The EU - A Cosmopolitan Polity?

Paper for the Panel
"From Civilian to Military Power: The EU at the Crossroads"
at the EUSA Ninth Biennial International Conference
March 31-April 2, 2005 in Austin Texas

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The parameters of power politics have changed in Europe and the EU exports the rule of law, democracy and human rights worldwide.The constitutionalisation of the Charter of Fundamental Human Rights of the EU is an important step in the process of institutionalising a framework of a cosmopolitan order where violations of human rights can be persecuted as criminal offences according to legal procedures. We may, however, question whether EU's external foreign and security policy is consistent with cosmopolitan tenets. But the EU is not a cosmopolitan order that aspires to be a world organization. Rather it is one that subjects its actions to the constraints of a higher ranking law. The critical question, then, is the democratic quality of the EU, as there should be no humanitarization without representation.

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Introduction

For a long time the EU has for along time been described as a 'civilian power' (Duchêne 1972). It has been reluctant to use coercive means in order to solve conflicts and achieve goals. This has been an integral part of its identity from the very start of the European Political Cooperation (EPC) in the 1970's. The divide over the Gulf war in the early 1990's, the Kosovo affair in the late 1990's and the present contention with USA over Irak and Iran testify to the notion of a polity with a humanitarian mark. In numerous documents, declarations and policy statements the EU has distinquished itself from the power politics of traditional states in international relations. According to (TEU) The primary goal of EU's Common Foreign and Security Policy (CFSP) is "… to safe guard the common values, fundamental interests, independence and integrity of the Union in conformity with the principles of the Union Nations Charter". [1]

The crisis of Kosovo 1999 and the perceived problems of the EU to cope with security issues after 9.11 have pushed for a more able security policy (Dannreuther 2004). Sometimes words and economic sanctions do not suffice. There is no European army and no European police corps. Increasingly, there is a perceived 'capability-expectations gap' (Hill 1998).

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[1] The Treaty of the European Union (TEU, Title V. art.11).

Especially the crises of former Yugoslavia, which called for military

reaction of one sort or the other, made it crystal clear that capability and

coherent action where in short supply in Europe. Eventually, regional

conflicts, organized crime, terrorism, state 'failure' etc. have lead to a

strengthening of the security policy. The so-called *rapid-reaction*

mechanism was established in 2001 designed to permit the Community to

respond in an "efficient and flexible manner to situations of urgency or crisis

or to the emergence of crisis".[2] *The European strategy* of 2003 – A secure

Europe in a better world: European Security strategy - was adopted by the

European Council December12-13., and represented a reassurance of the

determination "for guaranteeing a secure Europe in a better world"[3], which

is analysed in several of the articles of this volume. There is call for

concerted military action in the form of troop deployment. The aim of the

decision to establish EUs Battle Groups, which was made by the EU summit

May 2004 and is part of the so-called European Headline Goal for 2010, was

to establish rapid operable EU forces – a 60,000 member army European

Rapid Reaction force. But already January 1. 2003 the European Union

Police Mission in Bosnia and Herzegovina (EUPM) started and the EU

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[2] **Council Regulation (EC) No 381/2001 of 26 February 2001 creating a rapid-reaction mechanism [Official Journal L 57 of 27.02.2001].**
[3] Council of the European Union, European Council 12-13 Dec. 2003. Presidency Conclusions, 538/104, Brussels, 5. Feb. 2004

Military Operation in the same place (EUFOR - Althea) followed 2.12.04. In December 2003 a European Union Police Mission in the former Yugoslav Republic of Macedonia (EUPOL PROXIMA) was in place. The European Union Police Mission in Kinshasa (DRC) - (EUPOL KINSHASA) of January 2005 succeeded the military operation in Kongo (ARTEMIS) from June to September 2003.

Many fear that such peace-keeping and conflict-preventing missions and the enhanced military capability at the European level will endanger the 'civilian' aspects of EU. Will it become an actor like other actors in the world system? But even if the EU in reality is a different, 'humanitarian polity', is coercion foreign to such a polity as the conceptualizations of the EU in terms 'civilian' or 'humanitarian power' suggest? My point of departure is that the litmus test to whether a post-national polity is sustainable in normative terms is the actual subjection of its actions to a higher ranging law – to the law of the people. This does not preclude the use of force but rather the curtailing of state autonomy.

