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**Human Rights in the External Relations of
the European Union: Time for an
integrated approach**

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Dedication

To my grandmother Ivanka. Her support meant more to me than anyone can ever know.

*Živé naj vsi naródi
ki hrepené dočakat' dan
da koder sonce hodi,
prepir iz svéta bo pregnan,
da rojak
prost bo vsak,
ne vrag, le sosed bo mejak!*¹

*God's blessing on all nations,
Who long and work for that bright
day,
When o'er earth's habitations
No war, no strife shall hold its
sway;
Who long to see
That all men free
No more shall foes, but
neighbours be!*²

¹ 7th verce of Zdravljica (*A Toast*) poem by
France Prešeren written in 1844

² Translation from Slovene

Preface

From the 1st of May the European Union stretches itself from the Baltic States to the Mediterranean, having population of over 455 million, covering the territory of 3.9 million square kilometres and having twenty official languages.

Unification of Europe after fifty years of division is certainly a momentous achievement that gradually creates a new political order that for the first time in contemporary history is based on common values and a shared desire to construct a space of security and peace. However, it seems that beyond its frontiers the European Union has not been capable to adopt approach which is not based on the misconceptions, grave breaches of the international human rights and private interests which have plagued Europe's relations with the rest of the world, especially during the era of colonialism.

“At the Goteborg Council earlier in 2001, the EU agreed a Programme of Action to prevent conflict and promote peace and stability in the world. One part of this was an agreement that the EU should develop 'conflict indicators' to ensure that development programming take into account factors which might lead to violent conflict - such as political exclusion, regional tension and environmental degradation. Another was that we should tackle the incoherence in EU policy making which I referred to earlier by adopting an 'integrated approach' to our relations with third countries. In other words, co-coordinating our trade, external assistance and (significantly) political instruments so as to make a coherent whole.”³

This integrated approach can only be welcomed and has indeed shown effects already in practice.⁴ However, Commissioner Patten addressed only one aspect of an *integrated approach*, namely as regards combination of different external policies (trade, development cooperation, human rights and democratization) in one common approach, while the European Union until now has not adopted an integrated and comprehensive approach as regards its external human rights policy which remains one-sided and takes into consideration only the civil and political rights, whilst it leaves aside the other categories of human rights.

Other example even more plainly shows the inconsistency in the EU's external human rights policy. On May 14 2004, the European Union voiced its deep concern at the recent trials and sentencing of thirteen Cuban journalists and human rights activists.⁵ The question arises why the EU is reluctant to become similarly critical regarding human rights concerns within its borders as it is critical to human rights situations in third countries. Additionally, how can one improve the living standard of the population if civil and political rights and economic, social and cultural rights are not given equal consideration in the EU external human rights policy.

Jernej Letnar Čerňič, May 2004

³ Speech by The Rt Hon Chris Patten, CH, Central Party School - Beijing, China, 4 April 2002 - SPEECH/02/134; Developing Europe's External Policy in the Age of Globalisation

⁴ See example of Pakistan. Pakistan's support for the coalition in the fight against terrorism, and a commitment to the restoration of democracy have led to signature of a Trade and Co-operation Agreement, the proposal for an accelerated dismantling of textile quotas and the setting up of a quick-disbursing co-operation programme.

⁵ Declaration by the Presidency on behalf of the European Union on human rights in Cuba, Brussels, 13 May 2004, 9498/04 (Presse 162), P 62/04

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Remaining errors are solely my own responsibility.

Abbreviations

ACP	African, Caribbean, Pacific Countries
CFSP	Common foreign and security policy
CMLR	Common market law review
CPJ	cooperation in police and justice matters
WTO	World Trade Organisation
IMF	International Monetary Fund
WB	World Bank
COE	Council of Europe
COR	Committee of Regions
EEA	European Economic Area
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
EU	European Union
ECOSOC	United Nations Economic Social Council
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
MS	Member States
TEU	Treaty on the European Union
UN	United Nations

1 Approach and conceptual framework of the thesis

1.1 Background

The external human rights policy of the European Union has its origins in the decolonization process of 1950s and early 1960s. Despite the creation of various instruments of development cooperation during the first fourteen years of the Community's existence, no important effort has been made so far to adopt comprehensive policy in this field. The external human rights policy of the European Union remains inconsistent and non-transparent. It puts emphasis only on civil and political rights and neglects the situation of economic, social and cultural rights in the respective countries. Throughout the 1990s the consistency of EC behaviour in the sphere of human rights and development cooperation left a lot to be desired. The external relations of the European Union are structured in a complicated manner due to shared competences with the EU member states. Even though the issues of coordination and complementarity are very central to the EU Member States perception and interest in EU's role in general politics, aid and trade issues, the practice remains inconsistent. The EU Member State often take very different approach to issue of development aid as does the EU itself.

As the European Union is emerging as a new and powerful multilateral organization, it should move beyond the traditional boundaries of its humanitarian policy and adopt comprehensive approach. At the formal level the EU has chosen to respond to the crises in Africa, Asia and elsewhere with increased conditionality, new political and administrative demands, and little compensation for lost trade preference.

1.2 Statement of the Problem

The starting point of this thesis is that responses of the European Union to human rights violations in other countries are insufficient and flawed in the light of foreign policy consideration. The EU external human rights policy nowadays is grossly unsound as it refers only to political and civil rights and leaves aside economic, social and cultural rights of the population in the respective countries. The principles of interdependence, universality and inviolability of human rights are not respected in the EU external human rights policy. This thesis consistently argues that there is a need to ensure equal protection for all rights, as all human rights are universal, indivisible and interdependent and interrelated. The external human rights policy of the European Union has to have clear independent objectives. As the main trading partner of developing countries, the world's second largest multilateral donor of Official Development Assistance, and the source of over half of all official humanitarian assistance distributed worldwide, the EU simply must have a comprehensive, independent development policy at the EU in order to be truly effective in ensuring respect for human rights and rule of law. Nowadays, the European Union's human rights policy is characterized by various

inconsistencies and non-transparencies that hinder the effective implementation of human rights policies. If the European Union wants to play a substantial role in promoting respect for human rights, it has to ensure unity in its external political policies. It also requires a capacity to pursue cooperation with the third (developing) countries within the framework of a clearly defined and sufficiently independent development policy. The external policy of the European Union cannot be determined by the objectives of the Foreign and Security Policy of each Member States of the European Union.

A factor that makes it difficult for the European Union to have consistent and transparent policy is that EC/EU competence in this field is still shared with the member states. This affects the external human rights policy and development cooperation matters. While this arrangement was perhaps unavoidable, in practice it is likely to pose problems, due to lack of consistency and/or coordination between European and national policies in this field.⁶

1.3 The concept of human rights

There are many varied opinions about the concept of human rights. Several opinions divide human rights in three generations. Civil and political rights represent the first generation of human rights; the second generation is equated with the social, economic and cultural rights, whereas the third generation of rights includes rights such as the right to development, the right to self-determination and the right to environment. However, this segregated approach could be seen as insufficient since it does not take into consideration that all human rights are universal, indivisible, interdependent and interrelated.⁷ The indivisibility principle of human rights emphasises that human rights are interdependent and interrelated and that there should be no distinction between different categories of human rights civil and political rights, and economic, social and cultural rights.

1.4 Delimitation of the thesis

The title of this thesis includes three elements that are thoroughly discussed in thesis: the international legal personality of the European Union, the EU's external competences, human rights in bilateral trade and development cooperation, and development aid. The aim of this study is therefore to critically examine the role of the European Union in the external relations. More specifically, it tries to address the following issues:

1. Does the European Union have the international legal personality and to what extent it is necessary to exercise its external human rights policies and trade and development cooperation? What would be the appropriate role of the European Union regarding the protection of human rights in relation to third countries?

⁶ Karin Arts; *Integrating human rights in development cooperation: the case of the Lomé convention*, *Kluwer Law International*, 2000

⁷ World Conference on Human Rights, Vienna Declaration and Programme of Action, Vienna, 14-25 June 1993

2. Why is the European Union reluctant to adopt a universal approach to human rights in its external policies?
3. What is the nature of the EU external competences and conditionality approach as regards human rights in this context?
4. What has been the nature and focus of human rights clauses? Why are there so many problems in implementing human rights clauses? Could the European Union policy ever become transparent and consistent or is this too much to ask for?
4. Should sanctions be an exceptional measure, appropriate only in cases of extreme abuse of human rights? How can one address the problem of selectivity and inconsistency in the EU external relations, to prevent spread of arbitrary power in the application of international law?
5. What has been the impact of human rights clauses on the human rights situation in the country concerned? How can abuses be prevented in order to guarantee the protection of the rights of victims of conflicts?

Due to limited space and time it was necessary to delimit the scope of the thesis, in such a wide and extensive field as human rights in external relations in the European Union. The thesis topic relates to various areas of European Union Law, International Law and Human Rights Law, and hence the scope has to be delimited. In the light of this thesis mainly deals with the conditionality approach of the external relations of the European Union, the international legal personality of the European Union and human rights clauses in the EU cooperation agreements with third countries. Not all regions of the world are dealt with to the same extent as is Africa.

As it will become more evident in the subsequent discussion, the subject of external relations is rather broad, such that the dimensions of the scope of the present analysis will therefore be confined to:

1. the international legal personality of the European Union,
2. the conditionality approach and human rights clauses;

1.5 Significance of the Thesis

The reasoning which can be seen in the speech of Commissioner Patten, cited above shows that human rights in the external relations of the European Union are complex and involve numerous different factors with different philosophies and organisational structures. The present work intends to design strategies in order to establish a cohesive working relationship among the various players in the external relations of the European Union.

The EU human rights policy must become comprehensive and uniform in order to respond consistently to gross human rights violations. It has to adopt an interdependent human rights approach by integrating both, civil and

political, and economic, social and cultural rights in its external policies. The European Union and its member states have to overcome their reluctance to put emphasis on rights such as the right to food or the right to health. The study seeks to show that the European Union simply does not have any option left if it wants to become credible player in international arena.

Nothing is more important to third countries than the full realization of the Universal Declaration of Human Rights in the external human rights policies of the European Union.

The thesis has been written at the time when the EU external policy is plagued with the problems of non-transparency and inconsistency, which adds to the instability caused by poverty and inequality of resource distribution and natural disasters, thus occasioning complex emergencies in the third countries with which it has relations.

1.6 Organisation and Arrangement of the Thesis

The thesis argues that the rhetoric of the EU regarding human rights in its external relations is flawed. The immediate focus of the present study is to explore the various aspects of the external policy of the European Union as regards human rights and attempts to answer how the EU external policy could be adequately improved especially in relation to its implementation. Including this introduction, the thesis discourse has ten chapters. The first, introductory Chapter offers a brief profile of the context for discussion and illustrates the point of focus. It presents the way in which its methods and techniques were drafted, devised and executed. Chapter two discusses the issue of international legal personality of the European Union and briefly shows its impact on international legal personality.

The core of the thesis deals with the external competences of the European Union and human rights clauses. It illustrates the pattern in which the European Union pursues the human rights objectives. Chapter five is a critical discussion of the problems concerning conditionality and its various aspects. Special attention is awarded to concept of conditionality in the EU-ACP relation. The chapter five discusses the human rights clauses and their significance in relations of the EU with other states. The following chapter deals with unilateral trade preferences and technical assistance. Chapter seven and nine deal with implementation of policies of European Union in practice. Chapter seven describes how the EU sugar regime hurts poor countries, whilst chapter 9 examines the EU-Cuba relations as regards human rights policies. Chapter 10 suggests improvements in the external human rights policy of the European Union. The concluding remarks summarise the discussion and give critical appraisal of the current EU human rights policy.

1.7 Research Methodology

This study followed a non-complicated methodology which included a review of academic literature, reports of the international human rights and

humanitarian agencies, articles from books, professional journals, international instruments in this field and Internet sources including databases of various organisations. The materials used have been selected on the basis of the input and perspectives they were able to provide for the study. It has been the intention of the author to provide a critical analysis of the approaches, findings or conclusions of the material used. The literature review culminated in the development of a research proposal outlining the critical issues to be investigated, the methodology to be followed, and a schedule indicating time frame.

Having in mind interdisciplinary aspects of the topic, the law aspects of the subject has been given considerable thought by author. The reader will not find any references to the international human rights instruments. Thus, by human rights are meant those rights that are recognized in international human rights instruments, the Universal Declaration of Human Rights and five other human rights instruments, as the point of the departure. As will be shown below, most external policies of the European Union reserve the term human rights to projects that address merely civil and political rights and liberties.

The thesis brings together to parallel tracks:

It examines legal framework to discern how the EU incorporates human rights in their external relations

It deals with political considerations of the EU external policy and human rights as well.

A transdisciplinary bridge is necessary to discern what happens to rights and violations when they are extracted from the law to used in external relations of the European Union, whether the sanction are useful to be applied against violators and thus need to borrow authority from the law.

1.8 Objective of the Study

By and large, the aim of this exploratory study is to assess the effectiveness of the EU's external policy and to propose model of cooperation and coordination between the EU and members states in order to create a transparent and consistent policy the external human rights policy, and help developing countries, in their cohesive effort to achieve peace and respect for human rights and rule of law. This is a quest to bring the principles of interdependence and universality of human rights in the external relations of the European Union.

In more specific terms, the primary objective is to explore the external relations of the European Union and convey an impression of the challenges involved in trying to get all the stakeholders to function cohesively. The secondary objective is to provide relevant suggestions on how to enhance the human rights policy of the European Union.

2 Introductory chapter

By virtue of Article 56 of the Charter of United Nations Member States commit themselves *to take joint and separate action to achieve higher standards of living, full employment, and conditions of economic and social progress and development, ... solutions of international economic, social, health and related problems and ... universal respect for human rights*. All member states of the European Union are Member states of the United Nations and they are parties to the International Bill of rights.⁸ Hence, they are bound by the obligations contained in those treaties, even though the European Union itself it is not bound by those treaties. By invoking human rights obligations of the EU, the developing countries would be gradually able to level the playing field in bilateral and multilateral relations of developing countries with the European Union and they could to some extent eliminate inequality and dependence in their relations with the EU

This thesis argues that the European Union has failed to bring human rights in its external relations, that its aid has failed in Africa and elsewhere, that its conditionality approach is flawed and that there is very little chance of recovery from these failures under current institutional arrangements. It presents an overview of the existing approach of the European Union as regards human rights and proposes a direction of movement that would firstly level the playing field for both parties. Secondly, donors should pay more attention to standing firm on conditionality approach. Thirdly, a substantial debt relief would mean a step in right direction in bringing the European Union and its partners on equal footing. And fourthly, more importance should be given to consequences of bringing human rights in the foreground and less to the volume of aid or incorporation of human rights in legislative documents.

