



FACULTY OF LAW
University of Lund

Karl Hannus

Fundamental Rights in External EU Law

Master thesis
20 points

Xavier Grousot

European Union Law

2007

Contents

SUMMARY	1
PREFACE	3
ABBREVIATIONS	4
1 INTRODUCTION	6
1.1 Purpose	6
1.2 Method and Material	7
1.3 Delimitation	7
1.4 Disposition	8
1.5 General Remarks about the EU Reform Treaty and the Constitution for Europe	8
2 FUNDAMENTAL RIGHTS IN EU CONTEXT	9
2.1 The Growing Plant	9
2.1.1 <i>Initial Resistance</i>	9
2.1.2 <i>A Changing Attitude</i>	10
2.1.3 <i>Constitutional Traditions Common to the Member States</i>	10
2.2 International Treaties	11
2.2.1 <i>ECHR as a Source of Community Law</i>	12
2.2.2 <i>Opinion 2/94</i>	12
2.2.3 <i>Increasing Bilateral Use of Case Law</i>	14
2.3 The Charter of Fundamental Rights	15
2.3.1 <i>Content</i>	16
2.3.2 <i>Legal Status of the Charter of Fundamental Rights</i>	16
2.3.3 <i>The Charter of Fundamental Rights in Constitution for Europe</i>	18
2.4 European Union Agency for Fundamental Rights	19
2.4.1 <i>Origin of the FRA</i>	19
2.4.2 <i>Mandate, Objectives and Tasks of the FRA</i>	19
3 EXTERNAL RELATIONS OF THE EUROPEAN UNION	21
3.1 A Common Commercial Policy	21
3.2 A Doctrine of Implied Competence	23
3.3 Express External and Implied Competence under the European Treaties	27
3.3.1 <i>Treaty on European Community</i>	27
3.3.2 <i>Treaty on European Union</i>	29

3.3.2.1	CFSP	30
3.3.2.2	PJCCM	31
3.4	Mixed Agreements and Membership	31
3.4.1	<i>The Principle of Loyalty</i>	33
4	EXTERNAL HUMAN RIGHTS POLICY	34
4.1	The Development	34
4.2	The General Obligation by ECJ and ECtHR Case Law to Respect Human Rights	36
4.3	The Matter of Competence	38
4.3.1	<i>Fundamental Rights Agreements</i>	38
4.3.2	<i>Agreements Containing Provisions Regarding Fundamental Rights</i>	39
4.4	The Breadth and Depth	39
4.5	European Union Agency for Fundamental Rights	41
4.5.1	<i>Effects of the FRA</i>	41
4.5.2	<i>FRA and Foreign Policy Objective</i>	42
4.6	The Autonomous Trade Measures	43
4.7	The Future of the Policy	43
5	THE HUMAN RIGHTS CLAUSES	45
5.1	Origin	45
5.2	The Content of the Human Rights Clauses	47
5.3	The Legal Basis of the Clauses	48
5.3.1	<i>Development Co-operation Agreements – the Portugal v. Council case</i>	48
5.3.2	<i>Association Agreements</i>	49
5.3.3	<i>Trade and Co-operation Agreements</i>	49
5.4	Application	50
5.4.1	<i>Application in Opinion 2/94</i>	51
5.4.2	<i>Application in Portugal v. Council</i>	51
6	ECONOMIC SANCTIONS	54
6.1	The Development of a Co-operation	54
6.1.1	<i>Richardt Case</i>	55
6.1.2	<i>Application Against Iraq and Libya</i>	55
6.1.3	<i>Application in the FRY</i>	56
6.1.4	<i>The Protection of Fundamental Rights in the FRY Cases</i>	58
6.1.4.1	Bosphorus	59
6.1.4.2	Centro-Com	61
6.1.4.3	Ebony Maritime	61

6.2	The War Against Terror	61
6.2.1	<i>Yusuf and Kadi cases</i>	62
6.2.1.1	Factual and Legal Background	62
6.2.1.2	Incompetence of the Council to Adopt Regulation No. 881/2002	63
6.2.1.3	Infringement of Article 249 EC Treaty	64
6.2.1.4	Breach of the Applicants' Fundamental Rights	64
6.2.1.5	The Kadi Case	67
6.2.2	<i>The Ayadi and Hassan Cases</i>	67
6.3	Comments Regarding the War Against Terrorism Cases	68
6.3.1	<i>The Competence to Adopt the Economic Sanctions Regulations</i>	68
6.3.2	<i>The EC Treaty in International Law</i>	69
6.3.3	<i>Compliance with Fundamental Rights</i>	70
6.3.4	<i>The Solange Aspects</i>	71
6.4	The Economic Sanctions Under Treaty Establishing a Constitution for Europe	71
7	CONCLUSIONS	72
7.1	From Rhetoric to Practice – the Policy Dimension	72
7.1.1	<i>Coherence and Consistency</i>	73
7.1.2	<i>Mainstreaming of Human Rights</i>	74
7.1.3	<i>Transparency</i>	74
7.1.4	<i>Prioritisation</i>	75
7.1.5	<i>General Remarks</i>	75
7.2	Reactive or Preventive? – the Dimension of the Clauses	76
7.2.1	<i>A Contextual Support</i>	77
7.2.2	<i>A Literal Support</i>	77
7.2.3	<i>A Teleological Support</i>	78
7.2.4	<i>General Remarks</i>	78
7.3	To Prevent or Violate? – the Economic Sanctions	79
7.3.1	<i>The FRY Cases</i>	79
7.3.2	<i>Primacy of UN Law</i>	80
7.3.3	<i>The Community in the UNSC</i>	81
7.3.4	<i>Look Out For the History – Are the Solange Aspects a Threat?</i>	82
	BIBLIOGRAPHY	83
	TABLE OF CASES	89

Summary

Fundamental rights as part of the general principles of Community law have come to play an increasing role in building the contemporary EU as being the core of postmodern constitutionalism. Internally the fundamental rights are important in order to justify a growing co-operation and to find and develop the common values of the region. The internal area has, however, a large, less famous twin in the sphere of external fundamental rights. This external twin has in this thesis three main faces and the aim is to describe and analyse them.

The EU external human rights policy provides the Union with a legal framework in order to make fundamental rights concerns in the external relations. It clarifies the division of competence between the Member States and the EU. *Opinion 2/94* recognised a functional EC competence to enact provisions on human rights protection, as the EU Institutions are committed to respect fundamental rights. Additionally, the *Portugal v. Council* case established that human rights provisions as an essential element of the external agreements are acceptable. The external human rights policy is an important factor in exercising the CFSP. The EU Agency for Fundamental Rights is established to provide with data and analysis aiming to improve the use of fundamental rights in the Union. Furthermore, the case law of the ECJ and the ECtHR set up rules and principles to be followed. The autonomous trade measures are another way of protecting the fundamental rights through the external relations.

The human rights clauses are enshrined in every external agreement concluded since 1995. The most visible objective of the clauses is to create an emergency exit, a way to suspend the agreements if serious consequences of violations against the human rights and the principle of democracy appear. The clauses contain, however, potential to be more than a reactive provision. It is, on the other hand, not fully used in the contemporary EU.

Fundamental rights in the external EU law include also a reversed perspective. The external law may affect the internal EU law that in the next step affects citizens of the Member States. This is largely the case regarding the economic sanctions where the fundamental rights often are subject to restrictions justified by objectives of general interest (frequently fundamental rights concerns) pursued by the Community. In several cases the ECJ and CFI have given implemented resolutions from the UN Security Council an increasing importance, an approach that have been heavily criticised. In these cases, the Courts have a tendency to prioritise the rights close connected to the aims of the Union/Community on the costs of the protection of the individual's rights.

This thesis reach that the fundamental rights protection in external EU law are facing serious challenges. Firstly, the external human rights policy is

still too political and vague. It needs to take further steps from being solely rhetoric to become practice. In addition, the human rights clauses can be more effective and walk from their reactive nature of today towards a more preventive application. Lastly, the practical protection in the fields like the economic sanctions needs to be applied in a way taking the individuals rights seriously.

Preface

Writing a thesis as the final part of the law education was a big challenge for me. The freedom to dispose the days of my own free will made it possible to spend extra hours with my firstborn child, Judith and my wife Sara in Judith's first months in life, but also to extend the time it took to finalise this work. On the other hand, I do not regret the way I disposed the time this spring and summer. To Sara, Judith and our families – thank you for all support and love, I love you!

During my studies in Lund I have got many new friends from all Sweden and around the globe that have meant great joy and support during the studies. Even if I will keep up the relationship with some and you and probably lose it with others, I appreciate you all!

The final word in this preface goes to my supervisor, Xavier Groussot. As your student it is impossible not to get infected by the “flu of EU law” that severely affects your classes. Your enthusiasm and guidance made this thesis possible. You raised my interest in this field of law, thank you!

Åkarp summer 2007

Karl Hannus

Abbreviations

ACP	African, Caribbean and Pacific (countries)
AG	Advocate General
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CFR	Charter of Fundamental Rights of the European Union
EBRD	European Bank for Reconstruction and Development
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950
ECtHR	European Court of Human Rights (Strasbourg)
EC Treaty	Treaty establishing the European Community
ECJ	European Court of Justice (Luxemburg)
ECR	European Court Reports
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Association
EIDHR	European Instrument for Democracy and Human Rights
EMU	Economic and Monetary Union
EP	European Parliament
EU	European Union
EUMC	European Monitoring Centre on Racism and Xenophobia
EURATOM	European Atomic Energy Community
FAO	Food and Agriculture Organization
FRA	the European Union Agency for Fundamental Rights
FRY	Federal Republic of Yugoslavia
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice (The Hague)
IGC	Inter-Governmental Conference
IGO	Inter-Governmental Organisations
ILO	International Labour Office
IPR	Intellectual Property Right
MFN	Most Favoured Nation (the principle of)
MS	Member State
NATO	North Atlantic Treaty Organisation

NGO	Non-Governmental Organisations
OECD	Organisation for Economic Co-operation and Development
PJCCM	Police and Judicial Co-operation in Criminal Matters
SEA	Single European Act
TEU	Treaty establishing the European Union
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNC	Charter of the United Nations
UNGA	United Nation General Assembly
UNSC	United Nation Security Council
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

There are several thousand of ways to complete the sentence “There are two kinds of people, those that...” One way to complete the sentence is by saying: “There are two kinds of people, those that make things complex and people that simplify. The former are unwilling to reduction. Their instincts are to turn simple assignments into quagmires, and to reject simple ideas until they are buried (or asphyxiated) in layers of abstraction, while the latter find ways to communicate complex ideas in simple terms without losing the ideas. As a complexifier I have always been rather sceptical towards the persons that are (too) interested in the human rights and considered them as quite naïve, thus with great pathos. As an ignorant complexifier, I could never accept the easy answers. A complexifier is not satisfied with soft law – he requires harder stuff.

The journey it is to write this thesis has, however, gotten me on better thoughts. The human rights and the European fundamental rights are not just soft law, and they are crucial in several aspects in order to get a legitimate European co-operation also in the external relations. In other words, they are important to protect the EU and its citizens and to support a development of these principles, which we find so fundamental for humanity, also in third states through the EU external relations. Another achievement was to realise that I have a lot to gain being more of a simplifier. However, I ask the reader to overlook some of the bad habits of a recovery complexifier that blur this thesis, the unwillingness to reduction, its complexity and that it raises question not always easily answered.

By the way, in my new life as a simplifier I have found a new way of ending the sentence: “there are two kinds of people, those who split the world into two kinds of people and those who do not.” In any case, it is my hope that this thesis will be understood by all (kinds of) peoples.

1.1 Purpose

This thesis aims to examine the fundamental rights in external EU law. The protection of fundamental rights in the internal EU law has been an important area of studies since their development in the early case law, while the fundamental rights in the external EU law has been more on the sidelines. However, in the reality the external relations of the EU/Community are highly affected by the concerns of rights, called either human or fundamental. In the external agreements the objectives are multifaceted, not just trade and economical co-operation, but these integrated with the fundamental rights and the principle of democracy. Additionally, the EC relations with international organisations and the international law have lately raised questions regarding the protection of the fundamental rights. These are just examples of issues in the external EU law that regards the fundamental rights.

In this context, it is interesting to scrutinise further the protection of these rights and if they are satisfactory protected in the EU, worthy a legal order of its kind.

1.2 Method and Material

This thesis is written in accordance with the classical Swedish legal methodology, a dogmatic method. The thesis makes a description and an analysis of the law in form of primary and secondary legislation, case law of the European Court of Justice and the Court of First Instance in form of cases, opinions and rulings and the relevant doctrine.

It may seem, occasionally, that some material, in particular some case law returns in every section with large similarities. In choosing a method that facilitates the content of this thesis I have to ways of relating to this problem. Either a description of the case law one-by-one, letting the chronology divide the sections or alternatively the preferred division by subjects. It is my belief that the reader gain understanding by this method when getting the content in its context rather than on a case-by-case basis. The downside with the method is, on the other hand, the repetitions.

1.3 Delimitation

The purpose with the thesis is not to make a comparative analysis, but to study the EU law. Nevertheless, the case law of the ECtHR are of importance, not least when interacting with the Community law. It means that some ECtHR case law will be discussed, but solely when of interest in relation to the examination in general. In addition, the Solange-cases from the German Bundesverfassungsgericht are relevant and will be mentioned and discussed.

Furthermore, other areas of external relations of the EU could have been examined out of a fundamental rights perspective, in particular the WTO and GATT aspects. These areas do, however, rarely concern rights as examined in this thesis and are therefore of limited priority in this paper.

Regarding the economic sanctions they are prominent in the way they, as an area of the external Community law, are dominated by human rights concerns, either in their more political role of enforcing cease of human rights violations, or by the way these sanctions violate the rights, such as the freedom to enjoy property, etc. Not all aspects of trade, foreign policy and defence can be examined regarding the fundamental rights and the thesis is accordingly limited to examine the sanctions regime in this regard and its more legal aspects in particular.

1.4 Disposition

The first two sections are independent sections that describe the basic law of the Fundamental Rights in the EU Context, respectively the law of External Relations of the EU. These chapters aim to give the most basic knowledge of the subjects and their respective “hot spots”, which are necessary facts in order to reach a deeper understanding when reading the coming sections. In Chapter 4, the External Human Rights Policy is examined. The chapter includes the general obligation to respect human rights established by the ECJ and the ECtHR as a sub-section. Furthermore, it describes the recently introduced European Union Agency for Fundamental Rights and its presumptive role. The fifth chapter is about the Human Rights Clauses, which form an essential part of the external human rights policy and contain some potential of playing a bigger role. The last chapter before the conclusions, study the economic sanctions. This chapter contain a relatively extensive commenting part. The Conclusions aims to tie together the content with a discussion including the full picture. This section gives the author possibility to share his opinions, but also contains opinions of the doctrine. The discussions about the economic sanctions are, however, more of complementary nature to the comments made in Chapter 6. According to the technique used the thesis end up with the bibliography and table of cases.

1.5 General Remarks about the EU Reform Treaty and the Constitution for Europe

While writing this these a very interesting phase in the history of the EU took place. At the June European Summit in Brussels, the German EU Presidency reached a political agreement for a detailed mandate to launch an Intergovernmental Conference, after long-night negotiations with the UK and, in particular, Poland. At this IGC the Member States will finalise the text of a new Treaty to reform the EU's Institutions. The details of the Reform Treaty still need to be agreed upon by EU leaders, under the supervision of the incoming Portuguese Presidency. The new Treaty to Reform Europe is expected to contain many of the principles established in the Constitution for Europe, at least in the aspects of this thesis.

In order to be able to discuss the expected effects on the EU law, this thesis will refer to the former and denied Constitution for Europe and its Articles. This is to help the reader to search further information. The reader is therefore requested to overlook that it is impossible to get this thesis in the latest outfit, as it is not yet available on the market. It is, however, my strong conviction, that the main legal aspects are up to date.

2 Fundamental Rights in EU Context

When signing the three original European Community Treaties¹ in the 1950s, they contained no provisions directly protecting the fundamental rights. In the growing economical European co-operation these rights was a non-topic. This has fundamentally changed throughout the years. The approbation of the Charter of Fundamental Rights in Nice December 2000 is only one example of that. However, this Charter did not put an end to the discussions, the development continues - not least when later in this thesis entering the external relations. The purpose of this chapter is to briefly follow the remedy taken by, primarily the Court of Justice. However, the EC Treaty contains the four freedoms, anti-discrimination etc. These are important provisions that play a fundamental role in the Community. As so often in law, the provisions are not unconditional. It may be that these rights touch deep in the human nature and the conflict is, so to say, more sensitive. In these cases, the principle of proportionality is important to reach a verdict.² It has to be stressed here, that this part is not supposed to paint a detailed picture but giving an outline aiming to give a background for the further examination.

Firstly, we will look at the early small steps, taken by the ECJ, adopting fundamental rights in the European Community. Secondly, in the subsection called 'International Treaties' primarily scrutinise the ECHR. Thirdly, we will learn about the more recent Charter of Fundamental Rights and its role in the EU before the last section that will examine the new European Union Agency for Fundamental Rights that replace the former European Monitoring Centre on Racism and Xenophobia.

2.1 The Growing Plant

Signing the Community Treaties 50 years ago, few would say that the instigators intended seed them with such rights as now are sprung out of them. Anyhow, the Treaties contained mechanisms, such as the Court of Justice and common objectives to co-operate that made a development of fundamental rights possible. This chapter is to describe the cases making the plant growing.

2.1.1 Initial Resistance

The Court at first upheld a rather resistant approach to the fundamental rights. *Stork*³ is an early example where the Court was to consider rights as,

¹ Paris and Rome Treaties establishing ECSC, EURATOM and EEC.

² See one of many: Case C-112/00 *Schmidtberger* [2003] ECR I-5659, where the Court held the right to free movement of goods against the right to demonstrate.

³ Case 1/58 *Stork v. High Authority* [1959] ECR 17.

in the case, was enshrined in German constitutional law and denied such application. The ECJ upheld a similar approach in *Geitling*⁴ given one year later and *Sgarlata*⁵ some five years later. However, the Court in *Scarglata* did not reject the fundamental rights fully, but it did not find it possible to override Treaty provisions with these rights⁶.

2.1.2 A Changing Attitude

Years later, the Court acted more receptive towards the fundamental rights. In *Stauder*⁷ the Court stated that, “*interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.*”⁸ This case is by the academic literature often discussed as a landmark case. Scheuner does, however, take a more nuanced standing, as developed in Craig and De Burca: “*Indeed, the change of approach in Stauder might not have been quite the u-turn which is suggested in some of the academic literature, since the ECJ had already paid some attention to the development of general principles of individual protection, drawing not just on Treaty provisions but also on principles of domestic origin such as legal certainty, proportionality, and due process.*”⁹

2.1.3 Constitutional Traditions Common to the Member States

The fundamental rights play an important role in being an instrument reviewing Community acts. In the famous *Internationale Handelsgesellschaft* case¹⁰ the applicant challenged Council Regulation 120/67 and its system of deposit. The reasoning is similar to the one established in *Stauder* but the case at hand put the Court in a more intricate situation. In *Stauder* the Court interpreted the impugned Community measure in conformity with the invoked principle. However, in *Internationale Handelsgesellschaft* the Community measure stood against the national right. The Court established that respect for fundamental rights: “*forms an integral part of the general principles of Community law protected by the Court of Justice.*”¹¹ The Court established the: “*inspired by the constitutional traditions common to the Member States*”¹² expression, which still plays an important role in the EU fundamental rights doctrine,

⁴ Cases 36, 37, 38 and 40/59 *Geitling v. High Authority* [1960] ECR 423.

⁵ Case 40/64 *Scarglata and others v. Commission* [1965] ECR 215.

⁶ Following this approach the Court in Case 35/67 *Van Eick v. Commission* [1968] ECR 329 where the Court found that the disciplinary board under the Community staff regulation was bound to exercise its powers in accordance with ‘the fundamental principles of the law of procedure’.

⁷ Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

⁸ Para 7 of the judgement.

⁹ Craig and De Burca, *EU Law – Text, Cases and Materials*, 3: rd Edition, 2003, p. 321.

¹⁰ Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

¹¹ Para 4 of the judgement.

¹² *Ibid.*

not least when assessing the role ECHR plays as a presumptive source of ‘constitutional tradition common to the Member States’. The Court, however, reached that there had been no infringement of the rights claimed by the applicant. The restriction on the freedom to trade etc. was not disproportionate to the general interest justifying the deposit system. The German constitutional Court was not satisfied with this answer and the ruling in *Internationale Handelsgesellschaft* was not upheld before the German Bundesverfassungsgericht that instead judged the famous *Solange I*,¹³ not giving the ECJ rulings acceptance in Germany because of the poor parliamentary situation in the Community and the lack of a bill of rights comparable to the German one. This verdict shows the great importance the fundamental rights may play in acceptance of the Community in general and the decisions of the Court of Justice in particular.

However, the German Bundesverfassungsgericht followed up with *Solange II*¹⁴ and stated that the Court would not review Community legislation against German as long as the protection of fundamental rights within the Community is similar to the German one. After the *Solange II* case an interesting case appeared in the Bundesverfassungsgericht, the *Brunner case*.¹⁵ The lack of space hinders, however, a further discussion about these aspects.

2.2 International Treaties

Next important step is the development in *Nold case*.¹⁶ In this case, where the company Nold claimed that a decision by the Commission discriminated the company and violated its fundamental rights, the Court established and reached several conclusions important in this field of law. The Court reaffirmed that it has to draw inspiration from “constitutional traditions common to the Member States”¹⁷ but also draw inspiration from: “*international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.*”¹⁸

In *Rutili*¹⁹ the Court described rights expressed in provisions of Community legislation as specific manifestations of more general fundamental principles of Community law which could be found in ECHR.²⁰ This more receptive

¹³ Bundesverfassungsgericht, judgement of 29 of May 1974, 2 BvL 52 /71, English translation 2 CMLRev [1974].

¹⁴ Bundesverfassungsgericht, judgement of 22 October 1986, 2 BvR, 197/83, English translation 3 CMLRev [1987].

¹⁵ Bundesverfassungsgericht, judgement of 12 October 1993, 2 BvR 2134/92 och 2159/92, English translation 1 CMLRev [1994], p. 57.

¹⁶ Case 4/73 *Nold v. Commission* [1974] ECR 491.

¹⁷ Para 13 of the judgement.

¹⁸ *Ibid.*

¹⁹ Case 36/75 *Rutili v. Minister for the Interior* [1975] ECR 1219.

²⁰ Para 32 of the judgement.

approach taken by the ECJ opened up for these arguments in a number of cases of which some has shown to be of significant importance. *Hauer*²¹ is such case and it clarified the legal situation further. This time the Court for the first time took a comparative analysis of the constitutions of the Member States in consideration,²² at least as it was performed by AG Capotorti in his opinion.²³ However, the fact that a right is enshrined in a national constitution does not mean that this right is able to invoke before ECJ. This principle is established in e.g. *Hoecht*.²⁴

2.2.1 ECHR as a Source of Community Law

The steps taken by ECJ raised the question whether the ECHR is a direct source of law in the Union or/and the Community. Furthermore, TEU Article F.2 states that: “*The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law*” and Article J.1(2) concerning the objectives of the CFSP cooperation, that is: “*to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.*”

However, several ambiguities remain. Is ECHR directly applicable or is it the common constitutional traditions that predominate? AG Trabucchi discussed the topic in his opinion in *Watson and Bellman* case²⁵ where he declined a direct applicability. This standing is still the prevailing one where the rights origin from the Convention is not directly applicable but in “*fact they represent basic principles and common values to which all of the Member States signatories to the Convention have committed themselves.*”²⁶ The developments did, however, lead to an inevitable question in how the Community properly relate to the ECHR. An opinion by the Court is of essential nature in this thesis in many aspects and chapters and regards these issues.

2.2.2 Opinion 2/94

Within the academic circle and the institutions there is a lively discussion regarding the role played by the European Convention on Human Rights inside the Union. All 27 Member States are parts of the Convention and candidate states must be, because it is now a condition of membership on the EU. However, EU or the Community are not parties of the ECHR, although some think that such development is an appropriate step, as developed below. The issue have been on the political agenda for a long

²¹ Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727.

