
Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice

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Abstract

Since the early 1990s, human rights have gained increasing importance in the external policies of the European Union (EU) and, in particular, the European Community (EC), the primary focus of this paper. While the precise delimitation of the EC's external human rights competences is still controversial, an analysis of the existing primary sources of Community law (Founding Treaties and case law) and their extension by the Treaty of Amsterdam seems to confirm the emergence of human rights as a 'transversal' Community objective. Moreover, the EC has developed an abundant practice of including human rights aspects in its international agreements (by means of so-called 'human rights clauses'), unilateral trade preference schemes (via 'special incentive arrangements' or 'conditionality requirements') and technical or financial assistance programmes ('human rights clauses' and the 'European Initiative for democracy and the protection of human rights'). From a conceptual perspective, the EC's human rights policy seems governed by the principles of universality and indivisibility. However, the specific weight to be attributed to economic, social or minority rights, the EC's capacity to adhere to international human rights conventions and the interplay between 'First Pillar' (EC) and 'Second Pillar' (CFSP/EU) activities all await future clarification.

1 Introduction

There is an abundance of writings on the status and role of human rights in European Community (EC) law and the policies of the European Union (EU).¹ Especially the case

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¹ Suffice it to mention here A. Cassese, A. Clapham and J. Weiler (eds), *European Union: The Human Rights Challenge*, vols I–III (1991); N. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (1995); Woods, 'The European Union and Human Rights', in R. Hanski and M. Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (1997) 283–300, with references.

law of the European Court of Justice (ECJ) since 1969² and the relation between human rights as general principles of Community law and the European Convention on Human Rights (ECHR), including the possible adherence by the EC to the ECHR,³ have been widely discussed.

Less attention has been paid to the *notion* of human rights in the *external* policies of the EC and the EU. What are the sources of law forming the basis of such an external human rights policy, given that the EC is not a contracting party to any human rights convention in the true sense of the word? And how does this external policy relate to the main categories of human rights (civil rights, political rights, social rights, minority rights, and so on) and to their broader conceptual framework, notably democracy and the rule of law?

This paper is an endeavour to elucidate such basic issues. We have deliberately chosen to focus on the external human rights policy of the European *Community*, as the emphasis is on acts of Community law (notably the Treaties, Community agreements and autonomous regulations) and related pronouncements by the Commission and other Community institutions. It is more difficult to articulate and analyse the basic concepts of a human rights policy of the European Union to the extent that this falls outside the Community framework. This would lead us to the legal marshland of Common Foreign and Security Policy (CFSP, or the 'Second Pillar'), with its complex mix of common and national policies.⁴

2 Sources of Law

A General

According to the ECJ's case law referred to above, the principal source of law for human rights in the Community legal order is the *general principles* of Community law. In Opinion 2/94 on accession by the Community to the ECHR, the Court summarized the situation as follows:

It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the [ECHR] has special significance.⁵

The Court's jurisprudence has been a source of inspiration for *Treaty provisions* as

² Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419.

³ In *Opinion 2/94* [1996] ECR I-1759 (para. 36), the ECJ concluded that 'as Community law now stands, the Community has no competence to accede' to the ECHR.

⁴ For an analysis of this aspect of the question, see Fouwels, 'The European Union's Common Foreign and Security Policy and Human Rights', 15 *Netherlands Quarterly of Human Rights* (1997) 291.

⁵ *Supra* note 3 (para. 33).

well. Apart from the Preambles to the Single European Act (SEA)⁶ and the Treaty on European Union (TEU),⁷ this is true, in particular, for Article F(2) of the TEU, according to which

[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The legal implications of this provision for Community law are uncertain, given that it appears in Title I of the TEU ('Common Provisions'), which falls outside the jurisdiction of the ECJ, and that it refers to the Union, not to the Communities.⁸ However, this state of affairs will change with the entry into force of the Treaty of Amsterdam, which submits Article F(2) to the jurisdiction of the ECJ, subject to certain conditions.⁹

The Amsterdam Treaty has also introduced a new Article F(1), according to which the Union 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States', an Article F.1 on the possibility to suspend membership rights in the event of a serious and persistent breach of Article F(1), and an addition to Article O, which limits the right to apply for EU membership to European states which respect the principles set out in Article F(1). The new Article F.1 reaffirms a general competence of the Commission to monitor the human rights situation in the Member States, as it provides for the right of the Commission (alternatively, one third of the Member States) to propose that the Council determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article F(1). Finally, the Amsterdam Treaty brings to the 'First Pillar' a clause on combating discrimination in general (Article 6a), a provision on measures concerning asylum, refugees and immigration (Article 73k) and certain competences in the field of employment, working conditions and social protection (Article 117). At least at the 'internal' level, therefore, the Amsterdam Treaty will further integrate human rights into the Community legal order.

With respect to external policies, it is often assumed that the Treaty's emphasis is on the CFSP, one of the objectives of which, according to Article J.1 of the TEU, is 'to develop and consolidate democracy and the rule of law, and respect for human rights

⁶ According to the third preambular paragraph of the SEA, the Member States are 'determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States. In the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice'.

⁷ According to the third preambular paragraph of the TEU, the Member States confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

⁸ See, e.g., Neuwahl, 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?', in Neuwahl and Rosas, *supra* note 1, at 13–22.

⁹ According to the new Article L(d), the jurisdiction of the Court will cover 'Article F(2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty'.

and fundamental freedoms'.¹⁰ However, the relevance of human rights for the external policies of the EC under the 'First Pillar' is explicitly recognized in Article 130u of the EC Treaty (ECT), which provides that 'Community policy' in the area of development cooperation 'shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'.

While the drafters of Article F(2), given its reference to 'general principles of Community law', seem to have had mainly the internal dimension in mind, this provision, which covers the whole range of Union competences and activities, including the 'First Pillar', may be of relevance for the question of external policies as well.¹¹

In addition, Article 235 of the ECT (which provides for a general competence to take action, if this is 'necessary to attain, in the course of the operation of the common market, one of the objectives of the Community' and if other provisions of the Treaty have not provided, expressly or implicitly, the necessary powers) may offer a basis for Community external policies in the field of human rights. It is true that human rights are not expressly mentioned among the Community's general objectives listed in Article 2 of the ECT. But Article 235 was accepted by the ECJ as a legal basis for environmental action already at a time when the environment was not expressly mentioned among the Community's objectives.¹² Moreover, recourse to Article 235 is not restricted to 'internal' matters. There is a long-standing Community practice of using Article 235 as a legal basis for international agreements or external financing programmes, and this was validated by the ECJ as early as 1971, in the context of its famous *E.R.T.A.* judgment.¹³

It was on Article 235 that the Commission founded its view that the Community had competence to adhere to the ECHR. While the ECJ denied such a competence, it seems to have done so on the basis of the ECHR's specific features. True, the Court also

¹⁰ See also the fifth preambular paragraph of the SEA, which, in the context of an exhortation incumbent upon 'Europe' to speak with one voice, refers to the need 'in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached'.

¹¹ In *Opinion 2/94* (*supra* note 3), the ECJ listed as relevant sources for an EC human rights agenda the various declarations of the Member States and the Community institutions, the preamble to the SEA, the preamble and Articles F(2), J.1 and K.2 of the TEU, and Article 130u of the ECT (para. 32), without making a distinction between external and internal competences.