And there are many reasons why the situation does not improve despite massive amounts of foreign aid and the conditionality approach. While it is easy to lay blame on Africa's foreign debt and its internal disturbances, the donors and among them the European Union and its Member States have played an instrumental role in hindering the developing states such as African in their development.

One can easily see how things are occurring in the reality from the plain example of Kenya that could be easily applied to any other country. Kenya performs on regular basis a curious ritual with its donors. Nevertheless it is true that we did not have things then which are now part of our everyday life. It goes like this: "one, Kenya wins its early pledges of foreign aid. Two, the government begins to misbehave, back tracking on reforms and behaving in an authoritarian manner. Three, a new meeting of donor countries looms with exasperated foreign governments preparing for sharp rebukes. Four, Kenya

⁸ The International Bill of Human Rights comprises the following international documents: Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Optional Protocol to the International Covenant on Civil and Political Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty.

pulls a placatory rabbit out of hat. Five, the donors are mollified and the aid is pledged. The whole dance starts again.”⁹

The EU development policy and external relations on the whole must have clear independent objectives, the principal of which is the respect for human rights, rule of law and eradication of poverty. They cannot be determined by the objectives of the Common Foreign and Security Policy (the CFSP), or the Common Security and Defence Policy. As the main trading partner of developing countries, the world's second largest multilateral donor of Official Development Assistance, and the source of over half of all official humanitarian assistance distributed worldwide, the EU must have a comprehensive, independent development policy at an EU level in order to be truly effective in eradicating poverty. The poverty is a major contributor to conflict in the world and Europe will offer little towards achieving global peace if it is not able to offer something different to the American model where development policy is just a strategic asset of foreign policy.

*“The use of human rights to legitimize external policing and sanctioning undermines the very basis for human rights protection, which ought to be domestic. Human rights conditionality makes the recipient government accountable to donors, who are accountable to their own electorates. People in recipient countries – whose rights are at stake – are not factored into that equation.”*¹⁰

This statement illustrates the core of the European Union’s attitude in its external human rights policy not only towards the African continent but also to regions of the world over with which Europe has external relations and trade cooperation. Even though the European Union is providing vast financial resources to developing countries, this always inter-connected with the fulfilment of private motives of Member States often hidden in the form of human rights clauses or other conditions. Accordingly, the European Union often (intentionally) concludes cooperation with politically dubious partners that are insufficiently development oriented and could endanger the impact of development cooperation. It was not until blatant human rights violations under the Idi Amin regime in Uganda led to first de facto suspension of Community development assistance due disrespect for basic human rights and democratic principles.¹¹ However, later the compromise was reached whereby the aid to Uganda was not suspended but only redirected. The paper examines the contemporary practice of the European Union as regards the incorporation of human rights in the external relations of the European Union.

This thesis will focus on the presence of human rights in external relations of the European Union. Human Rights have gradually been incorporated in the policies of both the European Community (EC) and the European Union (EU). Human Rights are defined in different areas of external relations ranging from foreign policy, common foreign and security policy, development cooperation and to relations with third countries. However, even though

⁹ ‘Aid for Kenya: stop, go’, The Economist, 19 August 1995

¹⁰ Katarina Tomaševski, *Between Sanctions and Elections*, p. 215

¹¹ Unilateral decision by the EEC Council of Ministers taken on 21 June 1977

human rights is mentioned in a vast number of policy documents and cooperation agreements its meaning varies a great deal.

The EU Human Rights policy in external relations is putative and arbitrary. There is no reasonable explanation why Zimbabwe has been punished and Sudan and Haiti were punished so severely whereas China and Indonesia were being cut off aid only for a short time.

This essay will examine increasingly important issues arising out of the legal relationships of the European Union with non-member states from human rights perspective. The EC and the European Union are becoming significant actors in international community, and the Community's external relations are extending beyond traditional commercial policy based on trading relationships into newer areas such as services and development policy. Despite much criticism, the development of the Union's common foreign and security policy is of great legal and practical significance both for third states and for the Union itself. It will try to examine the structure of the European Union (including the inter-governmental pillars) from an external relations perspective, the international legal personality of the Community, the issue of legal personality for the Union, the legal principles governing the Community's external competencies and the scope of the Community's express and implied powers in the field. In addition brief emphasis will be given to the relationship between Community law and international law and the legal effect of international agreements in the Community legal order.

Specific aspects of external policy will include the development of the Common Foreign and Security Policy (CFSP) envisaged in the Treaty on European Union and the Treaty of Amsterdam and the external dimension of EU human rights policy and immigration from non-Member States and asylum policy.

It will then focus on specific aspects of external relations policy, and in particular the common commercial policy (CCP) of the Community, autonomous legal measures, bilateral and multi-lateral agreements including trade agreements, association agreements and relations with developing countries. All these areas will be examined from HR perspective. Special attention will be paid to relations with the countries of Africa.

The questions such as what are the sources of law forming the basis of an external human rights policy, given that the EC is not a contracting party to any human rights convention and how does this external policy relate to the main categories of human rights (civil rights, political rights, social, economic and cultural rights, minority rights, etc.) and to their broader conceptual framework, notably democracy and the rule of law will be discussed.

The focus of the thesis is on the external human rights policy of the European Community and the European Union as a whole. This means that I will take under consideration Human rights policy under Common Foreign and Security Policy (CFSP, or the 'Second Pillar'), with all of its ambiguous provisions.

3 International Legal Personality of European Union

The present thesis will initially examine whether the European Union has international legal personality¹² or not since this question is of essential importance for its relations with third states. Once the international legal personality is acquired, the EU would be able to become a party to the international bill of rights. This would gain the developing states the equal playing field in their bilateral and multilateral relations with the European Union since they are nowadays in unequal position and dependant on the EU. The member states of the European Union are already now parties to the international bill of rights. Hence, the European Union is already bound as a collective entity of its member states by the international human rights treaties and international customary law. The conferral of international legal personality itself on the European Union would strengthen the role of the European Union in its external human rights policy and would firmly put it under the obligations to comply with the principles of non-discrimination and interdependence of human rights. The Union would also be liable under international law for the breach of bilateral agreements with the third countries which, is at present not the case. The European Union already nowadays has to comply with the rules of customary international law.¹³

Does the European Union have to have the international legal personality and to what extent it is necessary to exercise its external human rights policies and trade and development cooperation? For one to answer this question one has to keep in mind that a common foreign and security policy and development cooperation do not fall under the exclusive competence of the European Union, but remain in the domestic sphere of the member states of the European Union. The European Union already nowadays has the implicit legal personality¹⁴,

¹² On the question of international legal personality of the European Union see Seminar paper at University of Lund by the author of the thesis

¹³ With regard to this the Court of Justice in several cases confirmed that the Communities have to exercise their powers in accordance with the rules of customary international law C-286/90 *Anklagemyndigheden v. Poulsen and Diva Navigation* (1992) ECR 6019, C-432/92 *R. v. Ministry of Agriculture, Fisheries and Food, ex parte Anastasiou* (1994) ECR I-3087

¹⁴ The European Union as already said and confirmed by the Working Group has already nowadays at least implicit legal personality that enables it to act on the political and economic sphere that merely confirms the assumption that international organization may acquire legal personality even if it is not specifically enshrined in the founding Treaty or Statute. The derivation of the EU personality on the basis of specific powers and rights can be seen from below. Examples of negotiated practice where international legal personality is at hand include: The Memorandum of Understanding on the EU Administration of Mostar (Mou)¹⁴ The Exchange of letters between the EU and Norway, Austria, Finland, Sweden The General framework agreement for Peace in Bosnia and Herzegovina (the Dayton Agreement). EU signed the agreement as a witness. The Protocol Concerning the Elections (Annex II) in the Israeli-Palestinian Interim Agreement on the West Bank and Gaza Strip.¹⁴ EU signed the Protocol as a witness. On the basis of Article 5 (4) of the Agreement which provides for a liability clause EU good be said to acquire international legal standing. The Protocol in Article V (4) provides that *the European Union will act as the coordinator for the activity of observer delegations*. And the next provision explains possible standing of European Union under public international law. It reads as follows: *The European*

while it does not have an explicit legal personality¹⁵, although the European Community as one of the main pillars of the European Union has the international legal personality. By having international legal personality the EU would have a single face in the Commission would be added weight in political representation. Additionally, a broad network of information and representatives would be established.

From the discussion of working group emerged that there was a very broad consensus that the Union should in future have its own explicit legal personality that should be a single and should replace the existing personalities.¹⁶ It should be said that if the Union did conclude international treaties and was accepted as contracting party, this direct evidence of its international legal personality that enables it to act in international relations and bilateral and multilateral trade cooperation. However, that opens door for question why the Union has, if already has legal personality, not yet become the party to any international human rights treaty. The acquisition of international legal personality is vital for the Union since it would enable it to ratify human rights treaties that would level the playing field in its bilateral relations with third countries.

The International Court of Justice in Reparations for Injuries Advisory Opinion held that international legal personality does not explicitly have to be granted, but can derive from the functions of the organization and its rights.¹⁷

The International court of Justice found out that even entities other than state could also possess international legal personality. As read as follows: “*the organization was intended to exercise and enjoy, and is in fact exercising and enjoying*

Union will only bear liability in relation to members of the coordinating body and to European Union observers and only to the extent that it explicitly agrees to do so. (Appendix 2 (8) to Annex II).

The Relations between the Union and the WEU¹⁴

The Council Decision 2001/352 concerning the conclusion of the Agreement between European Union and the Federal Republic of Yugoslavia (FRY) on the activities of the European Union Monitoring Mission (EUMM) in FRY¹⁴, (on the basis of Article 24)

The Council Decision 2001/682 concerning the conclusion of the Agreement between the European Union and the Former Yugoslav Republic of Macedonia (FYROM) on the activities of the European Union Monitoring Mission in (EUMM) in FYROM¹⁴,

Those documents plainly show the impact of policy decision on external relations and international legal personality of the European Union.

¹⁵ Explicitly provided for in the Treaties. To this date, there are no indications that the Union has explicitly entered into any international competences that would prove possession of its external competences. As mentioned earlier the document *Relations between the EU and the WEU* might be interpreted in the light of public international law. Under the agreement both organizations are obliged to work together in explicitly indicated areas, which is not far away from international agreement. Signing of a treaty is a legal act, which can only be performed by agents of international legal persons having the capacity to conclude international agreements.¹⁵ The Draft of 1969 Vienna Convention on the Law of the Treaties included a separate definition of *treaty in simplified form*, by which it was meant *a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other document concluded by any similar procedure.*

¹⁶ See Final Report of Working Group III on Legal Personality of 1 October 2002, CONV 305/02

¹⁷ Reparations for Injuries, Advisory Opinion, ICJ Reports 1949, para. 179I

functions and rights which can only be explained on the basis of possession of a large measure of international personality and the capacity to operate upon international plane.”¹⁸

As regards the procedure for negotiating and concluding international agreements, the Working Group recommended that a clear indication should be given in a single treaty article of who negotiates and concludes such agreements. The Group stated that it should always be the Council that authorizes the opening of negotiations and issues the negotiating directives, and concludes the agreements once they are negotiated. This is to be perceived as good solution especially as valid Article 24 TEU that allows the Council to negotiate and conclude agreements, which prove necessary to implement common foreign and security policy.

The Working Group confirmed that the explicit conferral of legal personality on the Union heightens its profile on the world stage. The Union will thus become a subject of international law – alongside the Member States but without jeopardizing their own status as subjects of international law – and would as a result be able to avail itself of all means of international action. By granting international legal personality to the European Union the Union will have the capacity to bring claims before international tribunal exercising an international legal jurisdiction, to enjoy rights and be subject to international legal obligations, *to participate in international law creation*, to enjoy the immunities attaching to international legal persons within national legal systems, to participate international organizations and to conclude international treaties.

As regards the procedure for negotiating and concluding international agreements, the Working Group recommended that a clear indication should be given in a single treaty article of who negotiates and concludes such agreements. This will simplify the conclusion of international agreements and thus enhance the capacity of the EU to act at the international scene, whether political or economical. The Group states that it should always be the Council that authorizes the opening of negotiations and issues the negotiating directives, and concludes the agreements once they are negotiated.

By acquiring international legal personality, the European Union will become more influential actor in political sphere, especially in international relations and will be able to accede to the human rights treaties that is of essential importance for third state when negotiating with the European Union. This should be welcomed for the reasons of effectiveness, legal certainty, transparency and as it heightens the picture of the Union vis-à-vis third States and European citizens.

¹⁸ *Id.*

4 EU EXTERNAL COMPETENCES

4.1 The scope, the principles and objectives of the EU external policy

The scope and objectives of the external human rights policy of European Union are defined in Article 11(1) TEU. Among other objectives the Union shall while defining and implementing a common foreign and security policy covering all areas of foreign and security policy also develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.¹⁹ However, The Union is not bound itself by any international human rights treaty, but it committed itself to comply with basic principles of human rights.

In order to grasp the flaws in the EU's approach to human rights in the external polices, one has to examine the commitments made by the European Union in several declarations and other non-binding documents. For an example, The Declaration on Human Rights²⁰ provides that respect for human rights is an essential part of its international relations and a cornerstone of European cooperation. In 1991 the Council adopted Resolution on human rights, democracy and development²¹ laying down the guidelines, procedures and priorities for improving the consistency and cohesion of the whole range of development initiatives. This is however not visible from the EU external human rights policies in practice that is still plagued by incoherent approach. That makes it difficult to pursue consistent policy in all regions world over.