The background for conceiving of the EU in cosmopolitan terms is that there has been a significant development of rights and law enforcement beyond the nation state in post-war Europe, which constrains the will power of the states. This culminated with the initiative taken to incorporate a

Charter of Fundamental Rights of the European Union into the new Constitutional Treaty of the EU. What is at stake with the institutionalization of human rights beyond the nation state is the sovereignty of the modern state as laid down in the Westphalian order in 1648. This order, which safeguarded the rulers' *external sovereignty,* can not prohibit genocide or other crimes against humanity and can not be sustained in normative terms.

In this article I would like to address whether the EU has cosmopolitan features by analysing the recent constitutional development of the Union. In addition to submit national practices to supranational review, the EU has incorporated human rights as a horizontal clause in all its external relations. Is this merely 'cheap talk'? However, it is in the question of the EU's use of military means that the conflict between national self-determination and human rights are brought to the fore. This will be addressed in the latter part of the article. I start with the putative right to a lawful international order.

Cosmopolitan law of the citizens

The Westphalian principle of state sovereignty is a principle that has protected the most odious regimes. It was only when Hitler-Germany attacked Poland that World War II broke out, not when the persecution of

Jews started. This also indicates the limitations of nationally founded and confined democracy. While human rights are universal and refer to humanity as such, democracy refers to a particular community of legal consociates who come together to make binding collective decisions. The validity of the laws is derived from the decision-making processes of a sovereign community. The propensity to adopt rights, then, depends on the quality of the political process in a particular community and that consequently may fail in respecting the rights and liberties of their citizens as well as other states' legitimate interests. Even though the contradiction between rights and democracy is, in principle, a false one - since there can be no democracy without the protection of individual rights, and since rights are not valid unless they have been democratically enacted - in practical terms there is a contradiction as democracy is only institutionalised at the level of the nation state. States are geared toward self-maintenance as the primary responsibility of the decision-makers are their own constituency. The state is so to say limited by the people:

> The individual may say for himself: "Fiat justitia, pereat mundus (Let justice be done, even if the world perish)," but the state has no right to say so in the name of those who are in its care. (Morgenthau 1993:12).

Hence, democracies may be *illiberal* (Zakaria 2003). Consequently, there is a tension between democracy, which is limited to the nation-state, and

human rights, which are universal and point to the ideal republic. Human rights apply to all members of humankind and transcend the rights of the citizens. To resolve the tension between human rights and democracy the authors of the law must at the same be its addressees. Cosmopolitan democracy where actors see themselves as citizens of the world and not merely of their countries is therefore required (Held 1995). Article 28 of *The United Nations Universal Declaration of Human Rights* (1948) recognizes a right to a lawful international order:

> Everyone is entitled to a social and international order in which rights and freedoms set forth in this Declaration can be fully realized.

In the last decades we have witnessed a significant development of rights and law enforcement beyond the nation state. Human rights are institutionalised in international courts, in tribunals and increasingly also in politico-judicial bodies over and above the state that control resources for enforcing norm compliance. Examples are the international criminal tribunals for Rwanda and the former Yugoslavia, The International Criminal Court, the UN and the EU. In addition, European states have incorporated 'The European Convention for the Protection of Human Rights and Fundamental Freedoms' and many of its protocols into their domestic legal systems. Thus legal developments over the last century have been

remarkable and one of their main thrusts has been to protect human rights (Fassbender 1998). Today, almost nobody can be treated as a stranger devoid of rights. These rights are no longer only present in international declarations and proclamations. Increasingly they are entrenched in power wielding systems of action and in the actual policies pursued. Aggressors can now be tried for crimes against humanity, and offensive wars are criminalized.

But human rights politics is often power politics in disguise (Schmitt 1996:54). As long as human rights are not positivized and law is not made equally binding on each of the Member States, human rights politics can easily degenerate into empty universalistic rhetoric or a new imperialism. Some states may continue to violate human rights with impunity, and some may use them for self-serving purposes. Human rights are ensured by non-democratic bodies such as courts and tribunals or, what is more often the case, enforced by the US and its allies. Only with a cosmopolitan order – democracy at the supranational world level – can this opposition finally find its solution. Hence the need for a democratic law-based supranational order. The question arises whether a Bill of Rights at the regional level, in the EU, can close the gap between abstract human rights and the need for democratic

legitimation. Is it a means to resolve the tension between popular sovereignty and human rights?