²² Para 20 of the judgement.

²³ AG opinion in Case 44/79, *Liselotte Hauer v Land Rheinland-Pfalz*.

²⁴ Case 46/87 and 227/88 *Hoechst v. Commission* [1989] ECR 2859.

²⁵ Case 118/75 *Watson and Belmann* [1976] ECR 1185, 1207.

²⁶ Craig and De Burca, *supra* footnote 9, p 324.

time by now. The Council referred an Article 228(6) question to ECJ for an opinion asking: “*Would the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 be compatible with the Treaty establishing the European Community?*” The Court gave its view in Opinion 2/94.²⁷ The Court answered by stating: “*as Community law now stands, the Community has no competence to accede to the Convention.*”²⁸ In other words - an amendment would be necessary. For a more detailed review of the pre-Opinion 2/94 case law regarding the external competence and the opinion seen out of that context, see chapter 3 below. Anyhow, one of the key passages to reach the conclusion are paragraph 26:

“Thus, in the field of international relations, at issue in this request for an Opinion, it is settled case law that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect (see Opinion 2/91 of 19 March 1993 [1993] ECR I-1061, paragraph 7).”

The Court could not find any provisions giving the Community power to “*enact rules on human rights or to conclude international conventions in this field.*”²⁹ The discussion continued concerning Article 308 as filling the gap “*where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.*”³⁰

The Court found that fundamental rights was of constitutional significance and therefore falls beyond the scope of Article 235.³¹ Several authors does not agree,³² Goja is one of them.

“[An] accession would not be enlarging the scope of Community law and thus those provisions of the Convention would remain as little relevant to Community law as they are now, irrespective of any declaration or reservation that the Community may wish to make on accession. Nor would protection of human rights in areas potentially covered by Community law be altered by accession. The Convention would still give rights under Community law only “within the field of application of Community law”, as

²⁷ *Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-01759.

²⁸ Para 36 of the opinion.

²⁹ Para 27 of the Opinion.

³⁰ Para 29 of the Opinion.

³¹ Para 35 of the Opinion.

³² Weiler and Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences*, in particular p. 16.

the Court stated in Grogan. [Case C-159/60, Grogan, [1991] ECR I-4685, at para 31.] Outside this field, the protection of human rights would remain entrusted to the Member States."³³ He then argues the Courts opinion being too defensive and summarise the article with saying: "*by simply closing the door to accession the Court has regrettably failed to contribute to the development of the protection of human rights.*"³⁴

Several authors have discussed the legal situation in the aftermath of the Opinion 2/94. Toth is one of them. He paints three options for the development:

1. Continuation of the status quo
2. A Community catalogue of fundamental rights
3. Accession to the European Convention

After describing the possible options, he tries to find criterions that must be satisfied for a lasting solution.³⁵ With these criterions, set up by Toth, he fines the incorporation of ECHR and its case law to be the most suitable for the European Union.

Another author, Tridimas finds an accession desirable based on these arguments: "*It would promote legal certainty, avoid the possibility of national courts being under contradictory obligations, enhance the protection of the individual, and promote the rule of law: it is an oxymoron that the Community institutions make observance of fundamental rights a sine qua non for the accession of aspiring Member States to the EU, whilst they themselves are not directly bound to observe the Convention.*"³⁶

2.2.3 Increasing Bilateral Use of Case Law

The situation remains the same but, more lately, there have been an increasing number of cases where ECJ uses, in one way or another, case law from the Strasbourg institutions. The author has no intention to cover this case law in this paper but more can be examined in Groussot.³⁷ Examples of these cases touch freedom of expression³⁸, right to family life³⁹, right to organise demonstrations⁴⁰ etc.

³³ Gaja, *Opinion 2/94, Accession by the Community to the European Convention on Human Rights and Fundamental Freedoms*, given on 28 March 1996, not yet reported, CMLRev. 1996, pp. 975-991, p. 985.

³⁴ *Ibid* p. 989.

³⁵ Toth, *The European Union and Human Rights: the way forward*, CMLRev. 1997, pp. 491-529, in particular p. 512.

³⁶ Tridimas, *The General Principles of EU Law*, 2nd Edition, 2006, p. 355.

³⁷ Groussot, *Creation, Development and Impact of the General Principles of Community Law: Towards a jus commune europaeum?*, 2005.

³⁸ Case C-274/99 *Connolly v. Commission* [2001] ECR I-1611.

³⁹ Case C-60/00 *Carpenter* [2002] ECR 6279.

⁴⁰ Case C-112/00 *Schmidberger*, *supra* footnote 2.

However, it is more than one way use of ECtHR case law by ECJ, the Strasbourg court uses case law from the Court of Justice.⁴¹ Another example is *Bosphorus* case.⁴² In this case, that was about a possible violation of the Convention, which had already been considered by the European Court of Justice, the Court reached that it was satisfied with the system of control and the observance of Convention rights that the ECJ did under EC law and concluded on that ground that there was no need for that Court itself to re-examine the issue of a violation. According to the *Bosphorus* case this requires a protection that is considered to be *equivalent*.

*“By "equivalent" protection of fundamental rights, the Court states that it means a "comparable" rather than "identical" system of protection; a very welcome position, and one which could be taken as a model by other courts. The Court explains that any requirement that the organisation's system of protection be identical could run counter to the interests of international co-operation – an interest which is described as a legitimate interest of considerable weight.”*⁴³

The reasoning reminds us of *Solange II* case and even if the reasoning is lifted from a national constitutional level to a more Convention one, it is tempting to call the ECtHR *Bosphorus* case just *Solange III*.

Voices have been raised that there is an obvious risk of having a double standard of human rights protection in the Community. The criticisers is of the opinion that it is likely to create a less stringent standard of protection as this judgement establishes a relatively low threshold for the EU, in contrast to the supervision generally carried out under the ECHR on contracting states.⁴⁴

2.3 The Charter of Fundamental Rights

Following from the political situation in the aftermath of Opinion 2/94, where the ECJ did not empower the Community to accede to the ECHR, the Community had to catalogue possible remedies. Voices arose within the Institutions (Council, Commission and Parliament) arguing a charter being the appropriate way to progress. The work escalated and took significantly speed in Cologne 1999 where the European Council concluded that the fundamental rights applicable at European Union level should be

⁴¹ Case of *Christine Goodwin v. the United Kingdom*, (28957/95) [2002], concerning the rights of transsexuals to marry in their assigned gender, where the Strasbourg Court referred to the European Court of Justice Case C-9/91 *R. v. Secretary of State for Social Security ex parte Equal Opportunities Commission*, [1992] ECR I-4927.

⁴² Case C-84/95 *Bosphorus* [1996] ECR I-3953 (ECJ) and Case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (45036/98) [2005] (ECtHR).

⁴³ Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice*, in: Ingolf Pernice/Juliane Kokott/Cheryl Saunders (eds.): *The Future of the European Judicial System in a Comparative Perspective* 2006, p. 293.

⁴⁴ Kuhnert, *Bosphorus. Double standards in European human rights protection?*, *Utrecht Law Review* Vol 2 (2006) No 2 pp. 177-189, p. 187.

consolidated in a charter, to give them greater visibility but also to bring legitimacy to the European Union.⁴⁵ The 7th December 2000 the presidents of the European Parliament, the Council and the Commission signed and solemnly proclaimed the Charter in Nice on behalf of the three institutions. The Charter of Fundamental Rights of the European Union⁴⁶ is born.

2.3.1 Content

The sources of inspiration when creating the CFR and references referred to are many. Influences make use of, not only the Treaties, ECHR and their case law, but also national constitutional traditions, the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers etc.⁴⁷ The result is a Charter that contain many different rights of which some are rather controversial.

The Charter has a structure based upon six values: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights and Justice containing economic and social as well as civil and political rights to which EU citizens should be entitled. The first chapter contains rights as the right to life and integrity, freedom from torture and slavery etc. One may claim that it is remarkable that a Charter primarily directed towards the institutions of the Union need such rights to be expressed,⁴⁸ however, the primarily purpose is necessarily not the only one and the one having greatest importance over time. The second chapter, Freedoms, carry civil and political liberties as liberty, association, expression, religion, property, private and family life, but also social rights such as the right to education, asylum and the right to engage in work etc. Chapter III gives equality before the Court, equality between men and women, rights for children and elders besides provisions showing 'respect' for cultural diversity and so forth. The Solidarity chapter (chapter IV) dictate mainly solidarity in employment situations and towards the environment. Some of the Articles are, however, not formulated as rights, such as the environmental and consumer protection and are thus, so to say, weak regulations, regardless of the legal status of the Charter, see below. The fifth chapter differ from the other chapters in the sense that its Articles citizen contain rights guaranteed only to EU citizens and are not universal. Chapter VI includes several legal principles, such as the right to defence, fair trial, the presumption of innocence etc.

2.3.2 Legal Status of the Charter of Fundamental Rights

There are many issues, addressed briefly in this thesis that could have been subject to a thesis all by itself. This title is definitely one of them. The legal status of the CFR is an interesting ongoing discussion in the doctrine.

⁴⁵ EP Minutes, 12 January 1999, in the Eight Report of the House of Lords, p. 7.

⁴⁶ Charter of Fundamental Rights of the European Union (2000/C 364/01) OJ 2000 C 364, p. 1.

⁴⁷ See http://ec.europa.eu/justice_home/unit/charte/en/charter02.html.

⁴⁸ See Craig and De Burca, *supra* footnote 9 p. 359.

However, I will try to raise the most essential questions and write about the important cases under this section.

Some of the rights enshrined in the CFR are definitely applicable as Community law, regardless the legal status of the Charter, because they origin from general principles of Community law as discussed above. One aspect may be to argue that all rights enshrined in the CFR origin from the general principles and are solely a codification of existing and applicable law. The Convention was given (and allegedly respected) a mandate to *consolidate* the existing EU law of fundamental rights, not to change or amend it.⁴⁹ This is, however, not the ruling opinion of today. On the other hand, it has become clear that the Charter pays an increasing role, it may not be binding but is, despite that, vital when assessing fundamental rights in EC law - as shown under this section.

One shall remember that it lies in the nature of arguing as a lawyer to find a broad base when pleading for an outcome of a case, whether it is a legal, common sense or political arguments etc. It is not likely that the Charter of Fundamental Rights will be used as the prime argument where there are stronger legal sources available. However, as the reader of this thesis realise, applying the principles enshrined in the legislation is not always that easy. It is thus not surprising that it did not take long before the Charter appeared in the AG's opinions and the case law or as a measure rod to determine whether candidate countries or third states are in line with the common constitutional traditions of protection of fundamental rights.⁵⁰

The Court of First Instance was the first Community Court to refer to the Charter of Fundamental Rights, in the *max.mobil* case.⁵¹ The CFI referred to the Charter as an affirmation of the general principles of law common to the member states. Another step was taken by the same court in *Jégo-Quéré*⁵² in the sense that Article 47 CFR was relied upon to see an opening in the strict *locu standi* principle in order to challenge a Community regulation. The discussion whether one of these cases as more important is a debate left outside this thesis. It is, however, worth mentioning that the court of CFI in *max.mobil* uses a rather revolutionary argumentation when not, as so far has been routine, referring to the ECHR as a source to examine the common constitutional principles. In *Jégo-Quéré* the CFI upheld a defensive

⁴⁹ See Presidency Conclusions of the Cologne European Council, 3-4 June 1999, (Annex IV) European Council Decision on the drawing up of a Charter of Fundamental Rights of the European Union, para 2, "The European Council believes that this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law."

⁵⁰ See e.g. AG Mischo by many in AG Opinion in C-20/00 and 64/00 *Booker Aquaculture* [2003] ECR I-7411, para 126. "[T]he Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order."

⁵¹ Case T-54/99 *max.mobil v. Commission* [2002] ECR II-313.

⁵² Case T-177/01 *Jégo-Quéré v. Commission* [2002] ECR II-2365.

approach when once again using ECHR. Whether this is a self-protective step moving more moderate is more elaborated in Groussot.⁵³ There are, however, numerous other cases by the CFI but more lately also by the Court of Justice.⁵⁴

The effects of the Charter on Member States national laws are yet to be seen. In accordance with established case law the Fundamental Rights are binding on the Member States when implementing Community legislation⁵⁵ or when derogating from requirements given by EC law,⁵⁶ typically when giving exceptions and justify measures hindering the free movement. The CFR seeks to continue this approach in Article 51(1), by providing that it is addressed to Member States only when implementing Union law.⁵⁷

2.3.3 The Charter of Fundamental Rights in Constitution for Europe

The development of the Community fundamental rights in general and the Charter of Fundamental Rights in specific could take a new turn dependant of the future of the resting Constitution for Europe, or its equivalent instruments. There could be a lot writing in this section about the probable material changes in the Charter or procedural effects etc. but due to the focus chosen, I leave that discussion outside, as the final result is not yet given. It is on the other hand important to mention some of the effects with an adoption of the Constitution or its equivalent effects. With a Reform Treaty the EU is likely to see a cross reference to a legally binding CFR as an annex. The Treaty will include statements that prevent the Courts interpretation of the CFR forcing changes in national laws and please the Brits with formulations that ensure them that the Charter will not create new rights or encroach UK law.⁵⁸

⁵³ Groussot, *supra note 37* pp. 178-179.

⁵⁴ See Case T-112/98 *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729, Case T-211/02 *Tideland Signal v. Commission* [2002] ECR II-3781, Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and others v. Commission* [2003] ECR II-1, Case T-198/01 *Technische Glaswerke Illmenau v. Commission* [2002] ECR II-2153, Case T-77/01 *Diputación Foral de Álava and others v. Commission* [2002] ECR II-81, Case C-540/03 *Parliament v. Council* [2006] ECR I-5769 and Case C-432/05 *Unibet v. Justitiekanslern and others* [2007] Judgment of 13/03/2007 etc.

⁵⁵ See e.g. Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609, para 19.

⁵⁶ See e.g. Case C-260/98, *ERT* [1991] ECR I-2925, paras. 42–43.

⁵⁷ For a deeper analysis regarding the Charter in general and Article 51(1) see Eeckhout, *The Charter of Fundamental Rights and the Federal Question*, CMLRev. 2002 pp. 945-994.

⁵⁸ Treaty establishing a Constitution for Europe, Presidency Conclusions of 21/22 June 2007, 11177/1/07 Rev 1 and Draft Treaty amending the Treaty on European Union and the Treaty establishing the European Community, Brussels, 23 July 2007, CIG 1/07.

2.4 European Union Agency for Fundamental Rights

This section will introduce the FRA and its main objectives. Its role regards the external relations will be further examined in later sections.

2.4.1 Origin of the FRA

In 2007 on 15 February, the Council adopted the regulation establishing a European Union Agency for Fundamental Rights⁵⁹ and the launch took place 1 March 2007. The Agency is located in Vienna and replaces the European Monitoring Centre on Racism and Xenophobia (EUMC). The origination of the Agency was a surprise to many commentators when European Council announced it in the late in 2003,⁶⁰ not least because of the rejection by the Commission of an earlier proposal from the Comité des Sages.⁶¹ The reasons for setting up the Agency are several. It seems, however, that the result of the EUMC was not fully satisfying. The new Agency shall monitor the EU rather than the Member States and differ in more ways from the functions of the EUMC.

2.4.2 Mandate, Objectives and Tasks of the FRA

The FRA is shaped like an independent Community agency and as such aims to provide assistance and expertise relating to fundamental rights to the relevant Community institutions and its Member States when implementing Community law. Its mandate is "collecting and analysing data on fundamental rights with reference to, in principle, all rights listed in the Charter".⁶² This is an expansion upon the scope of the present EUMC, which was restricted to issues of racism and xenophobia.

The Agency is, at the stage of writing this, relatively new and its full role not yet dashed up. The Institutions, in general, seem to search an increasing role of the fundamental rights in the European co-operation. By establish the European Union Agency for Fundamental Rights further steps are taken in such development.

⁵⁹ Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

⁶⁰ de Búrca *New Modes of Governance and the Protection of Human Rights* in Alston and Schutter *Monitoring Fundamental Rights in the EU, The Contribution of the Fundamental Rights Agency* pp. 33-34.

⁶¹ Comité des Sages, *Leading by Example: A Human Rights Agenda For the European Union for the Year 2000*, in P. Alston (ed.) *The EU and Human Rights*, 1999.

⁶² COM(2005) 280 final, 2005/0124 (CNS) and 2005/0125 (CNS), *Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union*, Brussels, 30.06.2005, p. 5.

Questions remain what instruments of rights or principles should be applied and interpreted by the FRA. EU documents indicate that the CFR is an essential document,⁶³ but is it the sole reference? The possible instruments or standards are, besides the Charter of Fundamental Rights, also the ECHR/constitutional traditions common to the Member States and various international law. Lawson argues the importance of considering other standards of protection.⁶⁴ Of special importance for the FRA concerning this thesis is the ECJ approach to the ECHR, see discussion above. The Fundamental Rights Agency have, on one way or another, to relate to the ECHR and the case law of the Strasbourg Court in order to fulfil its tasks to provide the Union with information, considering that a neglecting attitude towards these rights inevitably will lead to cases before the ECtHR. Even if the Agency clearly not deals with individual cases situations will appear where the Institutions are dependent on information regarding standards of a more international law character. One shall also remember the likely EU accession to the ECHR.⁶⁵

⁶³ COM (2004) 693 final of 25 October 2004, p. 4.

⁶⁴ Lawson, *International and European Human Rights Instruments*, in Alston and De Shutter, *Monitoring Fundamental Rights in the EU*, 2005, pp. 229-251.

⁶⁵ *Ibid* pp. 243-244.

3 External Relations of the European Union

The purpose with this section is to give an introduction of the external relations of the European Union with intent to offering a deeper understanding of the following discussion. Essential in this section are also the relationships between the pillars, the EU/EC and the Member States and the relationship to international organisations. This part does not paint a complete picture of the topic and the intention is not to do so.

When assessing this policy one have to examine provisions within different fields of Community law and scrutinise the external aspects of them. Important is the CCP that is the first sub-question. Secondly, the most important external doctrine, the implied competence, connecting the internal sphere to the external one, is scrutinised. After that the express external and implied competence, connecting provisions in the Treaties to external policies, will be examined before the last part about the circumstances with mixed agreement, concluded by the Community and the Member States in a combination.

3.1 A Common Commercial Policy

The contemporary Common Commercial Policy source from Article 3.1(b) EC Treaty that establish that: *“For the purposes set out in Article 2, the activities of the Community shall include, as provided in this Treaty and in accordance with the timetable set out therein: [b] a common commercial policy.”* The more detailed provisions are set out in Articles 131-134 under Title IX of the EC Treaty.

The European Union has some of its legal origins in the GATT. GATT is a step trying to realise the prevailing economical theory after World War II, the principle of benefits of free trade. GATT established in its first Article the principle of Most Favoured Nation (MFN), a principle of equal treatment between trading partners. Taking this principle unconditionally would make the creation of the EEC impossible, because it favours its own members. However, GATT tolerates departures when done in a purpose of regional integration and in a form of either custom union or free-trade area and in excess of that complies with the requirements set out in Article XXIV GATT.⁶⁶

The EEC was rather successful creating a custom union and to remove the obstacles of internal trade. The Commission consequentially replaced the

⁶⁶ Eeckhout, *External Relations of the European Union – Legal and Constitutional Foundation*, 2004, p. 9.

Member States in conduct trade negotiations, as the Treaty required.⁶⁷ The first case where ECJ recognised this development was in *Hauptzollamt Bremerhaven v. Massey-Ferguson*,⁶⁸ this case was, however, just a first indication of the coming progress.

A few years later, the Court delivered its *Opinion 1/75*⁶⁹ on an envisaged international agreement. The Commission asked whether they had the power to conclude an “Understanding on a Local Cost Standard” drawn up under the auspices of the OECD, and, if so, the power was exclusive. The Court reached that the subject matter of the “Understanding” lies within the scope of Articles 132 and 133 EC Treaty. It then stated: “*A commercial policy is in fact made up by the combination and interaction of internal and external measures, without priority being taken by one over the others.*”⁷⁰

Further, it concluded that CCP could be built gradually by internal legislation and international agreements. Reasoning like this one would find it logically to limit the Community competence in a sense that it has to cooperate with the Member States in building CCP. This is, however, not the case. The ECJ finds exercise of concurrent powers impossible and argue for an exclusive Community competence in conducting such agreements. It firstly point out the exclusivity as required because of the significant economical interests and the risk that the policy should become every Member States ego-interests in a non-uniform mix instead of a common commercial policy. This argument is, however, a more political argument and could be used in other fields of Community, where it not gets the same importance today.⁷¹ The second argument is the distortion of competition between undertakings when governed under different external trade policies. The Court also found a third argument based on the principle of loyalty towards the Community relevant when establishing an exclusive competence.

The later *Opinion 1/78*⁷², regarding the scope of Article 133 EC Treaty, broadened the concept of CCP and Article 133. In *Commission v. Council*⁷³ the Court reaffirmed the same reasoning as in the opinion. The discussion on the scope of CCP in general and Article 133 in specific continued. In 1990, in the *Chernobyl I* case⁷⁴ the Court dealt with maximum level of radioactive contamination when importing agriculture products from Central and Eastern Europe. The regulation was adopted under Article 133, even with an obvious aim to protect public health, but the Court accepted this base of legislation.

⁶⁷ For an account see joined Cases 21 to 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

⁶⁸ Case 8/73 *Hauptzollamt Bremerhaven v. Massey-Ferguson*, [1973] ECR 897, in particular para 4 of the judgement.

⁶⁹ Opinion 1/75 of the Court of 11 November 1975 ECR 1355.

⁷⁰ *Ibid.*

⁷¹ See further discussion in Eeckhout, *supra* footnote 66, p. 14.

⁷² *Opinion 1/78* [1979] ECR 2871.

⁷³ Case 45/86 *Commission v. Council* [1987] ECR 1493.

⁷⁴ Case C-62/88 *Greece v. Council* [1990] ECR I-1527.

The Uruguay round, lasting from 1986 to 1994 transformed the GATT to the World Trade Organization. By the time, the legal dispute between the Commission and the Council was in full swing. The Commission asked the Court for an opinion whether the Community had exclusive competence to conclude the WTO agreement based on Article 133 EC Treaty on its own or in combination with the implied competence (next chapter). The Court examined the different aspects of the agreement, such as trade in goods, services, transports and IPR's. The Court refused in *Opinion 1/94*⁷⁵ to allow the notion of commercial policy to expand so that it would cover the entire WTO agenda. Some authors are of the opinion that this opinion was a defensive step leaving the remedy taken by previous case law.⁷⁶ Eeckhout does not fully agree: "By calling this halt the Court recognized the limits of the concept contained the original EEC Treaty, and opened up a space for constitutional development through express amendment."⁷⁷

The resting Constitution would also in this area bring some clarification and codify some of the general principles set out in the case law. However, the case law on the CCP is of great significance for the EU's external action.

3.2 A Doctrine of Implied Competence

Apart from the CCP, discussed above, there were not many provisions bringing up the issue of external competence in the original EEC Treaty. The question then arose whether the external competence of the Community, and later the EU, is limited to the CCP or contains other external elements. In other terms, whether the Treaty contained implied external competence.

The first case dealing particularly with these interrogatories was the famous and still important, if not dominant *AETR* case.⁷⁸ The Commission requested the annulment of the Council's proceeding when negotiating an international agreement concerning the work of crews of vehicles engaged in international road transport, AETR agreement. The proceeding by the Council was a decision that those negotiations would continue to be conducted by the Member States, and thus not the Commissions suggestion to let the Community negotiate in their place. The Court reached the AETR doctrine, establishing that when the Community in acting externally to implement a common internal policy under the Treaty, the Member States no longer have the competence to take corresponding actions. The external and internal competences are consequently co-extensive and the

⁷⁵ *Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property* [1994] ECR I-5267.