¹² Case 240/83 *Procureur de la République v. ADBHU* [1985] ECR 531, where the Court, well before the Single European Act, referred to environmental protection as 'one of the essential objectives of the Community' (para. 13).

¹³ Case 22/70 *Commission v. Council [E.R.T.A.]*, [1971] ECR 263, where the Court noted that 'Article 235 empowers the Council to take any "appropriate measures" equally in the sphere of external relations' (para. 95). Article 235 thus exceeds the sole establishment of the 'common market' (as opposed to the Community's common policies). According to Flaesch Mouglin, 'Article 235', in V. Constantinesco *et al.*, *Traité instituant la CEE: Commentaire article par article* (1992) 1515 (para. 10), '[l]'expression "dans le fonctionnement du marché commun" est donc acceptée comme synonyme de "dans le cadre de la Communauté Economique Européenne" [...]' For an in-depth discussion of this issue, see Schwartz, 'Artikel 235 [Ergänzende Rechtssetzungsbefugnis]', in H. von der Groeben, C. D. Ehlermann and J. Thiesing (eds), *Kommentar zum EU-/EG-Vertrag* (1997, 5th ed.) 5/658–5/665 (paras 172–194).

stated that 'no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field'.¹⁴ But in the absence of any such express or implied powers, the Court went on to consider whether Article 235 could nevertheless constitute a legal basis for accession. The negative answer underlined the institutional implications of adherence to the ECHR¹⁵ and thus does not seem to constitute a refusal to acknowledge any EC human rights competence under Article 235.¹⁶

In light of the above, it is submitted that the combined effect of the human rights declarations made by the Community institutions, the Preamble of the SEA, the Preamble and provisions of the TEU, including Article F(2), and the case law of the ECJ on human rights as part of the general principles of Community law, is to make human rights a 'transverse' objective of the Community. This view may be corroborated by the very wording of Article 130u of the ECT, which qualifies this area as a 'general objective'. In any event, taking into account the increased emphasis on human rights in the Treaty of Amsterdam, including the submission of Article F(2) to the jurisdiction of the ECJ, it seems more and more difficult to argue that human rights are *not* an objective of the EC.

Just as human rights constitute general principles of Community law whose observance the Court ensures,¹⁷ they can and should be incorporated in the external policies of the EC. It would be strange if the EU's external human rights policy were restricted to the CFSP (where treaties cannot be concluded nor can internal legislative acts be adopted) and to promoting the development and consolidation of human rights in development cooperation. The Community ('First') Pillar is by now far from being limited to economic issues and the four freedoms but covers a wide range of issues of more general political, social and cultural interest. Moreover, as affirmed by Article M of the TEU and the case law of the ECJ,¹⁸ the fact that an issue such as human rights can be discussed in the context of the CFSP does not remove it from the ambit of Community competence.

There is no denying, on the other hand, that consensus is still lacking on the precise *delimitation* of Community competences in the field of human rights. Power to adhere

¹⁴ *Supra* note 3, at para. 27.

¹⁵ The Court underlined that accession 'would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order' (para. 34) and went on to say that such a modification, 'with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235' (para. 35).

¹⁶ See, e.g., Kokott and Hoffmeister, 'Note on Opinion 2/94', 90 *AJIL* (1996) 664; Gosalbo Bono, 'Reflexiones en torno al futuro de la protección de los derechos humanos en el marco del derecho comunitario y del derecho de la Unión: Insuficiencias y soluciones', *Revista de derecho comunitario europeo* (1997) 29, at 57.

¹⁷ *Opinion 2/94*, *supra* note 3.

¹⁸ See, e.g., Case C-124/95 *Centro-Com* [1997] ECR I-81, where the Court reaffirmed that political motives behind a trade embargo are not a sufficient reason to remove them from the ambit of Article 113 of the ECT. See also cases 70/94 *Werner* [1995] ECR I-3189 and C-83/94 *Leifer* [1995] ECR I-3231.

to international human rights conventions (other than the ECHR) would probably still be refused the Community by some, just as a recent Commission proposal for a regulation merely aimed at financing human rights activities in third countries has caused lively debate in Council (see *infra* 2D).

Nevertheless, the existence of a Community external human rights policy is confirmed by practice, notably of the 1990s. This takes many forms but can principally be associated with the so-called *human rights clause* in agreements concluded between the EC and third countries, issues related to the link between human rights and *unilateral trade preferences*, EC programmes on *technical (financial) assistance* for democracy- and human rights-building activities and related Commission activities of information-gathering and -sharing. Mention should also be made of the political conditions relating to democracy, human rights and the rule of law which have been recently discussed by the Commission in its Opinions on ten Central and Eastern European candidate countries in the context of *enlargement*. It is to these more specific contexts that we shall now turn.

B The Human Rights Clause

Since the early 1990s, the EC has included more or less systematically a so-called human rights clause in its *bilateral trade and cooperation agreements* with third countries, including association agreements such as the Europe agreements, Mediterranean agreements and the Lomé Convention.¹⁹ A Council decision of May 1995 spells out the basic modalities of this clause, with the aim of ensuring consistency in the text used and its application.²⁰ The model consists of a provision stipulating that respect for fundamental human rights and democratic principles as laid down in the Universal Declaration of Human Rights of 1948 (or, in a European context, also the Helsinki Final Act and the Paris Charter for a New Europe) inspire the internal and external policies of the parties and constitute an 'essential element' of the agreement. A final provision dealing with non-execution of the agreement requires each party to consult the other before taking measures, save in cases of special urgency. An interpretative declaration clarifies that cases of special urgency include breaches of an 'essential element' of the agreement.

Since the Council decision of May 1995, the human rights clause has been included in all subsequently negotiated bilateral agreements of a general nature (excluding sectoral agreements on textiles, agricultural products, and so on). At the time of writing, this amounts to more than 20 agreements which have already been signed.

¹⁹ See, e.g., the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95) 216 final of 23 May 1995; Napoli, 'The European Union's Foreign Policy and Human Rights', in Neuwahl and Rosas, *supra* note 1, at 306–308.

²⁰ Article 5 of the Lomé IV Convention, as revised by an Agreement signed in Mauritius on 4 November 1995, is somewhat more elaborate than the standard clause used in bilateral contexts (see also Article 366a on suspension).

These agreements come in addition to the more than 30 agreements negotiated before May 1995 which have a human rights clause not necessarily following the model launched in 1995.²¹ An agreement with Vietnam signed on 17 July 1995,²² while including the basic human rights clause, lacks the accompanying suspension clause, but this can be explained by the fact that the agreement was largely negotiated before May 1995. On the other hand, when Australia in 1996 refused to accept incorporation of the human rights clause in a trade and cooperation agreement, no binding agreement could be concluded and a political declaration was adopted instead.²³

An important reason for including this standard clause in agreements with third countries is to spell out the right of the Community to *suspend or terminate* an agreement for reasons connected with non-respect of human rights by the third country concerned. Suspension or termination can thus take place, in a manner consistent with the rules of customary international law codified in the Vienna Conventions on the Law of Treaties (to which the EC is not formally a contracting party), without, however, the need to follow all the procedural requirements (and, in particular, the notification requirements) laid down in the Conventions. Before the human rights clause, the EC had to rely on general international law to suspend an agreement, as happened with regard to Ex-Yugoslavia in 1991.²⁴

The human rights clause does not transform the basic nature of agreements which are otherwise concerned with matters not directly related to the promotion of human rights. It simply constitutes a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation under the agreements, and expressly allows for and regulates suspension in case of non-compliance with these values. This approach seems to have been confirmed by the ECJ in *Portugal v. Council* (1996), where the Court observed that an important function of the human rights clause could be to secure the right to suspend or terminate an agreement if the third state had not respected human rights.²⁵

²¹ For a list of the countries concerned (34 or so) and a short analysis of the various types of clauses found in the agreements, see COM(95) 216 final, *supra* note 19, at Annex 3.