One should, however, note from the outset that the EU should not be seen as cosmopolitan in the sense that it aspires (or could aspire) to a world organization – a world state – but in the sense that it subscribes to the principles of human rights, democracy and rule of law also for dealing with international affairs, hence underscoring the cosmopolitan law of the people.[4] In a cosmopolitan perspective the borders of the EU are to be drawn both with regard to what is required for the Union itself in order to be a self-sustainable and well-functioning democratic entity and with regard to the support and further development of similar regional associations in the rest of the world - that is with regard to the viability for the organisation for African Unity, MERCOSUR, NAFTA, ASEAN etc. In this perspective the borders of the EU should be drawn with regard to functional requirements both for itself and for other regions all within the framework of a democratized and rights-enforcing UN.

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[4] See Beck and Grande for a different take on what a cosmopolitian Europe means. Their'kosmopolitische Europa' is not confined to the EU but stretches from Los Angeles and Vancouver to Wladiwostok(Beck and Grande 2004:23).

Chartering Europe

The decision to frame a Charter of Fundamental Rights was taken at the Cologne European Council (June 3–4 1999). In October 1999, at the Tampere European Council, it was decided to establish a 62-member Convention to draft the Charter. 46 of the member were parliamentarians - 30 members of the Member State Parliaments and 16 members of the EP. It was led by a Presidium of five. This was the first time that the EP was represented in the same manner as the Member State governments and the national parliaments in a process of a constitutional nature.[5]

At the December 2000 Summit in Nice the Charter was solemnly proclaimed. The eventual incorporation into the Treaties was to be decided by the 'next' IGC. All articles on the rights of EU citizens in the Treaty of the Union have now been collected in one document of 54 articles, inspired by the ECHR (without replacing it), the Social Charters adopted by the Council of Europe and by the Community and the case-law of the European Court of Justice (ECJ). The Charter adds to the fundamental rights of Union citizens by expressing the principles of humanism and democracy (cp. the preamble)

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[5] A convention is an assembly with constitutional overtones. It is set up to handle the most fundamental questions of the political order.

The Charter contains provisions on civil, political, social and economic rights. Put together, these are intended to ensure the dignity of the person, to safeguard essential freedoms, to provide a European citizenship, to ensure equality, to foster solidarity, and to provide for justice. The number and range of rights that are listed are comprehensive. The Charter enumerates several 'rights to solidarity' - social rights - even though the realisation of these is not within the actual competence of the Union. They nevertheless constitute vital reasons for exceptions to market freedoms (Menéndez 2003:192).

In addition to provisions which most charters and bills of rights hold and which pertain to such clauses as the right to life, security, and dignity, there are numerous articles that seek to respond directly to contemporary issues and challenges of globalised risk societies. But why does the EU need a bill of rights to bolster its activity in the first place?

Predictability and security

The Charter enhances the *legal certainty* of the citizens of Europe as everybody can claim protection for the same interests and concerns. The principle of legal certainty is currently secured only in a limited sense at the Community level. The citizen can not be sure what rights she really is

entitled to. The founding treaties of the European Community contained no reference to fundamental rights. As integration deepened, and as the Community came to have more far-reaching effects on the daily lives of citizens, the need for explicit mention of fundamental rights was realized. They came to the fore in 1964 when the European Court of Justice set out the doctrine of supremacy of EC law over national law. This was objected to by Italy and Germany because EC law, in contrast to their national constitutions, did not protect human rights. As the EU is not itself a signatory to the Convention the Community is not bound by the ECHR in the same way as the subscribing Member States.

Another source of initiative of making a charter of fundamental rights is the argument that the EU which is '(…) a staunch defender of human rights externally' (…) 'lacks a fully-fledged human rights policy.' '(…) the Union can only achieve the leadership role to which it aspires through the example it sets' (Alston and Weiler 1999: 4-5). It is difficult to be a champion of cosmopolitan law and urge others to institutionalize human rights when one is not prepared to do so oneself. When basic institutions are lacking in the EU with regard to human rights, it is difficult to *lead by example*.