⁷⁶ Kaddous, *Le droit des relations extérieures dans la jurisprudence de la Cour de justice des Communautés européennes*, 1998, p. 181-218 as referred in Eeckhout, *supra* footnote 66.

⁷⁷ Eeckhout, *supra* footnote 66, p. 56.

⁷⁸ Case 22/70 *Commission v. Council* [1971] ECR 263. (Here referred to as AETR but by some commentators as ERTA case.)

competences of the Member States are limited by the EC Treaty provision whether they concern internal or external policies. The main principles behind the reasoning are shortly:

The principle of general power, connected to the legal personality of the Community established in Article 281 EC Treaty indicate that the Community have power to enter agreements as a legal partner.⁷⁹ Secondly, the principle of implied power establishes that the competence is limited to the Treaty and its substantive provisions.⁸⁰ Thirdly, the principle of exclusivity is closely related to the principle of supremacy. Whenever the Community take actions envisaged by the Treaty, also external ditto, the MS do not have the competence the undertake obligations with third countries affecting these rules.⁸¹ Lastly, the principle of parallelism that establish the co-existence of the internal and external Treaty powers.⁸²

In *Kramer*⁸³ the Court gave the MS's right to act in areas covered by the Community implied external competence as long as their actions are compatible with Community objectives.⁸⁴ In the same year as *Kramer* the Court gave its *Opinion 1/76*⁸⁵ answering a request by the Commission on the compatibility of a draft agreement (with an objective to rationalise inland water transporting) with the Treaty and a clarification of the Community's competence to conclude the agreement. The Court re-confirmed their previous stating that there is no requirement of a prior internal legislation for the exercise of external competence. In the case at hand the opinion gives that the Community's participation in the agreement are 'necessary' for attain the objectives of the Treaty. This statement is important when discussing the relationship with the WTO and *Opinion 1/94*. It is, however, unclear whether the opinion gives the community exclusive competence. It gives no reference in that direction, but is, nevertheless read in that way by commentators.⁸⁶

In 1991, the Court got the opportunity to write the next chapter in the development of Community external relations. The Member States refused to accept the Commission's view that the Community institution was the competent authorities in International Labour Office aspects and the Commission requested for the ECJ's opinion. In *Opinion 2/91*⁸⁷ the Court repeated the legal situation and previous case law in a good way and this

⁷⁹ Para 13 of the judgement.

⁸⁰ Para 15 of the judgement.

⁸¹ Para 17 of the judgement.

⁸² Para 19 of the judgement.

⁸³ Cases 3,4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279.

⁸⁴ In particular paras 34-45 of the judgement.

⁸⁵ *Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741.

⁸⁶ See Dashwood and Heliskoski, *The Classic Authorities Revisited* in A Dashwood and C Hillion (eds) *The General Law of EC External Relations*, 2000 p. 3-19. For an opposite view see Eeckhout, *supra* footnote 66, pp. 68-69.

⁸⁷ *Opinion 2/91 Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work* [1993] ECR I-1061.

deserve some attention. The opinion further establishes that the exclusive of non-exclusive competence does not solely flow from the provisions of the Treaty but also depend on further regulations adopted to apply these provisions. It also establishes that, when concluding an agreement in an area of shared competence it is required in such cases a joint action by the Community and the MS.

The *Opinion 1/94*,⁸⁸ discussed briefly above but needs to be commented in a few words even in this section. The opinion adjust the previous approach taken by the Court somewhat. The ECJ did not give the Community competence regarding the full scheme of WTO matters, neither under CCP nor under the doctrine of implied competence. Several matters covered by GATS and TRIPS are not matters which the Community can conduct negotiations with exclusivity.

The *Opinion 2/94*⁸⁹ is discussed above in Chapter 2 regarding the fundamental rights. However, it is an essential opinion for this thesis and will be scrutinised here and in later sections. Article 308 gives the Community the competence to attain necessary actions to create and preserve the common market, even if not provided for such powers in the Treaty. In *Opinion 2/94* the Court consider Article 308 as legal basis for an extensive implied competence: “*In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 [now Article 308] of the Treaty may constitute a legal basis for accession.*”⁹⁰

However, with the judgement in fresh mind the paragraph raises some questions. Does this mean that Article 308 should fall outside the span of implied competence? It is true that the Treaty does not give: “*the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.*”⁹¹

The approach taken is somewhat peculiar. There are numerous of relevant Community law in the field of fundamental rights. Eeckhout is also critical: “*This is not an autonomous power to legislate on human rights, as it is strictly a function of the other, non-human-rights powers which are conferred on the institutions. It is none the less a power, and indeed a duty, to the extent that protection of fundamental rights requires further rule-making and cannot simply be left to the devices of judicial protection.*”⁹²

Next chapter in the doctrine of implied competence is the *Open Skies cases*.⁹³ These cases, within the transport sector, deals with the Member

⁸⁸ *Opinion 1/94*, *supra* footnote 75.

⁸⁹ *Opinion 2/94*, *supra* footnote 27.

⁹⁰ Para 28 of the opinion.

⁹¹ Para 27 of the opinion.

⁹² Eeckhout, *supra* footnote 57, p. 983.

⁹³ Case C-466/98 *Commission v. UK* [2002] ECR I-9427, Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519, Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575, Case C-469/98 *Commission v. Finland* [2002] ECR I-9627, Case C-471/98 *Commission v.*

State competence to conclude the so-called ‘Open Skies’ agreements. These agreements, closed with third countries, in particular the U.S. usually reserve external traffic rights for domestic carriers and therefore distort the competition within the Community.

The Commission argued exclusivity based on *Opinion 1/76* and by virtue of the *AETR* principle. The *Opinion 1/76*-argument pleaded for an exclusive competence because it was required for the effective exercise of the internal Treaty competence and that external powers may be exercised. The Court, however, did not accept the argumentation by the Commission and distinguished the cases at hand from the opinion. *Opinion 1/76* is better looked at as a case which did not establish exclusive external competence but simply confirmed general parallelism between internal and external powers. The Court, furthermore, examined the *AETR*-principle and found that the agreements would jeopardize the attainment of the objectives pursued by internal rules, in specific Article 80(2). The Court therefore found the Member States in violation of the *AETR* doctrine and held the MS’s responsible for breach of Article 10 – the principle of loyalty and the relevant regulations.⁹⁴

*“The Court in the recent Open Skies cases did shed some light on the division of competence between the Community and the Member States in relation to the Open Skies Agreements. Moreover, the Court may now have settled some of the discussions about the legal principles to be derived from the AETR and Opinion 1/76 lines of authorities. However, despite a good deal of cases on the subject and abundant legal commentaries, Community law on external powers remains ambiguous in its foundation. The Court’s continuation of the method chosen in Opinion 1/94 and Opinion 2/92 whereby it ignores the distinction between the existence and the nature of external Community competence contributes to this confusion.”*⁹⁵

Later followed the *Opinion 1/03*.⁹⁶ The Court was requested by the Council to clarify the division of competence between the Community and the MS’s in concluding the new Lugano Convention.⁹⁷ The Court clarified some issues regarding the implied competence and they deserve a short mentioning. It reached that the implied competence can be either exclusive or shared.⁹⁸ This conclusion was no stumbling-block in the case at hand but

Belgium [2002] ECR I-9681, Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741, Case C-475/98 *Commission v. Austria* [2002] ECR I-9797 and Case C-476/98 *Commission v. Germany* [2002] ECR I-9855.

⁹⁴ EC Regulation 2299/89 and EC Regulation 95/93.

⁹⁵ Holdgaard, *The European Community’s Implied External Competence after the Open Skies Cases*, 2003, p. 394.

⁹⁶ *Opinion 1/03 Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145.

⁹⁷ Replacing The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters done at Lugano on 16 September 1988 (OJ 1988 L 319, p. 9, ‘the Lugano Convention’) arose from the creation of the EFTA.

⁹⁸ Paras 114-115 of the opinion.

have, however, importance when considering the field of Justice and Home Affairs and UN Conventions etc. in a later stage.⁹⁹ They reached further that *Opinion 1/76* was inapplicable in the relevant case. The Court does not reject the doctrine of the *Opinion 1/76* but some authors are of the opinion that the reasoning of the Court clearly indicates an approach similar to a rejection.¹⁰⁰ Thirdly, the Court straightened the *AETR*-doctrine and found it relevant in the case at hand.¹⁰¹ The Court also adds a warning when running into so-called “disconnection clauses” such as Article 54B in the agreement at hand. These clauses are created to disconnect (thence their name) the agreement when Member States have internal disputes where there is applicable Community law. The Court may not be against the content of these clauses if there had not been a warning that these agreements affect the Community law and the competence thus should belong to the Community.¹⁰² Lastly, the opinion clarified the exclusive competence when having a Member State standing outside the Community law. In the case at hand, Denmark does not participate in Title IV of the EC Treaty and Article 61 and 67 and Regulation 22/2001 relevant for Community’s competence to conclude the new Lugano Convention. As Denmark would not be part of the agreement concluded by the Community, Denmark must be part of the agreement by itself. It would, however, be interesting to see what consequences could be applied if Denmark neglected to conclude the agreement. Is that a possible breach of the principle of loyalty in Article 10?

The Court reached on these reasoning that the Community own competence to conclude the new Lugano Convention. The principle seems to be, seen from these to latter cases, a “comprehensive and detailed analysis”¹⁰³ of the agreement and Community law. This is so far the latest important verdict in the doctrine of implied competence field of law.

3.3 Express External and Implied Competence under the European Treaties

3.3.1 Treaty on European Community

In the EC Treaty, there are several provisions that play a role when it comes to the external competence. This section will scrutinise a limited number of them and their importance. The mere fact that the Community, by the

⁹⁹ Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law*, 2006.

¹⁰⁰ See Cremona *Ibid.*, Eeckhout, *supra* footnote 66 p. 68-69, Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the Community and its Member States*, 2001, p. 44 and Dashwood, *The Relationship between the Member States and the European Union/European Community*, 2004 p. 372.

¹⁰¹ Paras 122, 128 and 131 of the opinion.

¹⁰² Para 130 of the opinion.

¹⁰³ Para 133 of the opinion.

Treaty, owns legal personality¹⁰⁴ may be of limited practical importance but indicates that it as such body is competent to enter into external relations.

Article 310 EC Treaty was first out establishing a broad external competence. The Court's ruling in *Demirel*¹⁰⁵ gave that the Community by concluding association agreements could contract on matters of immigration. The Court accepted such provisions in an agreement with Turkey. The immigration is an issue that obviously affect the external situation and relations. It should be remembered that this was before the contemporary immigration policy.

The European Union is the biggest provider of developing aid in the world¹⁰⁶ and the development policies does naturally play a significant role in the external relation to numerous countries. In the Common Commercial Policy section, we have seen that the Court broadened the competence of CCP in *Opinion 1/78*.¹⁰⁷ That concept covers, among others, trade agreements with a strong focus on development. In the *Bangladesh* case¹⁰⁸ the Court reached that the Community did not have exclusive competence in the field of humanitarian aid. The competence is concurrent with the Member States. This approach was upheld in the latter *Lomé IV* case¹⁰⁹ and by the TEU when adding current Title XX in general and Article 177(1) in particular. The Court examined these provisions in *Portugal v. Council*.¹¹⁰ Portugal challenged a Community agreement with India based on Articles 133 and 181 because the lack of competence to conclude agreements containing provisions in the field of human rights etc. The applicant was of the opinion that such agreement should be based on Article 308 implying a concurrent competence with the MS's. The Court reached that: "*The mere fact that Article 1(1) of the Agreement provides that respect for human rights and democratic principles 'constitutes an essential element' of the Agreement does not justify the conclusion that that provision goes beyond the objective stated in [...] the Treaty.*"¹¹¹

Consequently, there is room for the Community when concluding external agreements to conclude a provision as in the case at hand.¹¹² The Article 308 competence was not the only ground of which Portugal raised its plea. The other grounds are developed more at a later stage in this thesis.

¹⁰⁴ Following from Article 281 EC Treaty.

¹⁰⁵ Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.

¹⁰⁶ See e.g. Smith, *Implementation: Making the EU's International Relations Work* in Hill and Smith (eds) *International Relations and the European Union* p. 167 and www.europa.eu/development/

¹⁰⁷ *Opinion 1/78*, *supra* footnote 72.

¹⁰⁸ Joined Cases C-181/91 and C-248/91 *Parliament v. Council and Commission* [1993] ECR I-3685.

¹⁰⁹ Case C-316/91 *Parliament v. Council* [1994] ECR I-625.

¹¹⁰ Case C-268/94 *Portugal v. Council* [1996] ECR I-6177.

¹¹¹ Para 24 of the judgement.

¹¹² Article 1(1) of the agreement gives: "Respect for human rights and democratic principles is the basis for the co-operation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement."

The Treaty of Nice does also play its role in the field of developing aid. The Treaty created Article 181a into the EC Treaty. It provides a legal basis for concluding co-operation agreements with all third countries and not only developing countries. It secondly gives that respect for human rights and democracy as a 'general objective' that should underlie the EU external activity. It does also give a broad competence recognising the need for recourse to different Treaty provisions depending on the subject matter of co-operation. This addition will most likely avoid a new *Portugal v. Council* case in this aspect.

The environmental protection was inserted into the EC Treaty by SEA in Article 174(4) that already from the beginning provided for external action. Not all external matters have to be based on Article 174(4), following from *Opinion 2/00*.¹¹³ The Court found that Article 174(4) defines the objectives but external measures based on Article 175 etc. The Court thus recognises implied external competence in this field. It further establish that in agreements with twofold purpose one should aim to determine the predominant purpose, if possible.¹¹⁴

When it comes to the internal market many issues lies within the scope of the CCP, but not all. Article 95 EC Treaty, concerning the harmonization of the internal market is one example of this. Directives adopted to secure the health of European consumers when importing products have an inevitable effect on the external relations. In *Opinion 1/94*¹¹⁵ the Court looks at WTO agreement on trade barriers but found, however, that these agreements fell within the scope of the CCP.

The EC Treaty further contain provisions that together with the doctrine of implied competence already do or may come to play a role in the external relations of the Union and the competence thereof in areas of social policy, EMU and monetary co-operation, immigration, freedom, security, justice etc.

3.3.2 Treaty on European Union

This section will examine the external competence under the TEU. It will briefly scrutinise the second and third pillar, the Common Foreign and Security Policy (CFSP) and the Police and Judicial Co-operation in Criminal Matters (PJCCM). The external competence under these pillars is not that easy to analyse in a strict legal way. The provisions in the TEU are wide in its nature and the lack of interpreting case law make this task impossible. The following text is therefore just a brief explanation of the legal situation in this field with an inevitable touch of politics.

¹¹³ *Opinion 2/00 whether an agreement envisaged is compatible with the provisions of the Treaty* [2001] ECR I-9713.

¹¹⁴ Paras 22-24 of the opinion.

¹¹⁵ *Opinion 1/94, supra* footnote 75.

While the EC pillar is so-called supranational and a ‘new legal order,’ as it is described in *Van Gend en Loos*,¹¹⁶ the second and third pillars are intergovernmental. This affects the character of EU law.

3.3.2.1 CFSP

Article 11(1) set out the objectives with the CFSP. The same Article provides that the policy *shall* be defined and implemented. Paragraph 2 instructs the MS’s to support the CFSP. The after coming Articles gives further provisions of loyalty with the CFSP when exercise its politics. These provisions are supposed to influence the external relations, and probably do. The obvious problem is the matter of enforcement. Article 11(1) provide the Council to ensure that the provisions are complied with. As that require unanimously action the difficulty gets evident. The ICJ may be a solution, even if a politically highly doubtful remedy.

Seen from the reasoning above it may appear that the CFSP is weak in exercising external relations. This is not fully true. The CFSP does play a role when interacting with the Community policies. It is easy to see that it is hard to distinguish the foreign policy from other policies. Article 2 TEU also give that the objective of the Union is ‘to maintain in full *acquis communautaire*’ with the policies and institutions of the Community and Article 3 TEU require consistency and co-operation between the Council and the Commission. When exercising CFSP external competence there needs to be a co-operation with the Community external policy. In this interaction between the pillars, Article 47 TEU is central. Article 301 EC Treaty also plays its role when it comes to economical and financial sanctions. Problems remain, however: “*As long as the Council and the Commission co-operate and agree, there are no problems, but there is nothing in the Treaties which regulates disagreement, other than the general provision on the obligation of interinstitutional co-operation in Article 3 TEU.*”¹¹⁷

In delimitate the competence the Commission challenged a Council joint action regarding visas adopted under the third pillar in the *Airport Transit Visas* case.¹¹⁸ The Court reached that it was competent to interpret acts adopted under Title VI TEU in order to determine if the issue more properly fell within the scope of the Community Treaty. Supporting this view, the AG referred to *AETR*¹¹⁹ and *Bangladesh*¹²⁰ etc. where the Court used a similar approach. The Court found that the joint action did not come within the scope of the EC Treaty. The principle does, however, remain, that the Court is willing to examine joint action by the Council. When reading the judgement it seem that the relationship between the Community and the Union differ from the ditto between the Community and the Member States.

¹¹⁶ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR I.

¹¹⁷ Eeckhout, *supra* footnote 66 p. 146.

¹¹⁸ Case C-170/96 *Commission v. Council* [1998] ECR I-2763.

¹¹⁹ Case 22/70 *supra* footnote 78.

¹²⁰ Joined Cases C-181/91 and C-248/91 *supra* footnote 108.

It seems that the Article of matter, Article 100c EC Treaty does not give the Community exclusive competence. If that is correct non-exclusive EC competence preclude EU action but not MS action.¹²¹ One could see the EC Treaty provisions as a form of *lex specialis* interpreted on its own terms.

When studying external relations one eventually reaches the question whether the European Union own legal personality and have the competence to conclude international agreements. The original TEU did not contain any provision of legal personality or similar and this led inevitably to a denial of such competence by most commentators. The contemporary Article 24 TEU gives the Union competence and a procedure to conclude international agreements. The resting Constitution for Europe, or its equivalent act would give the European Union legal personality but in the meantime most doctrine, thereby Dashwood, considers the practice based on Article 24 TEU as a confirmation of the legal personality of the EU.¹²²

3.3.2.2 PJCCM

Regarding the Police and Judicial Co-operation in Criminal Matters the legal situation is similar to the one concerning CFSP. Article 38 TEU connect the field to Article 24 TEU and Article 37 TEU provide the MS's to defend the PJCCM policies in international conferences and organisations. The conflict seem to appear, for instance in the field of anti-terrorism clauses where the competence could fall within PJCCM's, CFSP's, the Member States' or the Community's competence.

3.4 Mixed Agreements and Membership

When reading this chapter up to this point one can easily imagine that the external relations are about "splitting up" external actions between the Community/Union and its Member States. This is not the full picture. In reality, the Community and its Member States acting jointly when conclude most international agreements. Pure Community agreements are on the other hand rather exceptional. In the cases reviewed above, mainly in the implied competence section, many concerned mixed agreements. As long as they do not contain significant important developments in the legal field of mixed agreements they will not be examined again. Under this section, the Community membership in international organisations will be scrutinised. That is because the issues dealt with are so much the same in these fields.

The legal reason for mixity is the Community lack of competence to conclude the agreement by itself. To reach such competence the Community competence has to cover the full agreement with its exclusive competence. When this is not the case, there are mainly two different types of possible situations. When there is a situation of concurrent power the Member States

¹²¹ See Eeckhout, *supra* footnote 71 p. 150.

¹²² Dashwood, *External Relations Provisions of the Amsterdam Treaty*, 1998, pp. 1038-1041.

can conclude agreements by themselves if the Community has not ‘occupied the field’. The other situation is when the competence is parallel.

Articles 302, 303 and 304 EC Treaty establish that the Community shall maintain international relations as are appropriate with international organisations. The Treaty expressly mentions the relationship to the UN, the Council of Europe and the OECD. The Community as such is, however, not member of many international organisations. It is member of the FAO, the EBRD and the WTO. The reasons for not entering international organisations as a Community are probably not limited by the Treaty, seen out of the Articles mentioned and the reasoning above about the legal personality, but others. The Member States are unwilling to lose some of their role in the international scene may be one.¹²³ A second problem that would occur in many organisations is the voting right. How many votes would the Community get? Would the Member States lose its votes? etc.¹²⁴ Lastly, the third countries are concerned about their counterpart and the risk of blocks within the organisation as well as the enforcement mechanisms.¹²⁵

In *Opinion 1/76*¹²⁶ the Court for the first time established the principle that participation in agreements setting up their own institutions must not affect the autonomy of the Community legal order. In this case the Court recognised a potential risk of conflict of jurisdiction with a tribunal introduced by the agreement. The Court accepted the tribunal if changing conditions. The same approach was upheld in *Opinion 1/91*.¹²⁷ The, EEA agreement at stake had provisions on homogeneity and uniformity and the Court found these conflicted with Article 220 EC Treaty and the very foundation of the Community.¹²⁸ In addition, the composition of an EEA Court was unacceptable (in a similar way as in the agreement in *Opinion 1/76*). The agreement was renegotiated and accepted by the Court in a later opinion.¹²⁹ In *Opinion 1/00*,¹³⁰ the requisite of the principle appear more clearly. The Community legal order could be considered secure when the agreements does not rule on pure questions of Community law, such as division of powers, between the Community, its institutions and the Member States or provisions of the founding Treaties of Community legislation.¹³¹

¹²³ Sack, *The European Community's Membership of International Organizations*, 1995, p 1233.

¹²⁴ Eeckhout, *supra* footnote p. 201.

¹²⁵ Sack, *supra* footnote 125 pp. 1235-1237.

¹²⁶ *Opinion 1/76*, *supra* footnote 85.

¹²⁷ *Opinion 1/91 re Agreement on the European Economic Area* [1991] ECR I-6079.

¹²⁸ Paras 37-46 of the opinion.

¹²⁹ *Opinion 1/92 re Agreement on the European Economic Area* [1992] ECR I-2821.

¹³⁰ *Opinion 1/00 Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area* [2002] ECR I-3493.

¹³¹ In particular para 6 of the opinion.

3.4.1 The Principle of Loyalty

A main principle in the Community law in general is the principle of loyalty. The Article 10 duty is highly relevant when dividing competence in the field of external relations, mixed agreements and parallel membership. The principle, sometimes called the duty of co-operation, was first recognised in the *EAEC* ruling,¹³² where the Court did not apply Article 10 directly but an identically worded Article in the EAEC agreement. The Court stated that: “*there is to be found once more the necessity for harmony between international action by the Community and the distribution of jurisdiction and powers within the Community which the court of Justice had occasion to emphasize in its case law originating with the [AETR judgment]*”¹³³

The principle was upheld in *Opinion 2/91*¹³⁴ and *Opinion 1/94*¹³⁵ and further developed in *Commission v. Council*.¹³⁶ In the latter case, it was a conflict about voting rights in FAO meetings, where the Court found that the Council in this situation breached the agreement governing the co-operation between the institutions when giving the voting rights to the Member States. They consequently violated the duty of co-operation.

¹³² *Ruling 1/78 re Convention on the Physical Protection of Nuclear Materials, Facilities and Transports* [1978] ECR 2151.

¹³³ Paras 33-36 of the ruling.

¹³⁴ *Opinion 2/91*, *supra* footnote 87.

¹³⁵ *Opinion 1/94*, *supra* footnote 75.

¹³⁶ Case C-25/94 *Commission v. Council* [1996] ECR I-1469.