²² OJ 1996 L 136, at 28.

²³ Joint Declaration on EU-Australia Relations, signed in Luxembourg on 26 June 1997, Bull. EU 6–1997, point 1.4.103 (summary).

²⁴ The trade concessions of the 1983 Cooperation Agreement were suspended by Council Regulation (EEC) No. 3300/91 of 11 November 1991 (OJ 1991 L 315, at 1) and the whole Agreement by a Council decision, taken together with the Representatives of the Member States, meeting within the Council (the Agreement was mixed), OJ 1991 L 315, at 47. According to Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy', in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension* (1993), at 431, suspension was based on a combination of the *clausula rebus sic stantibus* and the principle of supervening impossibility of performance. In his Conclusions of 4 December 1997 relating to Case C-162/96 *Racke v. Hauptzollamt Mainz*, Advocate General Jacobs accepted *rebus sic stantibus* as a ground for suspension of the 1983 Agreement.

²⁵ Case C-268/94 *Portugal v. Council* [1996] ECR I-6177 (para. 27). A proposal for EC internal procedures for suspension of the Lomé Convention is contained in COM(96) 69 final of 21 February 1996. While this proposal has been blocked for quite some time in Council, as it provides for majority voting when the Council is to decide on suspension, it has gained new momentum in November–December 1997 and is, at

Such a clause thus does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all states as well as the EC in its capacity as a subject of international law.²⁶ The clause accordingly does not imply the enactment of rules on human rights or the conclusion of specific human rights conventions in the sense in which these expressions were used by the ECJ in *Opinion 2/94*.²⁷ Therefore, the human rights clause, with its emphasis on the right of suspension, is a question of treaty law, which does not depend on which view is taken on the potential of Article 235 (or Article 130u) to serve as an enabling clause for human rights standard-setting.

The basic term of reference for the human rights clause is the Universal Declaration of Human Rights, proclaimed by the UN General Assembly in 1948.²⁸ This Declaration, being a resolution of the General Assembly, is not as such a legally binding instrument. But with the major world conferences of the 1990s, including the World Conference on Human Rights of 1993,²⁹ it has become increasingly accepted that the Universal Declaration is not only of exceptional historical and political importance, but also reflects, at least at the level of general principles, existing general international law, whether seen as customary international law or as general principles of law recognized by civilized nations.³⁰ The Declaration can also be seen as a specification of the human rights provisions of the UN Charter.³¹

the time of writing, awaiting the European Parliament's assent. Article 228, para. 2, of the ECT, as amended by the Treaty of Amsterdam, will contain a general clause on the suspension of EC agreements.

²⁶ The relevance for the EC of general (customary) international law is acknowledged in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR 6019 (e.g., para. 9); Case C-432/92 *Anastasiou E.A.* [1994] ECR I-3087 (e.g. para. 40); Case T-115/94 *Opel Austria v. Council* [1997] ECR II-39. In *Opel Austria*, the Court of First Instance observed that 'it is generally recognised that the First Vienna Convention [on the Law of Treaties] codifies certain universally binding rules of customary international law and that hence the Community is bound by the rules codified by the Convention' (para. 77). See also the conclusions by Advocate General Jacobs of 4 December 1997 in Case C-162/96, *supra* note 24. On the implications for Member States, see Lowe, 'Can the European Community Bind the Member States on Questions of Customary International Law?', in M. Koskeniemi (ed.), *International Law Aspects of the European Union* (1997) 149.

²⁷ *Supra* note 3.

²⁸ Article 5 of the revised Lomé Convention IV does not mention the Universal Declaration, but the Declaration, together with the two International Covenants of 1966, is referred to in the Preamble.

²⁹ The Vienna Declaration and Programme of Action, adopted by consensus by the World Conference on Human Rights on 25 June 1993.

³⁰ See generally, e.g., T. Meron, *Human Rights and Humanitarian Law as Customary Law* (1989); A. Elde *et al.* (eds), *The Universal Declaration of Human Rights: A Commentary* (1992); Dmawicki, 'The United Nations Charter and the Universal Declaration of Human Rights', in Hanski and Suksi, *supra* note 1, at 74–76. See also O. Schachter, 'International Human Rights', *RdC* (1982, V), at 334–336, who considers that some, but not all, rights enshrined in the Universal Declaration could be considered as having obtained the status of customary international law; Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', 38 *ICLQ* (1989) 326.

³¹ In the *Tehran Hostage* case, the International Court of Justice noted that a certain conduct relating to the deprivation of liberty 'is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights'. ICJ Reports (1980) 3, at 42. At the World Conference on Human Rights, states reaffirmed in the

The EC's treaty practice since the early 1990s, accepted by an increasing number of third countries via bilateral agreements, contributes to the reaffirmation of the status of the Universal Declaration as an expression of general international law. Moreover, in a Declaration adopted by the Luxembourg Summit of 12–13 December 1997, the European Council reaffirmed the EU's solemn commitment to the respect and defence of the rights enshrined in the Universal Declaration.³²

It should be emphasized that these conclusions do not necessarily imply that each and every word of the Universal Declaration has become universally binding. In fact, the standard EC human rights clause refers to 'democratic principles and basic human rights, as proclaimed in the Universal Declaration', rather than to the provisions of the Declaration as such. What can be safely said is that recent international developments, including EC treaty practice, create a presumption (which may be rebutted on a particular point of detail) that the Declaration expresses customary international law, or at least general principles of law recognized by civilized nations.³³

As will be developed below (Sections 2C and 3B), the human rights policy of the EC includes a social and workers' rights dimension. It should be noted that in this context, too, the European Commission has assumed that there are some basic standards which are universally applicable, whether or not a given state (or the EC itself) has adhered to a particular human rights, including International Labour Organisation (ILO), convention.

For instance, in its 1996 Communication to the Council on 'The Trading System and Internationally Recognised Labour Standards',³⁴ the Commission recognized that, while a wide range of human rights and labour standards had been adopted over time in the UN, the ILO and other international organizations, the international debate on trade and fundamental workers' rights had recently focused on a minimum core of rights which could be generally recognized as universally applicable. In the Commission's view, these core labour standards include the prohibition of slavery and forced labour, freedom of association and the right to collective bargaining, the elimination of discrimination in employment and the suppression of the exploitation of child labour. The basic approach seems to be one of human rights, and the Communication cites a number of international instruments, including not only ILO

Preamble of the Vienna Declaration 'their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights'. In the substantive parts, the World Conference declared, *inter alia*, that 'the universal nature of these rights and freedoms is beyond question', that the protection and promotion of human rights 'is the first responsibility of Governments' and that the promotion and protection of all human rights 'is a legitimate concern of the international community'.

³² See Annex 3 to the Presidency Conclusions of 13 December 1997 of the Luxembourg European Council, SI (97) 1000, para. 1.

³³ The role of human rights as general principles of law is (rightly, it is believed) emphasized by Simma and Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law* (1992) 82, at 102–108. Some parts of the Universal Declaration may even reflect peremptory international law (*jus cogens*), see generally L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) 425–520.

