan's original criticism of CPE, stress that cosmopolitan parlance is only resorted to because of the Union's strategic disempowerment to act more forcibly. Proponents of NPE, on the other hand, would underscore the genuineness of the EU's normative and universalist commitment. Nevertheless, the softness of the Union's policy instruments in the case of sexual minority rights does resonate with the normative power thesis, if not by a morality-based volition then by legal constraints.

[343] Council of the European Union (2010d)
[344] European Parliament (2009c)

Nonetheless, the critique of the Union's normativity in its relations with neighbouring and partner countries should be recalled here. Of specific relevance is the argument that a third country's compliance with the Union's normative principle that LGBT rights are human rights is more the result of the size of the European market than of the moral persuasiveness of the EU's arguments. In consideration of third actors' structural dependency, declaring support for the Union's values could thus be seen as a case of imperial politics "through various forms of economic and political domination"[345]. It is thus customary for partner countries, largely irrespective of which form such institutionalised partnership takes, to align themselves with EU foreign policy statements.

For example, a number of candidate countries, potential candidates, countries of the Stabilisation and Association Process, members of the European Economic Area and the European Free Trade Association aligned themselves with the High Representative's statement on the International Day against Homophobia and Transphobia that was referred to in the introduction of this paper[346]. The same holds true for the HR's declaration on the human rights of LGBT people in Malawi[347]. Consequently, the importance of sexual minority rights is no longer represented as a unique concern of the EU, but as a deeply shared value that transcends the Union. As such, the idea's alleged universalism is underlined.

This then begs the question to what extent these alignments mirror the voluntary internalisation of EU norms, or whether they are merely reflective of the impelling political requirements of partnership. Barbé *et al.*'s analysis of the ENP suggests the latter. In the case of Ukraine, they note that "alignment is mainly a political act of support" the low costs of which "are clearly offset by expectations of political rewards under the form of intensified political relations with the EU"[348]. Similar conclusions could be drawn with respect to alignment with the IDAHO-statement and the declaration on Malawi. Third countries' economic and political dependency thus brings a hidden and subtle coercive logic into play. Because this is at odds with the Union's cosmopolitanism-infused normative rhetoric, the EU is unmasked as instrumentally conflicted. This echoes the conclusion of Scheipers and Sicurelli that "a closer look at what the EU does and

[345] Zielonka, J. (2008), p. 471
[346] Council of the European Union (2010a)
[347] Council of the European Union (2010b)
[348] Barbé, E., Costa, O., Herranz, A. *et al.* (2009), p. 390

what the EU achieves reveals that the EU is still far from playing the role of an effective normative power"[349]. In short, *prima facie* norm diffusion should not unquestionably be interpreted as an illustration of a successful Normative Power Europe, considering that norm adherence by third parties might be informed more by conventional realist arguments than by genuine morality.

[349] Scheipers, S. & Sicurelli, D. (2008), p. 621

5. Conclusion

> " [...] discrimination on the basis of gender and sexual orientation has ceased to constitute a political cleavage, and is enshrined in the EU's founding act and statement of values. It is something that distinguishes Europe from many other parts of the world."[350]

> "The European Union rejects and condemns any manifestation of homophobia as this phenomenon is a blatant violation of human dignity. It considers that discrimination on the grounds of sexual orientation and gender identity is incompatible with the basic principles on which the EU is founded".[351]

> "The EU is going to great lengths to combat homophobia in all its forms".[352]

According to such self-representations, the normative basis of the European Union reflects how the Union's member states and different institutional bodies unanimously reject unequal treatment and discrimination on the basis of sexual orientation and gender identity and are fully committed to upholding and promoting this unquestionably shared value, both internally and "in its relations with the wider world"[353]. As Swiebel reflects, this issue touches "the EU at the core of its soul"[354], because it is inextricably connected to five of the Union's nine fundamental values, namely associative human rights, the supranational role of law, inclusive equality, social solidarity and good governance[355]. Its normative ethics thus predisposes the Union to bring this self-ascribed moral ascendancy to bear on its external relations; ideational evangelism with respect to LGBT rights is the logically unavoidable outcome of the intersection between internal values and foreign policy objectives.

This moral vanguardism is at once uniquely European and fundamentally universal. As a matter of illustration, while the anchoring of sexual minority rights in groundbreaking EU documents such as the Employment Directive, the Treaty of Lisbon and the Charter of Fundamental Rights is invoked, international human rights instruments such as the

[350] European Council (2010)
[351] Council of the European Union (2010a)
[352] European Commission (2010a)
[353] European Union (2008)
[354] Swiebel, J. (2009), p. 30
[355] Cf. Manners, I. (2008)

ICCPR, ICESCR and the United Nations Convention on the Rights of the Child are drawn upon at the same time[356]. Such a juxtaposition of Europeanness and cosmopolitanism serves as a cushion against charges of moral imperialism. That is to say, it suggests that sexual minority rights are not a European social construct, but that the Union is merely leading the pack, as well as showing the way, in embedding its legal provisions in a higher-ranking law.