Generally, bills of rights empower the judges to protect liberty and hinder that democracy by means of majority vote crushes individual rights

(Brennan 1989: 432). A bill of rights, even one that is not more than the codification of existing law, decreases the room for discretion of the ECJ and national courts when dealing with EC law of fundamental rights. The EU Charter is, however, found wanting. It is weakly developed with regard to citizenship rights as a person must be citizen of a member state to qualify as a citizen of the Union, and with regard to political rights. The onus is on human rights, which undoubtedly has been strengthened but it has not introduced '... any concrete policy changes nor altered anything significant within the existing legal, political and constitutional framework' (de Búrca 2001: 129).

There are other limitations of the Charter: It only applies to the actions of the EU institutions and the Member States' authorities, and it is not designed to replace other forms of fundamental rights protection. Section 1 states that the Charter will only be made to apply to the "institutions and bodies of the Union" and only to the Member States "when they are implementing Union law". Article 51 (Section 2) states that the Charter does "not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". Moreover, certain human rights concerning the right to asylum, social rights, minority rights are contested at the EU level. Many of the rights clauses of the Charter have the status neither of fundamental, nor of ordinary rights but are merely

policy clauses. This hampers the impression of a fully credible external rights policy. But most importantly, the Charter was not made binding. It was not included in the Nice Treaty - only solemnly proclaimed.

Some, notably Joseph Weiler (2004), contends that there is a legitimacy problem with regard to the manner in which the Charter was forged. Although the Charter was not made by a specifically designated Constitutional convention and thus lacks legitimacy, it is *a public document* that was written by representatives of the people – parliamentarians were in majority. The deliberations were relatively open and inclusive. It proceeded by the logic of deliberation and reason giving. The Convention method was deemed a success both by observers and participants.[6] It is also a question of how much genuine popular participation is needed when the Charter is merely systematizing the existing legal material in Europe (Menéndez 2004), when it can be seen as a result of the fusion of constitutional traditions in Europe which reflect a shared political culture (Habermas 2004).

Now one needs to know whether the EU actually subscribes to a cosmopolitan perspective founded on the rights of the individual, her autonomy and dignity, and on her right to participate in a lawful order. The

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[6] For this analysis see Eriksen, Fossum and Menendéz eds. 2003, in particular the Chapters by O. De Schutter and J. Schönlau.

question as regard the EU is, first, whether cosmopolitanism actually feeds into the reform process of the Union itself – viz., whether the Charter is going to be binding and, secondly, whether it actually informs the external relations of the Union?

Constitutionalising Europe

In 2000 the fourteen other member states imposed sanctions on Austria by for letting Haider's Freedom Party - a rightwing, 'racist' party - into government. While it was the member states that decided to impose sanctions against Austria, the EU itself has now established procedures to ensure that breaches of fundamental principles are sanctioned. The Treaty of Nice amended Article 7 TEU that further specifies the concrete procedures to follow in case of a 'clear risk of a serious breach' on the side of one member state. Moreover, when the Treaty of Nice will come into force, a qualified majority vote will be enough to take action against the recalcitrant member state. This development of rights protection and polity-building is now carried further.

The Convention on the Future of Europe started its work in February 2002 and concluded its work in June/July 2003. It is now widely depicted as *a Constitutional Convention.* Its membership was modeled on the Charter

Convention, with a majority of parliamentarians. 46 out of 66 voting members, and 26 out of 39 from the candidate countries were parliamentarians. Its mandate was broader, its working method included working groups, and the applicant states had a number of representatives present, as active, participating, observers. The Convention succeeded in forging agreement on a single constitutional proposal 2003, which the IGC accepted (with some minor amendments) in June 2004, and which is going to be subjected to hard-won ratification processes in the member states in the years to come.

The Draft constitution contains the following basic changes:

- Incorporation of the Charter of Fundamental rights into the Constitution (Part II, Articles 1-54)
- Recognition of the Union's legal personality (Part I, Article 6)
- The partly abolishment of the pillar structure
- Recognition of the primacy of Union law (Part I, Article 10-1)
- Reduction and simplification of the legislative instruments and decision-making procedures, as well as the introduction of a hierarchy of legal acts (Part I, Articles 32-38)
- A clearer division of competences between the Union and the Member States (Part I, Articles 11-14)
- Decision-making by qualified majority as the main principle in the Council of Ministers (Part I, Article 24). Decisions to be adopted jointly by the Council of Ministers and the European Parliament on the basis of proposals from the Commission (Part I, Article 33-1, with reference to Part III, Article 302, though with important exceptions)
- The election of a President of the European Council for a term of two and a half years (Part I, Article 21)