³⁴ COM(96) 402 final of 24 July 1996.

Conventions, but also the Universal Declaration and specific UN human rights conventions, as indicators of universally applicable standards rather than as instances of treaty law.³⁵

C Unilateral Trade Preferences

Apart from international agreements, and general international law as a basis for these agreements, human rights may be linked to *autonomous* acts of secondary Community legislation. In the first place, the Community's unilateral scheme of generalized tariff preferences (the 'GSP'), laid down in Regulations No. 3281/94 and No. 1256/96 in respect of certain industrial and agricultural products originating in developing countries, probably contains the Community's most extensive set of actions related to third countries' respect for (or neglect of) fundamental labour standards to date.³⁶

On the one hand, by virtue of Article 9 of the said Regulations, benefits granted to a particular country under the GSP may be temporarily withdrawn, in whole or in part, if the country is found to practise any form of forced labour, as this term is defined in the Geneva Conventions of 1926 and 1956³⁷ and ILO Conventions No. 29 and No. 105.³⁸ Thus, formal adherence to these conventions is not a necessary prerequisite for withdrawal of tariff concessions in case of non-compliance. The approach is again one of universally applicable standards, which are articulated in more specific conventions.

While the procedure leading to such withdrawal is very time-consuming, recent experience has shown that it can nevertheless be brought to bear on countries significantly and consistently violating the most fundamental labour standards. Indeed, on 24 March 1997, based on a complaint by two Trade Union Confederations, the Council temporarily withdrew access to the tariff preferences under both the industrial and the agricultural GSP schemes for the Union of Myanmar (Burma) because of its use of forced labour.³⁹ This was based on an investigation opened on 20

³⁵ Cf. the much older Communication on 'La coopération au développement et le respect de certaines normes internationales en matière de conditions de travail', COM(78) 492 final of 8 November 1978, which (in relation to the Lomé Convention) is closer to a specific labour standard approach (although the Communication does cite the International Covenant on Economic, Social and Cultural Rights of 1966).

³⁶ Council Regulation No. 3281/94 of 19 December 1994 applying a four-year scheme of generalized tariff preferences (1995–1998) in respect of certain industrial products originating in developing countries, OJ 1994 L 348, at 1, as last amended by Council Regulation No. 2623/97 of 19 December 1997, OJ 1997 L 354, at 9; Council Regulation No. 1256/96 of 20 June 1996 applying multiannual schemes of generalized tariff preferences from 1 July 1996 to 30 June 1999 in respect of certain agricultural products originating in developing countries, OJ 1997 L 160, at 1, as last amended by Council Regulation No. 2623/97 of 19 December 1997, OJ 1997 L 354, at 9.

³⁷ Slavery Convention, signed at Geneva on 25 September 1926, and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 7 September 1956.

³⁸ Forced Labour Convention No. 29 of 1930 and Abolition of Forced Labour Convention No. 105 of 1957.

³⁹ Council Regulation No. 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, OJ 1997 L 85, at 8.

January 1996 by the Commission, which heard experts and consulted the GSP Committee according to the procedures laid down in the above Regulations.

On the other hand, Article 7 of the said Regulations provides for a system of additional preferences, the so-called 'special incentive arrangements', to be granted to countries honouring the standards laid down in ILO Conventions No. 87 and No. 98 concerning freedom of association and protection of the right to organize and to bargain collectively and Convention No. 138 concerning the minimum age for admission to employment.

At Community level, the GSP is the first instrument to contain a social incentive clause. However, its implementation still requires the completion of a two-step procedure: the first step has already been taken, the Commission having sent, on 2 June 1997, a report to the Council on the results of studies carried out in international fora such as the ILO, the WTO and the OECD on the relationship between trade and labour rights.⁴⁰ The second has been initiated with the Commission's adoption of a proposal for a Council Regulation concerning the implementation of Articles 7 and 8 of the two Regulations (labour standards- and environment-related incentive arrangements).⁴¹ At the time of writing, the proposal is still pending before the Council, since certain technical complications have arisen as regards the future monitoring of the new regime. However, it is to be expected that, during the first half of 1998, these problems will be overcome and the Community's first set of 'special incentive arrangements' for labour standards put in place.

The second example of autonomous trade preferences linked to compliance with pre-existing human rights standards concerns certain countries of south-east Europe (most of which have emerged from the former Yugoslavia). The matter is best known under the heading of 'Conditionality'.

In fact, in November 1991, given the progressive dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the Community and its Member States first suspended,⁴² then denounced⁴³ the Co-operation Agreement in force between the Community and the SFRY.⁴⁴ However, within weeks, the tariff preferences originally granted by this Agreement were reintroduced by the Community with respect to those Republics which actively contributed to the peace process, by means of autonomous Regulations.⁴⁵ Already at this time, the measures were explicitly qualified as 'positive

⁴⁰ COM(97)260 final of 2 June 1997.

⁴¹ COM(97)534 final of 30 October 1997, OJ 1997 C 360, at 9.

⁴² *Supra* note 24.

⁴³ Council Decision No. 91/602/EEC of 25 November 1991 denouncing the Cooperation Agreement between the European Economic Community and the SFRY, OJ 1991 L 325, at 23. As noted *supra* note 24, a preliminary reference procedure concerning the above-mentioned acts is currently pending before the ECJ; Case C-162/96 *Racke*.

⁴⁴ Cooperation Agreement between the European Economic Community and the SFRY, signed 2 April 1980; concluded by Council Regulation No. 314/83 of 24 January 1983, OJ 1983 L 41, at 1.

⁴⁵ The first such Regulation was Council Regulation No. 3567/91 of 2 December 1991 concerning the arrangements applicable to imports of products originating in the Republics of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia, OJ 1991 L 342, at 1.

incentive measures'.⁴⁶ They have been successively renewed, with varying geographical coverage, until the present day.

For instance, at the end of 1996 the Council adopted Regulation No. 70/97.⁴⁷ Its application was limited to one year (until 31 December 1997), since the benefits contained therein are supposed to be 'renewed on the basis of conditions established by the Council in relation to the development of relations' between the Community and each of the countries concerned. The one-year period was thus decided 'in order to permit a regular review of compliance, without prejudice to the possibility of modifying the geographical coverage of this Regulation'.⁴⁸

Meanwhile, the Community had defined a coherent strategy for its future relations with those countries of south-east Europe with which Association Agreements had not yet been concluded (Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia (FRY), the former Yugoslav Republic of Macedonia (FYROM) and Albania). Indeed, on 29 April 1997, the Council adopted Conclusions on the future strategy of 'Conditionality'.⁴⁹

As results from the Introduction to these Conclusions, bilateral relations with the countries concerned will be developed, among others, 'within a framework which promotes democracy, the rule of law [and] higher standards of human and minority rights'. Since the strategy is conceived as an incentive, and not an obstacle, for the countries concerned to fulfil the general and country-specific criteria laid down therein, the Community will follow a graduated approach in monitoring and evaluating the progress made in meeting these criteria. In this context, the Community's granting of (autonomous) trade preferences, the extension of financial assistance and economic cooperation (including assistance under the Phare Regulation)⁵⁰ and the establishment of contractual relations with the countries concerned are subject to different degrees of Conditionality.