Consequently, EU actors invariably refer to UN documents in their external communications with respect to LGBT rights. This is done in order to persuade third countries that the rights of people with a non-conforming sexual orientation or gender identity have already been firmly entrenched in UN covenants and declarations. Because the EU is itself a signatory to such nonpartisan documents, thus illustrating that it also "subjects its actions to the constraints of a higher ranking law"[357], allegations of double talk and self-serving behaviour appear to be unfounded.

Official grandiloquence therefore suggests that the Union's external relations regarding the human rights of LGBT people should showcase all the hallmarks of Ian Manners' Normative Power Europe; the EU seems to possess the potential "to define what passes for 'normal'" when it comes to the global politics of sexual identity[358]. Such a tentative conclusion is based on the observation that the Union's norm-setting activities in this issue area largely consist of declaratory politics and dialogue that are informed by cosmopolitan arguments, are promoted non-coercively, are made more credible by evidencing that the Union is itself committed to and bound by the principles that it propagates, and that are underpinned by supposedly altruistic motives. On the face of it, the EU is thus well-positioned to act as a normative power concerning LGBT rights.

Nonetheless, the concept's validity is called into question by the review of the academic debate. Most generally, NPE has been attacked for its limited theoretical reflexivity and for having been insufficiently problematised. Some authors want to overcome this imperfect construction of normative power by developing clear standards of cosmopolitanism on the basis of which it can be evaluated[359]. Others question NPE's

[356] Cf. Council of the European Union (2010a)
[357] Eriksen, E. O. (2006), p. 265
[358] Manners, I. (2002), p. 236
[359] Cf. Eriksen, E. O. (2006) and Sjursen, H. (2006a), p. 244

relevance by pointing to the ongoing militarisation of the Union. An important point of critique has been the alleged dominance of normative motives in driving EU policy. Authors such as Hyde-Price, Youngs and Bicchi have taken issue with this, emphasising instead the importance of strategic calculations and the desire to simply replicate the European experience abroad. In a similar vein, supposedly soft policy instruments have been unveiled as being far from purely ideational. Finally, Nicolaïdis and Howse have illustrated how the normative power argument is weakened considerably when the EU falls short of practising what it preaches, whereas other studies have revealed how internal fragmentation defies the image of a Union speaking and acting in unison. By uncovering the theoretical shortcomings of Manners' framework, and by highlighting the consequences of an uncritical, non-reflexive engagement with his thesis, these studies thus raise several points of concern that should be incorporated into any empirical evaluation of "the ability to diffuse [...] norms on to the world stage" [360], which remains the true litmus test of the Union's normative power.

In consideration of this, an overview of the LGBT-related policy landscape, with respect to both its internal and its external dimension, has revealed how the Union's ability to project its sexual ethics into the international realm is severely hamstrung by a series of inconsistencies. Internally, even though European-level provisions should have created a situation of *de jure* equivalence with regards to the principles of equal treatment and non-discrimination, reports on the pervasiveness of institutionalised and societal homo- and transphobia showed how there is no *de facto* level-playing field; frontrunners and laggards can easily be distinguished in an internally fissured Union. On top of the ubiquity of discrimination, three member states opted out of the Charter, baring more divisions. Consequently, if the Union wants to promote LGBT rights abroad, such an imperfect domestic record invites charges of double talk.

Institutionally, the Union's hybrid set-up predisposes it to an organisational inability to speak with one voice. Here, positive evaluations of Parliament as "the most reliable ally for European NGOs in the advancement of social rights"[361] need to be placed aside more mixed or even critical interpretations of the LGBT rights record of the Commission, Council and the Court of Justice. Such institutional incoherence is likely to have a

[360] Lightfoot, S. & Burchell, J. (2005), p. 80
[361] Beger, N. J. (2004), p. 23

disempowering effect on the Union's efforts to promote and protect the human rights of LGBT people in its external relations.

At a conceptual level, it was found that the EU frequently lacks definitional clarity in its policies towards the different groups of LGBT people. Moreover, while the EU sometimes groups sexual orientation and gender identity together, on other occasions they are treated differentially. The Union's approach to transgenderism and bisexuality is particularly inconsonant. Finally, it has been argued that "false universal claims" are embedded in the rhetoric that the Union employs in its efforts to promote LGBT rights as human rights[362], revealing an inherent tension between Eurocentrism and cosmopolitanism. The EU thus manifests definitional omissions, practical inconsistencies and conceptual tensions in addressing sexual minority rights.