Article 6(2) TEU stipulates that the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. Accordingly, the Union shall provide itself with the means necessary to attain its objectives and carry through its policies.²² In the field of development cooperation Article 177/2 stipulates that Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

The Treaty of Amsterdam incorporated further human rights provisions in the Treaty. The objectives of the Union have been extended to maintaining and developing Union as an area of freedom, security and justice.²³ Article 13 TEU provides that the Council has mandate to take appropriate action to combat

¹⁹ Article 11 TEU

²⁰ Declaration on Human rights, Conclusion of the Luxembourg European Council (28 AND 29 JUNE 1991)

²¹ Resolution of the council and of the member states meeting in the council on human rights, democracy and development, adopted on 28.11.1991

²² Article 6/4 TEU

²³ Art 2 TEU

discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. Respect for human rights, democracy, liberty, fundamental freedoms and the rule of law is also binding condition for membership and for not being subjected to a suspension procedure in cases of serious and persistent breach by an existing member.

The European Union's conduct in the field of external relations should be guided by compliance with the rights and principles contained in the EU Charter of Fundamental Rights which was officially proclaimed at the Nice Summit in December 2000, since this will promote coherence between the EU's internal and external approaches. This commitment is stated again in the Communication on the European Union's role in promoting human rights and democratization in the third countries.²⁴ The Charter on Fundamental Rights is important since it makes more visible the EU's commitment to human rights and democratic principles to non-member states with which the EU has the bilateral and multilateral relations.

A Draft Treaty establishing a Constitution for Europe again establishes the objectives and principles of the EU external policy. The statement of values is designed to establish entity for the Union: a defining identity that will be promoted both to its citizens and to the outside world. External objectives are enshrined in Article I-3"(4) of Draft Treaty establishing a Constitution for Europe²⁵:

*"In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter."*²⁶

Under a Draft Treaty on Constitution of Europe development cooperation and humanitarian aid are governed by shared competence of member states and the European Union. However these external policies are not governed by principle of pre-emption, which normally connected with shared competence. The Union has competence to take action and to conduct a common policy but this will not prevent the member states from exercising their own competence, subject to the overriding principle.²⁷ The legal basis for humanitarian aid is new and it is placed alongside the Articles on development cooperation and those on economic, technical and financial cooperation with third countries. Humanitarian aid is defined as *ad hoc assistance, relief and protection for people in third countries and victims of natural or man-made disasters*, operating within the framework of the Union's overall external policy principles and objectives and in accordance with the international law principles of

²⁴ COM(2001) 252 final, Brussels 8 Mai, 2001

²⁵ Draft Treaty establishing a Constitution for Europe adopted by consensus by the **European Convention on 13 June and 10 July 2003**, submitted to the President of the European Council in Rome on 18 July 2003

²⁶ Article I-3 (4) OF THE Draft Treaty

²⁷ Cremona, CMLRev. 2003, p. 1364

impartiality and non-discrimination. This reinforces Union's current policy to provide humanitarian aid to the peoples of countries whose governments are subject of sanctions and negative conditionality.²⁸ Treaty on EU from Amsterdam in Article 6 reaffirms that *the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles that are common to the Member States.*

References to human rights in external relations of the European Union are based on the various provisions in the different Treaties. The Preamble to the Charter of Fundamental Rights provides that the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity and it is based on the principles of democracy, respect of Human Rights and the rule of law.²⁹ Therefore, the promotion of democracy, the rule of law and the respect of human rights and fundamental freedoms forms one of the core objectives of the external policies of the European Union. The Commission's Communication on the European Union's role in the Promoting Human Rights and Democratisation in Third Countries incorporates this objective in the context of the Commission's overall strategic approach in external relations for the coming years.³⁰ It gives higher priority on human rights and democratisation in its relations with third countries and takes more proactive approach. The Council Conclusion on the European Union's role in promoting human rights and democratisation in third countries reaffirmed the EU's determination to promote stable, democratic environment of human rights providing for the full enjoyment of human rights. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.

As we saw the treaties grant upon EC powers to enter into certain kind of agreement with third countries. In Opinion 1/75 ECJ defined agreement as *any undertaking entered by entities subject to international law, which has binding force, whatever its formal designation.* In Opinion 1/91 the Court stated that *an international Treaty is to be interpreted not only on the basis of its wording, but also in the light of objectives. Article 31 of the Vienna Convention on the Law of the Treaties stipulates in this respect that a treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.*

Bilateral agreements bind the Community and become *an integral part of the Community legal order*³¹ from the moment they enter into force. They are binding both upon the institutions of the Community and the Member States. Agreements should be negotiated and concluded under the conditions of Article 300 of the Treaty. This Article does not confer power to act internationally, but it does set up the procedure to follow when Community wishes to enter into an agreement on the basis of a power contained explicitly or implicitly provided in the Treaty. Usually, the Commission conduct the

²⁸ Id., p.1365

²⁹ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, *entered into force* Dec. 7, 2000

³⁰ COM(2001) 252 final.

³¹ C-181/73 Haegeman v. Belgium, (1974) ECR I-449

negotiations, the Council concludes the agreement and the Parliament is consulted and it has to give assent.

The *capacity* to act must be distinguished from the actual *competence* of the EU in a given case. Capacity is one thing; competence another. Or in the words of the ECJ in the *ERTA* case:

'To determine in a particular case the Community's authority to enter into international agreements, regard must be had to the whole scheme of the Treaty no less than to its substantive provisions. Such authority arises not only from an express conferment by the Treaty [...] but may equally flow from other provisions of the treaty and from measures adopted, within the framework of those provisions, by the Community institutions.'

4.2 Common Foreign and Security Policy

Many issues in the external human rights policy are being dealt with under the frame of the Common Foreign and Security Policy. In accordance with Article 12 TEU, the objectives of CFSP should be pursued by: defining CFSP principles and general guidelines; deciding on common strategies, adopting common positions³² and joint actions³³; and strengthening systematic cooperation between member states in conduct of policy³⁴.

The Common Foreign and Security Policy provisions are partly flawed due to its intergovernmental character that comes to expression especially in its decision-making. The TEU provides for decision-making by unanimity unless expressly decided otherwise.³⁵ Apart from Member States the Commission has formally guaranteed right of initiative as regards CFSP matters. The European Parliament does not play substantial role in the CFSP policy. The European Court of Justice has no substantive jurisdiction over matters arising out of CFSP area.

³² Article 15 TEU

³³ Article 14 TEU

³⁴ Article 16 TEU

³⁵ See TEU Article 23

4 CONDITIONALITY

4.1 Definition of conditionality

A condition is “an arrangement that must exist before something else can happen”³⁶. The conditionality is in the context of external relations mainly referred as the *aid conditionality*. Conditionality basically concerns the relationship between two unequal partners – the donor and the recipient: the latter is dependent, to greater or lesser extent, on the aid awarded by the former.³⁷ This is visible from the EC-ACP relations, where the ACP states have fewer strings to pull than the EC states. In the field of development aid Tomaševski stated that the term conditionality “*was coined to denote donors’ practice of tying aid to specified conditions whereby recipients remain eligible for aid. Specification and definition of such conditions, as well as assessment of compliance, is the prerogative of donors, based on implicit donors’ right to make prescriptions for recipients*”.³⁸

In comparison, the International Monetary Fund (IMF) usually defines conditionality from financial perspective by saying that “*credit from the IMF is generally conditional on the adoption of appropriate policies to resolve a country's balance of payments difficulties, contribute to strong and sustainable economic growth, and enable the government to repay the Fund*”³⁹. IMF differs between different levels of conditionality, namely low and high conditionality. Low conditionality involves a country merely establishing that it has a "balance of payments need," coupled with a declaration, which the Fund does not ordinarily challenge, that it is taking measures to correct the problem, whereas high conditionality involves designing a specific set of measures to eliminate a country's balance of payments problem, Fund agreement that the program will be adequate for that purpose, and the country's commitment to implement the program.⁴⁰

The conditionality approach dates back to the time after the 2nd world war when USA was helping Europe to rebuild itself under the auspices of Marshall plan. However, the human rights conditionality in today's form emerged in the 1970s deriving from the economic conditionality of the early 1970s. The broadening of conditionality from economic to political criteria was prompted by the end of the cold war, but reinforced by critical reviews of past aid (and development failures).⁴¹

³⁶ Cambridge Dictionary

³⁷ Fierro, p. 95

³⁸ Katarina Tomaševski, “*Between Sanctions and Elections: Aid Donors and their Human Rights Performance*”, London Printer, pp. 9-10

³⁹ <http://www.imf.org/external/np/exr/facts/conditio.htm>, visited 20.5.2004

⁴⁰ <http://www.imfsite.org/conditionality/whatis.html>, visited 20.4.2004

⁴¹ K. Tomaševski, pp. 9-10

4.2 Types of conditionality

4.2.1 *Ex ante* and *ex post* conditionality

From time perspective, two types of conditionality may be defined: *ex ante* and *ex post*.⁴² *Ex ante* refers to conditions regarding human rights and democracy that have to be fulfilled in order to enter into contractual relationship. There is distinction between *ex ante* and *ex post* conditionality. In case of *ex post* conditionality the aid is handed over only after the necessary actions are taken. Conditionality *ex post* concerns the situation where conditions appear once parties have concluded a relationship. There has been a lot of critique towards this type of conditionality on grounds that, it is a contradiction in itself as conditions, by definition, can only be imposed in advance.⁴³ Nevertheless, this is most common way in which conditionality comes to light. An example of this type of conditionality is the human right clause. References to respect fundamental human rights and freedoms in agreements and regulations have become widespread and systematic. Since early 1990s essential element clauses have begun to appear in all cooperation agreements with third countries. The human rights clause grants the possibility to suspend the agreement and to impose the range of actions. As seen it operates *a posteriori* after the agreement has entered into force.

4.2.2 Positive contractual conditionality

Positive conditionality involves promising various benefits should the recipient country meet the conditions.⁴⁴ Among the benefits could be: the awarding of grants, loans, technical or financial aid, the increasing or establishment of diplomatic ties or international recognition. The widely practiced form of negative contractual conditionality is in the preconditions laid down by lenders such as the IMF. As noted, this form of contractual conditionality has its origins in the severe conditionalities of the Marshall Plan. There is a significant economic literature dealing with this form of conditionality which has been defined as “*a mutual arrangement by which a government takes, or promises to take, certain policy actions, in support of which an international financial institution or other agency will provide specified amounts of aid.*”⁴⁵

Positive conditionality is in a way a selection process. It is selectivity not only in the choice of aid projects but selectivity in the appreciation of the policies in developing countries that attract those aid projects. Once again, the literature tends to show that the selectivity is in fact not directly related to good policies but by other more political considerations.⁴⁶ The correct policy package is

⁴² See Fierro, p. 99

⁴³ Hilde Selverivik; “Aid as a tool for promotion of human rights and democracy: what can Norway do?”, Chr. Michelsen Institute, Evaluation Report 7, 1997, p. 16

⁴⁴ Fierro, p. 100

⁴⁵ Tony Killick *Aid and the Political Economy of Policy Change*, Overseas Development Institute, London (1998), p. 6

⁴⁶ Statistical Annex of 2001 OECD Development Cooperation Report <http://www.oecd.org/>

difficult to gauge for each developing country given the differing histories and capacities. This has led instead to the idea of measuring not policies but outcomes and tying aid to progress in outcomes such as a fall in child mortality or a certain rate of growth of GDP.⁴⁷ Measuring outcomes is also problematic, even if one has confidence in the developing country's statistics. Outcomes are dependent on many factors and basing aid on outcomes may lead to penalising a country that has missed its targets because of conditions such as drought.⁴⁸ Outcomes do not measure quality. Nevertheless, outcomes are at least measurable and increasingly sophisticated processes can be designed to factor in the qualitative aspects.

The positive conditionality is constructed under system of generalised preferences (GSOP regulation). Under Regulation trade preferences may be granted to beneficiary countries covered by the scheme under the condition of adopting and applying domestic legal provisions incorporating the substance of the standards of two ILO Conventions.⁴⁹

4.2.3 Negative contractual conditionality

On the other hand, negative conditionality involves the reduction or suspension of benefits should the recipient not comply with the conditions.⁵⁰ A distinction should be made between negative conditionality and punitive conditionality. The former is guided by the wish to influence policy, while the latter may contain rhetoric to this effect but is intended as a political response in the form of punishment.⁵¹

As will be seen in next chapters the EU has resorted to international law to suspend or terminate bilateral aid agreements in the event of human rights abuses or extra-constitutional attacks on democratic government.

Suspension of the EU aid for non-respect of democratic principles and interruption of the democratic process has occurred in several cases. Niger, Sierra Leone, Togo, Cameroon, Haiti, Comoros, Cote d'Ivoire, Fiji, Liberia and Zimbabwe are among those examples.⁵² Each case has its own particularities making generalisations about the effectiveness of the suspension mechanism difficult. One broad conclusion is that this policy is non-transparent, inconsistent and lacking general approach. The European Union is therefore in

⁴⁷ Jan Willem Gunning *The Reform of Aid: Conditionality, Selectivity and Ownership* Proceedings of Conference on Aid and Development, Stockholm, 21-22 January 2000

⁴⁸ Rich, Roland (2002) Democratic conditionality in development assistance. Technical Report Second Semester Seminars, Political Science Program, RSSS, ANU.

⁴⁹ Article 7 of the Council Regulation (EC) No. 3218/94 of 19.12.1994, OJ L 348 and Council Regulation No. 1256/96 of 20.6.1996, OJ L 160, 29.6.1996

⁵⁰ Fierro, p. 100

⁵¹ Rich, Roland (2002) Democratic conditionality in development assistance. Technical Report Second Semester Seminars, Political Science Program, RSSS, ANU, p. 9

⁵² Carlos Santiso *The Reform of the EU Development Policy – Improving Strategies for Conflict Prevention, Democratic Promotion and Governance Conditionality* Center for European Policy Studies Working Document No182, March 2002

urgent need of adopting more general approach in its external human rights policy.