Here again, while an Annex to the Conclusions lays down certain elements for the examination of compliance with democratic principles, human rights, the rule of law and respect for and protection of minorities, the Conclusions as a whole do not establish new rules. The substance of the respective countries' commitments stems mainly from the Dayton Peace Agreements, including the General Framework

⁴⁶ Cf. the second preambular paragraph of this Regulation.

⁴⁷ Council Regulation No. 70/97 of 20 December 1996 concerning the arrangements applicable to imports into the Community of products originating in the Republics of Bosnia-Herzegovina, Croatia and the former Yugoslav Republic of Macedonia and to imports of wine originating in the Republic of Slovenia. OJ 1997 L 16, at 1, as amended by Council Regulation No. 825/97 of 29 April 1997. OJ 1997 L 119, at 4 (extension of the benefits of this Regulation to the Federal Republic of Yugoslavia (FRY)).

⁴⁸ See the last preambular paragraph of Regulation 70/97; the extension of this Regulation to the FRY (*supra* note 47) for part of 1997 constitutes the first example of such an interim modification of the Regulation's geographical coverage.

⁴⁹ Council Conclusions on the principle of Conditionality governing the development of the European Union's relations with certain countries of south-east Europe, adopted on 29 April 1997. Bull. EU 4-1997, points 1.4.67 (commentary) and 2.2.1 (full text).

⁵⁰ See Section 2D below.

Agreement for Peace (and its provisions on cooperation with the International Tribunal), the Federation/Croatia and the Republica Srpska/FRY agreements, or the Basic Agreement on Eastern Slavonia.

On 29 December 1997, the Council decided to extend the application of the trade preferences of Regulation 70/97 for 1998.⁵¹ This extension applies to imports from Bosnia-Herzegovina and Croatia and to imports of wine from FYROM and Slovenia, FYROM being now covered, for its remaining products, by a new Cooperation Agreement which entered into force on 1 January 1998.⁵² FRY (Serbia and Montenegro) has again been excluded from the preferential regime (at least temporarily) because of its lack of fulfilment of the political Conditionality criteria.⁵³

D *Technical (Financial) Assistance*

Assistance related to human rights and institution or democracy building has also regularly been provided by the Community as part of its *technical (financial) assistance*, which again is regulated in *autonomous* Community acts (regulations). This is true in particular as regards the Community's instruments for assistance to the Central and Eastern European countries (CEEC), the New Independent States (NIS) and Mongolia as well as the Mediterranean countries. However, such activities also form an important part of the Community's 'horizontal' instruments governing development cooperation with lesser developed countries.⁵⁴

While the possible scope of projects relating to human rights or democracy building was not yet fully spelt out in the 1989 Phare Regulation, the main instrument for technical (financial) assistance to the CEEC,⁵⁵ projects concerning human rights and institution building as well as efforts towards the harmonization of legislation (aligning these countries' legal orders on prevailing European standards) are regularly included in Phare programmes. The objective is even clearer as regards the NIS and Mongolia, since Annex II of the 1996 Tacis Regulation lists the 'restructuring of public administration', 'legal assistance, including approximation of legislation' and, in particular, the 'strengthening of the civic society' among the indicative areas for assistance to these countries.⁵⁶

⁵¹ Council Regulation No. 2636/97 of 29 December 1997, OJ 1997 L 356, at 16.

⁵² OJ 1997 L 348, at 1.

⁵³ This motivation was fully spelt out in the penultimate preambular paragraph of the Commission's proposal, cf. COM(97) 637 final of 28 November 1997. However, as part of the political compromise achieved in Council, this language has not been included in the Regulation's final version.

⁵⁴ See, for example, Council Regulation No. 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (ALA), OJ 1992 L 52, at 1; according to Article 1 of this Regulation, in the context of financial and technical development assistance to and economic cooperation with these countries, the Community shall attach the utmost importance, *inter alia*, to '[t]he promotion of human rights, support for the process of democratisation [and] good governance'.

⁵⁵ Council Regulation No. 3906/89 of 18 December 1989 concerning economic assistance to the Republic of Hungary and the Republic of Poland ['Phare'], OJ 1989 L 375, at 11, as last amended by Regulation No. 753/96 of 22 April 1996, OJ 1996 L 103, at 5.

⁵⁶ Council Regulation No. 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia ['Tacis'], OJ 1996 L 165, 1 at 6.

A similar approach has been retained for the 1996 MEDA Regulation.⁵⁷ In fact, Article 2 of this Regulation mentions the 'reinforcement of political stability and of democracy' among the three main sectors of the Euro-Mediterranean partnership, thus including it in the Regulation's primary objectives. In addition, the 'strengthening of democracy and respect for human rights' and the promotion of 'good governance' (in all its various forms) are listed in Annex II of the Regulation as specific areas of MEDA cooperation.

The Tacis and MEDA Regulations contain an additional feature, however, insofar as they incorporate provisions which bear a certain resemblance to the 'human rights clauses' included in all recent EC agreements (see above, 2B). According to Article 3 of the MEDA Regulation:

This Regulation is based on respect for democratic principles and the rule of law and also for human rights and fundamental freedoms, which constitute an essential element thereof, the violation of which element will justify the adoption of *appropriate measures*. (emphasis added)

While at the time of adoption of the MEDA Regulation, unanimity could not be found for a provision regulating the procedures to be followed in case of suspension (unanimity v. qualified majority), this lacuna is now on the verge of being rectified. Indeed, at the end of 1997, the Commission proposed a modification of Article 16 of the MEDA Regulation so as to provide for the possibility to suspend cooperation by qualified majority.⁵⁸

The same idea is expressed, albeit in somewhat different form, in Article 3.11 of the Tacis Regulation. According to this provision:

When an essential element for the continuation of cooperation through assistance is missing, in particular in cases of violation of democratic principles and human rights, the Council may, on a proposal from the Commission, acting by a qualified majority, decide upon *appropriate measures* concerning assistance to a partner State. (emphasis added)

A somewhat similar formula has been included in Article 4 of Council Regulation No. 622/98 on assistance to the applicant countries of Central and Eastern Europe in the framework of the pre-accession strategy.⁵⁹ Indeed, according to this Article:

Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Europe Agreement are not respected and/or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by qualified majority on a proposal from the Commission, may take *appropriate steps* with regard to any pre-accession assistance granted to an applicant State. (emphasis added)

⁵⁷ Council Regulation No. 1488/96 of 23 July 1996 on financial and technical measures to accompany the reform of economic and social structures in the framework of the Euro-Mediterranean partnership (MEDA), OJ 1996 L 189, at 1, as corrected in OJ 1996 L 255, at 24.

⁵⁸ Proposal for a Council Regulation amending Regulation 1488/96 (MEDA) as regards the procedure for adopting the appropriate measures where an essential element for the continuation of support measures for a Mediterranean Partner is lacking; COM(97) 516 final of 10 November 1997, OJ 1997 C 386, at 9.

⁵⁹ Council Regulation No. 622/98 of 16 March 1998 on assistance to the applicant states in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, OJ 1998 L 85, at 1.

While not technically an amendment to the Phare Regulation, this new Regulation has *de facto* introduced a 'human rights clause' into Phare assistance to the applicant countries, since Phare is the main instrument for Community assistance to these countries in the context of the so-called 'Accession Partnerships' decided by the Luxembourg European Council of 12–13 December 1997.⁶⁰

All these clauses can be used to suspend, or even terminate, cooperation with a partner state in case of substantial human rights violations or significant undemocratic developments. However, experience shows that such clauses may also be used as a basis for certain *positive* measures aimed at promoting (or even restoring) human rights and democracy in an internal state of crisis in one of the partner countries, without it being necessary to apply all the normal procedures provided for in the respective Regulations.