- A Union Minister for Foreign Affairs who will be both the Vice-president of the Commission and be part of the Council (Part I, Article 27)
- A citizens' right initiative (Part I, Article 46-4)
- Voluntary withdrawal from the Union (Part I, Article 59)

Efforts have, thus, been taken to make the emerging constitutional structure comply with democratic principles. The weakening of the pillars, the incorporation of the Charter of Fundamental Rights[7], the strengthened role of the EP and the generalization of co-decision and qualified majority voting as decision-making procedures improve the coherence and the democratic quality of the Union. And so does the strengthening of national parliamentary involvement in EU activities. The proposed reforms will, short of making the Union fully democratic, make it more coherent, transparent and participatory. Increasingly the legal order of Europe confers rights upon the citizens and subjects law-making to the will of the citizens. The EU has achieved an element of supranational normativity based on the principles of fundamental rights, rule of law, and democracy, and the ECJ represents a firm dispute resolution mechanism whose foundation is now bolstered by the entrenchment of 'the primacy of Union Law'. However, the Member States remain key players. Among other things they retain control of the Union's sources of funds, the Council structure is strengthened -

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[7] The content was not reopened but included unaltered as part II of the draft Constitutional Treaty.

unanimity is demanded as regards fiscal policy and CFSP and CSDP[8] - and they still control the power of constitutional amendment - "..also in future Treaty amendments will require unanimity and ratification by all the Member States" (Kokott and Rüth 2003:1343).

With regard to the Foreign and security policy of the Union the Draft Constitutional Treaty represents an improvement from a normative perspective. This is so, first, because the EP's supervision is increased. Is consultant role is formally entrenched according to article I-40(8):

> "The European Parliament shall be regularly consulted on the main aspects and basic choices of the common and defense policy. It shall be kept informed of how it evolves."

Secondly, the common Foreign and Security Policy, whose institutional structure is formally intergovernmental (Pillar II), has been in the making for a long time but the national foreign ministries increasingly have difficulties in controlling the policy-making process. Many important decisions are made at the European level. The Constitutional Convention mandated by the Laeken IGC (2000) included the Foreign and Security policy on its agenda. This meant that this policy was debated in a transnational forum and not in an intergovernmental body, and, thus, reduces the executives' leverage on foreign and security policy. This is welcomed from a cosmopolitan point of

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[8] Common Security and Defence Policy

view as is the constraint on 'unilateralism' of the member states. A clause to preclude independent action of member states is now firmly stated in ARTICLE I-40, 5 of the draft Constitutional Treaty.

> Member States shall consult one another within the European Council and the Council on any foreign and security policy issue which is of general interest in order to determine a common approach.

Thirdly, when it comes to specific provisions concerning a common security and defence policy it is firmly stated the Union's peace-keeping and conflict preventing missions shall be "in accordance with the principles of the United Nations Charter" (Article I-41, 1).

The United Nations Charter is mentioned several places in the Draft Constitution, hence underscoring the respect for higher ranking principles. The Draft is an attempt to find a new balance between a Europe of states and a Europe of citizens. The states continue to be the masters of the Treaties, but once it is ratified this may change in so far it has been subjected to an inclusive European wide public debate and has been reflectively endorsed by the citizens. Only in this case can it live up to its name – a constitution for Europe –as it can claim to embody 'the will of the people' and hence achieve a legitimacy basis superior to that of state interests. Thus, the prospects of a cosmopolitan Europe. But are EU's external relations consistent with such a view?

Cosmopolitan policies or just cheap talk?

For a long time the Community subscribed to democracy and human rights as the basic principles of membership. Portugal, Spain and Greece were not admitted before they had abolished totalitarianism and changed their form of government. In a report to the June 1992 Lisbon European Council, the Commission re-stated that there were certain fundamental conditions for membership: only European states could become members of the EU; candidate states must have a democratic constitution and they must respect the principles of the rule of law and human rights. This is reiterated in the criteria for membership set by the Copenhagen European Council (1993). These conditions may be 'slippery' (Grabbe 2002:251f), and the mechanisms for achieving them inconsistent (Schwellnus 2004:255ff), but they nevertheless points out the principled value-basis of the Union.