4 External Human Rights Policy

This chapter aims to describe the human rights policy used by the European Community and Union when exercising their external competence. It furthermore connects the earlier chapters with each other. When studying fundamental rights one soon realise that the external sphere of rights may even be more important than the internal one. The fundamental or human rights are described as the core of a postmodern constitutionalism and plays as such an increasing role in the contemporary European co-operation.¹³⁷ Remarkable many CFSP decisions are motivated or inspired by human rights concern,¹³⁸ and they are crucial when it comes to the developing co-operation. The reader will find more examples under this section. Nevertheless, legal uncertainty and lack of co-ordination affects the EU human rights policy. As the Comité des Sages has put it in 2000: “*The EU has devoted a great deal of energy and resources to human rights, both in its internal and in its external policies. Yet the fragmented and hesitant nature of many of its initiatives has left the Union with a vast number of individual policies and programmes but without a real human rights policy as such.*”¹³⁹

4.1 The Development

The early progress of an external Fundamental Rights policy was in the relations with developing countries. The first important confrontation with the Fundamental Rights in Community external relations was in the Lomé Convention with the ACP countries. In the 70th and the 80th there were major human rights violations in some of these countries. Nevertheless, the Community was obliged by the agreements to keep delivering economical means to the countries in question, and felt uncomfortable with that, as the money ended up supporting such violations. Similar circumstances appeared in ex-Yugoslavia in the 90th.¹⁴⁰ These situations led to a Commission communication¹⁴¹ and a Council resolution¹⁴² regarding the issues. These documents, especially the resolution, were the beginning a policy, recognising the link between human rights and development. It also recognised the role of the Community and its Member State to support

¹³⁷ Eeckhout, *supra* footnote 66, p. 466.

¹³⁸ Chapman, *Where is the EU's Human Rights Common Foreign Policy, and How is it Manifested in Multilateral For a?* in P Alston (ed) *The EU and Human Rights*, 1999.

¹³⁹ Comité des Sages, *Leading by Example: A Human Rights Agenda For the European Union for the Year 2000*, in P. Alston (ed.) *The EU and Human Rights*, 1999, p. 922.

¹⁴⁰ For further description see Fierro, *The EU's approach to Human Rights Conditionality in Practice*, 2003, chapter II.

¹⁴¹ Commission Communication on human rights, democracy and development co-operation, SEC(61)91 of 25 March 1991.

¹⁴² Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, 28 November 1991, Bull. EC 11/1991, 122-123.

human rights and democracy in developing countries through a good political relation with them. The Council also addressed the question of military spending and its negative impact in already poor countries. The resolution did also introduce the use of, so called, human rights clauses, examined in next chapter.

Another important development was the negotiations in connection to the Maastricht Treaty as it led to the creation of Article 177(2) EC Treaty and furthermore Article 11(1) TEU. Some thought that these provisions and the discussion would lead to accession of ECHR,¹⁴³ however, the aftermath of these thoughts and *Opinion 2/94*¹⁴⁴ became 1996 as a year of consideration. The same year the Court also gave its judgement in *Portugal v. Council*¹⁴⁵ where the Court accepted human rights clause in the agreement at hand, but also indicated that the field of human rights could be a specific field of co-operation.¹⁴⁶ The Court also gave the Community an obligation to promote these rights in its external relations.¹⁴⁷ The Commission proposed a Council regulation in order to clarify some of the questions raised in these cases,¹⁴⁸ but the Council never adopted such regulation as the Council Legal Service contested the power of the Union regarding human rights. The *United Kingdom v. Commission* case¹⁴⁹ further complicated the situation, when the Court requested a relevant appropriation in the budget.¹⁵⁰ The point of the Court is clear. Human rights funding require legislation, legislation needs basis in the Treaty.

However, the Council adopted two regulations based on Article 179, regarding the development co-operation and Article 308, regarding the non-development relations.¹⁵¹ The Treaty of Nice inserted Article 181(a) EC Treaty giving that the relations with developed countries shall respect the human right policy of the Community. In light of the limitations of Article 308 by the *Opinion 2/94*, this statute gives a stronger legal basis for such policy.¹⁵²

¹⁴³ See further discussion in chapter 2.

¹⁴⁴ *Opinion 2/94*, *supra* footnote 27.

¹⁴⁵ Case C-268/94, *supra* footnote 110.

¹⁴⁶ Para 28 of the judgement.

¹⁴⁷ Paras 24 and 26 of the judgement.

¹⁴⁸ COM(97)357 final, [1997] OJ C282/14.

¹⁴⁹ Case C-106/96 *United Kingdom v. Commission* [1998] ECR I-2729.

¹⁵⁰ In particular para 26 of the judgement.

¹⁵¹ Council Regulation 975/1999 laying down the requirements for the implementation of development co-operations which 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 [1999] OJ L120/1, and Council Regulation 976/1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, 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 in third countries [1999] OJ L120/8.

¹⁵² Eeckhout, *supra* footnote 66, p. 469. "The combined provisions of Article 177(2) and 181(a) EC now offer a broader basis for an external human rights policy."

4.2 The General Obligation by ECJ and ECtHR Case Law to Respect Human Rights

As mentioned above, the Institutions are obliged to comply with Article 6 TEU and the Charter of Fundamental Rights. The practical means of these provisions are, however, limited. One reason for this is, obviously, the lack of jurisdiction by the ECJ to give rulings regarding the full CFSP and PJCCM areas. Thus, the ECJ sometimes, through its competence over the Community matters, affects the EU external policy.

In *Racke*¹⁵³ the ECJ suspended the EC agreement with Yugoslavia after the outbreak of hostilities there, and in *Centro-Com*¹⁵⁴ they ruled regarding economic sanctions against Iraq. The *Bosphorus* case¹⁵⁵ is once more relevant, besides the “Solange III” aspect. The case before the ECJ was about EC and national measures implementing the UN sanction regime against the Federal Republic of Yugoslavia. The dispute, before an Irish court, concerned the impoundment of an aircraft, leased by a Turkish company, Bosphorus, because it was owned by the Yugoslavian national airline. The legal basis for such action was the EC legislation implementing the UN sanction regime.¹⁵⁶ Bosphorus claimed breach of its fundamental right to property. The Court found this right not absolute and that it could be subject to restrictions:

“It is settled case-law that the fundamental rights invoked by Bosphorus Airways are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community (see Case 44/79 Hauer v Land Rheinland-Pfalz [1979] ECR 3727; Case 5/88 Wachauf v Bundesamt fuer Ernaehrung und Forstwirtschaft [1989] ECR 2609; and Case C-280/93 Germany v Council [1994] ECR I-4973).

*Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.”*¹⁵⁷

The Court found the breach of the fundamental rights of Bosphorus proportionate and appropriate in relation to the aim of the regulation, to give an ending to the violence in Federal Republic of Yugoslavia.¹⁵⁸ One can

¹⁵³ Case C-162/96 *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655.

¹⁵⁴ Case C-124/95 *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England* [1997] ECR I-81.

¹⁵⁵ Case C-84/95, *supra* footnote 42.

¹⁵⁶ Regulation 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] L/102/14.

¹⁵⁷ Paras 21 and 22 of the judgement.

¹⁵⁸ Para 26 of the judgement.

criticise the verdict, because the case in hand did not show any obvious causal link between the aim of the regulation and the use of the plane by the Turkish Bosphorus. It is worth mentioning that the payment, according to Turkish implementation of the same UN sanction regime, was set to an unreachable account for the FRY and that the agreement was set out before the beginning of the violence. As the reader of previous sections already know, the case was raised before the ECtHR, was found applicable and ruled. The Strasbourg Court reached, however, that the protection of the fundamental rights within the Community was *equivalent* with the ECHR. Read other chapters (primarily the one about economic sanctions) for further descriptions.

Moreover, the ECtHR can hold the parties of the ECHR responsible for acts of their authorities producing effect outside their own territory.¹⁵⁹ The question arises whether external action entails responsibility. In *Bankovic*,¹⁶⁰ regarding the NATO bombardment on Belgrade, the ECtHR found the case inadmissible, because the applicants had not been within the jurisdiction of the States concerned as is required by Article 1 ECHR. However, in many cases the ECtHR reached that states should be responsible for its external actions.¹⁶¹ “A State’s responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction.”¹⁶²

The Court then referred to *Soering*.¹⁶³ In this case the ECtHR established the principle that a state that extradite an individual that runs a risk of treatment in breach of Article 3 ECHR (prohibition of torture or inhuman or degrading treatment or punishment) cannot be held responsible for breaches by a third state. The responsibility lies solely in exposing the individual for the risk. The Human Rights Committee with respect to the ICCPR has also applied this principle.¹⁶⁴ Consequently, states and international organisations are obliged to consider effects of their actions on individuals in third countries.¹⁶⁵ In *Zaoui*¹⁶⁶ the applicant claimed the Union responsible for the death of his wife in a terrorist attack by a Palestinian in Israel. The argument was that the educational system and a special handbook in particular, incited hatred against Israel, and the Union should be held responsible because of its role as the biggest sponsor of the

¹⁵⁹ Case of *Drozd and Janousek v. France and Spain* (12747/87) [1992], para 91, Case of *Loizidou v. Turkey* (15318/89) [1996] in particular para 62.

¹⁶⁰ Case of *Bankovic and others v. Belgium and 16 other Contracting States*, (52207/99) [2001].

¹⁶¹ See e.g. Case of *Loizidou supra* footnote 159 and Case of *Ilaşcu and Others v. Moldova and Russia* (48787/99) [2004].

¹⁶² *Ibid* Case of *Ilaşcu* para 314.

¹⁶³ Case of *Soering v. United Kingdom* (14038/88) [1989].

¹⁶⁴ See e.g. Case of *Ng v. Canada*, Communication No 469/1991.

¹⁶⁵ For further reading see de Schutter, *Globalization and Jurisdiction : Lessons from the European Convention on Human Rights*, 2004.

¹⁶⁶ Case T-73/03 *Zaoui and others v. Commission*, 23 April 2003 (unpublished Order of CFI).

educational system. The action was based on Article 288 EC Treaty. In the case at hand, the Court of First Instance did not recognise any sufficient causal link between the economical support of the educational system and the terrorist attack. The verdict is reasonable and argumentation regarding the casual link should, in my opinion, be applied in *Bosphorus*. The ECtHR took a similar approach, denying the casual link in *Tugar* case.¹⁶⁷ The applicant, an Iraqi who was seriously injured by stepping on an anti-personnel mine of Italian origin, saw his complain declared inadmissible.

4.3 The Matter of Competence

This section aims to examine the division of competence in the external human rights policy. Important verdicts, as *Opinion 2/94* and *Portugal v. Council* are scrutinised once more together with the other important steps. There appear to be two kinds of agreements concluded by the EU/EC. The first kind is agreements imposing legislation in the field of human rights. The others are these agreements containing human rights provision in agreements with other primary objectives. Usually these agreements contain a clause such as the human rights clauses. The deeper description concerning the human rights clauses is left to chapter 4.3.

4.3.1 Fundamental Rights Agreements

This type of external competence is closely related to constitutional issues. These issues are, at least by many Member States, core provisions in national constitutions. EU/EC does not have general power to enforce fundamental rights protection. If it had, the Charter of Fundamental Rights would dominate the constitutional studies throughout the Member States.¹⁶⁸ Consider, however, the doctrine of implied competence, the internal and external competence is parallel in that manner. However, *Opinion 2/94* did not rule out every Community participation in any agreement concerning human rights. The focus of the opinion was the constitutional consequences of an accession. “[T]here is surely a functional EC competence to enact provisions on human rights protection, within the scope of EC policies and of the ‘substantive’ powers conferred by the Treaty. As the EU institutions are committed to respect fundamental rights, there must be competence to legislate so as to ensure such respect.”¹⁶⁹

The question remains whether this power give sources to positive rights. One case that shows that they can is the rather famous *Matthews* case¹⁷⁰ (right to vote for the citizens of Gibraltar). The ECHR require a positive action, to set up an election procedure at Gibraltar. The requirement is thus formally upon the United Kingdom to accomplish, but the election at stake

¹⁶⁷ Case of *Rasheed Tugar v. Italy* (22869/93) [1995].

¹⁶⁸ For a deeper analysis see Eeckhout, *supra* footnote 57.

¹⁶⁹ Eeckhout, *supra* footnote 66, p. 471. Such examples are, e.g. the Anti-dumping regulation, Council Regulation 384/96 on protection against dumped imports from countries not members of the European Community [1996] OJ L56/1.

¹⁷⁰ Case of *Matthew v. United Kingdom* (24833/94) [1999].

was the election to the EP.¹⁷¹ The result is, however, that if it is necessary for the Community to comply with Fundamental Rights and to adopt provisions to carry out these requirements it follows from the doctrine of implied competence that the external sphere will be at the heels of the internal competence. The role of the CFR, applicable on the Institutions, following this reasoning, can be one affecting the external relations in the light of the doctrine of implied competence. More examples are the asylum policy, PJCCM, the principle of non-discrimination as in Article 13 EC Treaty etc. In relation to ECHR Protocol 12, dealing with non-discrimination, the Member States have to respect the Community competence origin from *AETR* doctrine and the one of implied competence. There is consequently clear that the Community own competence to conclude binding human rights treaties on these conditions.

4.3.2 Agreements Containing Provisions Regarding Fundamental Rights

This category, in contrast to the previous one, contains considerable practice, but is precarious. In accordance with Article 181a EC Treaty external agreements: “*shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.*” This objective shall be respected in all agreements with third countries, even in pure trade agreements, based on Article 133 EC Treaty. This is clear seen in the light of Articles 177(2) and 181a EC Treaty giving the respect for human rights etc. as a general objective in their respective policies.¹⁷² Article 11(1) TEU stating that the objectives of the CFSP is: “[...] *to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.*”

This Article combined with Article 3 TEU that tie the objectives of the external relations of the European Union with the ones of the Community, more exactly Articles 177(2) and 181a, makes the picture even clearer. The Court examines the scope of the objective in the *Portugal v. Council*¹⁷³ agreement and reached that a provision respecting fundamental rights as an essential element in the agreement between the Community and India was acceptable. The content of such clauses in Community agreements vary. To sum up, the Community have competence to conclude agreements discussed in this section when based on Article 177(2) or Article 181a.

4.4 The Breadth and Depth

This thesis cannot cover the breadth and depth of the external fundamental rights policy, and do not plan to do so. However, this section aims to give a

¹⁷¹ Read more in Fierro, *supra* footnote 140, chapter II.

¹⁷² *Ibid* p. 256.

¹⁷³ Case C-268/94, *supra* footnote 110.

short view of the practical importance of the policy by giving some examples of it applied.

The standard of protection of fundamental rights is important, as it is a condition for accession to the European Union. The Council laid down in the ‘Copenhagen criteria’ enforced through e.g. Regulation 1085/2006¹⁷⁴ that the candidates must comply with certain requirements. One requirement is to show stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.¹⁷⁵

The discussion of allowing Turkey to access the Union is vivid, partly because of the fundamental rights policy in this Country. In the Luxembourg Summit in 1997 the EU plainly excluded Turkey from its future enlargement plans on ambiguous grounds such as religious but probably more important – the human rights situation. However, in the aftermath of the September 11 the EU leaders rather surprisingly welcomed the 12-year old bid to be accepted as a candidate country. Turkey have done major improvements and responded to the EU criticism. The Cyprus issue on the other hand, remain. With European politicians like French president Sarkozy, that openly said that he would stop a Turkey accession if he wins the presidency, which he did, it is hard to see any progress in this issue. The reasons for a resistant approach may vary and even be a wave of islamophobia. The public arguments concern on the other hand often the human rights situation and possible violations.¹⁷⁶

All agreements regarding bilateral co-operation should respect fundamental rights, read above. These conditions are not just lip service; there are examples of trade negotiations that collapsed just because of these requirements.¹⁷⁷ In the political dialogue, often going hand in hand with the agreements, the EU states the importance of these rights.¹⁷⁸

The European Union aims to act together before the institutions of the United Nations. The ‘European Union at the United Nation’ co-operation, by e.g. the EU Council Secretariat in New York and Geneva, makes EU a strong party in the UN. The Member States, the Council and the Commission meet to coordinate their position. The 27 Member States have more than one-eighth of all votes in the UNGA and together with the candidate states the EU account for one-third of the UNSC current members. The Member State holding the presidency of the EU Council usually represents the Union, because only states can be members of the

¹⁷⁴ Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA).

¹⁷⁵ See more at the Commission homepage regarding enlargement - http://ec.europa.eu/enlargement/enlargement_process/accesion_process/criteria/index_en.htm

¹⁷⁶ Tekin, *Future of Turkey – EU relations: a civilisational discourse*, pp. 288-289.

¹⁷⁷ Read more about the negotiations with Australia and New Zealand etc. in Fierro, *supra* footnote 140, p. 287-302.

¹⁷⁸ Eeckhout, *supra* footnote 66, p. 474.

UN. In the UNSC the permanent members besides the elected states represent the EU.¹⁷⁹

Human rights violations are a topic of CFSP common positions and joint action and the CFSP use visa bans and freezing of funds or assets to enforce its position.¹⁸⁰ The EC links autonomous trade measures to human rights protection, see below. Furthermore, the human rights are crucial in relations with third countries. In EIDHR human rights projects makes a substantial part of the financial support. Its importance was recognised in a Commission communication¹⁸¹ regarding these issues. The creation of FRA is another example.

4.5 European Union Agency for Fundamental Rights

With the founding of the Fundamental Rights Agency or, more exactly, the reform of the EUMC, the Union want to increase the effectiveness of the work with fundamental rights. Its objective is to collect data, give advises and the co-operation and awareness-raising. This section aims to examine how these tasks affect the external relations.

4.5.1 Effects of the FRA

There have been voices raised that the external effects of an Agency of Fundamental Rights should be limited. *“Although it must be underlined that the EU’s internal and external human rights policies must be co-ordinated and consistent, if they are to be effective and credible, this does not necessarily mean that data collection, analyses and advice in both areas should take place in the same institutions.”*¹⁸² Not everybody agree. *“These views, however, are difficult to reconcile with the paramount importance of respect for the fundamental rights laid down in the EU Charter for all EU policies, including its external policies.”*¹⁸³

Following the latter reasoning, an Agency, having the task to analyse the Union actions in all its policies for its compatibility with the CFR will play an indirect role when these analyses will encompass also the external actions. Reading Article 4(1)(a) of the Regulation 168/2007 establishing the FRA, makes it clear that the task of relating to data also include the data of third countries. How this information will be used, and the importance of it

¹⁷⁹ www.europa-eu-un.org

¹⁸⁰ Eeckhout, *supra* footnote 66, p. 474.

¹⁸¹ The European Union’s role in promoting human rights and democrization in third countries, COM(2001)252 final.

¹⁸² Swiebel, *Working Documents on the proposal for a Council Regulation on the European Monitoring Centre on Racism and Xenophobia*, 25 March 2004. Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, 2004.

¹⁸³ Bulterman, *The Contribution of the Agency to the External Policies of the European Union*, in Alston and De Schutter, *Monitoring Fundamental Rights in the EU*, 2005, p. 272.

remains to observe. It seems reasonable that the importance of the data will be bigger in relation to candidate countries than other third countries. In the external agreements in general the political dialogue is more important for a progressive external human rights policy than the enforcement of the rights in the CFR, and the information and analyses may be of more significance in that aspect than in the strict legal one.¹⁸⁴ It is, on the other hand, possible that the FRA, with a less legal approach than the European Courts, will be in a better position to clarify the role of the Charter in the external relations.

4.5.2 FRA and Foreign Policy Objective

The Commission introduced in its Public Consultation Document an important restriction regarding the geographical scope of the Agency.¹⁸⁵ The geographical scope, at least in fulfilling the task to relate to data covers third countries. The Commission argue that such wide scope will undermine the internal work of fundamental rights. This is not convincing in all aspects. First, it is hard to see how and why a scope extended to third countries would undermine the work with fundamental rights within the Union. Moreover, the information about the situation of human rights in third countries affects decisions taken in internal matters, such as decisions within the area of freedom, security and justice. Lastly, the Commission claimed that the “*respect for human rights in the Union’s foreign policy was already taken into account in the context of cooperation with third countries.*” Seen in the light of previous description concerning the fundamental rights in the EU, it is difficult to see the importance of the FRA in any area monitoring the fundamental rights. It is, obviously not, solely in the external relations that these rights are taken into account.

In Commission Communication, the Commission further argued the lack of need for reports regarding the situation of human rights in third countries by a Union agency. According to the Commission reports and other instruments from e.g. the UN is enough.¹⁸⁶ Once again, Bulterman disagree with the Commission. She find the arguments weak and sees a point in having an independent agent that draw up different reports etc. that is not an actor on the field. Bulterman continues with describe the possible effects that the agency may have on the consistency in the external human rights policy between the Member States and the Union. The gathering and analysing of information about the fundamental rights situation in their respective external relations would help upholding a consistent EU human rights policy in relations with third countries.¹⁸⁷

As writing this, with such recent establishment of the Agency, the answers is not yet fully given, and from an outside perspective, it is complex to

¹⁸⁴ Read more about that aspect in Chapter 5 - The Human Rights Clauses.

¹⁸⁵ Communication from the Commission, *The Fundamental Rights Agency – Public Consultation Document*, SEC(2004)1281/COM(2004)693 Final, p. 8.

¹⁸⁶ Commission Communication, *The European Union’s Role in Promoting Human Rights and Democratisation in Third Countries*, COM(2001)252 Final.

¹⁸⁷ Bulterman, *supra* footnote 182, pp. 274-275.

determine the importance of the arguments brought by the Commission. It is, however, clear that the contemporary Agency not has such limited scope as proposed by the Commission. The mandate given lies more in the line of Bulterman in that sense. The role of the FRA shall, on the other hand not be overestimated. When it comes to give important decisions and develop policies, the responsibility returns to the European Institutions, but with the new solution using information and advises from the Agency.

4.6 The Autonomous Trade Measures

Another aspect of the external human rights policy that cannot be left outside this thesis is the autonomous trade measures. The autonomous EC measures may be an efficient tool for improving human rights in third countries. The internal market of the EU is big enough so that most of the third countries cannot afford not having access to it. Using the trade as a carrot for reaching a better standard in protecting the human rights is probably the most efficient tool in the hand of the European Union. This tool is, however, limited largely by the WTO law and the principle of the MFN. This equality principle accepts mainly two exemptions, regional co-operation, usually in the form of a free-trade area alternatively custom unions, or in the relationship with developing countries. The autonomous trade measure is, however, used in certain relationships with third countries and in particular regarding slavery and child labour. The legality of these measures in relation to WTO law is unclear but left outside the scope of this thesis. Nevertheless, to defend the measures in fighting such severe violations of the human rights it may be worth mentioning the possibility that these measures may be justified in accordance with WTO law because these rights are considered as *jus cogens*, a fundamental principle of international law considered to have acceptance among the international community of states as a whole.¹⁸⁸

4.7 The Future of the Policy

The respect for human rights as a foreign policy has to be distinguished from the constitutional rights given to citizens. The external human rights policy is a political standpoint that binds the contracting states or international organisations. The CFR will be applicable towards all EU policies, so also the external relations. The possibilities for the ECJ to supervise the external policies will, however, still be limited. This principle was established already in the draft Constitution in Article III-376 stating that the ECJ shall not have jurisdiction with respect to the provisions concerning the CFSP. Exceptions are thus accepted with respect to sanctions against natural and legal persons, which can be challenged before the Court in an action for annulment.¹⁸⁹

¹⁸⁸ Eeckhout, *supra* footnote 66, pp.481-483.

¹⁸⁹ *Ibid* p. 269.

A more apparent change in the Union is the elimination of the current pillar structure. The absorption of the Community into the Union will affect also the external relations.¹⁹⁰ Article III-292(1) in the draft Constitution and Article 10a in the Reform Treaty proposition establishes that the Union's action on the international scene shall be guided by the principles that have inspired its own creation, such as the universality and indivisibility of human rights and fundamental freedoms.¹⁹¹

Paragraph 2 of the Article establishes that:

“The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: [...] (b) consolidate and support democracy, the rule of law, human rights and the principles of international law.”

The difference between this Article in comparison with Article 11 TEU is that in the reformed Union the human rights applies to all EU policy areas, not merely to its CFSP. The lack of expressly mentioning the human rights in areas such as the developing, economic, financial and technical co-operations does not mean that the human rights will not be respected in these policies. The established principle in *Portugal v. Council*¹⁹² on the relevance of human rights in the developing policy is upheld.¹⁹³

¹⁹⁰ See further in Cremona, *The Draft Constitutional Treaty – External Relations and External Action*, 2003.

¹⁹¹ *Supra* footnote 58.

¹⁹² Case C-268/94 *supra* footnote 110.

¹⁹³ Bulterman, *supra* footnote 182 p. 270.