Negative conditionality works poorly in weak or failing states and can have the effect of reducing even further the legitimacy of the state thus making the solution to the problems more elusive.⁵³ Haiti provides one example of that type of policy. In case of Haiti provides an example where the EU has basically dealt itself out of the process by suspending the means through which it exerted some influence. Negative conditionality seems to work best when allied to internal forces working for the restoration of democracy.⁵⁴ In other cases it doomed to failure. It thus strengthens the hand of those forces by giving them leverage that they would not otherwise have.⁵⁵

Negative conditionality is extremely limited in its content and application. It grossly ignores economic and social rights both as legal basis and for action and consequence of the action and gives priority to civil and political rights. This grossly violates the principles of universality, indivisibility and interdependence of human rights. Conditionality is almost entirely based on civil and political rights, and this often results in reducing the economic and social rights of the population. Fierro states four non-negligible problems with use of negative conditionality in EU context:

1. *Once the sanction has been applied, the actor (EU), to a large extent loses influence over recipient. Hence, The EU moved from a Baltic cause allowing for automatic suspension of agreement to a so called Bulgarian clause setting up a system of prior consultations before the measures.*
2. *the use of negative conditionality faces the challenge of directing the pressure towards the government, without affecting the population. In practice the picture is different as though conditionality flagrantly punishes the population, without getting closer to government.*
3. *the EU have to response to challenge of justifying why sanction have been imposed on a respective countries and not to impose on other countries supposedly guilty of similar violations.*
4. *perverse affect of conditionality. This theory asserts that negative conditionality, instead of provoking the changes sought by the actor plays, the role of legitimising the governments.*⁵⁶

4.2.3.1 Suspension or termination of agreement

When concluding the agreement the Community includes provision stipulating a right to suspend or terminate bilateral co-operation and trade agreement for reasons connected with non-respect of human rights. Suspension or termination is allowed in accordance with the rules of customary international law codified in the Vienna Conventions on the Law of Treaties (to which the EC is not formally a contracting party), without, however, the need to follow

⁵³ Rich, p.10

⁵⁴ Id.

⁵⁵ Id. Fiji may provide an example where negative conditionality seemed to have a positive influence. See supra note 55

⁵⁶ Fierro, Elena; pp. 101-102

all the procedural requirements (and, in particular, the notification requirements) laid down in the Conventions. Before the incorporation of the human rights clause, the EC had to rely on general international law to suspend an agreement, as happened with regard to Ex-Yugoslavia in 1991.

Blatant breaches and infringements of human rights clause and democratic principle usually lead to suspension of cooperation either to total extent and in official manner (see examples of Togo, Niger, Guinea-Bissau, Ivory Coast, Zimbabwe, Liberia) or partially and in a less formal manner paying respect to severity of human rights violations and the willingness of government to improve situations. Therefore, negative conditionality has only partial effect in the practice. There are some doubts whether there exist legal coherence has been ensured between first- and second-pillar instruments for adoption of economic sanctions and suspension of cooperation.

ECJ in *Portugal v. Council*⁵⁷ (1996) observed that an important function of the human rights clause could be to secure the right to suspend or terminate an agreement if the third state had not respected human rights, rule of law principle and goods. The latter clause thus does not seek to establish new standards in the international protection of human rights⁵⁸. It merely reaffirms existing commitments that, as general international law, already bind all states as well as the EC in its capacity as a subject of international law.⁵⁹ The clause accordingly does not imply the enactment of rules on human rights or the conclusion of specific human rights conventions in the sense in which these expressions were used by the ECJ in *Opinion 2/94*.⁶⁰ Therefore, the human rights clause, with its emphasis on the right of suspension, is a question of treaty law, which does not depend on which view is taken on the potential of Article 235 (or Article 130u) to serve as an enabling clause for human rights standard-setting.⁶¹

4.2.4 Other types of conditionality

In order to have complete overview over the types of conditionality, one has to mention other variations of conditionality. Among the most common measures are inter alia *dialogue*, *positive measures* and *a comprehensive human rights policy*. A dialogue, may be only a tool which could result in conditionality⁶², or it may be the result of applying conditionality or it may be incarnation of

⁵⁷ Portuguese Republic v. Council of the European Union, C-268/94, *European Court Reports*, 1996, P. I-06177

⁵⁸ Brandtner and Rosas, EJIL; Vol. 9, Nr.3, p.9

⁵⁹ Id. See The relevance of international customary law for EU is acknowledged by ECJ in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR 6019 (e.g., para. 9); Case C-432/92 *Anastasiou E.A.* [1994] ECR I-3087 (e.g. para. 40); Case T-115/94 *Opel Austria v. Council* [1997] ECR II-39.

⁶⁰ *Opinion 2/94* [1996] ECR I-1759 (para. 36), the ECJ concluded that “as Community law now stands, the Community has no competence to accede” to the ECHR.

⁶¹ Id.

⁶² Consultation procedure under the Cotonou Convention. It was opened with several ACP countries, often as response to a military coup or a flagrant electoral fraud. For an example in cases of Togo, Comoro Islands, Niger, Guinea Bissau, Ivory Coast, Haiti and Fiji.

conditionality itself⁶³. Positive measures differ themselves from positive conditionality as they aimed at promotion of human rights, but they are awarded unconditionally. As regards human right policy it has that has to be coherent and transparent which is not the case with the existing EU external human rights policy. It will be discussed in separate chapter.⁶⁴

4.3 Conditionality in EU-ACP relations

Grave breaches of human rights and democratic principles by third countries have shifted importance on the democratic conditionality as a helpful tool as regards economic sanctions. However, first step to be taken should diplomatic action in form of declarations under the CFSP framework and action by High representative or the Troika. Article 5 (1) (3) of Lomé IV Convention as revised by agreement in Mauritius on 4th November 1995 reads as follows:

*Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of this convention.*⁶⁵

This provision forms together with Article 366a of revised Lomé IV Convention so called non-compliance clause. It reads as follows:

1. *Within the meaning of this Article, the term 'party' refers to the Community and the Member States of the European Union on the one side, and each ACP State, on the other.*
2. *If one Party considers that another Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it.*

For the purposes of such consultations, and with a view to finding a solution:

- *the Community side shall be represented by its Presidency, assisted by the previous and next Member States to hold the next Presidency, together with the Commission;*
- *the ACP side shall be represented by the ACP State holding the Co-Presidency, assisted by the previous and next Member States to hold the Co-Presidency. Two additional members of the ACP Council of Ministers chosen by the party concerned shall also take part in the consultations.*

The consultations shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days.

3. *At the end of the period referred to in the third subparagraph of paragraph 2 if in spite of all efforts no solution has been found, or immediately in the case of urgency or refusal of consultations, the Party which invoked the failure to fulfil an obligation may take appropriate steps, including, where necessary, the partial or full suspension*

⁶³ for example the EU dialogue with China

⁶⁴ see chapter 8

⁶⁵ Article 5 (1) (3) of Lomé IV Convention

of application of this Convention to the Party concerned. It is understood that suspension would be a measure of last resort.

The Party concerned shall receive prior notification of any such measure which shall be revoked as soon as the reasons for taking it have disappeared.⁶⁶

In the event of grave and persistent human rights violation or the serious interruption of democratic processes, the Community and its Members States will consider appropriate responses in the light of the circumstances, guided by objective and equitable criteria.⁶⁷

The Lomé Convention was the first EC external cooperation agreement to include reference to human rights (Lomé III) and also the first document to incorporate good governance (Lomé IV-bis) in the human rights related clause. It is the first agreement that incorporates a clear and procedurally guaranteed human rights consultation mechanism.

The development and trade cooperation between the EU and the ACP-African, Caribbean, Pacific group dates back in 1970s when the first Lomé Convention was signed in Lomé the capital of Togo on 28 February 1975. This group consists of 71 states with approximately 650 million inhabitants, 39 of them are least developed countries. It should be mentioned that development fund was established in already 1958 to provide financial resources for development cooperation with then remaining colonies of six founding members of EC countries, in Africa, the Caribbean and Pacific (the ACP countries). The European Commission was given the task of managing the EDF while the Member States retained their own national development programmes.

Human rights have since first Lomé Convention gained in importance, eventually being regarded as *conditio sine qua non* for development cooperation. Respect for fundamental human rights, good governance and rule of law has become necessity in development cooperation, especially in the assessment of the human rights and rule of law respect and performance of recipient countries in decision making on the allocation of the assistance. However, the attention is not given to social, economic and cultural rights in practical implementation.

⁶⁶ 366a of revised Lomé IV

⁶⁷ Resolution of 28 Nov. 1991, para. 6

5 HUMAN RIGHTS CLAUSES

5.1 Human rights in bilateral/contractual relations with third countries

The European Community started incorporating a human rights clause in its framework agreements with third countries in the early nineties. However, the human rights clause is neither present in the sectoral nor in the framework agreements with developed countries.⁶⁸ The human rights clause is divided in two parts, the first part contains an essential element clause enshrined in the first provision of the agreement, whereas the second part is the final part of the agreement. The essential element clause will be in detail discussed later but it basically provides for:

*Respect for democratic principles and fundamental human rights (established by the Universal Declaration of Human Rights) inspires the internal and international policies of Parties and which constitutes an essential element of this Agreement.*⁶⁹

The first part of the essential element clause is divided in two parts by the word *and*: namely, respect for democratic principles and fundamental human rights inspires the internal and international policies of parties, while as a second part human rights and democratic principle are an essential element of agreement. As one can easily notice, the economic, social and cultural rights are not referred in the essential element clause, while the civil and political rights are addressed only in the form of vague wording such as *respect for democratic principles and fundamental rights inspires the EU policies*. Clearly, more would have to be done in order to integrate fully all categories of human rights in the external relations of the European Union than to address the issue merely in one sentence in the form of the principle. Additionally, the content of *respect for democratic principles and fundamental rights* is left without any substantial explanation in any of the legal documents of the EU. Apart from that, there is no reference to the international human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on the Economic, Social and Cultural Rights.

The second part of human rights clause is included in the final part of the agreement and provides for possibility of taking appropriate measures in case of violation of an essential element clause as seen from above. The provision is

⁶⁸ There is not other sound reason for that policy than that the Community considered that such inclusion was unnecessary given supposedly good track record of most developed countries. This question will be addressed in section 5.7.5

⁶⁹ See “Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republic of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of the other part, signed on 15.12.2003 in Rome, also see and compare “Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its member countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela, Article 1, 1998, OJL L 127/11. 29.4.1998

called “fulfilment of obligation”, but is basically in essence “non-compliance clause” and it reads as follows:

*If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take the appropriate measures. Before so doing so, except in case of special urgency, it shall supply the Joint Committee with all relevant information required for a thorough examination of the situation with a view of seeking a solution between the Parties. In the selection of measures, priority must be given to those which least disturb the agreement. These measures shall be notified immediately to the Joint Committee if the other Party so request.*⁷⁰

There is no reference to what constitutes the appropriate measures. WhoThe suspension of the agreement on the basis of this agreement is formed in accordance with Article 60 (1) and 60 (3) of the Vienna Convention on the Law of the Treaties.⁷¹

5.2 Evolution

This section discusses the development of the human rights clauses since their first inclusion in the formal EC agreement. The political upheavals in the early 1990s gave new dimension to the Community’s human rights policy and allowed it to develop an approach based on conditionality.⁷² An essential step in integrating human rights in the EU’s policies was taken with the entry into force of the Treaty on European Union (TEU) on 1 November 1993. As regards internal affairs the Commission issued a communication on accession to the European Convention of Human Rights, externally it enacted a communication on human rights, democracy and development co-operation. This issue will be addressed in Chapter 8 with deals with inconsistencies in the EU external policy.

On 28 November 1991 the Council and the Member states jointly adopted resolution that provided for incorporation of human rights clauses in the text of multilateral/bilateral co-operation agreements with developing third countries. Since the early 1990s, the EC has included more or less systematically a so-called human rights clause in its bilateral trade and cooperation agreements with third countries, including association agreements such as the Europe agreements, Mediterranean agreements and the Lomé Convention. Nowadays latter agreement is considered as platform for lasting and binding commitment to shared and universal values. Article 5 stated that *respect for human recognized as a basic factor of real development and cooperation is conceived*

⁷⁰ Article 56 of the Agreement

⁷¹ Article 60 (1) provided that a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part, whereas Article 60 (3) states that a material breach of a treaty, for the purposes of this article, consists in: (a) a repudiation of the treaty not sanctioned by the present Convention; or (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

⁷² Fierro, at page 213

as a contribution to the promotion of these rights.⁷³ However, no strategies have been developed to implement and enforce this provision.

The Council in its resolution of November 28th, 1991, affirmed that *the Community and its Member States will explicitly introduce the consideration of human rights clauses as an element of their relations with developing countries; human right clause will be inserted in future cooperation agreements.*⁷⁴ The wording of references to human rights clauses has been throughout the years made more firm and strict. Accordingly, agreements with Argentina⁷⁵, Chile⁷⁶, Paraguay⁷⁷; Uruguay⁷⁸, Macao⁷⁹ and Mongolia⁸⁰ all refer in express wording to *respect for democratic principles and human rights*. As said since June 1992 all EU bilateral agreements refer to *respect for democratic principles as essential element of agreement*. Essential element standard was included in the association and partnership agreements. In addition, suspension clause was introduced providing for the immediate suspension of all agreements when one is serious breach of essential provisions or of a more general clause that provides for appropriate measures where and if the parties fail to comply with their main obligations.

Albeit human rights were included in Europe's relations with third countries as early as 1970s, it was not before 1990s that instrument of human rights clauses emerged. Human rights clauses in multilateral and bilateral agreements with third countries are thus fairly new instrument for the promotion and respect and compliance with international human rights standards as they were introduced in the EU external relations so late as early 1990. There are many reasons why the Community has hesitated to address human rights issues in cooperation with third countries. The main reasons can be summoned on as following: that the member states of the European Union were reluctant to criticise the newly independent states, while African, Caribbean and Pacific (ACP) countries were opposed to receiving aid subject to political conditions.⁸¹ The additional reason was certainly that the EU was fore and foremost economic cooperation as well.