Also when it comes to trade and international cooperation in general there is a commitment to democracy and human rights. The EU insists on the respect of minority rights in third countries – non-European Countries - and there is political conditionality on aid and trade agreements.[9] Since 1995 the 'human- rights clause' is supposed to be incorporated in all cooperation and association agreements. In 1998 the Union launched an initiative on the

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[9] "The offer of trade and association agreements, technical and development assistance, political dialogue, diplomatic recognition, and other instruments is now usually made conditional on respect for human rights." (Smith 2003:111)

death penalty and torture and raised the issue on a bilateral and multilateral basis worldwide, and through the UN. The list of countries having abolished capital punishment as a result of EU pressure is impressive. The EU has affected the human rights situation, in particular with regard to the abolishment or reduction of capital punishment in Cyprus and Poland, Albania and Ukraine, Azerbaijan and Turkmenistan, Turkey and Russia through different kinds of means and measures (Manners 2002:249.50). In Turkey there has been a political avalanche with respect to democratization and human rights, especially since 2002: "Achievements included the abolition of death penalty, easing of restrictions on broadcasting and education in minority languages, shortened police detention periods, and lifting of the state of emergency in the formerly troubled Southeast". (Avci 2005:137-138) Further, the Union has cut direct budgetary support to Zimbabwe, to the Ivory Coast, to Haiti and to Liberia. The EU has stalled on deepening relations with Russia, Croatia, Pakistan and Algeria due to breaches of basic human rights.

The Commission has adopted several cooperation instruments for regional and bilateral relations and the EU holds regular summit meetings with its main partners. It has developed so-called partnership and co-operation agreements, "aiming to establish an area of prosperity and good

neighborliness",[10] with many countries and it has prompted a new regionalism. "New regionalism appear to constitute a relatively safe space within which Europe can display identity and norm difference from the US: The EU can lay down an identity marker of what it perceives to as a more humane governance model in its relations with the developing world, without have to confront or contradict US power head-on" (Grugel 2004:621)

The EU whose biggest members have been colonial powers, now exports the rule of law, democracy and human rights (Rosecrance 1998:22). These policies are reflective of the value basis of the Union. However, one may ask whether this is mainly cheap talk. Is the EU consistent, does it apply the same principles on themselves and their members, and do they apply them consistently on third countries – or merely in places where it is not very costly? To the latter, the EU certainly is not consistent as non-European Countries are being treated differently. For example, Russia is merely marginally sanctioned for its wars in Chechnya (although it threatens with imposing stronger sanctions). Israel is being threatened of being sanctioned because of its policies towards the Palestinians, but sanctions have not been carried out (yet). Uzbekistan is another example of countries

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[10] Draft Constitution, Article I-57, 1, see also Communication from Commission, European Neighbourhood Policy, Strategy Paper, Brussels, 12.5. 2004 COM8(2004) 373 final

where ' the 'essential elements' clause' is not upheld rigorously despite of widespread torture and lack of reform (European voice 18 – 24 March 2004, 15). These examples indicate lack of consistency in EU external policies; hence the criticism of hypocrisy and window-dressing. There is also the complaint that there is more emphasis on the protection of civil and political rights compared to social and economic ones and that the commercial interests take precedence, which the present urge for lifting the embargo on China seems to substantiate. But it is beyond doubt that the human rights politics of the Union costs and is not without sacrifices (as e.g., the Enlargement and the support to former Yugoslavia testify to), and with regard to the abolition of death penalty "the EU often finds itself at odds with other developed OECD states, such as the US and Japan" (Manners 2002:253) While Enlargement reveals a common value-base in Europe, the establishment of a common foreign and security policy demonstrates the salience of rights, viz., the proclivity to let ones actions be subjected to higher ranging principles (cp Sjursen 2002, 2003). However, it is also a question of whether punishment is the best way of promoting change of development. "The inclusion of an essential elements clause is not intended to signify a negative or punitive approach. It is, instead, meant to promote dialogue and positive measures" (External Relations Commissioner, Chris

Patten, European Voice op.cit).