5 The Human Rights Clauses

One of the important principles in the EU's external human rights policy is the existence of universal provisions. The principle gives that the external human rights policy does not necessarily aim to promote new human rights obligations for third countries according to European standards, but to promote the respect for their existing human rights obligation under international law. The existing human rights obligations, different for each country, are based on UDHR, ICCPR and ICSCR etc. and regional instruments, such as ECHR. The Article 6(2), and similar, discussed above play in that sense a minor role when practically promote human rights in third countries.¹⁹⁴ Since 1995 the inclusion of a human rights clause in the Community's co-operation agreement, which it has concluded with most third countries, is a non-negotiable part in the mandate of the Commission. However, there are no EU guidelines giving instructions how the clauses should be interpreted. Most agreements also contain an institutional framework for political dialogue, that plays an important role for the rights at stake.¹⁹⁵

This section would fit well as a sub-section under the previous chapter about the external human rights policy, as the clauses are part of that policy. It is, on the other hand, such an important and specific part in that policy, so that the human rights clauses deserve a section for themselves.

5.1 Origin

In the aftermath of Lomé I Convention, the discussions were raised for express reference to respect human rights in the agreements. The Convention at hand did not permitted suspension in accordance with the *pacta sunt servanda* principle, even if several of the parties, in particular Uganda and the Central African Empire, obviously committed crimes towards the human rights. The discussions did not, however, lead to the insertion of human rights clauses in the after coming Lomé II Convention, nor the Lomé III. The negotiation power by the EEC was thus weak, affected by the politics in South Africa at the time.

Later in the 1970s, when the first directly elected EP started to play an increasing role, it expressed in regulations that human rights was universal and should be respected in relations with third countries.¹⁹⁶ The EP invited

¹⁹⁴ Brandtner and Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 1998, p. 475.

¹⁹⁵ See e.g. *The 2006 EU Annual Report on Human Rights*, pp. 20-22 in particular and Communication from the Commission to the Council and the European Parliament, *The European Union and the External Dimension: From Rome to Maastricht and beyond*, COM(95)567 Final.

¹⁹⁶ Fierro, footnote 140 above pp. 42-63.

the Commission to draw up a proposal how to include some kind of human rights clause when exercising external relations.¹⁹⁷

When negotiating the Lomé IV Convention, with pressure from the EP, the Commission included a human rights clause.¹⁹⁸ Even if the clause was weak in some aspects, the clause none the less created a precedent. The development continued when the collapse of the Soviet Union changed the political scene in Europe. In assisting the new countries, the Commission attached great importance in democracy and human rights. In 1991 the Community also suspended the co-operation with Yugoslavia. This suspension was based, not only on the break-up of the country but also the unwillingness to cease-fire and to respect human rights. The suspension was criticised and later challenged before the Court of Justice in *Racke*.¹⁹⁹ This development made the different Institutions realise the need of human rights clauses in the external co-operation agreements. From 1991 the Community include a human rights clause in all its agreements, following the approach taken by the Council in its resolution the same year.²⁰⁰

The Community later, in the Framework Agreement for trade and economic co-operation with Argentina,²⁰¹ managed to include a so-called ‘basis clause’. The same clause could later also be found in the agreements with Chile, Uruguay and Paraguay. The relevance to include such clause is to be capable to terminate or suspend an agreement in case of human rights violations, in accordance with Article 60(3) VCLT establishing that: “1. 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. [...]

3. A material breach of a treaty, for the purposes of this article, consists in: [...] (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.” Even with the inclusion of a ‘basis clause’, as ambiguous as the one in these particular agreements, it is doubtful that this Article would justify a suspension or termination of agreements.²⁰²

With the criticised and forensic examined suspension of the agreement with Yugoslavia, the Community realised the importance of a legal ground for suspending or terminating agreements when the counter party committed human rights breaches. Consequently, the Community transformed the ambiguous ‘basis clause’ to a stronger ‘essential element clause’, which was used in the agreements with the Baltic States.²⁰³ The use of the term ‘essential’ refers specifically to the wording in the VCLT.

¹⁹⁷ [1983] OJ C161/58.

¹⁹⁸ Lomé IV Convention – [1991] OJ L229/3.

¹⁹⁹ Case C-162/96 *supra* footnote 153.

²⁰⁰ Resolution of the Council *supra* footnote 142.

²⁰¹ [1990] OJ L295/67.

²⁰² Eeckhout, *supra* footnote 66.

²⁰³ E.g. in the Agreement on Trade and Commercial and Economical Cooperation with Estonia [1992] OJ L403/2.

This clause was followed by a ‘non-compliance clause’. After using a far too inflexible clause, the Community, in the agreement with Bulgaria, found a better model for the ‘non-compliance clause’.²⁰⁴ These developments led gradually towards the current “standard” of human rights clauses, as influenced by Commission Communication.

5.2 The Content of the Human Rights Clauses

The following shall be included in all new drafts negotiating directives for Community agreements with third countries, given by the Commission Communication:²⁰⁵

- (a) In the preamble:
 - General references to human rights and democratic values;
 - References to universal and regional instruments common to both parties;

- (b) In the body of the agreement:
 - Insertion of an Article (X), defining the essential elements:

"Respect for the democratic principles and fundamental human rights established by [the Universal Declaration of Human Rights]/[the Helsinki Final Act and the Charter of Paris for a New Europe] inspires the domestic and external policies of the Community and of [the country or group of countries concerned] and constitutes an essential element of this agreement."

- Insertion of an Article (Y) on non-execution:

"If either Party considers that the other Party has failed to fulfil 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 the subject of consultations within the Association Council if the other Party so requests."

- Insertion of an Article on interpretation:

²⁰⁴ Article 118(2) of the Europe Agreement with Bulgaria [1994] OJ L358/3.

²⁰⁵ Commission Communication COM(95)216 of 23 May 1995 on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries.

"(a) The Parties agree, for the purpose of the correct interpretation and practical application of this Agreement, that the term "cases of special urgency" in Article Y means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in:

- (i) repudiation of the Agreement not sanctioned by the general rules of international law; or*
- (ii) violation of essential elements of the Agreement, namely its Article X.*

(b) The parties agree that the "appropriate measures" referred to in Article Y are measures taken in accordance with international law. If a party takes a measure in a case of special urgency as provided for under Article Y, the other party may avail itself of the procedure relating to settlement of disputes."

With this communication, the Commission merely recognized the political commitment made and the status quo of the human rights clause. It did not, however, contained any progressive steps forward. Another aspect is the political nature of the clauses. They are legally binding but their highly political character is demonstrated by the documents mandating the clauses, which are of political, soft law nature.²⁰⁶

5.3 The Legal Basis of the Clauses

5.3.1 Development Co-operation Agreements – the *Portugal v. Council* case

The observant reader has, at this stage of reading this thesis, a good basic knowledge of the *Portugal v. Council* case.²⁰⁷ In this section, we have the possibility to scrutinise the reasoning of the ECJ further. The legality of the human rights clauses is clear, but it is worth looking at the legal basis of such reasoning.

The legality arose from the current Article 177(2) EC Treaty, which gives the Community policy the objective to respect human rights etc. The Portuguese government never contested the legality of including human rights in the agreements, but the ranking of human rights as an ‘essential element’ went beyond the scope of Article 177(2) EC Treaty in their point of view. The inclusion of human rights as an ‘essential element’ would need recourse to Article 308 EC Treaty, which would mean a different procedure.

As stated above, the Court rejected the pleading because Article 308 demonstrates the importance of respect for human rights. The Court found reasons for confirming legality under Article 177(2). The principles seem to

²⁰⁶ Fierro, *Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?*, 2001, p. 43.

²⁰⁷ Case C-268/94 *supra* footnote 110.

be that one have to find the dominant and the subordinate objectives, secondly, the suspension mechanism and thirdly, the fact that the paragraph is not a specific field of co-operation.²⁰⁸ The question remains whether these principles are applicable to other agreements.

5.3.2 Association Agreements

Regarding association agreements Article 310 EC Treaty state that: “*The Community may conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.*”

Obvious to the reader are the lack of clear references to human rights and the principle of democracy etc. Notwithstanding, there are examples of agreements with an explicit human rights clauses, such as the ACP agreement, solely concluded with Article 310 EC Treaty as basis. Are the human rights clauses legitimate when concluded solely on Article 310 EC Treaty? To answer the question one has to consider the external human rights policy as described in previous sections in general and Article 6 TEU in particular. A further argument to support legitimacy is in agreements where the parties already are parts of a development co-operation. Often the association agreements also contain development provisions or provisions in the boundaries between clear association provisions and them affected by development concerns. One reason is the difficulties to find a clear definition of the development policy and to what countries that policy would be applicable, another is the clear political dimension of these aspects.²⁰⁹

Considering these arguments, one can establish that whenever an association agreement contains provisions regarding development co-operation and uses Article 177(2) EC Treaty, even if not clearly referred to, the human rights clauses are legally justified. They are also justified when a party is associated so that it participates, to a certain extent, in the Community system and through this participation becomes affected by the objectives in Article 6(2) TEU.²¹⁰

5.3.3 Trade and Co-operation Agreements

Regarding the agreements at hand, the question is whether Article 133 EC Treaty is a sufficient legal basis for human rights clauses. These agreements are, somewhat, more complex. If the clauses were to be considered as of subsidiary nature, as in *Opinion 1/78*,²¹¹ they certainly would fall within the scope of the Article. The problem regarding the legal basis appears if one considers the human rights clauses as bearing an important function in the agreements. Fierro argue in such direction when she addresses that:

²⁰⁸ Paras 26-28 of the judgement.

²⁰⁹ Fierro, *supra* footnote 206, pp. 46-48.

²¹⁰ *Ibid.*

²¹¹ *Opinion 1/78 supra* footnote 72.

*“human rights clauses are more than suspension mechanism provisions, as they fit well within the context of trade relations between the parties. A justification of the clauses may take the point of departure of the Rubber Opinion [Opinion 1/78] – clauses are justified when they are of ancillary nature – but may also go a step further: there is a point of convergence between the objectives pursued by a trade and cooperation agreement, as a whole, and the objectives of the clause – provided that its main aim is contribution to promotion of human rights and democratic principles.”*²¹²

There seem to be two aspects of arguments supporting a legal basis for human rights clauses in trade and co-operation agreements. We have the negative argument. The reasoning here is that if Article 133 EC Treaty does not speak about human rights, nothing prevents human rights conditions from being included. According to this standing, *Opinion 1/78*²¹³ supports this argument when stating that the subjects covered by the CCP is conceived as a non-exhaustive enumeration, which must not, close the door to the application of in a Community context of other process intended to regulate external trade, such as the human rights clauses.²¹⁴

Secondly, we have the positive argument. In *Commission v. Council*²¹⁵ the Court recognised the link between trade and development has become progressively stronger in modern international relations,²¹⁶ and seen in the light of *Portugal v. Council*²¹⁷ this link would justify human rights clauses in trade and co-operation agreements. The practical examples of trade and co-operation agreements not containing development clauses and concluded solely under Article 133 are close to non-existent and need therefore no further explanation. One reason for this is that, as discussed above, Article 133 EC Treaty gives the Community exclusive competence and the Member States has been somewhat reluctant to such agreements.²¹⁸

5.4 Application

It is somewhat difficult to measure the effectiveness of a human rights clause by the rate of formal consultation and suspension. It is intended to be respected and as part of a more political dialogue. The effectiveness is connected more to the good relationship with the third country and the economical and political significance of that relationship. There are many human rights violations in the countries of which the EU have relationships, so also within the EU, and not all these are “solved” or put under pressure by a human rights clause. However, there has been violations pointed out for the purpose of the human rights clause in relation to Comoro Islands, Ivory Coast, Togo and Guinea Bissau, but on the other hand, not in relation

²¹² Fierro, *supra* footnote 206, p. 48.

²¹³ *Opinion 1/78 supra* footnote 72.

²¹⁴ Para 45 of the opinion.

²¹⁵ Case C-45/86 *supra* footnote 73.

²¹⁶ Para 17 of the judgement.

²¹⁷ Case C-268/94 *supra* footnote 110.

²¹⁸ For a more detailed analysis see e.g. Fierro, *supra* footnote 206, pp. 50-54.

to Israel or Russia.²¹⁹ This may seem arbitrariness, but one reason for this is financial aid to certain countries. In the situations where the EU is involved in development co-operation it sets more pressure on the EU to avoid financial support which in the next step end up support violations of the human rights.²²⁰

To examine the scope of the human rights clauses, and its possible application, one has to consider two questions regarding the human rights clauses and its central instrument – the suspension mechanism. Is the construction of the suspension mechanism aiming solely to give the Community the power to suspend agreements? Alternatively, is the suspension mechanism an instrument to reach the more central aim of human rights clauses, to promote human rights and democracy? The lack of wide-ranging case law makes us once again look at the central cases of *Opinion 2/94*²²¹ and *Portugal v. Council*²²² and the clauses in the light of these judgements by the ECJ.

5.4.1 Application in *Opinion 2/94*

As stated above the *Opinion 2/94* established that no Treaty provision confers upon the Community any general power to enact rules on human rights. Several arguments can be raised in order to distinguish the situation in adopting the ECHR and include human rights clauses in external agreements and let them play the role of promoting human rights. The fact that the focus of the contemporary clauses tends to be more towards the UDHR can be taken as evidence that the Community is not trying to enact rules, but to promote the universal ones. Further, it can be argued that the lack of general power to enact rules on human rights, does not exclude enacting specific rules based on certain Articles of the EC Treaty. Moreover, the post-Amsterdam situation, in these fields of law, look different then the situation before the Court in 1994. This is some of the circumstances that differ the case before the Court in 1994 from the human rights clauses.²²³

5.4.2 Application in *Portugal v. Council*

To quickly repeat the principle of the *Portugal v. Council* case, the Court established that the human rights clause was acceptable and the fact that it was inserted under the section ‘Basis and Objectives’ proved that the human rights field was not a special field of co-operation in that agreement. Does that exclude any positive interpretation of the human rights clause?

Fierro argues that the Courts judgement in the case at hand, may have ended up differently if the Court looked into the agreement as a whole. She argues

²¹⁹ Fierro, *supra* footnote 140.

²²⁰ Eeckhout, *supra* footnote 66, p. 480.

²²¹ *Opinion 2/94 supra* footnote 27.

²²² C-268/94 *supra* footnote 110.

²²³ For more arguments and reasoning see Fierro, *supra* footnote 206, pp. 55-57.

that the human rights may not be made a specific field of co-operation explicitly but implicitly. Even if, as the Court rightly states in its judgement, there is no significant section about human rights co-operation, there are several provisions in the agreement with human rights connection. Whether, this observation is true or not does not really matter, the judgement did not preclude, at any stage, that other agreements could contain human rights as a specific field of co-operation.²²⁴

Two agreements support this view. The first example is the co-operation agreement with Mexico, where the human rights are made a specific field of that co-operation, based on the human rights clause. Article 39 in that agreement, named 'Co-operation on Human Rights and Democracy' refer to the principles set out in the human rights clause of the agreement. Other provisions in the human rights' field are Articles 36 and 38.²²⁵ The second example is the Partnership and Co-operation Agreement with Georgia. In this agreement there is a special title dedicated to co-operation in the field of human rights – Title VII – co-operation on matters relating to democracy and human rights by means of technical assistance.²²⁶

Fierro continue the reasoning by argue that an effective human rights policy needs an interpretation giving the provisions positive power. She sums it up as follows:

“if the rights are meant to be effective, and not symbolic or illusory, the notion of ‘respect’ entails positive duties from the Community. And that at present, as Barbara Brandtner and Allan Rosas have put it ‘the human rights clause is a child of the 1990s’. [Barbara Brandtner and Allan Rosas, Trade Preferences and Human Rights in The EU and Human Rights, Aliston (ed.), p. 702.] At the infant level, the Community way of achieving a measure is through institutional non-action. Soon, however, the conclusion is reached that in order to guarantee this measure effectively, positive duties are needed. The notion of respect of human rights is to develop, in its adulthood, into a notion needing true cooperation.”²²⁷

The *Portugal v. Council* case did recognise the human rights clause as a suspension clause.²²⁸ The main legal implication, in Rosas view, is to spell out the right of suspension in case of violation of such fundamental human rights.²²⁹ However, if one analyse the paragraph 27 it becomes apparent that

²²⁴ Ibid p. 58.

²²⁵ Council decision of 28 September 2000 concerning the conclusion of the 'Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States of the other part', OJ L276/44.

²²⁶ Council and Commission Decision of 31 May 1999 on the conclusion of the Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part OJ L 205, 4.8.1999.

²²⁷ Fierro, *supra* footnote 206, p. 62.

²²⁸ Para 27 of the judgement.

²²⁹ Rosas, *Mixed Union – Mixed Agreements* in Koskeniemi (ed.) *International Law Aspects of the European Union*.

the door is open for other interpretations. According to the Court in this case the human rights clause: “*may be, amongst other things, an important factor for the exercise of the right to have a development cooperation agreement suspended or terminated where the non-member country has violated human rights.*”²³⁰

It is somewhat ambiguous exactly what *among other things* means in this context? Reading this passage strictly the suspension mechanism may not even be the main aim, but *an important factor*. However, looking realistically at the human rights clause the real limitation is hardly the approach taken by the Court in these verdicts, but rather the political challenges in negotiating with third countries. The Community “assume”, often against better knowledge, that the democratically principles and human rights are respected. The diplomatic situation does not offer any possibility to enter the negotiations with another approach. These issues are further discussed below.

²³⁰ Para 27 of the judgement.

6 Economic Sanctions

There are numbers of interesting aspects of the external relations of the EU, as seen above in the section dedicated solely to this topic. When moving within this field of law, one realise that the topic is dominated by the WTO law and its applicability, or rather lack of applicability, in the Community legal order. These cases do rarely concern fundamental rights in a direct way. However, in the interface between the CCP and Trade and Foreign Policy - the economic sanctions, the fundamental rights play a central role. The economic sanctions or embargos can be used in order to enforce rights in Member States and third countries. This topic is a rather political one, but the legal aspects of them are examined briefly in this section. However, the legal status of the UN Security Council resolutions are certainly more legal in its nature. The last years have offered some controversial cases in this sphere.

6.1 The Development of a Co-operation

Before the 1980s, the Member States owned the powers to proclaim economic sanctions under the so-called Rhodesia doctrine based on Article 297 EC Treaty.

“Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the common market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations it has accepted for the purpose of maintaining peace and international security.”

The Rhodesia doctrine provides that Member States are free to implement economic sanctions, if serving political aims against third countries under national rules, based on Article 297. The economic sanctions lied without the scope of the CCP. Then, in the 1980s, the adoption of economic sanctions developed within the European Political Co-operation, predecessor to the CFSP. In this co-operation, it became possible to sanctions on the basis of Article 133 EC Treaty. The first time practised it was against the Soviet Union,²³¹ and later the same year against Argentina.²³² Article 133 as legal base when adapting economic sanctions became with these actions the established practise. The procedure has proven to be smooth and the sanctions are directly applicable and supreme over national law.²³³ The practise was codified and forms today Article 301

²³¹ Council Regulation (EEC) No 596/82 of 15 March 1982 amending the import arrangements for certain products originating in the USSR [1982] OJ L72/15.

²³² Council Regulation (EEC) No 877/82 of 16 April 1982 suspending imports of all products originating in Argentina [1982] OJ L102/1.

²³³ Eeckhout, *supra* footnote 66 p. 424.

EC Treaty. This provision was supplemented by Article 60 EC Treaty regarding exemptions to free movement of capital and payment defining a procedure when taking such measures and dividing the competence between the EU and the MS's.

Today, most of the EU sanctions are implemented UN Security Council resolutions as part of the 'political' decisions under the CFSP. Scope for independent action is left to the Member States. These provisions establish a co-operation procedure amongst the MS's and with the Commission.²³⁴

6.1.1 Richardt Case

In *Richardt case*²³⁵ the Court balanced the activity in the scope or the CFSP, or rather the national security justifications, with the right to property. The case dealt with a confiscation of goods capable of being used for strategic purposes, which was justified by the confiscating MS on external security grounds. The State, Luxembourg, in the *Richardt* case invoked public security concerns. These would give the decision-makers broad discretionary powers, for which they bear political responsibility to which the Court would be respectful. Following this, an automatic penalty of confiscation was deemed by the Court as disproportionate, because such a measure interfered the legally recognised interests when less restrictive measure could have sufficed to achieve the same aim. The interest at stake was the individual's right to property. The Court said that in the compliance with the principle of proportionality, account should be taken of the circumstances in which the breach of the public security aim proposed occurred, and whether or not the applicant was acting in good or bad faith.²³⁶ As seen in the coming examination of the *Bosphorus* case, this line of reasoning is not upheld in a strict way, even if it is possible to claim, and true, that every case needs its own deliberation.²³⁷

6.1.2 Application Against Iraq and Libya

Immediately after the Iraqi invasion of Kuwait in 1990 the UNSC adopted resolutions that the Community implemented almost entirely, imposing a complete embargo on payments and trade with Iraq.²³⁸ These measures was later the same year completed and modified with other resolutions and regulations.²³⁹ The sanctions regulation did not bring much that was new at

²³⁴ Ibid. p. 425.

²³⁵ Case C-367/89 *Criminal Proceedings against Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621.

²³⁶ Para 25 of the judgement.

²³⁷ Canor, "Can Two Walk Together, Except they be Agreed?" *The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions against Yugoslavia into European Community Law through the Perspective of the European Court of Justice*, 1998, p. 178.

²³⁸ Resolutions 660 and 661/1990 and Council Regulation (EEC) No. 2340/90 of 8 August 1990, OJ [1990] L213/1.

²³⁹ Resolution 670 (1990) of 25 September 1990 and Council Regulation No. 3155/90, OJ L304/1.

this time. The scope of these regulations is, however, remarkable, considering the Treaty and the jurisdictional scope. The adoption on the base of current Article 133 is weak. The measures could be considered as ancillary in the lights of *Opinion 1/78*.²⁴⁰ Nevertheless, the Council took two precautions when excluding financial services from the scope of the regulation, because considering the Member States having the competence regarding them, not the Community. The Council also accompanied the adoption of these regulations with a declaration to the effect that they did prejudice the general question of the applicability of current Article 133 to trade in services. The jurisdictional scope is also interesting regarding the sanctions adopted in the 1990th. This is, according to Kuyper, the first application that could give rise to a clash of jurisdiction with third states. Such clash did, however, never occur regarding these regulations.²⁴¹

In 1992, the UNSC decided to adopt a resolution with economic sanctions against Libya.²⁴² Largely the same questions were at stake, that in the sanctions against Iraq some two years earlier. The Community used once again Article 133 as legal basis for the air transport sanctions, which was the most important part of the sanctions. Whether this Article give a sufficient ground at this time was far from obvious at the time of adopting this regulation.²⁴³

6.1.3 Application in the FRY

The economic sanctions and the provisions governing the procedure are open to interpretation by the ECJ. National courts are free to follow the Article 234 EC Treaty procedure and refer questions for a preliminary ruling, etc. This is the situation in several cases brought before the Court of Justice.

In *Bosphorus*,²⁴⁴ discussed in other sections of this thesis, the Court had to interpret an EC sanctions regulation²⁴⁵ implementing a UN Security Council resolution.²⁴⁶ The case is, however, of great importance once again in this thesis, because it was the first case of its kind.²⁴⁷ The aspect of importance in this section is that the Court established that the regulation should be interpreted in the light of its context and aims, which includes the UNSC resolution. Important was the distinction between ownership and control. When interpreting these wordings in the light of the UNSC resolution the

²⁴⁰ *Opinion 1/78*, *supra* footnote 72.

²⁴¹ Kuyper, *Trade Sanctions, Security and Human Rights and Commercial Policy* in Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*, 1993, pp. 394-396.

²⁴² Resolution 743 (1992) and Regulation 945/92 [1992] OJ L101/53.

²⁴³ Kuyper, *supra* footnote 241, p. 398.

²⁴⁴ Case C-84/95, *supra* footnote 42.