The Commission has long considered that such clauses, given their reference to 'appropriate' measures or steps (and not simply to suspension or termination), should in fact have a positive dimension, at least in certain (possibly exceptional) situations. This view was recently confirmed by the Council.

Indeed, in the aftermath of the 1996 constitutional crisis in Belarus, all bilateral Tacis assistance was *de facto* suspended, since it proved impossible for the Commission to negotiate an Indicative Programme and an Action Programme, both prerequisites for effective programming under the Tacis Regulation. However, in three successive political statements (Conclusions and Declarations), the Council, while condemning the situation and thus (politically) confirming the *de facto* suspension of all technical assistance, nevertheless left some opening for future Community assistance to Belarus, if this were directly geared towards promoting human rights, freedom of the media and, more generally, the democratization process.⁶¹

The Commission reacted to this signal and adopted, on 19 September 1997, a proposal for a Council Decision on a Tacis Civil Society Development Programme for Belarus.⁶² This Decision was adopted by the Council on 18 December 1997.⁶³ It constitutes the first measure to be founded on the 'human rights clause' of the Tacis Regulation, and probably the first measure ever to be formally decided by the Council under a 'human rights clause' with the objective of helping restore human rights and democracy in a country in serious constitutional crisis.

Finally, Community human rights assistance extends beyond the scope of technical (financial) cooperation in the sense in which this was just described. Indeed, Chapter 7–7 of the Community budget contains a whole series of budget lines aimed more directly at the promotion of human rights on a global scale, thus laying the ground for a 'European Initiative for democracy and the protection of human rights'. Measures

⁶⁰ See the Presidency Conclusions of 13 December 1997 of the Luxembourg European Council, SI (97) 1000, paras 14–16.

⁶¹ Council Conclusions of 24 February 1997; Council Declaration of 29 April 1997, Bull. EU 4–1997, point 1.4.6; Council Conclusions of 15 September 1997; all cited in the Commission's proposal (*infra*).

⁶² COM(97) 441 final of 19 September 1997, as amended by COM(97) 602 final of 12 November 1997, OJ 1997 C 384, at 10.

⁶³ Council Decision (98/1, EC/EAEC) of 18 December 1997, OJ 1998 L 1, at 6.

envisaged under this heading range from the (classical) support to democracy, human rights and institution building in developing and other countries (including the CEEC, the NIS and Mongolia and the countries of the former Yugoslavia), to assistance in the establishment of free and independent media, support for the international criminal tribunals with a view to fostering the creation of a permanent international criminal court, to concrete assistance to victims of torture and other human rights violations.

As results from the broad field of actions envisaged in this Budget Chapter, the Community is now called upon to move from a sectoral (and largely geographically predetermined) human rights approach to a global and encompassing appreciation of human rights in its international relations. This is also the objective of the Commission's recent proposal for a Council Regulation, which is meant to constitute the 'legal base' for all financing activities in the field of human rights and democracy.⁶⁴

The proposal, based on Article 130w (development cooperation), was examined at Council working group level during autumn 1997 and winter 1998. It generated a vivid debate on the existence and extent of Community competences in the field of human rights protection, which demonstrates that the precise status of human rights in the context of the First Pillar is still subject to differing interpretations. Nevertheless, as matters currently stand, the Council might well decide to split the Commission proposal into two legal acts, one applying to developing countries and based on Article 130w, the other applying to other countries and based on Article 235.

If adopted in this form, the Regulations would enable the Commission, assisted by the same Committee(s) of Member State representatives, to implement projects in all areas currently covered by Chapter 7-7 of the Community Budget. The Regulations could thus contribute significantly to a more coherent human rights approach in the external policies of the Community. Moreover, they (or rather, one of the two Regulations) would reaffirm the use of Article 235 as a basis for external EC human rights activities.

3 Categories of Human Rights

A General Context

In line with a general tendency in international law and diplomacy, the EC (and EU) approach to human rights is more often than not based on the broader triad of democracy, human rights and the rule of law.⁶⁵ Sometimes, as with Article F of the

⁶⁴ Proposal for a Council Regulation concerning the development and the consolidation of democracy and the state of law as well as respect for human rights and fundamental freedoms, COM(97) 357 final of 24 July 1997.

⁶⁵ The relation between the three concepts could be described as being one between 'Siamese triplets'. Cf. Rosas, 'Democracy and Human Rights', in A. Rosas and J. Helgesen (eds), *Human Rights in a Changing East-West Perspective* (1990) 17, at 17, where democracy and human rights are characterized as 'Siamese twins', which seem 'not only to presuppose each other but also to be genuinely intertwined'.

TEU⁶⁶ and the standard human rights clause discussed above (Section 2B), express reference is made to human rights and democratic principles only, apparently on the assumption that the rule of law is covered by the concept of human rights. In most of the other human rights provisions of the TEU (the Preamble, Article 130u ECT, Article J.1) reference is made to democracy, human rights and the rule of law. Inspired by the Preamble, the new Article F(1) of the Treaty of Amsterdam provides that the Union is founded on the principles of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.

In its Opinions on ten Central and Eastern European candidate countries published in July 1997,⁶⁷ the Commission, in accordance with the 'political criteria' formulated by the European Council in Copenhagen, included a chapter on i) democracy and the rule of law and ii) human rights and the protection of minorities. The first sub-chapter discusses the political and constitutional system and the judiciary. The second sub-chapter includes sub-headings on civil and political rights, economic, social and cultural rights, and minority rights. The Opinions avoid any sharp distinctions between these different categories, but rather seem to view them as interrelated and mutually reinforcing. This, of course, is in line with a current tendency in international human rights discourse, including the 1993 Vienna Declaration and Programme of Action.⁶⁸ The same approach can be seen in the above-mentioned Commission proposal for a human rights financing regulation, since this refers not only to the universality but also to the indivisibility of human rights.⁶⁹

B Economic and Social Rights

As demonstrated by the specific references to 'liberty', 'democracy' and the 'rule of law' in the new Article F(1) of the Amsterdam Treaty, there can be no doubt that civil and political rights are covered by the EC concept of human rights. What may be more open to question is the status and role of economic, social and cultural rights. While in internal Community law, and notably in the ECJ's case law, there is a certain emphasis on the European Convention on Human Rights, which deals with economic and social rights only marginally,⁷⁰ the *acquis* may well include other human rights conventions, including those dealing with economic and social rights.⁷¹

⁶⁶ Article F(2) discussed above merely refers to 'fundamental rights', whereas 'principles of democracy' are mentioned in Article F(1) as the foundation of the systems of government of the Member States.

⁶⁷ COM(97) 2000 final of 15 July 1997, vols. I and II ('Agenda 2000'); COM(97) 2001–2010 final of 15 July 1997 (Commission Opinions on the individual candidate countries).

⁶⁸ According to paragraph 1:5 of the Vienna Declaration and Programme of Action, 'all human rights are universal, indivisible and interdependent and interrelated'. See also A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995), *passim*.

⁶⁹ *Supra* note 64, preambular paragraph.

⁷⁰ But the ECHR is not a treaty limited by definition to civil and political rights, see, e.g., Pellonpää, 'Economic, Social and Cultural Rights', in R. St. J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993) 855.