However, before that specific inclusion of human rights clause some agreements were referring to human rights and/or international human rights treaties. Human rights clauses were first included in the EU external agreement with conclusion of the fourth Lomé Convention. The Fourth ACP-EEC Convention (Lomé 4)⁸² was concluded with 69 African, Caribbean and Pacific (ACP) countries. It first included a specific reference to respect for human rights and democracy/good governance in the body of the agreement. Article 5 expresses the signatories' shared commitment to respect human rights and

⁷³ *ibid*, pp. 19-20

⁷⁴ Resolution of the Council and representatives of the Member States meeting in the Council on human rights, democracy and development (November 28th, 1991)

⁷⁵ 2 April 1990 (O.J. 1990, L 295)

⁷⁶ 20 December 1990 (O.J.1991, L 79)

⁷⁷ 19 October 1992 (O.J. 1992, L 313)

⁷⁸ 16 March 1992 (O.J. 1992, L 94)

⁷⁹ 14 December 1992 (O.J. 1992, L 404)

⁸⁰ 8 February 1993 (O.J. 1993, L 41)

⁸¹ J. Marantis, p. 5

⁸² Fourth ACP-EEC Convention signed at Lomé on 15.12.1989, OJ L 229 (1991) pp. 19-20

allocates partial amount of the funds under Convention to measures to promote human rights.

The European Parliament, the Council and the Commission of the EU in Nice solemnly proclaimed the Charter of Fundamental Rights in December 2000.⁸³ Second recital of the Charter's preamble presents the EU as indivisible, universal values of human dignity, freedom, equality and solidarity.

The process is on-going and Community institutions are now considering the inclusion of social clauses in future agreements in order to combat various forms of forced labour and child exploitation. The commitment for human rights is the best visible from allocation of financial resources and insertion of specific references to human rights in various agreements.

5.3 Legal Basis for Human Rights clauses

Is there any legal basis to include binding human rights provision in the framework (scope) of an agreement? Provided that there is one, what is its scope and limitations. For one to answer that question, it is necessary to have in mind the wording of the ECJ in the Opinion 2/94 *on the Accession of the European Community to the ECHR* which said that “no treaty provision confers upon the Community any general power to enact general rules on human rights or to conclude international conventions on the field.”⁸⁴

The legal basis of human rights clause was challenged by Portugal before ECJ concerning *Cooperation Agreement between the EC and the Republic of India on Partnership and Development*. In that case Portugal did not contest the legality of including human rights references in the agreement. Portugal suggested that to rank human rights as an essential element as was the case in the Indian agreement went beyond the wording of Article 177 (2), requiring recourse to Article 308 and unanimity rule. The ECJ rejected this argument on the ground that *the very wording of the latter provision demonstrates the importance to be attached to respect for human rights and democratic principles.*⁸⁵ As regards human rights as an essential element the Court confirmed its legality under Article 177 (2) *it must be first stated that to adapt co-operation policy to the field of human rights necessarily entails establishing certain connection between those matters whereby one of them is subordinate to the other.* After the enactment of Amsterdam Treaty there is a legal basis for human rights clause and can be found in Article 130u. It states that in the field of development cooperation. *The Community policy (...) shall contribute to the general objective of developing and consolidating democracy and the rule of law and that of respecting human rights and fundamental freedoms.*

⁸³ OJ 2000 C 346/1

⁸⁴ Opinion 2/94 *Accession by Community to the ECHR*, (1996) ECR I-1759

⁸⁵ p. 24 of the Judgement *Portugal v. Council*

5.4 The types of human rights clauses

5.4.1 Article 5 of Lomé IV (1989)

The Lomé IV Convention for the first time introduced a human rights clause which is surprisingly late especially having in mind flagrant human rights violations which had occurred during the period since the first Lomé was signed in 1970s. However, a human rights clause was drafted in the form of programmatic principles and not as substantial human rights provision that would be capable of invoking as conditions for the fulfilment of the Treaty. The provision can be found in Article 5 (2) (2) and goes as follows: *every individual shall have the right; in his own country or in a host country, to respect for his dignity and protection by the law.* The problem with this provision is that it does not contain any explicit clause for cases of violation. It is not clear whether such violation amounts to an essential breach of obligations under Article 60 (3) (b) VCLT. Nevertheless it could be interpreted in this way in the light of Article 5 (1) (1) of Lomé IV (1989) which states that *cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights.* Accordingly Article 5 does not constitute an adequate basis for treaty suspension in cases of serious human rights violations.

5.4.2 Basis Clauses

Due to failure to include human rights clause in EU – ACP cooperation, the framework treaty with Argentina instead introduced *democratic basis for co-operation* in Article 1 (1) which read as follows: *Cooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights, which inspire domestic and external policies of the community and Argentina.*

This basis clause was later introduced in agreements with other Latin American countries (Chile, Uruguay, Paraguay) and is regarded as important foundation for introduction of human rights clauses into all external agreements of the Community. However, the basis clause by itself does not provide for the termination or suspension of an agreement on the grounds of human rights violations or disregard for democratic process. One of the main reasons for this is the ambiguous wording that leaves much room for interpretation. Some commentators argue that this makes it easy to assert that respect for human rights and for democratic principles cannot be regarded as a provision essential for the fulfilment of the object or purpose of the treaty under Article 60 (3) (b) of Vienna Convention on the Law of the Treaties.⁸⁶ Even after having said that, the basis clause represents the improvement on the clause in Article 5 of Lomé IV (1989), however the issue as regards the effect on suspension and termination of the treaties in cases of human rights infringements.

⁸⁶ Riedel and Will, in Alston (ed.), 1999, p. 728

5.4.3 The Essential Element Clause

The essential elements clause is enshrined in the most of the EU's bilateral agreements. It was used also in the agreements with Latin American countries. The essential element clause presupposes that the respect for fundamental human rights and democratic principles has to follow from internal and external policies of the parties and constitute an essential element of the agreement.

It reads as follows:

*Cooperation ties between the Community and the Andean Pact, and this Agreement in its entirety, shall be based on the respect for democratic principles and human rights which guide the domestic and international policies of both the Community and the Andean Pact and which constitute an essential component of Agreement.*⁸⁷

The effect of essential element clause was further enhanced by so-called specific non-compliance clause, enabling recourse to specified modes of the reaction in the event of non-compliance by the treaty partner, without reference to Article 60 of the Vienna Convention on the Law of the Treaties (VCLT), the application of which may otherwise remain in doubt.⁸⁸

An important reason for including this standard clause in agreements with third countries is to spell out the right of the Community to *suspend or terminate* an agreement for reasons connected with non-respect of human rights by the third country concerned. The non-compliance clause is based on the Article 65 (2) of the VCLT and it is formed in one of the following forms:

- a) as an *Bulgarian clause* – a general non-execution clause which provides for appropriate measures should the parties fail to meet their obligations after special consultation procedure bar in cases of special urgency. This clause was used in the agreements with Romania, Bulgaria and the Russian Federation, Ukraine, Kyrgystan, Moldavia, the Czech Republic, Slovakia, Kazakhstan and Belarus. In some instances has been supplemented by interpretative declarations in the form of a joint declaration or an unilateral declaration by the Community. The European Parliament has held that the Bulgarian clause was invented in order not to be used. The standard wording for »Bulgarian clause« goes as follows:

*»The parties reserve the rights to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs.«*⁸⁹

- b) as *the Baltic Clause* – an explicit suspension clause which allows for the suspension of the application of essential provisions. It was used in the

⁸⁷ Article 1, Framework Agreement on Cooperation between the European Economic Community and the Cartagena Agreement and its member countries, namely the Republic of Bolivia, the Republic of Colombia, the Republic of Ecuador, the Republic of Peru and the Republic of Venezuela, Article 1, 1998, OJL L 127/11. 29.4.1998

⁸⁸ *ibid*, p. 729

⁸⁹ Commission Communication COM (95)216 of 23 May 1995

first agreements with Albania, Estonia, Latvia, Lithuania and Slovenia.⁹⁰ The standard wording of »Baltic« clause goes as follows:

»If either Party considers that the other Party has failed to fulfill an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be subject of consultation within the Association Council if the other Party so requests.»⁹¹

The human rights clause does not transform the basic nature of agreements that are otherwise concerned with matters not directly related to the promotion of human rights. It simply constitutes a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation under the agreements, and expressly allows for and regulates suspension in case of non-compliance with these values. This approach seems to have been confirmed by the ECJ.

5.4.4 Article 5 of Lomé IV (1995)

The revised Lomé Treaty under ACP-EU framework incorporated an essential element clause with extended scope of protection and the addition of non-compliance clause. The Article was dealt with in Chapter 4, Section 3. Additionally, it should be added that Lomé IV (1995) included a joint declaration of interpretation of Article 366a, contained in annex LXXXIII, which is much more restrictive regarding unilateral measures. It reads as follows:

- 1. In the practical application of this Convention, the Contracting Parties will not have recourse to the provision of special urgency in an Article 366a, other than in exceptional cases of particularly serious and flagrant violations, that, because of the response time required, render any prior consultation impossible.*
- 2. In the event that either Contracting Party has resort to this measures, the relevant Party undertakes to make arrangements to consult with other expeditiously with a view to assessing the situation in detail and, if necessary, remedying it.*

5.4.5 Standard clause

According to this clause human rights are referred to in the preamble as well as in the operative provisions, which in turn contain a combination of the essential element clause and non-compliance clause. This clause is widely used in bilateral framework agreements of the Community with the third countries and it this way forms the *acquis communautaire* in this field.

⁹⁰ Estonia OJ 1992 L403/2,, Latvia OJ 1992 L403/11, Lithuania OJ 1992 L403/20, Slovenia OJ 1993 L189/2

⁹¹ *ibid*, note 50

5.4.6 Article 9 of Cotonou Agreement⁹²

The Cotonou Agreement replaced the Lomé Convention, which has provided the structure for trade and cooperation between the EU and the ACP since 1975. The Agreement is valid for a period of 20 years, subject to revision every 5 years. Reference to human rights and democratic principles is modified in comparison with Lomé V as it includes reference to **social rights** even though they are mentioned very briefly.⁹³

⁹² Partnership agreement between the members of the African, Caribbean and Pacific group of states of the one part, and the European Community and its member states, of the other part. Signed at 23rd of June 2000 in Cotonou, Benin.

⁹³ Article 9 reads as follows: "1. *Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.*

Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

2. *The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women.*

The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms. On the basis of universally recognised principles, each country develops its democratic culture.

The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.

Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.

3. *In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.*

Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement. The Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element.

4. *The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance.*

These areas will be an important subject for the political dialogue. In the context of this dialogue, the Parties shall attach particular importance to the changes underway and to the continuity of the progress achieved. This regular assessment shall take into account each country's economic, social, cultural and historical context.

5.5 Content of human rights clauses

A range of human rights clauses refers to human rights and democratic principles without making references to international instruments for the protection of human rights. Examples of clauses *tout court* may be found in earlier framework cooperation agreement of EU with Central American countries⁹⁴, while new EU-Central America Political dialogue and co-operation agreement⁹⁵ already includes references to the Universal Declaration of Human Rights. What is the reason for including human rights clause without specific reference to international standards? The only explanation could be that they refer to pure Community agreements and that when the Community negotiates and concludes framework agreements alone, it favours, simplification of references.⁹⁶

The human rights clauses basically refer to the Universal Declaration of Human Rights. The Universal Declaration is also important because it reflects, at least at the level of general principles, existing general international law, whether seen as customary international law or as general principles of law recognized by civilized nations. One cannot find proper explanation why there is no specific reference to other international human rights treaties such as the International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, Optional Protocol to the International Covenant on Civil and Political Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty. The European Union has to comply with international customary law and especially *ius cogens* norms.⁹⁷

General human rights clause of this kind have another striking characteristics namely, that some of the clause mentioned above provide that agreement *is based on respect of human rights*⁹⁸, whereas other state that the agreement *shall be*

These areas will also be a focus of support for development strategies. The Community shall provide support for political, institutional and legal reforms and for building the capacity of public and private actors and civil society in the framework of strategies agreed jointly between the State concerned and the Community."⁹³

⁹⁴ Acuerdo-marco de cooperación entre la Comunidad Económica Europea y las Repúblicas de Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua y Panamá - Canje de notas relativo a los transportes marítimos - Declaraciones unilaterales, 22.2.1993 Diario Oficial n° L 063 de 12/03/1999 P. 0039 – 0053, 12.3.1999

⁹⁵ Political dialogue and cooperation agreement between the European Community and its Member States, on the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, Brussels, October 2, 2003

⁹⁶ Fierro, *The EU's approach to Human Rights Conditionality in Practice*, p. 232

⁹⁷ Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR 6019 (e.g., para. 9); Case C-432/92 *Anastasiou E.A.* [1994] ECR I-3087 (e.g. para. 40); Case T-115/94 *Opel Austria v. Council* [1997] ECR II-39. In *Opel Austria*, the Court of First Instance said that 'it is generally recognised that the First Vienna Convention [on the Law of Treaties] codifies certain universally binding rules of customary international law and that hence the Community is bound by the rules codified by the Convention' (para. 77).

⁹⁸ See agreement with Sri Lanka and Vietnam

*based on the respect for human rights*⁹⁹. That could create confusion concerning what was really meant since the first case could mean that human rights are already respected.

5.6 Sanctions for non-compliance with human rights clauses

In case of disrespect of human rights and democratic principles the agreements can be suspended or appropriate measures taken. Accordingly, measures may be taken in response to serious human rights violations or serious interruptions of democratic process. Annex 2 to Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and third countries provides for non-exhaustive list:¹⁰⁰

- alteration of the contents of cooperation programmes or the channels used
- reduction of cultural, scientific and technical cooperation programmes
- postponement of a Joint Committee meeting
- suspension of high-level bilateral contacts
- postponement of new projects
- refusal to follow up partner's initiatives
- trade embargoes
- suspension of arm sales, suspension of military cooperation
- suspension of cooperation

5.7 The types of cooperation agreements

5.7.1 Development Cooperation Agreements

Types of bilateral agreements will be discussed according to human rights relevance and legal basis. The Treaty of Maastricht included for the first time an explicit basis for conclusion of agreements concerning development cooperation. However, this was merely confirmation of the practice that the Community had been pursuing in development cooperation since many years. Since the Treaty on EU from Maastricht there is explicit legal basis on which to conclude agreements on the development cooperation. The legality of human right clause initially arose from the former Article 130u (the new 177(2)) of the Treaty of Amsterdam which states that in field of development cooperation *"the Community policy ... shall contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms"*.