Finally, the poorness of fit between the Union's moralistic rhetoric and the actual policy tools that it employs in its foreign policy, when it comes to the promotion and protection of sexual minority rights, is suggestive of instrumental incongruence. While third countries' political alignments at first sight appear genuinely normative and unforced, they might in fact be triggered by a position of political and economic dependency rather than by an ideationally persuasive EU.

The combination of these internal, institutional, conceptual and instrumental inconsistencies produces a dissonance in the Union's external relations that has a crippling effect on the EU's ability to shape international norms and values. These schisms directly call into question the Union's credibility, which, by implication, corrodes its authority in international affairs. Failing to rectify this inconsonance would reflect, as well as reinforce, a "crusading, messianic and imperialist mentality" that is irreconcilable with other states' "conceptions of the 'good'"[363]. Because a truly normative actor relies upon the compelling integrity and righteousness of its values, the Other's perception of the Union's policies of "subjugation and indoctrination"[364] would clearly be at odds with Manners' thesis. Simply put, an international actor that is internally divided, both at the organisational and the member state level, and whose policies are full of chinks and irregularities is ill-positioned to persuade others of the rectitude of its standards.

[362] Kollman, K. & Waites, M. (2009), p. 11
[363] Hyde-Price, A. (2008), p. 42
[364] Zielonka, J. (2008), p. 484

This holds true especially for highly contentious topics such as sexual orientation and gender identity; because LGBT rights are often perceived to be alien to the domestic and political cultures of many states outside the EU, these rights require passionate and irreproachable normative leadership in order to establish an international consensus that cosmopolitan law and the human rights situation of LGBT people are inseparable. Currently, because it is riddled with incongruence, the EU is not fully qualified to take up this role. This is not to say that the Union possesses no ethical influence whatsoever with regard to sexual minority rights or that it should refrain from promoting its normative principle of LGBT rights as human rights abroad until the asymmetry between rhetoric and reality has been remedied. It merely points out how such a plethora of solecisms weakens the sway of the EU's moral reasoning, the upshot of which is more likely to be normative paralysis than normative power.

These sobering conclusions notwithstanding, recent policy developments are a cause for optimism, albeit of a cautious kind, in evaluating the fit between normative power and the Union's advancement of sexual minority rights in third countries. The Council's *Toolkit to Promote and Protect the Enjoyment of all Human Rights by Lesbian, Gay, Bisexual and Transgender (LGBT) People* possesses the potential to overcome the majority of the inconsistencies that currently have an enervating effect on the Union's foreign policy on sexual minorities: it constitutes a policy instrument that is to be used across the EU's institutions and member states, it stresses non-coercive policy tools such as multilateralism and civil society dialogue, it is attuned to the particular vulnerability of transgender people and women, and it provides conceptual and definitional clarity.

Above all, the toolkit underscores the primacy of cosmopolitanism with references to UN documents, statements and covenants. Through such an emphasis on the universal nature of LGBT rights, the Union could try to build on its global efforts to abolish the death penalty, where it also "frequently stresses international agreements as the basis of its policy" and where it seeks to further institutionalise and legalise human rights norms[365]. By founding its rights-based norm-setting behaviour upon the blueprint offered by the death penalty case, which is generally seen as archetypal of Europe's normative

[365] Lerch, M. & Schwellnus, G. (2006), p. 309

influence[366], the toolkit thus has the potential to equip the Union with the self-binding moral framework, and the ideational tools that are prerequisite of acting as a full-fledged normative power.

Because it was only launched in June 2010, and has not yet fully been worked out, the instrument is now merely emblematic of embryonic normativity. On top of this, the Council initiative is not binding. Future research will thus have to closely monitor its development in order to see whether the toolkit can fulfil its promise of increasing the EU's normative strength in promoting and protecting the human rights of LGBT people in the EU's external action. Until such potential materialises, however, the role of the Union in this policy field is best summarised as that of a conflicted normative power.

[366] Cf. Manners, I. (2002) and Lerch, M. & Schwellnus, G. (2006)

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Education and Qualifications

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2005 - 2008 Roosevelt Academy, Utrecht University, Middelburg, The Netherlands
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Jan – Apr 2010 Intern at the Dutch European Parliament Bureau, The Hague, The Netherlands.

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Awards & Scholarships

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Publications

Forthcoming in November 2010 "Book Review: Private Security Companies and Private Military Companies: A Comparative and Economical Analysis", *Lindenwood Journal of International and Global Studies, 2* (1).

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