⁷¹ See, e.g., O'Leary, 'The Social Dimension of Community Citizenship', in A. Rosas and E. Antola (eds), *A Citizens' Europe: In Search of a New Order* (1995) 156, at 177–178; Szyszczak, 'Social Rights as General Principles of Community Law', in Neuwahl and Rosas, *supra* note 1, 207, at 208–213; L. Betten and D. MacDevitt (eds), *The Protection of Fundamental Social Rights in the European Union* (1996).

On the level of the founding Treaties, the Preamble to the Single European Act makes reference not only to the European Convention on Human Rights, but also to the European Social Charter. In addition, the Preamble to the Treaty of Amsterdam as well as the new version of Article 117 ECT (adopted in Amsterdam) refer to 'fundamental social rights' such as those defined in the European Social Charter and in the 1989 Community Charter on the Fundamental Social Rights of Workers. The ECJ, for its part, has sometimes referred to 'the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories',⁷² which in principle may include both categories of human rights conventions.

Even more to the point, the Community Courts have repeatedly drawn inspiration from international social rights standards when interpreting certain EC Treaty provisions with a view to developing a set of EC based social rights. As early as 1978, having declared that the elimination of discrimination based on sex (Article 119 of the EC Treaty) formed part of the fundamental human rights respect for which the Court must ensure, the Court went on to note:

Moreover, the same concepts are recognised by [the European Social Charter] and by Convention No. 111 of the [ILO] concerning discrimination in respect of employment and occupation.⁷³

The European Social Charter was also referred to in the context of the Court's interpretation of the concept of vocational training under Article 128 of the EC Treaty.⁷⁴ Finally, in a case where the applicant had specifically invoked certain ILO Conventions and the European Social Charter, the Court of First Instance reaffirmed that a female worker's dismissal on account of pregnancy constituted a direct sex discrimination under Community law, since '[t]he same conclusion is to be drawn from the international instruments in which the Member States have cooperated or to which they have acceded'.⁷⁵

As to the external aspect, in its 1995 Communication on the external dimensions of human rights policy, the Commission stressed, *inter alia*, the principle of indivisibility, which precludes discrimination between civil and political rights, and economic, social and cultural rights.⁷⁶ In fact, the Universal Declaration itself, which forms the basic frame of reference for the EC human rights clause (cf. Section 2B *supra*), includes a number of rights belonging to the sphere of economic, social and cultural rights. These include the right to social security and other economic, social and cultural rights indispensable for the dignity and the free development of the personality of each human being (Article 22), the right to work (Article 23), the right to rest and leisure

⁷² This is stated, e.g., in Case 4/73 *Nold* [1974] ECR 491 (para. 13), and in *Opinion 2/94*, *supra* note 3, at para. 33.

⁷³ Case 149/77 *Defrenne v. Sabena* (No. 3) [1978] ECR 1365 (para. 20).

⁷⁴ Case 24/86 *Blatzot* [1988] ECR 379 (para. 20).

⁷⁵ Case T-45/90 *Alicia Speybroeck v. European Parliament* [1992] ECR II-33 (para. 49).

⁷⁶ COM (95) 567 final of 22 November 1995, at 10.

(Article 24), the right to an adequate standard of living (Article 25), the right to education (Article 26) and the right to participate in cultural life (Article 27). The European Council, for its part, recently reaffirmed its support for an 'integrated approach' to human rights (including social and economic development) in all pertinent activities of the UN and other international organizations.⁷⁷

It is against this background that the question of whether or not to include a separate 'social clause' in the Community's agreements with third countries should be viewed. In fact, it appears that such rights are already covered by the unlimited reference to 'respect for human rights and democratic principles' contained in the standard human rights clause. There may be a certain risk that, if separate 'social rights' were defined and covered by a specific 'social clause', this might give the erroneous impression that these rights are not universal human rights, which might diminish, rather than increase, their significance. The Commission has so far refrained from proposing separate social rights clauses for EC agreements to be concluded with third countries.⁷⁸ Article 5 of the IV Lomé Convention expressly covers both civil and political rights and economic, social and cultural rights, which according to the Convention are 'indivisible and inter-related' (para. 2).

Also in the context of the international debate on the relation between trade and workers' rights, the Commission, for instance in its 1996 Communication referred to above,⁷⁹ approached the issue in the broader framework of human rights and cited not only ILO Conventions but also the Universal Declaration and UN human rights conventions in support of its view that a core of fundamental workers' rights exist which are universally applicable. In fact, the core rights invoked (freedom from forced labour, freedom of association, etc.) illustrate the difficulties in making a sharp distinction between civil and political rights, on the one hand, and economic, social and cultural rights on the other.

In the context of enlargement, too, the Commission has included economic and social rights in its discussion of the fulfilment of the so-called 'Copenhagen criteria' by the ten candidate countries. The Opinions consider whether these countries have adhered to the European Social Charter or not (other conventions considered include the European Convention on Human Rights, the European Torture Convention and the main UN instruments). There is also a brief discussion on the state of certain selected economic and social rights, such as trade union rights, but this discussion is

⁷⁷ *Supra* note 32, at para. 7.

⁷⁸ However, human resources development and social cooperation have been included among the objectives of development cooperation (Articles 3, paragraph 4, respectively) of the recent Cooperation Agreements with Laos (OJ 1997 L 334, at 14) and Cambodia (COM(97) 78 final of 3 March 1997, OJ 1997 C 107, at 6, not yet adopted), while a separate Article 12 on social cooperation 'giv[ing] particular priority to respect for basic social rights' has been inserted in the Cooperation Agreement with Yemen (OJ 1998 L 72, at 17). The recent Agreement with FYROM, on its part (*supra* note 52), even includes social rights among its main objectives (Article 1, para. 5). According to this Article, the parties 'acknowledge the importance of social development which should go hand in hand with any economic development' and undertake to 'give particular priority to the respect for basic social rights' (emphasis added).

⁷⁹ *Supra* note 34.

generally much shorter than the part of the Opinions dealing with civil and political rights. This may be indicative of the fact that economic, social and cultural rights, while being seen (also) as part of the human rights agenda, have not yet been conceived as enjoying quite the same status *qua* human rights as civil and political rights.

Finally, it will be recalled that the 1997 Commission proposal for a human rights financing regulation⁸⁰ is based on the principle of indivisibility of human rights. That economic and social rights are included in the concept of human rights is spelt out in a preambular paragraph.

C *Minority Rights*

While the Commission Opinions on the ten candidate countries make rather short shrift of economic and social rights, the same is not true of what in the Opinions is called 'minority rights and the protection of minorities'. Especially for countries with large minority populations, such as Estonia and Latvia, there is a fairly detailed discussion of existing problems and the need to integrate the minority population into the society.

This emphasis on minority rights is not anchored in any long-standing EC law tradition. The concept of minority rights has not had a specific place in Community law, which may relate to the fact that some Member States have emphasized the unity of the state and the nation rather than special minority arrangements.⁸¹ At the same time, the case law of the Court of Justice,⁸² in referring to 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' does not exclude that *some* minority rights could be included in the *acquis*. But this is uncertain ground, given the reservation formulated by one Member State to Article 27 (persons belonging to ethnic, linguistic or religious minorities) of the International Covenant on Civil and Political Rights.⁸³

Nor does the Treaty of Amsterdam introduce the concept of minority rights into the founding Treaties. However, this Treaty may be said to take some steps in this direction. For instance, the principle of non-discrimination, traditionally limited to discrimination on the basis of nationality (Article 6 of the ECT), has merited a new Article 6a, according to which the Council may take appropriate action to combat discrimination based, *inter alia*, on 'racial or ethnic origin'.⁸⁴ Moreover, a new version of Article 128(4) requests the Community to take cultural aspects into

⁸⁰ *Supra* note 64.