⁹⁹ See agreement with Tunisia and South Africa

¹⁰⁰ Communication from the Commission - COM(1995)216 (May 1995)

5.7.2 Association Agreements

The Association Agreements are treaties that establish an association between the EC and non-member states. The Association Agreements referred to here concern the new democracies of Eastern and Central Europe. They are often referred as Cooperation Agreements, with other states, notably Turkey and the Maghreb countries.

As regards association agreements, Article 310 EC Treaty allows the Community to conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure. In the light of this wording is questionable if one could include a human rights clause in this kind of agreements. However, it is true that the Article 6 states that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States. Some authors argue that the association agreements are already part of the Community system of development cooperation. In *Demirel* case, the ECJ briefly defined association agreements as those *creating special, privileged links with non-member country which must, at least to certain extent, take part in the Community system*.¹⁰¹ It further said that *Article 238 must necessarily empower the Community to guarantee commitments towards non-member countries in all field covered by the treaty*. Therefore, one of the characteristics of association agreements is that they are aimed at creating permanent or durable links. It will enable the associated states to take decisions necessary to the well functioning of the institutions, whereas political chapter is included as well. Therefore it could be argued that human rights clauses can be more effective in the framework of association agreements rather than in ordinary trade and co-operation agreements.¹⁰² One could agree that association agreements provide a better environment for the successful implementation of human rights clauses since they are aimed at setting up permanent and durable links with the Community and partly participate to a certain extent in the Community system. Advocate General Darmon noted that in *Demirel* the provisions at issue must be seen as part of an association agreement founded on the desire to *"establish ever closer bonds between the Turkish people and the peoples brought together in the European Economic Community"*, with a view to the subsequent accession of Turkey to the Community. Article 310 states that association agreements shall provide for reciprocal rights and obligations. Reciprocity does not imply equality of contractual obligations.¹⁰³

There are at least three forms of association agreements that could be distinguished:

- (1) association as a special form of development assistance
- (2) association as a preliminary to membership of the EC, and
- (3) association as a substitute for membership

¹⁰¹ Case C-12/86 *Demirel v. Stadt. Swäbisch Gmünd* (1987) I-ECR 3719, para.9.

¹⁰² Fierro, p. 27

¹⁰³ Case C-87/75 *Bresciani v. Amministrazione italiana delle finanze* (1976) ECR I-129, p.

Since the association agreements under point 2 and 3 fall beyond the scope of the thesis, we will deal only with association as a special form of development assistance. The Cotonou Agreement and the Mediterranean Agreements are one of the examples of the first category. The Community avoided using the legal basis that the Treaty provides for concluding agreements aimed at development cooperation, and it has preferred to stress the *ratione personae* scope, and thus, the importance of the links with those countries by concluding association agreements.¹⁰⁴ The first generation of those agreements was concluded around from 1964 to 1973¹⁰⁵. Those trade agreements were characterised by non-reciprocal preferences, meaning that European Union unilaterally opened up its industrial markets. The former agreements were followed by second generation around year 1979.¹⁰⁶ Under present agreements, the EU is asking countries to reciprocate by opening up their heavily protected industrial markets. That was merely political decision. In the exchange for lowering the tariffs on EU industrial goods, the Arab Mediterranean countries have been granted slight improvements in access to EU markets, and financial assistance to face the high social cost of economic transition.

However, if the EU is serious about its commitment to comprehensive partnership in the Mediterranean region, it must be equitable in its trading relations. The aim of EU-Med agreements is to bring greater stability and prosperity to the region, however this will not be achieved unless EU adopts fairer trade rules and practices and with its Arab neighbours.¹⁰⁷

From this agreement it seem that the European Union is not taking sufficient account of human development concerns in their design – a failure stemming from excessive confidence in the contribution economic liberalisation will make to growth, and in the poverty reduction that will flow from that growth.¹⁰⁸ Finally, we consider how the agreements could better achieve economic development and equity. Many of these suggestions are relevant to EU policies towards other countries in Latin America, and to any future regional agreement with the Caribbean countries.

¹⁰⁴ Fierro, p. 27

¹⁰⁵ Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, Official Journal L 133 , 21/05/1973; Council Regulation No 492/71/EEC of 1 March 1971 concluding the Agreement establishing an association between the European Economic Community and Malta and laying down provisions for its implementation, Official Journal L 061 , 14/03/1971 and Agreement establishing an Association between the European Economic Community and Turkey, Official Journal P 217 , 29/12/1964

¹⁰⁶ Cooperation Agreement between the European Economic Community and the People's Democratic Republic of Algeria, Official Journal L 263, 27/09/1978, Cooperation Agreement between the European Economic Community and the Arab Republic of Egypt, Official Journal L 266 , 27/09/1978; Cooperation Agreement between the European Economic Community and the Hashemite Kingdom of Jordan, Official Journal L 268 , 27/09/1978; Cooperation Agreement between the European Economic Community and the Lebanese Republic, Official Journal L 267 , 27/09/1978; Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, Official Journal L 269 , 27/09/1978

¹⁰⁷ see Mediterranean Agreements, Partnership or Penury ?, Oxfam International 2003

¹⁰⁸ see Euro-Med: Seeds of Raw deal ? Oxfam International Report, April 2004

5.7.3 Trade agreements

The common commercial policy is defined in Article 133 EC. The common commercial policy is based “*on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.*”¹⁰⁹ In Opinion 1/94 the Court stated that the concept of common commercial policy covers services supplied across frontiers in which neither the supplier nor the recipient moves to other’s country.¹¹⁰ Does Article 133 provide sufficient legal basis for the human rights clauses? The provision itself does not mention human rights amongst its objectives. However, one argument could be that the clauses are of an altogether subsidiary or ancillary nature and they could fit in the context of trade agreement.¹¹¹

5.7.4 Evolution of human rights clauses in EU development cooperation

It has been said that since the early 1990s, the EU has insisted on including more or less systematically a so-called human rights clause in its bilateral trade and co-operation agreements with third countries, including association agreements such as the Europe agreements, Mediterranean agreements and the Cotonou Agreement (ex Lomé Convention). Below we show the evolution of human rights causes in EU development cooperation.

- 1957 Treaty of Rome, Part IV: Association of overseas countries and territories (i.e. non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands (6 EEC members and 22 countries and territories).
- 1963 Yaounde I Convention, i.e. Convention of Association between the EEC and the African States and Madagascar Associated with that Community (6 EEC members and 18 African countries)
- 1969 Yaounde II Convention (with the same parties); EEC’s proposal for human rights clause rejected by ACP as ‘undue interference’
- 1971 GSP (Generalized System of Preferences) following GATT’s waiver of non-discrimination rule; European Development Report; EuroAid to non-associated developing countries begins in 1976
- 1975 Lomé I Convention

¹⁰⁹ Article 133 (1) of EC

¹¹⁰ Opinion 1/94 *Agreement establishing the World Trade Organisation (1994)* ECR I-5267, see Fierro at p. 22

¹¹¹ Fierro, p. 256

- 1977 Joint Human Rights Declaration; Council re-directs aid to Uganda under Idi Amin's regime; controversies regarding Central African Empire and Equatorial Guinea
- 1978 Parliament's hearings on Argentina (boycott by Christian Democratic Party); Parliament calls in 1980 for critical appraisal of EEC's economic relations with Argentina
- 1979 Council affirms that punitive measures can be taken against ACP countries in case of human right violations
- 1980 Georges Marchais criticises Parliament's outward bias (out of 89 human rights resolutions only one concerned an EEC member); Cooperation agreements with Romania, Yugoslavia, and ASEAN; Lomé II Convention
- 1981 Parliament's call for ban on arms deliveries to Uruguay, sends delegation to El Salvador
- 1982 Council regulation on economic sanction against USSR and Argentina
- 1985 Lomé III Convention: Joint declaration on human rights said that *ACP-EEC cooperation must help eliminate the obstacles preventing individuals and peoples from actually enjoying to full their economic, social and cultural rights and that this must be achieved through the development which is essential to their dignity, their well-being and their self-fulfillment. European parliament said that in case of persistent flagrant violations of the human rights the Community should consider ending all agreements of aid and cooperation with the offending states"*
- 1988 Trade and co-operation agreements with the Central and Eastern European countries
- 1989 PHARE
- 1990 Lomé IV Convention (12 EC members and 68 ACP countries)
- 1991 First association agreements with Central and Eastern European countries; Resolution on human rights, democracy and development leads to the addition of human rights clauses to cooperation agreements with third countries.
- 1994 European Parliament stated that *the inclusion of a both a human rights and social clause in agreements with third countries and for provisions for the automatic suspension of the agreement in case of violation of these countries*
- 1995 Human rights clauses become mandatory for all co-operation agreements with third countries; three models as discussed before: Baltic model (human rights essential component of co-operation, right of suspension); Lomé model (human rights essential component,

consultation before suspension); China, Mexico, Australia, New Zealand model.

Revised Lomé IV Convention: Article 366a enables either of two parties to suspend the treaty in the event of a serious violation preceded by 30-day consultation procedure (the EU Troika, the ACP Troika, and two members of the ACP Council of ministers selected by the state deemed in violation); if a solution is not found, appropriate steps may be taken by the Council of Ministers; this does not apply to exceptional cases of particularly serious and flagrant violations which render prior consultations impossible

2000 End of Lomé model, and signing of the Cotonou agreement

5.7.5 The EU double standard policy

The double standard policy concerns human rights clauses, which are not included in the framework agreements with developed countries, whilst the EU insist on their inclusion in the framework agreements with developing countries. Additionally, the EU therefore pursues a policy of not signing framework agreements with developed countries, but opting instead for sectoral agreements or political – non –binding declarations.¹¹² The EU is reluctant to include human rights clause in relationship with developed countries as most of them are in equal economic position and not dependant on the EU. The example of Australia plainly shows this attitude where Australian government opposed the inclusion of the human rights clause in the agreement. Their argument was quite unconvincing as it said that the clause is not appropriate for a country whose human rights record is satisfactory.¹¹³

As already mentioned, the economic, social and cultural rights are left aside in the standard wording of the human rights clause, whilst the civil and political rights are mentioned merely in the form of general principle that does not provide any guidelines how to interpret is meaning. Additionally, there is no reference to the international human rights treaties such as the International Covenant on Civil and Political Rights and the International Covenant on the Economic, Social and Cultural Rights. Hence, the developing countries are left in their trade and development cooperation with the European Union without any foreseeability and transparency that should govern their relations. The observance of foreseeability and transparency is the essential condition for ensuring legal certainty, coherence and consistency in the EU external human rights relations.

¹¹² Fierro, p. 382

¹¹³ EU/Australia: Australia explains its attitude on the human rights clause and suggests two-alternatives-talks early next week, Europe No. 6901 of 27 and 28 January 1997

6 UNILATERAL TRADE PREFERENCES AND TECHNICAL ASSISTANCE

6.1 Unilateral trade preferences

The chapter provides a brief overview of the unilateral trade preferences of the EU. This question is of essential importance since the EU has been subjecting the award of preferences to respect of human rights. The Generalized System of Tariff Preferences was adopted in 1971 under the framework of the European Community at recommendation of the United Nations Conference on Trade and Development (UNCTAD) in 1968. It basically provided a mechanism under which the industrialized countries would grant trade preferences to all developing countries. The current GSP scheme is based on the Council Regulation No. 2501/2001 and is valid for the period 1.1.2002 - 31.12.2005.

The preferential treatment system under that Regulation may be temporarily withdrawn in case of serious human rights violations. Article 26 of Regulation provides that this would be possible in respect of all or of certain products, originating in a beneficiary country, for a several reasons. First four of them concern of violation *ius cogens* human rights norms:

- (a) practice of any form of slavery or forced labour as defined in the Geneva Conventions of 25 September 1926 and 7 September 1956 and ILO Conventions No 29 and No 105;
- (b) serious and systematic violation of the freedom of association, the right to collective bargaining or the principle of non-discrimination in respect of employment and occupation, or use of child labour, as defined in the relevant ILO Conventions;
- (c) export of goods made by prison labour;
- (d) shortcomings in customs controls on export or transit of drugs (illicit substances or precursors), or failure to comply with international conventions on money laundering;

The Regulation No. 2501/2001 does not refer to economic, social rights and cultural which shows the lack of interrelated approach. EU trade relations with developing countries are mainly governed by three framework agreements that are aimed enhancing developing countries' exports to the EU.

GSP (Generalised System of Preferences): under its GSP the EU is currently granting unilateral tariff preferences to 178 developing countries from every continent. As regards the preferential imports under this regime in 2002, half were duty free and half at a reduced duty. In 2002 EU imports under GSP amounted to EUR 53,2 billion.¹¹⁴

EBA (Everything But Arms initiative): under this unilateral preferential regime, the worlds 48 poorest countries out of which 34 are Sub-

¹¹⁴ European Commission 2004, <http://www.eubusiness.com/guides/gsp>

Saharan African countries export to the EU duty-free and quota-free. In 2002 EU imports under this scheme amounted to EUR 2,2 billion.¹¹⁵ Cotonou Agreement (ex Lome Agreements) with Africa, Caribbean and Pacific: as a result of deeply rooted historic and economic links between Europe and ACP countries,

6.2 Technical (financial) assistance

Assistance related to human rights and institution or democracy building has also regularly been provided by the Community as part of its *technical (financial) assistance*, which again is regulated in *autonomous* Community acts (regulations). This is true in particular as regards the Community's instruments for assistance to the Central and Eastern European countries (CEEC), the New Independent States (NIS) and Mongolia as well as the Mediterranean countries. However, such activities also form an important part of the Community's 'horizontal' instruments governing development cooperation with less developed countries.¹¹⁶ In order to get practical impression, we will take brief look on EU technical assistance with Asian, Latin American countries, Eastern European countries and Central Asian countries.

6.2.1 The ALA Regulation (Asian and Latin American Countries)

The cooperation between Asian and Latin-American (ALA) countries started in year of 1976. The main emphasis of regulation from 1981 was on development aid including agricultural and rural development and social fields. In 1992 new regulation was adopted with the main difference being in giving a substantial importance to human rights, democracy/good governance, gender equality and environment.

The ALA regulation is the main financial instrument of European development co-operation with Asia and Latin America. The renegotiation of the regulation is an important opportunity to improve the effectiveness of this programme in eradicating poverty and contribute to the challenge of securing peace and prosperity in Europe and globally.