²⁴⁵ Council Regulation (EEC) No 990/93 of 26 April 1993 concerning trade between the European Economic Community and the Federal Republic of Yugoslavia (Serbia and Montenegro) [1993] OJ L102/14.

²⁴⁶ Resolution 820 (1993).

²⁴⁷ For a further description of the facts, read in section 4.2 above.

Court reached that, any actual control was not needed.²⁴⁸ The legal status of UNSC resolution was, even if not specifically judged in such terms, rather strong. The Court did, however, weight the measures against the fundamental rights and the principle of proportionality, as discussed in previous section.

In *Ebony Maritime*²⁴⁹ these issues was back on the agenda. This case concerns the same regulation²⁵⁰ as in *Bosphorus*. In 1994, a Maltese tanker Lido II, owned by the Maltese Loten Navigation Company left Tunisia for Rijeka, Croatia with cargo owned by the Liberian company Ebony Maritime. The tank was starting to take in water in the engine room and after sending out distress signals, the captain set course towards the nearest land, which was the Montenegro coast. Still on international water, the tank was arrested and the cargo confiscated because of breach of trade embargo with FRY. The companies brought proceeding before the competent Italian court.

Firstly, the Court had to establish whether the regulation was applicable. When reading the relevant provisions in the regulation the Court reached that it was applicable and that the tank had committed a potentially breach of the regulation. Measures adopted under the UNSC are binding on all UN member states (which also are all EU members) and in the event of a conflict between the UN Charter and other international agreements, the Charter prevails (Article 103 UNC).²⁵¹

Secondly, the Court dealt with the fact that the tank been arrested in international water. The Court here adopted a broad interpretation of the regulation in order to reach effectiveness of the sanctions.²⁵²

Thirdly, the Court had to answer on the question whether the Italian authorities were entitled to confiscate the cargo of the vessel. The applicant claimed *nulla poena sine culpa* (no penalising without inaccuracy). These arguments were turned down by the Court, which referred to the obligation to take measures to ensure the effectiveness of Community law. The ECJ left to the national court to determine whether the penalty of confiscation was dissuasive, effective and proportionate. When judging in the national court, it should consider the objectives of the resolution and the serious breach against human rights in the war-region.²⁵³ The Court stressed the effectiveness of the sanctions. One can criticise the Court for not pointing out the companies rights to their property, but we will return to such issues later.

²⁴⁸ In particular paras 11-18.

²⁴⁹ Case C-177/95 *Ebony Maritime and Loten Navigation v. Prefetto della Provincia di Brindisi and Others* [1997] ECR I-1111.

²⁵⁰ Regulation No 990/93.

²⁵¹ Paras 15-21 of the judgement.

²⁵² Paras 22-27 of the judgement.

²⁵³ Paras 28-39 of the judgement.

The same year came a third case regarding the sanctions imposed on the FRY, the case of *Centro-Com*.²⁵⁴ The case concerned payment for authorised exports of medical products. The case at hand did not, however, deal with the same regulation, giving effect to another resolution.²⁵⁵ *Centro-Com*, an Italian company, exported medical equipment to Montenegro after having the approval of the Sanctions Committee and the Italian authorities, as required by the regulation. To explain the facts shortly, the equipment was paid through a special procedure according to UK policy on release of funds. The question of interest is whether this procedure was compatible with the CCP, as implemented by the sanction regulation. The Court started with accepting MS's competence in the field of foreign and security policy, but emphasised that this competence had to be consistent with Community law. The second issue concerned the scope of the CCP. Since the export of the medical equipment had already taken place, the refusal to release the payment could be an action in reaching the objectives of the export ban. The Court further addressed the general question of justification. Amongst others, the Court of Justice found that there was less restrictive means possible. The UK policy was consequently contrary to the combined provisions of the sanctions regulation and of the export regulation.²⁵⁶

The consequences of the judgement are an extensive approach to external trade and the CCP. This approach affects the national sovereignty. When the Community have adopted a regulation, the Member States loses their competence outside this framework in the foreign and security policy, which they otherwise exercise in accordance with international law and in front of the UN.²⁵⁷

Lastly, to conclude this segment, the reader is helped by a structured summary. The regulations need to be uniformly interpreted and applied (*Bosphorus*); they need to be effective (*Bosphorus* and *Ebony Maritime*); MS sanctions need to be effective, proportionate and dissuasive (*Ebony Maritime*); and the MS cannot freely decide how to enhance their effectiveness by imposing further requirement which do not conform to the regulations themselves (*Centro Com*).²⁵⁸

6.1.4 The Protection of Fundamental Rights in the FRY Cases

As this thesis aims to examine the protection of the fundamental rights, that reasoning in the FRA cases deserve an own sub-chapter. In this sense the Court's judgement in *Bosphorus* case in general and the opinion of AG

²⁵⁴ Case C-124/95 *supra* footnote 154.

²⁵⁵ Council Regulation 1432/92 prohibiting trade between the European Economic Community and the Republics of Serbia and Montenegro [1992] OJ L151/4 and UN Security Council Resolution 757 (1992).

²⁵⁶ Paras 44-53 of the judgement.

²⁵⁷ Eeckhout, *supra* footnote 66, p. 435.

²⁵⁸ *Ibid.*

Jacobs²⁵⁹ in particular are of significant interest, and the focus here will therefore be upon that case. *Ebony Maritime* and *Centro-Com* will be briefly examined after the *Bosphorus* case.

6.1.4.1 Bosphorus

Economic sanctions, aiming to enforce changes, such as stop violence or human rights breaches etc. do not simply affect countries or regimes. As seen in the cases in this section, they haunt individual persons and companies. The consequences, that often are severe, are usually of kinds so that someone's fundamental rights have been violated. In the cases where the economic sanctions have origin in an UNSC resolution the only remedy for the individual to seek legal review is that in the Community legal order.

In *Bosphorus* the company argued that they had been offer to several fundamental rights violations, such as the principle of legal certainty, proportionality, the right to peaceful enjoyment of property, protected under the ECHR and the right to pursue commercial activity. AG Jacobs carefully analysed the case law of the ECtHR and found that the rights claimed by Bosphorus was rights protected under the ECHR.²⁶⁰ Jacobs further examines the right to property in the ECJ case law in general and the *Hauer* case²⁶¹ in particular, and its principle to find a reasonable relationship between the measures enforced and the aim pursued by Community law.²⁶² The AG further classified the restriction as severe and an infringement in the company's rights.²⁶³ On the other hand, the aims behind the embargo was particularly strong, indeed it was difficult to think of any stronger type of public interest than that of stopping a civil war as devastating as the one which engulfed the former Yugoslavia and in particular Bosnia-Herzegovina. Bosphorus is not unique in being afflicted by losses and these are inevitable if the sanctions shall have any effect.²⁶⁴

The ECJ was not as detailed in its analysis as Jacobs but it brings the issues up. The Court recognise the fundamental rights, in particular the right to peaceful enjoyment of property and freedom to pursue a commercial activity, and that these rights have been interfered. The Court also brings up the principle of proportionality,²⁶⁵ before it reach the consideration between the interests:

“It is settled case-law that the fundamental rights invoked by Bosphorus Airways are not absolute and their exercise may be subject to restrictions justified by objectives of general interest pursued by the Community [Hauer,²⁶⁶ Wachauf²⁶⁷ and Germany v. Council²⁶⁸].

²⁵⁹ AG Opinion in Case C-84/95.

²⁶⁰ Paras 57-59 of the AG opinion.

²⁶¹ Case 44/79 *supra* footnote 21.

²⁶² Para 61 of the AG opinion.

²⁶³ Para 63 of the AG opinion.

²⁶⁴ Para 64 of the AG opinion.

²⁶⁵ Paras 19 and 20 of the judgement.

²⁶⁶ Case 44/79 *supra* footnote 21.

²⁶⁷ Case 5/88, *supra* footnote 55.

Any measure imposing sanctions has, by definition, consequences which affect the right to property and the freedom to pursue a trade or business, thereby causing harm to persons who are in no way responsible for the situation which led to the adoption of the sanctions.

*Moreover, the importance of the aims pursued by the regulation at issue is such as to justify negative consequences, even of a substantial nature, for some operators.*²⁶⁹ These aims referred to was, as done by Jacobs, to bring peace and an end to the terrible violence in the Balkan region.

Besides the criticism regarding the lack of an obvious causal link, the judgement has been criticised for failing to protect fundamental rights and double too easy in the relationship to the UNSC resolutions. Canor emphasises in her examination of e.g. the *Bosphorus* case the role of fundamental rights in the Community and the external sphere of Community law, roughly as done in this thesis.²⁷⁰ She continues by setting up how the principle of proportionality should be applied according to her:

*“The application of the principle of proportionality often entails an active role for courts in reviewing administrative and legislative measures. It was to be expected, given the important foreign affairs and security issues that were at stake in the Bosphorus case, that the Court would exercise restraint even in view of severe violence of human rights. Still, comparing this Court decision to previous and related cases might demonstrate the difficulty I have in supporting the Court’s conclusion. Admittedly, analogies relating to the proportionality principle should be handled cautiously, since its application does not necessarily entail the implementation of a certain judicial policy but rather signifies a preference closely related to the factual matrix examined. Still, done carefully, such analogies might reveal certain discrepancies in the application of the principle by the Court.”*²⁷¹

Pursuant to Canor, the *Bosphorus* case should have gotten the same outcome as the *Richardt* case,²⁷² concerning confiscation of goods, justified on external security grounds. Reading this case in the light of *Leifer*,²⁷³ recognising the difficulties to draw a clear distinction between foreign policy and security policy, would according to Canor mean that the Court should have found less restrictive means.²⁷⁴ Others mean that such verdict would create a flood of cases before the Court of Justice, undermining the sanction regime.²⁷⁵

²⁶⁸ C-280/93 *Germany v Council* [1994] ECR I-4973.

²⁶⁹ Paras 21-23 of the judgement.

²⁷⁰ Canor, *supra* footnote 237.

²⁷¹ *Ibid* p. 176.

²⁷² Case C-367/89, *supra* footnote 235.

²⁷³ Case C-83/94 *Criminal proceedings against Leifer and others* [1995] ECR I-3231.

²⁷⁴ Canor, *supra* footnote 237, p. 178.

²⁷⁵ Eeckhout, *supra* footnote 66, p. 447.

6.1.4.2 Centro-Com

In the *Centro-Com* case²⁷⁶ the Court further clarified what was established the principle that the Member States must conform with Community law when exercising their competence within the CFSP, established in *Leifer* case²⁷⁷ but also *Werner* case.²⁷⁸ The Court discussed further aspects of the relationship between the Community and the Member States.²⁷⁹

6.1.4.3 Ebony Maritime

The *Ebony Maritime* case²⁸⁰ the Court of Justice was criticised for extending the Community jurisdiction into areas which cannot be covered by Community competence and contrary to customary international law where a vessel of the High Seas is subject only to the jurisdiction of the flag state. The judgement is interesting and controversial because it refers to the objectives of the UNSC resolution in its broadest terms and because the literal interpretation of the resolution is made in order to not restrict the scope of its application.²⁸¹

Koutrakos further holds that the Court's apparently minimalistic approach towards the UN Security Council Resolutions conceals its attempt to achieve maximalistic objectives. He emphasises the Member States on the international scene as fully sovereign subjects of international law and the UNSC resolutions as the expression of the political will of the Member States beyond the Treaty. In the light of this consideration, there is no basis for arguing that the Court's ruling, along with the previous ones dealing with sanctions, further a hidden agenda to transform the Community judicature into the ultimate adjudicator upon the international actions of the Member States, according to Koutrakos.²⁸²

6.2 The War Against Terror

Last years a new wave of sanctions cases aroused in the aftermath of the terrorist attacks on 9/11 2001 and the following war against terror. The UN Security Council have used the economic sanctions frequently against states for years now in order to respond to serious political crisis. Lately, one can see an increasing use of this instrument towards individuals and private organisations in the war against terror. The reason for this is easy to see. In this war the enemy is not clearly connected to a particular state. The terrorism is, so to say, a global organisation. In this reality a variety of measures has been taken, at global, regional and national level to ensure a

²⁷⁶ Case C-124/95, *supra* footnote 154.

²⁷⁷ Case C-83/94, *supra* footnote 273.

²⁷⁸ Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany* [1995] ECR I-3189.

²⁷⁹ For a deeper analysis of this and other aspects in Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law, The Legal Regulation of sanctions, exports of dual-use goods and armaments*, 2001, pp. 142-145.

²⁸⁰ Case C-177/95, *supra* footnote 249.

²⁸¹ Koutrakos, *supra* footnote 279, p. 148.

²⁸² *Ibid*, p. 149.

successful outcome of the war against terror. Needless to say, the military actions against states, as the wars in Afghanistan and Iraq, are examples of this, of immense importance in the world-politics in this decade. One of the measures is the economic sanctions imposed by the UNSC. These aims are mainly to prevent founding of terrorist activities. The means are, among others, to freeze the assets of terrorists and their sponsors.²⁸³

There are two cases that are remarkable in two aspects under this section. The *Yusuf* and the *Kadi* cases. The judgements by the CFI are remarkable in its outcome and consequences and the numbers of commentators is remarkable high, and will probably increase when times goes by, with these rather new cases. This thesis is yet another example of this.

6.2.1 Yusuf and Kadi cases

In these cases, *Yusuf*²⁸⁴ and *Kadi*²⁸⁵ annotated here, the judicial system of the European Communities was confronted with the complexities of a world system of governance established at three levels, the UN and UNSC level, the Community level and lastly the national level, where the relevant measures were to be carried out.²⁸⁶ The reasoning is similar in these two cases. In order to make the reading easy the *Yusuf* case is the one mainly reviewed here. To the extent that the judgement in *Kadi* differ, it will be scrutinised later in this section. So let us begin with the *Yusuf* case.

6.2.1.1 Factual and Legal Background

The UNSC adopted a series of resolutions on the conviction that fighting suppress terrorism is essential for the maintenance of international peace and security.²⁸⁷ These resolutions condemned the fact that Afghan territory was used for the sheltering and training of terrorists and demanded the Taliban to turn Usama bin Laden over to appropriate authorities. It further required all States to freeze the funds and other financial assets of bin Laden and individuals and entities associated with him, prohibit the export of certain goods and services to Afghanistan and strengthen the flight ban. These resolutions was implemented in the EU under the CFSP framework. The Council adopted EC Regulations 337/2000 and 467/2001 and the Commission EC Regulations 2062/2001 and 2199/2001 under the basis of Articles 60 and 301 EC Treaty. After the collapse of the Taliban regime, a new series of UNSC resolutions was adopted.²⁸⁸ Also these became EC law

²⁸³ Read further in the rather extensive material at www.un.org/terrorism/

²⁸⁴ Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2005] ECR II-3533.

²⁸⁵ Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005] ECR II-3649.

²⁸⁶ Tomuschat, *Case T-306/01, Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council and Commission; Case T-315/01, Yassin Abdullah Kadi v. Council and Commission*, 2006, p. 537.

²⁸⁷ Resolutions 1267 (1999) and 1333 (2000).

²⁸⁸ Resolutions 1390 (2002), 1452 (2002) and 1455 (2003).

under the framework of CFSP and the Council adopted EC Regulations 881/2002 and 561/2003, based on Articles 60, 301 and 308 EC Treaty.²⁸⁹

The application was originally seeking annulment of the regulations based on the incompetence of the Council to adopt the regulations at hand, the infringement of Article 249 EC Treaty and the allegation of breach of their fundamental rights, the right to the use of or respect property and the principle of proportionality, the right to a fair hearing and the right to an effective judicial review.²⁹⁰

6.2.1.2 Incompetence of the Council to Adopt Regulation No. 881/2002

Even if the applicant originally argued against the former Regulation No. 467/2001 and that pleading became devoid because that Regulation was replaced by a later, the Court decided to examine the legal grounds for a devoid pleading before moving on to the latter Regulation.

The Court dismissed the argument brought by the applicant on a kind of negative definition of the competence in Articles 60 and 301 EC Treaty. The reasoning by the Court meant that nothing in the wordings of these provisions makes it possible to exclude the adoption of restrictive measures directly affecting individuals or organisations, as the Regulation implementing the UNSC resolutions seeks to do.²⁹¹ The Court continues by arguing that such measures, in general, are necessary and justified, both considering the principle of effectiveness and humanitarian concerns²⁹² and further connect the reasoning justifying these measures in general to the facts in the case at hand.²⁹³ When not finding the measures disproportionate the CFI did not find any reason for denying the Council the competence to adopt the Regulation at stake, based on Article 60 and 301.²⁹⁴

Regulation No. 881/2002 is based also on Article 308 together with Articles 60 and 301. The implemented resolution in the more recent Regulation differs somewhat from the former one. The resolution adopted by the UNSC after the falling of the Taliban regime, was adopted more directly towards Usama bin Laden, Al-Qaeda and the persons and entities associated with them. The lack of connection to any third country made the legal basis of Articles 60 and 301 EC Treaty a weak ground. On the other hand, Article 308 EC Treaty, formulated to fill the gap when there are no Treaty provisions available to reach the aims of the Treaty, did not provide any strong base either.²⁹⁵ To bring the reasoning shortly, the CFI tries to find enough support in the aims and measures stated in Articles 2 and 3 EC

²⁸⁹ Karayigit, *The Yusuf and Kadi Judgments: The Scope of the EC Competences in Respect of Restrictive Measures*, 2006, pp. 380-381.

²⁹⁰ Case T-306/01, *supra* footnote 284, para 78 of the judgement.

²⁹¹ Para 112 of the judgement.

²⁹² Paras 113-116 of the judgement.

²⁹³ Paras 117-121 of the judgement.

²⁹⁴ Paras 122-124 of the judgement.

²⁹⁵ Paras 126-134 of the judgement.

Treaty to apply 308 as a legal basis. However, it did not find such support.²⁹⁶

The Court reaches instead other interpretations leading to this conclusion: *“In such a situation, recourse to the cumulative legal bases of Articles 60 EC, 301 EC and 308 EC makes it possible to attain, in the sphere of economic and financial sanctions, the objective pursued under the CFSP by the Union and its Member States, as it is expressed in a common position or joint action, despite the lack of any express attribution to the Community of powers to impose economic and financial sanctions on individuals or entities with no sufficient connection to a given third country.”*²⁹⁷

6.2.1.3 Infringement of Article 249 EC Treaty

The applicants maintain that, in so far as the contested regulation directly prejudices the rights of individuals and prescribes the imposition of individual sanctions, it has no general application and therefore contravenes Article 249 EC.²⁹⁸ Also this allegation was dismissed by the CFI. The Court finds in the circumstances of the case that the contested regulation unarguably has general application, since it prohibits anyone to make available funds or economic resources to certain persons. The fact that those persons are expressly named in Annex I to the regulation, so that they appear to be directly and individually concerned by it, within the meaning of the fourth paragraph of Article 230 EC, in no way affects the general nature of that prohibition, according to the court. In the light of the established case law and the facts of the case the Court rejected this pleading.²⁹⁹

6.2.1.4 Breach of the Applicants’ Fundamental Rights

The Court deliberated over this issue in three sub-questions. Firstly, the relationship between the UNSC Resolutions and the Community legal order. Secondly, the review of lawfulness in respect to the regulations implementing those resolutions. Thirdly, the breach of the applicants’ fundamental rights.

The first sub-question is, to a large extent, a research regarding the questions discussed in previous parts of this thesis. After doing this examination the Court reached that it must be held first that the Community may neither infringe the obligations imposed on its Member States by the UN Charter, nor impede their performance. The CFI further reached that the Community is bound in the exercise of its powers by the EC Treaty to adopt all the measures necessary to enable its Member States to fulfil those obligations and so to give effect to Security Council resolutions concerned within the sphere of its powers. This follows from the *International Fruit* case³⁰⁰ where ECJ held that the EEC, although not contracting party, was bound by the obligations under the GATT. Additionally, the primacy derives from the

²⁹⁶ Paras 135-157 of the judgement.

²⁹⁷ Para 166 of the judgement.

²⁹⁸ Para 181 of the judgement.

²⁹⁹ Paras 182-189 of the judgement.

³⁰⁰ Cases 21 to 24/72, *supra* footnote 67.

principle of customary international law as consolidated under Article 27 of the VCLT. The more specific rule regarding the UN-EC/EU relationship is Article 103 UNC providing primacy of the UN Charter in the event of a conflict between the obligations under that charter and any other international agreement.³⁰¹

Secondly, the Court had to scrutinise the scope of review of legality regarding the regulations implementing the UNSC resolutions. The question arises whether any structural limits exist, imposed by general international law or by the EC Treaty, on the judicial review under Article 230 regarding the contested regulation, implementing the UNSC resolution. The Court find it relevant to recall that, given that the institutions acted under circumscribed powers without any autonomous discretion any review of internal legality would imply that the Court is to assess, indirectly, the legality of the UNSC resolution. Following reasoning like that, such approach is not desirable; the Court recognised that a limitation of jurisdiction is necessary.³⁰²

The Court further argue that it is up to the UNSC to determine what is threat to international peace and security and the measures required to maintain or re-establish them. In that regard, the Court finds itself incapable to review the legality of the regulations and was hindered thereto by international and Community law.³⁰³ Then the CFI found another way to, indirectly, review the legality, through the concept of *jus cogens*. The reason for this is that such provisions through the first chapter of the UNC 'Purposes and Principles' bind the UNSC itself and the binding effects upon the UN members are dependant of that the UN institutions respect *jus cogens*.³⁰⁴ This gives that the third sub-question is to decide whether the applicants' fundamental rights been violated in the light of *jus cogens*. The Court starts to examine the right to respect property and the principle of proportionality and continue with the right to a fair hearing before lastly, the right to an effective judicial review.

Seen in the light of the cases above, and considering that it probably are harder to recognise a violation of the *jus cogens* principles than the fundamental rights in the FRY cases, it is not surprising that the Court dismissed the applicants' allegation regarding the right to respect property and the principle of proportionality. To form part of this right it has to be an arbitrary deprivation of that right, which is not the situation in the case at hand. Additionally the CFI emphasise the importance of the objectives of the sanctions.³⁰⁵ *"Therefore, freezing the funds of persons and entities*

³⁰¹ Case T-306/01, *supra* footnote 284, paras 242-257 of the judgement. The rule of primacy holds true in respect of agreements made earlier as well as later than the UN Charter in accordance with Article 30 of the VCLT. That primacy extends to decisions contained in a Security Council resolution in accordance with Article 25 of the UN Charter, according to which the Members of the UN agree to accept and carry out the decisions of the UNSC.

³⁰² Paras 260-269 of the judgement.

³⁰³ Paras 270-274 of the judgement.

³⁰⁴ Paras 276-283 of the judgement.

³⁰⁵ Paras 288-302 of the judgement.

suspected of having participated in the financing, planning, preparation or perpetration of terrorist acts cannot be held to constitute an arbitrary, inappropriate or disproportionate interference with the fundamental rights of the persons concerned."³⁰⁶

The next right in order is the right to a fair hearing. The applicant claimed that he should have the right to be heard by the Sanctions Committee before being included in the Resolution. The Court could not find that this right at stake form part of the *jus cogens*. It further recognised the necessity of a surprise effect of the sanctions in order to give them appropriate effect. The CFI also pointed out the possibility in the resolution to a re-examination in order to enable an individual to be removed from the list. Furthermore, in these circumstances, the observance of fundamental rights of concerned persons does not require that the facts and evidence adduced against them should be communicated to them on the ground of security.³⁰⁷ The applicant also claimed that he has right to be heard by the Community Institutions before implementing the Resolution into the Regulation. The Court reach that the Institutions within the Community was required to implement the resolution and was not authorised to any Community mechanism for the examination or re-examination of individual cases. The measures fell entirely purview of the UNSC and its Sanction Committee. The Institutions was not obliged to hear the applicants before the adoption of the Regulation because the Community institutions had no discretion.³⁰⁸

Thirdly and lastly, the Court examined the right to an effective judicial review. The Court referred to the examination above regarding the review of legality in general. The new aspect was instead regarding the *jus cogens* concept to the question at hand. The Court concluded that there were no judicial remedies available to the applicants. *"However, it is also to be acknowledged that any such lacuna in the judicial protection available to the applicants is not in itself contrary to jus cogens."*³⁰⁹ With this conclusion, the Court reached that such access to the court is not absolute. The Court maintained that: *"the limitation of the applicants' right of access to a court, as a result of the immunity from jurisdiction enjoyed as a rule, in the domestic legal order of the Member States of the United Nations, by resolutions of the Security Council adopted under Chapter VII of the Charter of the United Nations, in accordance with the relevant principles of international law (in particular Articles 25 and 103 of the Charter), is inherent in that right as it is guaranteed by jus cogens."*³¹⁰

The Court finds such limitation justified because of the nature of the UNSC decision and the objective pursued. The CFI therefore, consider that the examination mechanism of the Sanctions Committee adequately protected the fundamental rights as recognised by *jus cogens*. The *Yususf* case is

³⁰⁶ Karayigit, *supra* footnote 289, p. 390, concerning paras 293-302.