The EU prefers positive and soft measures. But when compared with crimes against humanity, and when all other options are exhausted, the international society should be enabled to act, even with military force, we are instructed by moral reason. Human rights are universal - they appeal to humanity as such, to the interests of irreplaceable human beings and exhibit a categorical structure – they have a strong moral content: 'Human dignity shall be respected at all costs!' Borders of states or collectives do not make the same strong claim – 'they do not feel pain'. But the EU is not a borderless organisation.

Bounded Justice?

Citizenship is a means for setting the conditions for inclusion / exclusion of any given society. A European citizenship was inaugurated by the Maastricht Treaty (1992) and comprises a right of residence in other Member States, voting rights based on residence in local and European parliamentary elections, diplomatic protection in third countries, and the rights to make petitions to the European Parliament and to make complaints to the European Ombudsman. It was strengthened in the Amsterdam Treaty in order to democratize the Union and is firmly stated in the Draft

Constitutional Treaty but still premised on national membership. More than 10 million individuals are 'third country nationals' in Europe and cannot get a Union citizenship. In reality Union citizenship increases exclusion of large groups. One should, however, be aware of the dynamic aspect of European citizenship as it has been extended with every Treaty change and is co-evolving with national developments. It is held to be reflecting an ongoing process of establishing a more open, just and democratic community of citizen: "the dynamic of citizenship results from the cross-application of norms so that membership becomes more inclusive by extending rights, and rights become instrumental for securing equal membership". (Bauböck 1994:207, cited in Shaw 2000:75).

There is no sign of the EU developing into a borderless cosmopolitan entity. Immigration is strictly regulated. Third country nationals have only limited protection as the asylum policy of the Union as well as the low level of protection of minorities' citizenship rights testify to. Critics find the EU bounded when it comes to immigration and the rights of third country nationals. According to Schengen II the internal borders may be crossed at any point without any checks on persons being carried out, but the fact remains that non-EU (and non-EEA) citizens are not granted the same right to free movement. Minority issues have been high on the agenda during the

enlargement process, but it is contested whether they are yet part of the 'aquis communautaire' – the total corpus of EEC/EU law, treaty provisions, regulations and policy directives. It is covered by the Council of Europe and the Organisation for Security and Cooperation in Europe (OSCE). The respect for and protection of minorities has been one of the prominent EU-imposed Copenhagen criteria which the candidate countries have had to fulfill in the last decade. Some analysts fear they vanish from the EU-scene once the candidate states acquire full EU membership (cp Kveinen 2000). This fear is due to the lack of institutionalization of a human rights policy in the EU.

> The real problem of the Community is the absence of a human rights policy, with everything this entails: a Commissioner, A Directorate General, a budget and a horizontal action plan for making effective those rights already granted by the Treaties and judicially protected by the various levels of European Courts (Weiler 2004: 65)

In empirical terms one may, thus, question whether the EU is a cosmopolitan polity, but as we have seen the EU has to a large degree committed itself to a law-based view of international relations. In Europe we have, as documented, witnessed a strong development towards the abolishment of force through right, to talk with Hans Kelsen (1944), a development that was initiated by modernity. But what is the role of force in such an order? Presently there are no European prisons, no European army and no European

police corps, but is the eventual establishment of such detrimental to cosmopolitanism? There is an internal link between coercion and morality in a law-based order.

Peace through law

From the Enlightenment stems the trust in written constitutions and judicial review as a means to civilize the relations among men as well as among nations. Law is a functional complement to politics and morality as it stabilizes behavioural expectations and solves the collective action problem. In general terms the problem of collective action has to do with overcoming the problem of *contra-finalité*, in which each actors' egoistic behavior leads to results devastating to everybody's interest, and the problem of *suboptimality*. The latter designates the situation in which all members opt for a solution aware that all the others members will do as well and that all would have benefited from another strategy. If another solution had been chosen all would have come out better. Game theorists model this as a Prisoner's Dilemma game in which strategic action leads to collective action problems. When the consumption of a public good can not be restricted actors have an incentive not to co-operate because they may risk contributing more than they receive, and hence be in a "sucker" position

(Axelrod 1990:8). This is why legal norms with attendant sanctions are needed in order to coordinate actions in case of conflict over outcomes. The law is a system of action that transforms agreements into binding decisions. It is the means through which political goals can be realized also against opposition.