6.2.2 Technical assistance to Eastern European and Central Asian countries

Tacis Programme was established in 1991 and provides grant-financed technical assistance to 12 countries of Eastern Europe and Central Asia (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan), and mainly aims at

¹¹⁵ Id

¹¹⁶ Bradner and Rossas

enhancing the transition to market economies and rule of law in respective countries process in these countries.¹¹⁷ The first Regulation was in 1999 replaced by a new regulation. The human rights clause in original regulation was based on an essential element clause and provided that: *Whereas such assistance will be fully effective only in the context of progress towards free and open democratic systems that respect human rights and towards market-oriented systems.*¹¹⁸ Article 3 (1) provided for a suspension clause that implies that the reference of the preamble really constitutes the essential element clause. This Article reads as follows: *When an essential element for the continuation through assistance is missing, in particular in cases of violation of democratic principles and human rights, the Council may on a proposal from the Commission, acting by the qualified majority, decide upon appropriate measures concerning assistance to a partner State.*

The new regulation¹¹⁹ does not include an essential element clause within the legal text. It was enacted for the period between 2000-2006. The regulation will promote programme to promote the transition to a market economy and to reinforce democracy and the rule of law in participating States. The programme is according to Article 2 be based on the principles and objectives set out in the Partnership and Cooperation Agreements and Trade and Economic Cooperation Agreements, in the context of which the Community, its Member States and the partner States work together to support initiatives of common interest. The entire wording of Article II can be understood as an implicit reference to human rights clause in the form of principle. Some Scholars argue that Article 2 is constructing a bridge between the PCA Agreements and the new TACIS Regulation.

¹¹⁷ (Mongolia was also covered by the Tacis programme from 1991 to 2003, but is now covered by the ALA programme.)

¹¹⁸ TACIS regulation

¹¹⁹ (Council Regulation (EC, Euratom) No 99/2000 of 29 December 1999).

7 HOW THE EU SUGAR REGIME HURTS POOR COUNTRIES¹²⁰

This chapter shows how the external and internal policy of European Union (EU) as regards sugar policies hurt its own efforts to reduce poverty gap in the third world. The Oxfam International in April 2004 published a report saying that export subsidies are used to put 5 million tonnes of surplus sugar annually on world markets, destroying opportunities for exporters in developing countries¹²¹. Additionally, producers in Africa have limited access to EU markets. The Common Agricultural Policy (CAP) sugar regime produces an annual harvest of subsidised profit for food processors and big farmers, and it perpetuates unfair trade between Europe and the developing world. Reform could benefit millions of people in poor countries. The EU sugar regime is a notoriously system which each year generates an export surplus of approximately 5 million tonnes. This surplus is dumped overseas through a system of direct and indirect export subsidies, destroying markets for more efficient developing-country producers in the process. Meanwhile, high trade barriers keep imports out of Europe.¹²²

Trade preferences mitigate the losses caused by the sugar regime – but only marginally. Countries in the African, Caribbean, and Pacific (ACP) group enjoy preferential access to the European sugar market at prices linked to EU guaranteed prices. Least Developed Countries (LDCs) also have preferential access for a limited quota. This is a transitional arrangement under the Everything But Arms (EBA) initiative, through which the EU is committed to providing duty-free access from 2009.

The EU usually to point to the EBA initiative as an example of its commitment to development – and it must be said that the initiative has helped some countries.¹²³ However, EU generosity has its limits. Market-access rights are severely restricted to accommodate the concerns of processing companies such as British Sugar, Beghin Say, Sudzucker, and the sugar-beet lobby.

EBA arrangements allow Least Developed Countries to export a volume of sugar equivalent to 1 per cent of EU consumption.¹²⁴ This plainly shows unequal footing in relations of EU with third countries. In other words, a group of 49 of the world's poorest countries are allowed to supply Europe, one of the world's richest regions, with only three days' worth of sugar consumption. Mozambique and Ethiopia, two of the world's poorest countries, have a right to export a combined total of 25,000 tonnes in 2004. Just fifteen

¹²⁰ Based on Dumping on the world: How EU sugar policies hurt poor countries, Oxfam International Report, 14 April 2004, http://www.oxfam.org/eng/pdfs/bp61_sugar_dumping.pdf

¹²¹ Id.

¹²² Id.

¹²³ Id, p.6

¹²⁴ Id.

of the biggest sugar farms in Norfolk produce more than this.¹²⁵ When it comes to choosing between reducing poverty in Africa and supporting big farm and industrial interests in Europe, EU governments have made a clear choice.

¹²⁵ Id.

8 INCONSISTENCIES IN EXTERNAL HUMAN RIGHTS POLICY OF EUROPEAN UNION

“Africa would be democratic if Europe (the European Union) would want Africa to be democratic.”¹²⁶

This statement in my mind plainly describes the European Union’s attitude not only towards the African continent but also to regions of the world over with which Europe has external relations and trade cooperation. There is growing feeling in developing countries that the EU maintains its trade and development relations with third countries only for sake of its external commercial benefits. This may be correct but it does not justify the failures in the EU external human rights approach that is extremely incoherent and hence also inconsistent in practice. The economic, social and cultural rights are left aside, while the civil and political rights are addressed only in the form of vague wording such as *respect for democratic principles and fundamental rights inspires the EU policies*. Clearly, more would have to be done in order to integrate fully all categories of human rights in the external relations of the European Union than to address the issue merely in one sentence in the form of the principle. Additionally, the content of *respect for democratic principles and fundamental rights* is left without any substantial explanation in any of the legal documents of the EU. The developing countries should not be left in their trade and development cooperation with the European Union without any legal certainty, foreseeability and transparency what to expect from the European Union. The observance of principles of legal certainty, foreseeability and transparency is *condition sine qua non* for coherence and consistency in the EU external human rights situation. The external human rights policy of the European Union has to have clear independent objectives. This is of essential importance for its trade relations with third countries in order to raise its credibility in international relations. As the main trading partner of developing countries, the EU simply must have a comprehensive, independent development policy in order to be truly effective in ensuring respect for human rights and rule of law.

The EU’s reasons to engage more with some countries and suspend relations with other countries are not very transparent or consistent. The major obstacle in adopting common approach to human rights in the EU’s external relations therefore concerns the private interests and motives of the European Union and its Member States (as they are the Masters of the Treaties) to or not to engage in a human rights dialogue with specific countries or regimes. In the light of that approach some states, such as Sudan and Haiti were dealt more harshly than others and they became targets of positive and negative measures and of rather active position taking by various Community actors. While countries such as Ethiopia, Democratic Republic of Congo and Kenya, could

¹²⁶ Professor Michelo Hansungule, Centre for Human Rights, Faculty of Law, University of Pretoria (South Africa), at public seminar at the Raoul Walenberg Institute, 1.3.2004

for a long time enjoy and rely on resources from the EC even though the human rights records remained poor.

The Tianamen Square massacre and subsequent response by the EU (at the time EEC) illustrate the inconsistency in the EU' external policy. As a response to the massacre the EEC imposed a set of negative measures on China.¹²⁷ However, the measures were not serious in their nature and they hardly had any affect on commerce. Discussion on suspension of the EU-China agreement was not even under discussion. The European Council adopted only weak measures, most of them have symbolic nature.¹²⁸ Hence, the approach was weak and without any legal foundation.

One could find several explanations for this incoherent and inconsistent approach. One of them surely refers to political consideration within the EU and its Member States as different Member States have different political relations with different developing states and, that may lead them to develop different attitudes and measures in response to the situations in developing countries. Other explanation concerns the shared competence between the EU/EC and each individual member state in the field of foreign policy and development. The following paragraph displays this under the ACP-EU Framework.

Lomé Convention has been overly uncritical cooperation with politically dubious partners, which not only impairs the impact of development cooperation measures but at the same time threatens to compromise the European Union. This criticism is aimed at cooperation with regimes that are insufficiently development oriented (some were criminal and kleptocratic) and at individual issues of project policy. Thus, the European Commission gives its partners too much leeway in the choice of project location and beneficiaries (Kenya).¹²⁹

As it obvious from above, principles of coherence, coordination and complementarity are of essential importance when discussing the external policy of the European Union as regards human rights. There is urgent need for some institution to be established in order to follow and monitor the human rights situation in developing countries and Member States of the European Union. In the ACP-EU framework there exists already Human rights Office dealing with establishing up-to date information base on the human rights situation in ACP and the EU countries. The contradiction between the Union's increasingly critical human rights stand towards third

¹²⁷ Fierro, p. 74

¹²⁸ Declaration on China, Madrid, 26-27 June 1989; The following measures were adopted:

- raising the issue of human rights in China in the appropriate international fora: asking for the admittance of independent observers to attend the trials and to visit the prisons,
- interruption by the member states of the community of military cooperation and an embargo on trade in arms with China,
- suspension of bilateral Ministerial and High Level contacts,
- postponement by the community and its member states of new cooperation projects, reduction of programmes of cultural, scientific and technical cooperation to only those activities that might maintain a meaning in the present circumstances,
- prolongation by the member states of visas to Chinese students who wish it.

¹²⁹ Hildegaard Lingau, Working Paper No. 12, ECDPM: Maastricht, May 1996, p.3

countries, especially ACP countries, and its strong reluctance to be similarly and publicly critical about human rights situations and concerns within the EU and its member states, is a serious and untenable inconsistency itself.

Other inconsistencies are apparent also by itself as there exist huge discrepancies between human rights standard goals and low practical commitments on the other hand. The responsibility and mandates for giving shape to the EC/EU human rights policy are still spread out over too large number of different actors without assigning a clear leadership role to any of them.

8.1 Need to adopt a comprehensive approach in EU's external human rights policy

The traditional approach to human rights assumes that the realizations of civil and political rights only requires states not to interfere, whereas positive action on the part of the state is required for the fulfilment of economic, social and cultural rights.

In 1992 Danilo Türk at that time Special Rapporteur to the UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, in his report on realization of economic, social and cultural rights provides a number of reflections on the need for a comprehensive approach towards human rights and for strengthening economic, social and cultural rights.¹³⁰ Recommendations state that the following issues should be taken in consideration: popular participation in the development process (including through local government, while paying attention not to play power into hands of local elites, decentralization), establishment of appropriate judicial or administrative review mechanism concerning economic, social and cultural rights¹³¹, and giving attention to the most disadvantaged groups and the extremely poor.¹³²

The European Union already in its Communication on external dimensions of human rights policy from 1995¹³³ emphasised the importance of principle of indivisibility of human rights. However, the EU does not follow this principle in practice.

Hence, the EU aid should be aimed at improving access to health (by building or strengthening medical care), education, an adequate standard of living (including food, clothing, housing), as well as access to work. The issue, which arises, is whether or not to include a separate 'social clause' in the Community's agreements with third countries. Authors such Brandtner and Rosas argue that

¹³⁰ UN doc. E/CN.4/Sub.1/1992/16

¹³¹ *Id.*, p. 224

¹³² *Id.*, p. 228-229

¹³³ The inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, Communication from the Commission - COM(1995)216 (May 1995)

such (economic, social and cultural) rights are already covered by the unlimited reference to ‘respect for human rights and democratic principles’ contained in the standard human rights clause.¹³⁴ This explanation is not plausible since the European Union is intentionally reserved to include economic, social and cultural rights in a standard human rights clause. Explanation *that if separate ‘social rights’ were defined and covered by a specific ‘social clause’, this might give the erroneous impression that these rights are not universal human rights, which might diminish, rather than increase, their significance*¹³⁵ does not provide valuable argument not to include such a rights since it merely dismisses the argument of universality of human rights only in general and superficial manner.

There is no full agreement that economic and political transformations are mutually interdependent. Tomaševski observes that *an empirical verification of the assumption that economic and political liberalization go hand in hand in varied conditions of developing countries today has not been found. Indeed, experience of South East Asian countries may point to opposite direction.*¹³⁶ As Buhmann found out that there are *no uniform predictable linkages between economic development and political development, but nevertheless there clearly are relationship of basic importance, deserving thoughtful attention in the approach being taken to the development challenge in every society.*¹³⁷

The European Union and several other actors assume that there is a positive relationship between civil and political rights and socio-economic rights. It has to be also noted that respect for and promotion of civil and political rights leads to socio-economic development, rather than the contrary. However, the situation in many developing countries proves the contrary. Relevant information could provide valuable input to the debate and to formulation of appropriate strategies and modalities for human rights assistance.

A comprehensive human rights policy must encompass both carrots and sticks. A policy excessively focused on carrots may well send a wrong signal, meaning that the donor is substituting the role of recipient.

¹³⁴ Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice, EIJL, Vol.9, No.3

¹³⁵ Id.

¹³⁶ Tomaševski, Differences between Democratization and Human Rights (1995), p.2

¹³⁷ Karin Buhmann, p. 19 and DAC (1995), p. 26

9 EU-CUBA RELATIONS – FAILURE TO ADOPT COHERENT APPROACH

The EU-Cuba relations plainly illustrate what is wrong today with the EU external human rights policy and why its external policy does not take into consideration the principles of transparency, foreseeability, coherence and consistency. After five years of bad relations following the EU 1996 Common Position (a "de-certification") on Cuba that put conditions on a bilateral development assistance agreement, EU-Cuba rapprochement began in 2001. In September 2002, the ACP group requested to grant Cuba the status of "informal" observer for the Economic Partnership Agreement negotiations. In December 2003 the EU Council introduced two modifications to its common position from 1996 stipulating:

“a) There will be no limitations for development-cooperation measures as long as Cuba undertakes meeting the objectives of the Common Position: respect for human rights and democracy, improvement of living standards for Cubans and promotion of sustainable economic growth.

b) The term for periodic reviews was extended to 12 months from six to give both parties more time to pursue a political dialogue.¹³⁸”

Cuba has faced not only a shortage in foreign hard currency, but also in food and medical supply due to suspension of agreement. This exemplifies total disregard of the EU external human rights policy for economic, social and cultural rights in respective countries. The improvement of living standard mentioned only to blur the overall picture of the EU's external human rights approach. On May 14 2004 the European Union voiced its deep concern at the recent trials and sentencing of thirteen Cuban journalists and human rights activists. The EU strongly condemned the conduct of the trials, which it said once again failed to meet international standards in relation to due process.¹³⁹

One would pose the question how could entity that is not party to any international human rights treaty demand compliance with human rights from the non-member state which is party to several international treaties. If one visits webpage of the EU-Cuba relations¹⁴⁰ it is easy visible that the EU plans to have relations with Cuba but there is reluctance to engage in Cuba due to violations of civil and political rights. The fact that economic, social and cultural rights are not given proper attention in this respect that shows another misgiving of EU policy.