³⁰⁷ Case T-306/01, *supra* footnote 284, paras 306-320 of the judgement.

³⁰⁸ Paras 322-329 of the judgement.

³⁰⁹ Para 341 of the judgement.

³¹⁰ Para 343 of the judgement.

appealed to the European Court of Justice and is currently a pending case in this Court.³¹¹ Moreover, Yusuf is not offer of any UNSC sanctions anymore and has not a pending case before the ECtHR.³¹²

6.2.1.5 The Kadi Case

A parallel case to Yusuf was brought before the CFI on 18 December 2001 by Kadi.³¹³ Kadi is a Saudi Arabian businessman who was put on the UN sanctions list by Committee 1267 on 19 October 2001. The financial sanctions imposed upon him were implemented by EC Regulation 2062/2001, which was then challenged by Kadi before the CFI.

The case at hand, just as *Yusuf*, was referred to the second chamber of the Court of First Instance in extended composition. Out of a legal point of view the principles and reasoning is identical and needs no repetition. Whether this case straightened the principles remains to be seen in the following cases. The *Kadi* case is, just as *Yusuf*, appealed to the ECJ.³¹⁴

6.2.2 The Ayadi and Hassan Cases

The Court of First Instance has been given more opportunities to scrutinise the approach taken in *Yusuf* and *Kadi*. Two cases in the “war against terrorism category” are the *Ayadi* case³¹⁵ and *Hassan* case.³¹⁶ While *Ayadi* more or less was a repetition of the previous discussed case law, *Hassan* merits further examination.

Mr. Faraj Hassan was a Libyan national detained in London's Brixton prison pending extradition to Italy on terrorism charges. He was listed as a person against whom economic sanctions should be taken by the UN Sanctions Committee and by Council Regulation³¹⁷ and Commission regulation.³¹⁸ Consequently, he sought the annulment of those regulations besides damages. The case was dismissed by the CFI for largely the same reasons as in *Yusuf* and *Kadi* cases. However, some interesting aspects deserve further explanation.

³¹¹ Case C-415/05 P *Appeal brought on 23 November 2005 by Ahmed Yusuf and Al Barakaat International Foundation against the judgment of the Court of First Instance (Second Chamber (Extended Composition)) of 21 September 2005 in Case T-306/01 Ahmed Yusuf and Al Barakaat International Foundation v the Council of the European Union and Commission of the European Communities*, pending.

³¹² Press release of the Swedish Helsinki Committee for Human Rights 29 August 2006 - <http://www.shc.se/sv/1/60/472/?tpl=64>

³¹³ Case T-315/01, *supra* footnote 285.

³¹⁴ Case C-402/05 P *Appeal brought on 17 November 2005 by Yassin Abdullah Kadi against the judgment made on 21 September 2005 by the Second Chamber (Extended Composition) of the Court of First Instance of the European Communities in Case T-315/01 between Yassin Abdullah Kadi and the Council of the European Union and the Commission of the European Communities*, pending.

³¹⁵ Case T-253/02 *Chafiq Ayadi v. Council* [2006] ECR II-2139.

³¹⁶ Case T-49/04 *Faraj Hassan v. Council and Commission* [2006] ECR II-52.

³¹⁷ Council Regulation No. 881/2002.

³¹⁸ Commission Regulation No. 2049/2003.

Firstly, it was the question of the correct defendant. The original list of persons was on the Council Regulation, of which Hassan was not on. He was later added when Commission adopted its Regulation. The Council therefore submitted that he should sue the Commission alone. The Court held that he could sue both of the Institutions because of the special role assigned to the Commission by the Council in its Regulation. The Council had empowered the Commission to emend or supplement the list of persons against whom sanctions should be taken because of determinations made by the Sanctions Committee.³¹⁹

Secondly, the right to be heard before inclusion in the list of persons against whom sanctions should be taken was under assessment. The applicant relied on two judgements of the US Court of Appeals for the DC Circuit. The American Court held that the proscription of two Iranian organizations under the US Anti-Terrorism and Effective Death Penalty Act 1996 without a prior hearing infringed the constitutional rules on due process. The Court dismissed also this argument because the US verdicts did not, as in the case before the CFI, concerned measures transposing UNSC resolutions.³²⁰

The applicant also claimed right of a due process before the UNSC Sanction Committee. The Court found it adequate that an appropriate national authority, as it was in the regulation at stake, gave that possibility. The Court consequently held that the applicants' fundamental rights have not been violated.³²¹

6.3 Comments Regarding the War Against Terrorism Cases

The economic sanctions-cases, enforcing the UNSC sanctions upon individuals are subject for rather heavy criticism. Voices are raised regarding the characteristics of the EC Treaty as an regular international law agreement or as the constitutional charter of the Community, etc. Authors criticise the approach taken by the CFI regarding the relationship between EC Treaty and the UN Charter as well as the presumptive problems when bringing the Solange-doctrine back to the arena. This section aims to approach the comments and understand the problems lying in an effective war against terrorism on the one hand and the problems of the judgments of the Court of First Instance.

6.3.1 The Competence to Adopt the Economic Sanctions Regulations

This is not the most commented part and it does not have to stand the heaviest criticism. However, the reasoning regarding accepting Articles 60

³¹⁹Paras 47-60 of the judgement.

³²⁰Paras 64-129 of the judgement.

³²¹Ibid.

and 301 as a cumulative legal base together with Article 308 is talked about as less straight forward. The problem seems to be that Articles 60 and 301 simply talk about states as subjects to economic sanctions. The UNSC have the same problem when finding legal base for their action, Chapter VII UNC clearly was not written taking into account the possibility that the UNSC would have to find the remedy through Article 41 to impose sanctions directly on specific individuals. It appears, however, to be the significantly importance of fight the elements of terror in the world that makes the legal bases develop.³²²

6.3.2 The EC Treaty in International Law

The CFI emphasise, as elaborated above, that the members of the UN are obliged to accept the primacy of the UNC in the international legal order, according to, most of all, Article 103 of the UNC. The Community is, according to the Court, bound by the UNSC resolutions in the same way as the EC MS's. This prevents the Court from review the compatibility with the fundamental rights as protected by Community law and the ECHR.³²³

This aspect can easily be criticised because the way the Court interpret the EC Treaty as an international agreement amongst many overlooks the characteristics of the EC Treaty as the constitutional charter of the Community legal order. In that respect, it is worth mentioning that the CFI does not make any distinction between the international and Community legal order as it could have done.³²⁴ The Court also refers to Article 27 VCLT supporting the *pacta sunt servanda* principle, which imposes on contracting parties the obligation to perform their international obligations in a good faith. According to Eeckhout this does not mean, and has never been interpreted as meaning that international agreements automatically prevail over domestic law.³²⁵ Eeckhout further stress that at the current international level, it is not clear whether there is a hierarchical relationship between human rights law and UNSC action sufficient to maintain international peace and security, in the sense that these resolutions would trump the rights at stake.³²⁶

Lavranos supports this view and reach that the hierarchy of norms in the Community legal order differs between the ECJ and the CFI. He interprets the established hierarchy in ECJ case law to be: firstly the primary EC law (EC Treaty, including ECHR), international agreements/decision of international organs and Secondary EC law (regulations/directives) and secondly the national (constitutional) law. The differing hierarchy according

³²² Bulterman, *Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities*, 2006, pp. 763-765.

³²³ Lavranos, *Judicial Review of UN Sanctions by the Court of First Instance*, 2006, p. 473.

³²⁴ Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations*, 2005, p. 26.

³²⁵ Eeckhout, *ibid*, p. 23.

³²⁶ Eeckhout, *supra* footnote 66, p. 445.

to the CFI is, when interpreted by Lavranos: firstly *jus cogens*, international agreements/decision of international organs (UN Charter, including UNSC resolutions), secondary EC law (regulations implementing UNSC resolutions) and primary EC law (including ECHR) and secondly the national (constitutional) law.³²⁷ Not surprisingly, Lavranos finds these differences unacceptable and emphasises that Community law is a distinct legal order from international law with its own hierarchy of norms, meaning that the CFI made an erroneous interpretation of the Community law when reaching these verdicts.³²⁸

6.3.3 Compliance with Fundamental Rights

The approach taken by the Court in the war against terror cases regarding the legal review in accordance with a weaker instrument of protecting fundamental rights is criticised from different perspectives.

First, some authors are critical to the actions by the EU states that are members in the UNSC. Cameron is of the opinion that these conflicts never would occur if these states would have a consistent policy. The primacy of the UNC over every other international agreement would in such situation not create problem if the EU members of the UNSC, when applying the UN law would comply with their internal obligations regarding fundamental rights. If MS's obligations to comply with human rights are to have any significance, then it must mean that, where it is at all possible, when acting together in the Security Council, they must design and implement sanctions so as not to violate human rights.³²⁹

Another aspect is the more political one regarding the legitimacy of the economic sanctions. Several problems arise in the war against terror situation compared to the fighting against a certain government. This special situation would require special needs, such as a properly compliance with fundamental rights. The war against international terrorism risks being a forever war and in light of the characteristics of resolutions which are open-ended and do not have a connection to a certain territory, relate to a certain state, regime and have no factual or temporal limitation, steps should be taken to improve legal safeguards for individuals in terms of smart sanctions.³³⁰ Such steps would also strengthen the UN system and its legitimacy and the lawfulness of its sanctions. If not taking these issues seriously would otherwise damage the completely peacekeeping UN system. In the long run the UN system can be maintained only if it reach improvements in the legal protection of individuals targeted by smart sanctions that provide judicial review *a posteriori*.³³¹

³²⁷ Lavranos, *supra* footnote 323, p. 478.

³²⁸ *Ibid* pp. 478-479.

³²⁹ Cameron, *UN Targeted Sanctions, Legal safeguards and the European Convention on Human Right*, (2003) 72 *Nordic Journal of International Law* 159, p. 180.

³³⁰ *Ibid* p. 172.

³³¹ Karayigit, *supra* footnote 289, p. 400.

6.3.4 The Solange Aspects

The final aspect of the judgement, at least developed in this thesis, is one about an issue that has been a reality during most of the European co-operation and has been behind the curtain for several years now. It is the Solange doctrine. The war against terrorism cases risk to raise concurrence of jurisdiction in more than one aspect. German Bundesverfassungsgericht (German Federal Constitutional Court) have, since the *Solange II* case³³² stated that the German court would not review Community legislation against German law as long as the protection of fundamental rights within the Community is similar to the German Basic Law. If the ECJ uphold the judgement by the CFI several potential conflicts would occur. What would be the outcome if one of the listed terrorists were a German citizen that succeeded in bringing a case before the German Bundesverfassungsgericht? A similar conflict would appear in Italy, in the light of the *Frontini* case.³³³ Moreover, the ECtHR in the recently judged *Bosphorus* case³³⁴ gave a judgement largely in line with the Solange doctrine in relation between the ECtHR and the ECJ. How should the ECtHR interpret facts as in *Yusuf* case before that court in the future? Additionally one cannot exclude that the relevant Member States will be held responsible before the ECtHR of violations of the rights in the ECHR.³³⁵

6.4 The Economic Sanctions Under Treaty Establishing a Constitution for Europe

In this section the question whether a Constitutional Treaty, or equivalent Treaty, would make any difference for the economic sanctions will be examined briefly. In the proposal, Article III-322 incorporates and takes over Articles 60 and 301 EC Treaty. Additionally this Article extends the scope of the economic sanctions in order to enable the Union to take financial and economically measures not only against states, but also against natural or legal persons, groups or non-States entities, which have no connection with any territory or regime. The adoption would still require a prior Union decision adopted by unanimity within the framework of the CFSP before adopted by the Council by a qualified majority voting. Article 308, in the proposal Article I-18, would consequently, not be needed in war against terrorism cases. Article III-322 would still be under the jurisdiction of the European Courts.

³³² BvR 197/83, *supra* footnote 14.

³³³ Italian Corte Costituzionale Case No. 183 *Frontini v. Ministero delle Finanze*, Judgement 27 December 1973, English translation [1974] 2 CMLRev 372.

³³⁴ Case of *Bosphorus*, *supra* footnote 42.

³³⁵ Karayigit, *supra* footnote 289, p. 401-403.

7 Conclusions

This section will offer some concluding remarks regarding the fundamental rights in EU external law and address the question whether the EU protects the fundamental rights in a way that is worthy a legal order of its kind.

It is worth mentioning that the protection of fundamental rights and the remedies available differ essentially between states. The Soviet Union presided over a modern and developed constitution regarding protection of the fundamental rights, while the protection in reality was non-existent.³³⁶ This shows that it is important to look, not solely, at the constitutional instruments but also at the application.

7.1 From Rhetoric to Practice – the Policy Dimension

As proven in this paper there exist several instruments and resources available for the European Union to apply an external human rights policy. On the other hand, it has not managed to establish a policy that stands the test of criticism. The application of the available instruments could have been used in third countries in several occasions, but so did not happen. The human rights clause is applicable towards the situation in Israel, or to take a clear stance on the situation of the detainees in Guantanamo Bay prison, but it was not used. Listing similar situation where the Union failed to take strong actions in order to protect fundamental rights in third states would make this thesis a long reading. It is therefore important to scrutinise the shortcomings in the regulatory and institutional framework that may be the cause that the EU's external human rights policy is so susceptible to criticism.³³⁷

The criticism comes also from internal organs. The *Comité des Sages* came in 1998 with a report and it observed a discrepancy between the rhetoric and practice of the EU human rights policy.³³⁸ The *Comité* gave in this report also proposals for improvement, such as the appointment of a Commissioner for Human Rights, the establishment of a specialist Human Right Office for support the CFSP High Representative, the development of balanced and objective surveys on the human rights situation worldwide and the adoption of criteria for the application of the human rights clauses. Only few of these suggestions have been materialised.

³³⁶ Constitution of The Union of Soviet Socialist Republics, Chapter II-6 'Citizenship of the USSR/Equality of Citizens' Rights, available in English at - <http://www.departments.bucknell.edu/russian/const/1977toc.html>

³³⁷ Bulterman, *supra* footnote 182, p. 264.

³³⁸ The Comité des Sages, *supra* footnote 62.

In addition, the main European Institutions have stressed the importance of an improvement of the EU external human rights policy. The Commission and Council documents identified different areas in which the EU could play a more effective role, the coherence and consistency between EC and EU, mainstreaming the rights into the EU policies and actions, transparency in the dialogue with e.g. the EP and review of priority. There is certainly a useful starting point for an exploration of the challenges facing the European Union, but also a useful starting point to look critically at the EU external human rights policy before some general remarks.³³⁹

7.1.1 Coherence and Consistency

This principle has its origin in Article 3 EUT: “*The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.*”

This coherence and consistency require a co-ordination and co-operation. However, the obligation is mainly fulfilled by co-ordination that takes place on an ad hoc basis. The procedure is not institutionalised.³⁴⁰ Chapman distinguishes eight different aspects where the coherence and consistency should take place. Consistency:

1. between the Union’s economic influence and its foreign policy,
2. between the pillars,
3. between the different EU bodies,
4. with regard to different non-Member States,
5. over time,
6. between dealing with human rights at home and abroad,
7. between the existing monitoring of Member States and the absence of international accountability for EU institutions and
8. between ambitions and available funds.³⁴¹

According to the author, the obligation of coherence and consistency should be more effective if it was institutionalised. There are several reasons why the EU external human rights policy should gain by such procedure. An institutionalised co-ordination would mean more regular and organised efforts to reach coherence and consistency that would give a more developed and effective policy. There would also be greater possibilities for scholars to monitor and comment the remedies taken that would help studies like this.

³³⁹ Bulterman, *supra* footnote 182, pp. 264-265.

³⁴⁰ Fouwels, *The European Union’s Common Foreign and Security Policy and Human Rights*, pp 291-324.

³⁴¹ Chapman, *supra* footnote 138, pp. 637-640.

7.1.2 Mainstreaming of Human Rights

There is no clear definition of what mainstreaming the human rights means. The Council define it as: “*the process of integrating human rights into all aspects of EU policy decision-making and implementation, including external assistance.*”³⁴²

Little is done to concretise the mainstreaming as an important element. The Council Annual Report refer to the use of human rights clauses, support of human rights projects in third countries and education of the staff in these issues, but there is a lack of guidelines concerning the relevance of human rights for the various fields of Union external action. To reach the high objectives set out in the Treaties etc. it is necessary to formulate guidelines when setting out the development aid, trade and environmental policies. There are, however, examples of a successful mainstreaming of human rights, such as the Generalised System of Preferences.³⁴³ A Council regulation give incentives for third countries to get rid of child labour, prison labour or other forms of forced labour and give possibilities to temporarily withdraw trade with these states.³⁴⁴ In 1997 the Community and its Member States used the procedure against Myanmar.³⁴⁵

Generally, the EU external human rights policy can be criticised for being far too vague and political and not giving practical consequences, this is certainly true regarding the mainstreaming of human rights. This lack is a serious threat to a future successful external human rights policy.

7.1.3 Transparency

The principle of transparency is important to achieve a public understanding for the human rights issues. The Council gives its Human Rights Reports, referred to in this thesis. They intend to enhance the transparency of the EU human rights policies by explaining who the actors of the policies are and setting out their goals, methods and activities. These reports are definitely welcome even if their importance can be questioned. The information is not necessarily enough for drawing any conclusions and deep analysis. The practise of the human rights clauses is according to the reports mentioned as important elements. As the reader of this thesis know some of the limitations of these clauses and its political aspects it is hard to draw any conclusions of their importance if these Reports do not offer any deeper knowledge.³⁴⁶

³⁴² EU Annual Report on Human Rights – 2004, p. 19.

³⁴³ Bulterman, *supra* footnote 182, p. 266.

³⁴⁴ Council Reg 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 [2001] OJ L/346/1.

³⁴⁵ Council Reg 552/97 of 24 March 1997, temporarily withdrawing access to general tariff preferences from the Union of Myanmar [1997] OJ L/85/8.

³⁴⁶ Bulterman, *supra* footnote 182, p. 267.

Another criticism is the one against the transparency in the dialogue between the Council and the EP. The Council Conclusion of 25 June 2001 recognised that greater transparency should be achieved through a straightened dialogue with the EP and the civil society. The European Parliament has, however, criticised the Council for not reaching its goals.³⁴⁷

There is a possibility to a dialogue with civil society through the formalised EU Human Rights Discussion Forum. This establishment provides for an opportunity to meet and discuss the issues. Whether these discussions have, any at all, influence at the work in the Commission is another question to consider.³⁴⁸

7.1.4 Prioritisation

As everybody realise the matter of prioritisation is a key to a successful policy. The budgetary means available under ‘European Initiative for Democracy and Human Rights’ are, in spite of everything, limited. The Commission gave in their 2001 Communication its view regarding what focuses it should keep using these means. The priorities are:

- support to straighten democratisation, good governance and the rule of law,
- activities in support of the abolition of the death penalty,
- support for the fight against torture and impunity and for international tribunals and criminal courts and
- combating racism and xenophobia and discrimination against minorities and indigenous peoples.

Another prioritising is the EIDHR Programming Document adopted 25 June 2001 and updated yearly. It is adopted by the Commission and welcomed by the Council. The author of this thesis does not have access to the political and institutional processes behind this prioritisation. I see, therefore, no reason to either comment nor criticise the policy.

7.1.5 General Remarks

The way from rhetoric to practice is a tricky road. These issues are deeply political in their nature. The problem is to offer the EU sufficient tools to make reality of the beautiful words. The problems facing the EU’s external human rights policy are many. A European co-operation has to stand the criticism and the internal struggle with hypocrisy-tendencies when exercising a very offensive policy. By historical and political reasons, Europe is not well sheltered from criticism regarding the human rights protection. Europe was the trigger continent in the two world-wars disasters and the severe breaches of human rights. Additionally, Europe as the biggest colonial power committed violations of which most of these countries suffer

³⁴⁷ European Parliament resolution on human rights in the world in 2003 and the European Union’s policy on the matter, as adopted on 22 April 2004.

³⁴⁸ http://europea.eu.int/comm/external_relations/human_rights/conf/forum1/

still today. The contemporary war against terrorism may be considered as justified by EU/EC and its courts, but still have to stand the hard criticism from the public opinion within and without Europe. The examples are many. The possible remedies of the EU of today seem to be two. Firstly, the rhetorical remedy, meaning that keeping the high objectives in the Treaties and not giving them any practical importance or secondly, the choice to face the reality and give tools to the courts and power to institutions to develop an effective policy. This mean, on the other hand, that the politicians of the Member States, the Council and the EP would lose some of its powers. I interpret the steps that are already taken by the EU as indications to walk the latter path, but more has to be done.

Other problems occur when considering the different political traditions of the Member States. It is my belief that most of the politicians in the EU and the MS's support the human rights and an EU external human rights policy. However, they are of constitutional nature and when these rights stand against each other the focuses differ. Germany, as protector of the 'human dignity' as their highest standard would probably reach a different outcome in specific matters than other countries having the principles of equality, freedom of beliefs or the right to a fair trial as their highest standard. Leaving more competence to the Community and the Union would, according to the author, mean a growing harmonisation of the interpretation of the rights at stake. According to the author, the general obligation to accept the case law of the ECJ and the ECtHR is successful examples showing that when giving jurisdiction to judges it opens up for progressive solutions that straighten the policy. Nevertheless, if the rhetoric represent the politics and the sufficient legal tools stands for the possibility to practises these words, the EU needs to sharpen its tools in order to reach the high objectives.

7.2 Reactive or Preventive? – the Dimension of the Clauses

Even if the human rights clauses have some potential to give positive rights they are mostly used as an emergency exit when the Community recognise some serious problems in a state to which the Community have relationship. The clauses are expected to be respected and the Community is sometimes calculatedly blind to human rights violations in favour for good political relationships, intending to use the political platform to promote human rights in the political dialogue between the parties. Beside this, there are examples where the Community *de facto* suspended agreements with third countries. Nevertheless, there are some views of the human rights clauses and their application that is worth to be commented.

Howsoever, the fundamental rights (including the human rights) are given importance at Community level this does not reflect the reality externally. The protection of general principles of Community law comes *ex post* – reactive and not preventive. The human rights clause seam to follow this

approach. They are formulated in order to create an emergency exit in serious cases. As the clause looks and applies, it is mainly a suspension mechanism. However, voices are raised that consider them as an ideal potential framework to pursue a coherent external policy on human rights. Fierro is one of the authors that see this potential and she writes in these terms about the clauses: “*A human rights policy cannot solely rely on reactive measures, or suspension. Cooperation on human rights, and preventive measures under the human rights clause, are both possible and necessary. The Community should be able to cooperate for the promotion on human rights through the awarding of financial and technical aid, and both political and economic incentives.*”³⁴⁹

This co-operation would mean a positive development for the EU external human rights policy. Even if there are economical means set off to support human rights development in third countries the incentives for the third countries gets a greater weight if integrated with the trade, financial and technical aid agreements. The human rights clause should not only support the political dialogue and the suspension mechanism but a coherent and efficient external human rights policy. This thesis promote the opinion that the human rights clause also contains a positive entitlement for co-operation. I borrow three major supporting arguments from Fierro, a contextual support, a literal reason and a teleological reason.³⁵⁰

7.2.1 A Contextual Support

The 1991 Council in Luxembourg and the 1991 landmark Council resolution first mandated the human rights clauses. The aims were to fight the poverty, illiteracy and hunger. The Council resolution provided that positive measures should have ‘high priority’. The suspension mechanism developed as a reaction to the failing attempts to suspend the international agreements with Haiti and FRY, but there were a focus on emerging human rights concerns into external relations. The political goals of the Community at the time were to promote these rights and the principle of democracy throughout the world. If the beholder solely consider the human rights clauses as a suspension mechanism created as a reaction to the experiences in the relationship with Haiti and FRY, he is just looking at a minor part of the whole context. Reading *Portugal v. Council*³⁵¹ one realise that the Court very much rely on the context of emergence of the policy.³⁵²

7.2.2 A Literal Support

In this part Fierro founds reasons to read positive entitlement out of the strict formulation of the human rights clause:

³⁴⁹ Fierro, *supra* footnote 206, p. 66.