⁸¹ See Martín Estébanez, 'The Protection of National or Ethnic, Religious and Linguistic Minorities', in Neuwahl and Rosas, *supra* note 1, 133, at 133–134.

⁸² *Supra* note 72.

⁸³ The French reservation, the text of which can be found, e.g., in *Human Rights: Status of International Instruments* (1987) 35, states that 'article 27 is not applicable as far as the Republic is concerned'. It should be noted that Greece only ratified the Covenant in 1997, without, however, making any reservation in this respect.

⁸⁴ Already on 2 June 1997, the Council adopted Regulation No. 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ 1997 L 151, at 1. The Regulation is based on Articles 213 and 235 of the ECT.

account in its action under other provisions of the Treaty, 'in particular in order to respect and to promote the diversity of its cultures'.

With respect to the external dimension, express references to minority rights are included in the 1997 Council Conclusions on the future strategy of 'Conditionality' with respect to ex-Yugoslavia.⁸⁵ In a broader EU framework (including the policies of Member States), minority rights and the protection of minorities have received much attention during the 1990s, with the instruments adopted in the framework of the Organization of Security and Cooperation in Europe (OSCE), the 1994 Council of Europe Framework Convention for the Protection of National Minorities and, at the universal level, the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁸⁶

This more recent emphasis on minority rights and the status of minorities has, especially at the European level, been seen as part of a policy to promote stability and sustainable development in 'new' democracies and countries in transition. The Commission's 1997 Opinions on the ten candidate countries of Central and Eastern Europe⁸⁷ should be seen against this background. The Opinions are based on a broad conception of what constitutes a minority, including that part of the permanent population which has not been granted citizenship by countries such as Estonia and Latvia.⁸⁸ With respect to these countries, the Opinions discuss the criteria for acquiring citizenship and the rights of the minority populations with respect to freedom of movement, political participation and access to public posts, access to courts, freedom of information and the educational system. This status of minority rights as part of the enlargement process has recently been confirmed in the new Regulation concerning the pre-accession strategy, by reference to the Copenhagen criteria.⁸⁹

Finally, the 1997 Commission proposal for a human rights financing regulation contains a preambular paragraph (and, in its current version, even an Article 2.1.c.) confirming that EC human rights programmes should favour special groups, including 'minorities' and 'indigenous peoples'.⁹⁰ Community assistance could thus promote minority rights in all third countries, not just the Central and Eastern European states which are candidates for enlargement.

⁸⁵ *Supra* note 49.

⁸⁶ On these developments see, e.g., A. Phillips and A. Rosas (eds), *Universal Minority Rights* (1995) *passim* (Part II contains the relevant texts). The OSCE documents and the 1992 UN Declaration have been adopted by consensus and thus accepted by all EU Member States.

⁸⁷ *Supra* note 67.

⁸⁸ For a similar approach, see the General Comment on Article 27 of the International Covenant on Civil and Political Rights approved by the Human Rights Committee in 1994, Report of the Human Rights Committee, Vol. I, GAOR, 49th Session, Supplement No. 40 (A/49/40) 107–110. Compare the declaration made by Estonia to the Council of Europe Framework Convention for the Protection of National Minorities (ratification of 6 January 1997), which attempts to exclude non-citizens from the protection of the Convention.

⁸⁹ *Supra* note 59.

⁹⁰ *Supra* note 64.

4 Summary and Conclusions

Especially since the early 1990s, human rights have found a place in EC external policies, including commercial policies. In fact, a considerable part of EU external human rights activities and policies has been situated in the 'First Pillar', that is, Community legal acts, rather than CFSP action. This is after all not surprising, given that international agreements and secondary legislation can only be adopted in the framework of the Communities.

Nevertheless, the scope and intensity of Community action in this field has continued to be controversial. This can be seen from the statements made by some Member States before the ECJ in its consideration of *Opinion 2/94* (on adherence to the ECHR), the recent discussions on competence and legal base for the adoption of the proposed Council Regulation(s) on human rights financing programmes and the absence from the Treaty of Amsterdam of a clause expressly enabling the EC to adhere to international human rights conventions, including the ECHR.

But the proposed Regulation(s) on human rights financing programmes (one of which might eventually be based on Article 235), and the provisions relating to human rights which did find their way into the Amsterdam Treaty, are indicative of a trend towards a full-fledged human rights competence of the Community, including in the external field. The human rights clauses of the EC bilateral agreements and the autonomous legislation on trade preferences and technical assistance programmes are of course also significant in this respect. Moreover, since the adoption of a model human rights clause in May 1995, all subsequently negotiated EC 'framework' agreements have been bestowed with such a clause.

At the time of this writing, there is also an increased tendency to accept (qualified) majority voting for the suspension of Community legal acts in case of human rights violations committed by a third country (modification of the MEDA Regulation, new Regulation concerning the pre-accession strategy, consideration of procedures for suspending the Lomé Convention). This may imply that the possibility of suspension will not remain a dead letter. In fact, the recent suspension of GSP trade preferences with respect to Myanmar and the exclusion of the FRY from the Community's import regime for certain countries of south-east Europe in 1998 show that suspension is not just a theoretical possibility. In addition, the recent use of the Tacis 'human rights clause' with respect to Belarus, while not technically a case of 'suspension', shows that such clauses can be used to adopt, by qualified majority, positive measures aimed at restoring human rights in certain partner countries. Human rights conditionality, whether 'positive' or 'negative', has entered both EC trade and technical assistance policies.

EC external human rights policy is underpinned by two fundamental principles: universality and indivisibility. As part of the emphasis on universality, the Universal Declaration of Human Rights stands out as the normative foundation of Community action. In this respect, the Community's activities are based on the presumption that the Universal Declaration expresses general principles which have become binding on all subjects of international law, including the Community itself.

The principle of indivisibility stresses that human rights are interdependent and interrelated and that the distinction between different categories of human rights, while sometimes useful as a presentational and educational tool, should not lead to any watertight compartments between, for instance, civil and political rights, and economic, social and cultural rights. Community legal acts and Commission documents generally seem to be based on the principle of indivisibility. They also apparently follow an 'integrated' approach. However, only the coming years will tell what specific weight economic and social rights, and minority rights, will be given in the development of EC and EU external human rights policies.

While the EC, as a subject of international law, is already bound by, and influences the development of, general international law in the field of human rights, the Community remains formally outside the written conventions, including the ECHR. This is regrettable, as it means that the EC is not directly responsible for the execution of these conventions. While EC accountability could already in the present situation be advanced on the basis of voluntary cooperation with the treaty bodies established under the various conventions, EC adherence to such human rights conventions as the ECHR, the European Social Charter or the 1966 Covenants is a challenge which has not yet been met with an adequate response.

Another challenge, certainly not limited to the field of human rights, is posed by the distinction between 'First Pillar' (EC/EU) and 'Second Pillar' (Non-EC/EU) matters. While the present article has not addressed 'Second Pillar' issues in their own right, a long-term strategy for an EC/EU human rights policy must take as one of its starting points the principle of coherence ('consistency') of EC/EU external activities, as proclaimed in Article C of the TEU.

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