In December 2003 the European Parliament adopted Resolution on Cuba which in point 6 reads as follows:

¹³⁸ Re-evaluation of EU Common position on Cuba, European Council, Brussels, 21 July 2003

¹³⁹ Declaration by the Presidency on behalf of the European Union on human rights in Cuba, Brussels, 13 May 2004, 9498/04 (Presse 162), P 62/04

¹⁴⁰ http://europa.eu.int/comm/development/body/country/country_home_en.cfm?cid=cu&lng=en&status=old#overview

*The European Parliament reiterates that the objectives of the EU's external policy are based on promoting respect for human rights and fundamental freedoms, encouragement of processes of transition to pluralist democracy, and support for lasting economic recovery aimed at improving the living standards of the population;*¹⁴¹

The wording of above question is vague since it does not explain what improving living standard of the population means, as it does not provide any guidelines on how to interpret it. The question is how can one improve the living standard of the population if the civil and political rights and the economic, social and cultural rights are not given equal consideration in the EU external human rights policy.

¹⁴¹ P5_TA-PROV(2003)0374, EU-Cuba relations, European Parliament resolution on Cuba

10 Recommendations

The European Union shall take a comprehensive approach in its external human rights policies. The following steps should be undertaken in order to adopt an integrated human rights policy in its external relations and adopt consistent approach to all countries, where principles of coherence, complementarity and coordination would be respected.

- The EU should abolish the double standard policy regarding human rights clauses and should include them also in the framework agreements with developed countries.
- *Ex ante* conditionality should be abolished due to vagueness that surrounds this area.
- The EU should decide whether if it will pursue EC foreign aid as an autonomous policy field or as an instrument of foreign policy.
- The EU should establish a credible and systematic mechanism for allocating aid. The system should put more emphasis in interdependence between different categories of human rights in order to improving the living standards of the population in respective countries as it nicely put in several of documents of the European Union.¹⁴²
- It should put the economic, social and cultural rights on its agenda for decision-making and action and interrelating them with the civil and political rights.
- The suspension of aid should not be an unilateral result as was the case with suspension of aid to Zaire because national conference was suspended, while in other cases more blatant violations were left ignored by the European Union.¹⁴³ Some countries showed reluctance to conditions being included in the negotiating the agreement.
- The EU should improve market access for the poorest countries. Governments of the Least Developed Countries have indicated a preference for retaining quotas through which they can export to the EU at a remunerative and predictable price. If this option is adopted, the quota should reflect their export capacity.
- The EU should treat third countries as equal partners even though they are economic inferior and dependent.
- Third countries should issue joint comments and statements on the human rights situation in the EU and in individual EU member states and role of the EU in relation to human rights situation in ACP countries.
- The EU should become similarly critical regarding human rights concerns within its borders, as it is critical to human rights situations in third countries.
- The EU external human rights policy should become more transparent and foreseeable

¹⁴² see supra note

¹⁴³ Statement on Zaire, *Courier*, no. 132, March-April 1992, p. 16

11 CRITICAL ASSESSMENT AND CONCLUSION

The EU external human rights policy lacks reference in practice to fundamental principles of human rights law, namely the principles of universality, interdependence and indivisibility. It may be true that the formal external policies of the European Union are based on such principles, but one can hardly find those principles implemented in practice. The EU external human rights policy encourages the discrimination between civil and political rights on one hand and economic, social and cultural rights in practice on the other. In its Communication from 1995¹⁴⁴ the EU states that it respects the principle of indivisibility of human rights and principle of interdependence between human rights, democracy and development. Hence, it is overzealous to argue as some authors do¹⁴⁵ that the EU external human rights policy is based on full observance of those principles.

As regards conditionality several scholars have argued that human rights conditionality appeared for the first time in the agreement based on the flagrant inequality between parties (it was conditionality rather than aid). It is much easier to interrupt a grant of development aid than to impose sanctions. While significant progress has been made to include human rights in the external relations of the European Union, elements of current external policies and practices leave room for improvement. At present the EU's approach to conditionality is now rather incoherent than a mature coherent policy.

"At the core of the debates on Europe's future foreign policy has been how the different parts of external policy will relate to each other. A crucial issue will be about the future role for European development co-operation policy. This has a long history within the European Union, initially based on the colonial relationships that many member states had with different parts of the world. Over time the Union's development policies have changed and define the principles on which the EU's relations with the developing countries should be built. Indeed, it is through the Union's development and humanitarian policies that the interests of global society can be rooted within the EU's policies as a whole."¹⁴⁶

Apart from focusing on the external cooperation partners, the European Union should once and for all disregard its reluctance to monitor and assess critically its own human rights accord, and that of its Member states.

Further, the availability, potential and record of positive support measures should be promoted. Under these circumstances cooperation under ACP-EU framework and its similar external documents would surpass its current role as

¹⁴⁴ see supra note 159

¹⁴⁵ Brandtner, Barbara and Rosas, Allan; Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice; EIJL , Vol9, Nr. 3

¹⁴⁶ <http://www.eurostep.org/pubs/position/convention/con2015.html>, visited 28.4.2004

instrument in between a *paper tiger* and a human rights guardian and rise to become this guardian.¹⁴⁷

The distinction between public and private in foreign policy was blurred in the 1990s and foreign policy was domesticated. The inflation of the EU's human rights rhetoric inevitably leads to its devaluation. The arbitrariness of the EU human rights rhetoric then justifies the arbitrary pattern of sanctions. Development aid and export promotion may not be explicit in a formally adopted foreign policy, but this policy would not exist without support of those constituencies which export their goods and services through aid.¹⁴⁸ This becomes apparent when there is a need to pursue a single external human policy, which cannot function outside an integrated framework.

¹⁴⁷ Karin Arts: Integrating Human Rights into Development Cooperation: The Case of Lomé Convention, Kluwer Law International, 2000

¹⁴⁸ Tomaševski, p. 394

Summary

This thesis argues that the external human right policy of the European Union is flawed and that it remains inconsistent and non-transparent. It puts emphasis only on civil and political rights and neglects the situation of economic, social and cultural rights in the respective countries. The external relations of the European Union are structured in a complicated manner due to shared competences with the EU member states.

The principles of interdependence, universality and inviolability of human rights are not respected in the EU external human rights policy. If the European Union wants to play a substantial role in promoting respect for human rights, it has to ensure unity in its external political policies. It also requires a capacity to pursue co-operation with the third countries within the framework of a clearly defined and sufficiently independent development policy. The external human rights policy of the European Union has to have clear independent objectives. This is of essential importance for its trade relations with third countries in order to raise its credibility in international relations. As the main trading partner of developing countries, the EU simply must have a comprehensive, independent development policy in order to be truly effective in ensuring respect for human rights and rule of law.

The reasons of the European Union to engage more with some countries and suspend relations with other countries are not very transparent or consistent. There is no guidelines one could follow in case of human rights violations in a third country. The major obstacle in adopting common approach to human rights in the EU' external relations hence concerns the private interests and motives of the European Union and its Member States (as they are the Masters of the Treaties) to or not to engage in a human rights dialogue with specific countries or regimes. The double standard policy concerns human rights clauses, which are not included in the framework agreements with developed countries, whilst the EU insist on their inclusion in the framework agreements with developing countries.

The European Union shall take a comprehensive approach in its external human rights policies. It shall adopt an integrated and a consistent human rights approach to all countries, where principles of coherence, complementarity and coordination would be respected.

Povzetek (Summary in Slovene)

Namen raziskave je bil z vidika zunanjega opazovalca dokazati nezadostno, nedosledno in pomanjkljivo zastopanost človekovih pravic v zunanjih odnosih Evropske unije z drugimi deželami sveta.

Pravni red EU na področju človekovih pravic za druge dežele sveta je precej neurejen. Veljavni pravni red upošteva le pravice na področju politične in državljanske dejavnosti, medtem ko pravic prebivalstva na področju dejavnosti in na ekonomskih, socialnem in kulturnem področju ne vključuje. Pravni red EU za področje človekovih pravic v odnosih do drugih dežel ne upošteva medsebojne odvisnosti, splošnih določb in možnosti kršitev. Namen raziskave je bil dokazati, kaj je potrebno storiti za enakopravno zaščito vseh opisanih pravic. Kajti človekove pravice so splošne, neločljive, medsebojno neodvisne in medsebojno povezane.

Pravni red EU na področju človekovih pravic za druge dežele sveta mora obsegati jasne in nedvoumne standarde. Več kot polovico celotne svetovne humanitarne pomoči pri sodelovanju z deželami v razvoju zagotavlja Mednarodni sklad za razvoj. EU mora imeti enostaven in učinkovit ter neodvisen pravni sistem, da bi lahko dejansko v največji meri učinkovito zagotavljala človekove pravice in pomen pravnih zakonitosti.

Danes v pravnem redu Evropske unije človekove pravice v njenih zunanjih odnosih vsebujejo številne nejasnosti in nepreglednosti, ki vplivajo na zaostajanje učinkovitega uveljavljanja pravnega reda na področju človekovih pravic v odnosih s tretjimi državami. Če želi imeti Evropska unija pomembno vlogo pri uveljavljanju človekovih pravic je potrebno zagotoviti enotnost pri političnem delovanju na področju pravnega reda do dežel izven Evrope. To dejstvo zahteva zelo obsežno sodelovanje z deželami v razvoju (tretji svet) v okviru natančno opredeljenega pravnega reda v deželah v razvoju. Zunanji odnosi Evropske unije ne morejo biti omejeni z merili zunanje in varnostne politike vsake od članic Evropske unije.

Medsebojno sodelovanje EU s posameznimi deželami in izključevanje povezav z drugimi deželami ni pregledno in jasno razvidno. Pomemben vidik delovanja EU na področju človekovih pravic z drugimi deželami sveta je osnovan na privatnem interesu in dejavnosti Evropske skupnosti in njenih članic (če vodijo razpravo), da zagotavljajo ali ne zagotavljajo dialog na področju človekovih pravic na področju posamezne države ali regije.

Z vidika posameznih držav, kot sta Sudan in Haiti je delovanje precej bolj strogo kot pri ostalih, tako da predstavlja primer pozitivne in negativne ocene in dosega precej aktivno vlogo pri različnih dejavnikih v skupnosti. V deželah kot so Etiopija, Demokratska republika Kongo in Kenija se že dalj časa pričakuje širše delovanje. Predvsem pričakujejo pomoč in sredstva iz EU, čeprav je dokumentov o kršenju človekovih pravic na teh področjih zelo malo.

Supplement A

**POLITICAL DIALOGUE AND COOPERATION AGREEMENT
BETWEEN THE EUROPEAN COMMUNITY
AND ITS MEMBER STATES OF THE ONE PART,
AND THE ANDEAN COMMUNITY AND ITS MEMBER
COUNTRIES
(BOLIVIA, COLOMBIA, ECUADOR, PERU AND VENEZUELA),
OF THE OTHER PART**

TITLE I

OBJECTIVES, NATURE AND SCOPE OF THE AGREEMENT

ARTICLE 1

Principles

1. Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, as well as for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement.
2. The Parties confirm their commitment to the promotion of sustainable development and to helping to achieve the Millennium Development Goals.
3. The Parties reaffirm their attachment to the principles of good governance and the fight against corruption.

....

ARTICLE 56

Fulfilment of obligations

1. The Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement and shall ensure that they comply with the objectives laid down in this Agreement.
2. Where one of the Parties considers that the other Party has failed to fulfill an obligation under this Agreement it may take appropriate measures. Before doing so, it must supply the Joint Committee within 30 days with all the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In this selection of measures, priority must be given to those measures which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Joint Committee and shall be the subject of consultations in the Committee if the other Party so requests.
3. By way of derogation from paragraph 2, any Party may immediately take appropriate measures in accordance with international law in the event of:
 - (a) termination of this Agreement not sanctioned by the general rules of international law;
 - (b) violation by the other Party of the essential elements of this Agreement referred to in Article 1(1).The other Party may ask for an urgent meeting to be called to bring the Parties together within 15 days for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

Supplement B

The Cotonou Agreement¹⁴⁹

ARTICLE 9

Essential Elements and Fundamental Element

1. Cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.

Respect for all human rights and fundamental freedoms, including respect for fundamental social rights, democracy based on the rule of law and transparent and accountable governance are an integral part of sustainable development.

2. The Parties refer to their international obligations and commitments concerning respect for human rights. They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. Human rights are universal, indivisible and inter-related. The Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural. In this context, the Parties reaffirm the equality of men and women.

The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms. On the basis of universally recognised principles, each country develops its democratic culture.

The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.

Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.

3. In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.

Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement. The Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element.

4. The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance.

¹⁴⁹ Partnership agreement between the members of the African, Caribbean and Pacific group of states of the one part, and the European Community and its member states, of the other part. Signed at 23rd of June 2000 in Cotonou, Benin.

These areas will be an important subject for the political dialogue. In the context of this dialogue, the Parties shall attach particular importance to the changes underway and to the continuity of the progress achieved. This regular assessment shall take into account each country's economic, social, cultural and historical context.

These areas will also be a focus of support for development strategies. The Community shall provide support for political, institutional and legal reforms and for building the capacity of public and private actors and civil society in the framework of strategies agreed jointly between the State concerned and the Community.

ARTICLE 96

Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law

1. Within the meaning of this Article, the term "Party" refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.

2. If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.

a. The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.

The consultations shall begin no later than 15 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultations shall last no longer than 60 days.

If the consultations do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken. These measures shall be revoked as soon as the reasons for taking them have disappeared.

b. The term "cases of special urgency" shall refer to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require an immediate reaction.

The Party resorting to the special urgency procedure shall inform the other Party and the Council of Ministers separately of the fact unless it does not have time to do so.

c. The "appropriate measures" referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort. If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers. At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions. These consultations shall be conducted according to the arrangements set out in the second and third subparagraphs of paragraph (a).

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