³⁵⁰ *Ibid.* pp. 66-67.

³⁵¹ Case C-268/94, *supra* footnote 110.

³⁵² Read further in section 5.4.2.

*“The essential element clauses are more than a reflection of the VCLT on suspension. Albeit the reference ‘essential element’ is arguably directed to build a bridge with the suspension procedures of that instrument, the clause starts by saying that ‘human rights inspire the parties internal and external policy’. This reference, which is separated by an ‘and’ from the essential element part, could be brought to play a positive role. ‘Inspire’ is arguably very vague, but could provide the basis to pursue a external human rights policy which is inspired by positive measures of cooperation and promotion.”*³⁵³

7.2.3 A Teleological Support

According to Fierro the agreements are, whether directly or indirectly, aimed at co-operating in human rights. Even if the human rights co-operation is not the primary objective of most agreements Fierro argues that the human rights are understood in its entirety, embracing civil, political and economic, and social rights. The ECtHR in *Arey* case³⁵⁴ recognises this view. The mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such interpretation. There is no watertight division separating that sphere from the field covered by the Convention.³⁵⁵ The agreements contain several provisions aiming to improving that standard of living of the population, relating to develop the social and economic rights of the parties. The human rights clause as part of these agreements as a whole should be interpreted teleological in the light of its aims and purposes.

As final words Fierro address some of the difficulties and the balancing act the EU external human rights policy face, in light of the human rights clauses: *“By the same token, a policy which focuses solely on negative measures is clumsy, because it ignores the preventive approach that should characterise any human rights policy, and because perhaps, at the end of the day, there is an element of (dubious) pressure in a policy that puts conditions without helping the party to attain them. Is it not more legitimate to have a policy which, in addition to placing conditions on others, actively helps them to attain these conditions?”*³⁵⁶

7.2.4 General Remarks

Even if I have tried to show that the human rights clauses have potential to be more than a reactive provision but also containing a potential of preventive, positive measures, one have to realise that the use of the human rights clauses today are limited. Fierros’ arguments are convincing. The Court of Justice recognises and confirms this potential in *Portugal v.*

³⁵³ Fierro, *supra* footnote 206, p. 67.

³⁵⁴ The Case of *Arey v. Ireland* (6289/73) [1979].

³⁵⁵ Para 26 of the judgement.

³⁵⁶ Fierro, *supra* footnote 206, p. 68.

Council.³⁵⁷ However, so far there is a difference between the potential of the human rights clauses and the actual use of it.

On the other hand, the remedy taken, with a stronger focus on the political dialogue can be argued as a more effective way of reaching a better protection of human rights in the third countries at stake. It is, however, hard to believe that these more informal dialogues will reach the objectives pursued effectively. The politicians can hardly, if the dialogue is not formalised, take the opportunities to keep up such dialogue and it risks being on the initiative on the public opinion and media, focusing on the most spectacular and severe situations in the third countries that would produce the interest of the politicians. These spectacular cases are, moreover, the situations where it is hardest to assist.

7.3 To Prevent or Violate? – the Economic Sanctions

This section, and its corresponding chapter above, wears a somewhat different aspect than the ones about the external human rights policy and the human rights clauses. This part is interesting and relevant for this thesis as it as phenomena almost secluded touch upon question of fundamental rights in the external sphere of law. The scope of this thesis exposes weaknesses in that regard. The description and discussion does not examine the economic sanctions fully, but focuses on their role to hinder violations of fundamental rights or in these situations where the enforcing of the economic sanctions is criticised for infringing the fundamental rights. As the examination above also contain rather deep comments about the development, in particular the war against terrorism cases, less is scrutinised here. However, the personal opinion of the author is better reflected in this section, and will so be. It should, nevertheless, be expressed that it is always easier to be a back seat driver looking at the outcome in the mirror than to drive it yourself, in particular if you get help from others in criticising the consequences.

7.3.1 The FRY Cases

In these cases, the Court and the AG's strongly emphasised the importance of the aims pursued by the regulations at stake and found these aims strong enough to justify the violation of the right to property. Additionally, the Court finds support for that the rights infringed are not absolute and can be objects to restrictions. E.g. in *Bosphorus*³⁵⁸ the balancing between the aims of the regulation in question and the company's right to their property. However, a more fair and correct balancing would be between how the actions by the company affects or distort the aims of the regulation and the seriousness of the breach of the company's fundamental rights. This rewording may just seem as a rhetorical point in defence if the company, but

³⁵⁷ Case C-268/94, *supra* footnote 110.

³⁵⁸ Case C-84/95, *supra* footnote 42.

it contains a different aspect that need to be considered. The argument of the Court is strong if the company or the individual make it impossible or in any other way affects the aims pursued. In the FRY cases such approach is highly doubted. The better deliberation would include a feature that measure the consequences of the action committed in breach of the regulation and set these consequences against the aims pursued by the regulation. Such approach seem to be the only reasonable way to a fair proceeding that well fitted to protect the fundamental rights in question.

The second aspect is the similar one about less restrictive means, supported by e.g. Canor. If a similar reasoning that was used in *Richardt* case³⁵⁹ had been applied to *Bosphorus* the outcome may have ended up differently, probably as in the *Centro-Com*.³⁶⁰ Even if the right at stake in *Centro-Com* was the freedom to export, recognised as fundamental in the EC Treaty, and in *Bosphorus* was the right to property established primarily in the ECHR and the case law of the ECtHR; the overall assessment, seen in the light of the section regarding the fundamental rights in the Community, should be leading to the same result in *Bosphorus* that it did in *Richardt* and *Centro-Com* cases. According to the author it is not required that the Court in this way defends the specific Community interests (the freedom to export included) and not so much the human rights.

7.3.2 Primacy of UN Law

Considering the fact that the European protection of fundamental and human rights are the only possible remedy for a citizen of any of the 27 Member States or, regarding the protection of the ECHR, any of the contracting parties to that Convention when that individuals rights has been infringed by any instrument, even at the international level of law. This situation is naturally intricate for the politicians and the judges of Europe. In the war against terrorism cases the Court establish an approach of review the legality of Community regulations, implementing UNSC resolutions, not according to the basic principles of Community law but in the light of the, for the UN binding, *jus cogens*.

Important in reaching such result is the high status of the resolutions by the UNSC and the way the Court considers the EC Treaty in relation to these. The Court if First Instance overlooks some aspects of the EC Treaty, and in particular its role as the constitutional charter of the Community. Seen in the light of the comments made previously, I find the conclusions of the Court rather weak. The approach taken does not necessarily follow from neither the primary or secondary EC law nor the previous case law. The CFI forgets, or at least overlooks, the fact that the Community is an own legal order with its own hierarchy of norms.

³⁵⁹ Case C-367/89, *supra* footnote 235.

³⁶⁰ Case C-124/95, *supra* footnote 154.

Other questions can be raised in light of the case law of the ECJ. In *Opinion 1/76*³⁶¹ the Court establish the principle that the participation in agreements setting up their own institutions must not affect the autonomy of the Community legal order. The principle was later upheld in e.g. *Opinion 1/91*.³⁶² In the latter, the Court further found provisions in conflict of the very foundation of the Community unacceptable. Is it possible that the CFI does not find the untouchable (in relation to the EC Treaty) primacy of UNSC resolutions in conflict of the very foundation of the Community? Is not the principle of the Community as an own legal order a ‘very foundation’ of the Community? Moreover, the principle is clarified by the Court in *Opinion 1/00*³⁶³ where it establish that the Community legal order could be considered secure when the agreements does not rule on pure questions of Community law, such as division of powers, between the Community, its institutions and the Member States or provisions of the founding Treaties of Community legislation.³⁶⁴ It is nothing with the clarification of the latter opinion that oppose that the approach by the CFI is problematic in view of this case law. Anyhow, it is hard to propose fundamental changes in the UN and the international law following from it, but the reality put, on the other hand, some obligations upon the members’ appearance in front of the UN Security Council. Their role needs further comments.

7.3.3 The Community in the UNSC

The Community is, in many aspects, indirectly represented in the UNSC through the MS’s that are members of the Security Council. In that regard the conflict should never have appeared. The arguments of Cameron are convincing, but are, nevertheless, not upheld by the MS’s that are members in the UNSC. The author support the view that these states are obliged to comply with human rights when acting in the UNSC and wonder whether an action can be raised against these states for not fulfilling their obligations. In order to answer such question it is necessary to consider the *EAEC* doctrine following from *EAEC* ruling.³⁶⁵ This case gives the principle of co-operation, inspired of Article 10 EC Treaty and origin in the *AETR* doctrine.³⁶⁶ The principle is upheld in several other cases and plays an important role in them.³⁶⁷ Whether, and how, the principle of co-operation should apply in the war against terrorism cases is more difficult to answer.

Suppose that the UNSC resolutions are considered as external agreements falling under the scope of the CFSP. Such approach would require that the Court would consider Articles 11(1) and 3 TEU that ties that objectives of

³⁶¹ *Opinion 1/76*, *supra* footnote 72.

³⁶² *Opinion 1/91*, *supra* footnote 127.

³⁶³ *Opinion 1/00*, *supra* footnote 130.

³⁶⁴ Para 6 of the opinion.

³⁶⁵ *Ruling 1/78*, *supra* footnote 132.

³⁶⁶ Case 22/70, *supra* footnote 78.

³⁶⁷ See e.g. *Opinion 2/91* *supra* footnote 74, *Opinion 1/94* *supra* footnote 62 and Case C-25/94, *supra* footnote 136.

the external relations of the EU with the ones of the Community, in particular Articles 177(2) and 181a. Following this reasoning, the MS's appearance in the UNSC in the war against terror context is a breach of EU law. It is, however, doubtful that the Court would adopt such approach.

Moreover, these issues are problematically because of the political aspects. One of the reasons of the resistance by the UK in the Brussels Summit 2007 against the CFR could be the fear of possible unwanted effects on the obligations towards the UNC etc. If Tony Blair did right to opt the Brits out remains to be seen. It is, on the other hand, not likely that the UK is the only Community MS that want to prevent their independent role in the UN, even if great co-operations are already functioning.

7.3.4 Look Out For the History – Are the Solange Aspects a Threat?

Firstly, it has to be mentioned that these cases will be examined by the ECJ, which means that these comments are just hypothetical. The Solange aspect is, on the other hand, an interesting aspect following from the CFI judgements in the war against terrorism cases. It is outside the scope of this thesis to speculate in how the German Bundesverfassungsgericht or the ECtHR will react to the judgements discussed. This part does not aim to develop the issue deeper but to ascertain this interesting twist to the case.

As a final remark it is, however, important to consider that the national courts and the European Court of Human Rights in Strasbourg may play an increasing role of protecting the fundamental rights in the European Union in the future, if the EU does not take these tasks seriously. If it does? Sometimes.

- Cameron, Iain UN Targeted Sanctions, Legal safeguards and the European Convention on Human Right, (2003) 72 Nordic Journal of International Law 159.
- Canor, Iris “Can Two Walk Together, Except they be Agreed?” The Relationship between International Law and European Law: The Incorporation of United Nations Sanctions against Yugoslavia into European Community Law through the Perspective of the European Court of Justice” CMLRev 35 (1998) pp. 137-187.
- Chapman, Audrey R Where is the EU’s Human Rights Common Foreign Policy, and How is it Manifested in Multilateral Flora?, in P Alston (ed) The EU and Human Rights, Oxford University Press, 1999.
- Comité des Sages Leading by Example: A Human Rights Agenda For the European Union for the Year 2000, in P. Alston (ed.), The EU and Human Rights, Oxford University Press, 1999.
- Craig, Paul and de Búrca, Gráinne EU Law – Text, Cases and Materials, Third Edition, Oxford University Press, 2003.
- Cremona, Marise External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law, EUI Law Working Paper No. 2006/22, Firenze, 2006.
- Cremona, Marise The Draft Constitutional Treaty – External Relations and External Action, (2003) 40 CMLRev, pp. 1347-1366.

- Dashwood, Alan External relations provisions of the Amsterdam Treaty, CMLRev, 1998, pp. 1019-1045.
- Dashwood, Alan The Relationship between the Member States and the European Union/European Community, (2004) CMLRev. pp. 355-381.
- Dashwood, Alan and Heliskoski, John The Classic Authorities Revisited, in Dashwood, Alan and Hillion, Christophe (eds), The General Law of EC External Relations, Sweet & Maxwell, London, 2000, pp. 3-19
- Duke, Simon The Convention, the draft Constitution and External Relations: Effects and Implications for the EU and its international role, in European Institute for Public Administration Working Paper No. 2003/W/2, 2003.
- Eeckhout, Piet The Charter of Fundamental Rights and the Federal Question, (2002) 39 CMLRev 945-994.
- Eeckhout, Piet Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations, Fifth Walter van Gerven Lecture, Europa Law Publishing, Groningen, 2005.
- Eeckhout, Piet External Relations of the European Union – Legal and Constitutional Foundations, Oxford EC Law Library, 2004.
- Fierro, Elena The EU's approach to Human Rights Conditionality in Practice, The Hague, Martinus Nijhoff, 2003.
- Fierro, Elena Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?,

- European Law Journal Vol. 7 No 1
March 2001, pp. 41-68.
- Fouwels, Martine
The European Union's Common Foreign and Security Policy and Human Rights, 15 (1997) Netherlands Quarterly of Human Rights, pp 291-324.
- Gaja, Giorgio
Opinion 2/94, Accession by the Community to the European Convention on Human Rights and Fundamental Freedoms, CMLRev. 1996, pp. 973 – 989.
- Groussot, Xavier
Creation, Development and Impact of the General Principles of Community Law: Towards a *jus commune europaeum*? Lund 2005.
- Heliskoski, John
Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States, Kluwer Law International, 2001.
- Holdgaard, Rass
The European Community's Implied External Competence after the Open Skies Cases, EFARev. 2003 pp. 365-394.
- Jacobs, Francis G.
The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice, in Ingolf Pernice, Juliane Kokott and Cheryl Saunders (eds.): The Future of the European Judicial System in a Comparative Perspective, Nomos 2006.
- Kaddous, C
Le droit des relations extérieures dans la jurisprudence de la Cour de justice des Communautés européennes, Helbing & Lichtenhahn, 1998.

- de Schutter, Olivier Globalization and Jurisdiction :
Lessons from the European
Convention on Human Rights,
CRIDHO Working Paper 2005/04,
2004.
- Smith, Michael E Implementation: Making the EU's
International Relations Work, in
Hill and Smith (eds) International
Relations and the European Union,
Oxford University Press, 2005.
- Swiebel, Joke Working Documents on the
proposal for a Council Regulation
on the European Monitoring Centre
on Racism and Xenophobia, 25
March 2004. Committee on
Citizens' Freedoms and Rights,
Justice and Home Affairs, 2004.
- Tekin, Ali Future of Turkey – EU relations: a
civilisational discourse, Futures 37
pp. 287-302, 2005.
- Tomuschat, Christian Case T-306/01, Ahmed Ali Yusuf
and Al Barakaat International
Foundation v. Council and
Commission; Case T-315/01,
Yassin Abdullah Kadi v. Council
and Commission, (2006) CMLRev
pp. 537-551.
- Toth, Akos G. The European Union and Human
Rights: the way forward, CMLRev.
1997, pp. 491 - 529.
- Tridimas, Takis The General Principles of EU Law,
2nd Edition, Oxford EC Law
Library, London 2006.
- Weiler, Joseph HH and Fries, Sybilla C. A Human Rights Policy for the
European Community and Union:
The Question of Competences,
Harvard Jean Monnet Working
Paper 4/99, Cambridge, 1999.

Table of Cases

Cases by the Court of Justice

Case 1/58 *Stork v. High Authority* [1959] ECR 17.

Cases 36, 37, 38 and 40/59 *Geitling v. High Authority* [1960] ECR 423.

Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1.

Case 40/64 *Scarglata and others v. Commission* [1965] ECR 215.

Case 35/67 *Van Eick v. Commission* [1968] ECR 329.

Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125.

Case 22/70 *Commission v. Council* [1971] ECR 263.

Cases 21 to 24/72 *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

Case 4/73 *Nold v. Commission* [1974] ECR 491.

Case 8/73 *Hauptzollamt Bremerhaven v. Massey-Ferguson*, [1973] ECR 897.

Case 36/75 *Rutili v. Minister for the Interior* [1975] ECR 1219.

Case 118/75 *Watson and Belmann* [1976] ECR 1185, 1207.

Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] ECR 741.

Cases 3, 4 and 6/76 *Cornelis Kramer and others* [1976] ECR 1279.

Opinion 1/78 [1979] ECR 2871.

Ruling 1/78 re Convention on the Physical Protection of Nuclear Materials, Facilities and Transports [1978] ECR 2151.

Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719.

Case 45/86 *Commission v. Council* [1987] ECR 1493.

Case 46/87 and 227/88 *Hoechst v. Commission* [1989] ECR 2859.

Case 5/88 *Wachauf v Bundesamt fuer Ernaehrung und Forstwirtschaft* [1989] ECR 2609.

Case C-62/88 *Greece v. Council* [1990] ECR I-1527.

Case C-367/89 *Criminal Proceedings against Richardt and Les Accessoires Scientifiques SNC* [1991] ECR I-4621.

Case C-159/90, *Grogan*, [1991] ECR I-4685.

Opinion 1/91 re Agreement on the European Economic Area [1991] ECR I-6079.

Opinion 2/91 Convention N° 170 of the International Labour Organization concerning safety in the use of chemicals at work [1993] ECR I-1061.

Case C-9/91, *R. v. Secretary of State for Social Security ex parte Equal Opportunities Commission*, [1992] ECR I-4927.

Cases C-181/91 and C-248/91 *Parliament v. Council and Commission* [1993] ECR I-3685.

Case C-316/91 *Parliament v. Council* [1994] ECR I-625.

Opinion 1/92 re Agreement on the European Economic Area [1992] ECR I-2821.

Case C-280/93 *Germany v Council* [1994] ECR I-4973.

Opinion 1/94 Competence of the Community to conclude international agreements concerning services and the protection of intellectual property [1994] ECR I-5267.

Opinion 2/94 Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-01759.

Case C-25/94 *Commission v. Council* [1996] ECR I-1469.

Case C-70/94 *Fritz Werner Industrie-Ausrüstungen GmbH v Federal Republic of Germany* [1995] ECR I-3189.

Case C-83/94 *Criminal proceedings against Leifer and others* [1995] ECR I-3231.

Case C-268/94 *Portugal v. Council* [1996] ECR I-6177.

Case C-84/95 *Bosphorus* [1996] ECR I-3953.

Case C-124/95 *The Queen, ex parte Centro-Com v. HM Treasury and Bank of England* [1997] ECR I-81.

Case C-177/95 *Ebony Maritime and Loten Navigation v. Prefetto della Provincia di Brindisi and Others* [1997] ECR I-1111.

Case C-106/96 *United Kingdom v. Commission* [1998] ECR I-2729.

Case C-162/96 *Racke v. Hauptzollamt Mainz* [1998] ECR I-3655.

Case C-170/96 *Commission v. Council* [1998] ECR I-2763.

Case C-260/98, *ERT* [1991] ECR I-2925.

Case C-466/98 *Commission v. UK* [2002] ECR I-9427.

Case C-467/98 *Commission v. Denmark* [2002] ECR I-9519.

Case C-468/98 *Commission v. Sweden* [2002] ECR I-9575.

Case C-469/98 *Commission v. Finland* [2002] ECR I-9627.

Case C-471/98 *Commission v. Belgium* [2002] ECR I-9681.

Case C-472/98 *Commission v. Luxembourg* [2002] ECR I-9741.

Case C-475/98 *Commission v. Austria* [2002] ECR I-9797.

Case C-476/98 *Commission v. Germany* [2002] ECR I-9855.

Case C-274/99 *Connolly v. Commission* [2001] ECR I-1611.

Opinion 1/00 Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area [2002] ECR I-3493.

Opinion 2/00 whether an agreement envisaged is compatible with the provisions of the Treaty [2001] ECR I-9713.

Case C-112/00 *Schmidtberger* [2003] ECR I-5659.

Opinion 1/03 Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2006] ECR I-1145.

Case C-540/03 *Parliament v. Council* [2006] ECR I-5769.

Case C-402/05 P *Appeal brought on 17 November 2005 by Yassin Abdullah Kadi against the judgment made on 21 September 2005 by the Second Chamber (Extended Composition) of the Court of First Instance of the European Communities in Case T-315/01 between Yassin Abdullah Kadi and the Council of the European Union and the Commission of the European Communities*, pending.

Case C-415/05 P *Appeal brought on 23 November 2005 by Ahmed Yusuf and Al Barakaat International Foundation against the judgment of the Court of First Instance (Second Chamber (Extended Composition)) of 21 September 2005 in Case T- 306/01 Ahmed Yusuf and Al Barakaat International Foundation v the Council of the European Union and Commission of the European Communities*, pending.

Case C-432/05 *Unibet v. Justitiekanslern and others* [2007] 13/03/2007.

Cases by the Court of First Instance

Case T-112/98 *Mannesmannröhren-Werke v. Commission* [2001] ECR II-729.

Case T-54/99 *max.mobil v. Commission* [2002] ECR II-313.

Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01 *Philip Morris International and others v. Commission* [2003] ECR II-1.

Case T-77/01 *Diputación Foral de Álava and others v. Commission* [2002] ECR II-81.

Case T-177/01 *Jégo-Quéré v. Commission* [2002] ECR II-2365.

Case T-198/01 *Technische Glaswerke Illmenau v. Commission* [2002] ECR II-2153.

Case T-306/01 *Ahmed Ali Yusuf and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* [2005] ECR II-3533.

Case T-315/01 *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities* [2005] ECR II-3649.

Case T-211/02 *Tideland Signal v. Commission* [2002] ECR II-3781.

Case T-253/02 *Chafiq Ayadi v. Council* [2006] ECR II-2139.

Case T-49/04 *Faraj Hassan v. Council and Commission* [2006] ECR II-52.

Case law of other jurisdictions

European Court of Humans Right

Case of *Arey v. Ireland* (6289/73) [1979].

Case of *Soering v. United Kingdom* (14038/88) [1989].

Case of *Drozdz and Janousek v. France and Spain* (12747/87) [1992].

Case of *Rasheed Tugar v. Italy* (22869/93) [1995].

Case of *Loizidou v. Turkey* (15318/89) [1996].

Case of *Matthew v. United Kingdom* (24833/94) [1999].

Case of *Christine Goodwin v. the United Kingdom*, (28957/95) [2002].

Case of *Ilaşcu and Others v. Moldova and Russia* (48787/99) [2004].

Case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland* (45036/98) [2005].

Human Rights Committee

Case of *Ng v. Canada*, Communication No 469/1991.

German Bundesverfassungsgericht

Bundesverfassungsgericht, judgement of 29 of May 1974, 2 BvL 52 /71, English translation 2 CMLRev [1974].

Bundesverfassungsgericht, judgement of 22 October 1986, 2 BvR, 197/83, English translation 3 CMLRev [1987].

Bundesverfassungsgericht, judgement of 12 October 1993, 2 BvR 2134/92 and 2159/92, English translation 1 CMLRev [1994], p. 57.