Pure agreements on their hand do not warrant collective action or the delegation of sovereignty. There may be reasons to oppose even a rational agreement, and nobody is obliged to comply unless all others also comply. Due to weakness of will, and as long as citizens are not reassured that the violation of norms will not be left unsanctioned, general and spontaneous compliance is endangered. Without the treat of force there will be no political association! The medium of law stabilizes behavioral expectation in two ways. First, it alleviates *coordination problems* by signaling which rule to follow in practical situations (Luhmann 1995: 136). In this way it is also a functional complement to morality as the latter can not tell what one should do in particular contexts. Many justified norms may apply, but which is the correct one in this particular situation can not be inferred from the bare existence of moral agreements. Even angels need 'a system of laws in order to know the right thing to do' (Honoré 1993:3).

Secondly, sanctioning of non-compliance and defecting make it less risky for actors to act in a morally adequate manner. People may comply with the law out of self-interest because it is expensive not to do so. Law is then not merely a constraint on morality, but is in fact enabling such while it makes it possible for actors to behave correctly without personal losses. By sanctioning non-compliance and preventing violence, law-based orders make it possible for its members to act in accordance with their own conscience, out of a sense of duty (Apel 1998:755).

Cosmopolitanism restrained

A real republic depends on bodies above the nation state that citizens can appeal to when their rights are threatened. In order to ensure justice at the world level, or at least to be able to sanction norm breaches such as human rights violations and crimes against humanity there is, thus, need for a system that lays down the law equally binding on all. It is a rather thin normative basis for such an order as it must be based only on what human beings have in common, viz., their right to freedom, equality, dignity, democracy and the like that are listed in human rights declarations and basic rights stipulations of modern constitutions. The question is how much power the custodian of such an order – the EU, the UN – should have and what

kind of organization it should be. It follows from the preceding analysis that the threat of sanctions is an intrinsic part of the law. That is, even though the law should comply with moral tenets so that it can be followed out of insight into what is right, and which is required for it to be a means for justice, it cannot achieve legitimacy unless it is connected with sanctions so that every subject can be sure that the same rules apply to all (Habermas 1996:107ff).

The legitimacy of the laws, then, paradoxically stems from the very fact that they are obligatory and coercive. The law is a means to compel compliance, but it can only do so without unleashing the potential threat of force when it applies equally to all and when it is in compliance with moral principles, which, under modern conditions, means that it must have been made by the people. An association is only democratic to the extent it relies upon the putative legitimate use of force to ensure compliance with its norms and only democratically made law can claim to be legitimate. Also an organization above the nation state level equipped with mechanisms to enforce compliance – viz., military capacity to make threats credible – can rightly do so only in so far as its actions are democratically regulated. The positivisation and codification of human rights represents juridification and is in need of democratization. Hence, no humanitarization without representation!

Correct implementation of common action norms requires concrete institutions and procedures. Proponents of a world state with far-reaching competencies – with an executive government – face severe difficulties.[11] The principle of rule of law – das Rechtsstaat – requires the government to act on legal norms that are general, clear, public, prospective and stable in order to safeguard against states' infringement of individual liberties and rights. In concrete situations of norm violations often more than one justified norm may be called upon. Norms, also legal norms, are contested and require argumentation and interpretation with regard to concrete interests and values in order to be properly applied. To choose the correct norm requires interpretation of situations and sometimes also the balancing and weightening of rights (Günther 1993, Alexy 1996). Individuals' rights are limited by others' rights and concerns, and the abstract law enforcement by a world state runs the danger of glossing over relevant distinctions and differences. There is a problem with cosmopolitan law in contrast to the existing 'international law' with regard to *legal protection* (Scheuerman 2002: 448). The cosmopolitan mission faces significant difficulties with

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[11] There is no uncontested blueprint for the design of a cosmopolitan order as the argument over the proposal of David Held & co testifies to, see e.g., Habermas 1998, 1999, 2001, Eriksen and Weigård 2003. See further Apel 2001, Bohman, J. and Lutz-Bachmann, M (eds.) 1997, Brunkhorst, 1999; Brunkhorst, Köhler, Lutz-Bachmann, M. (eds.) 1999, Höffe 1999.

regard to legal protection when it is not properly institutionalised. How can the rights of the citizens be protected at the post-national level?

The idea of the constitutional state is not only to protect against encroachment but also to make sure that the regulation of interests as well as the realisation of collective goals can be rendered acceptable from a normative point of view by taking stock of a whole range of norms, interests and values. The EU is not a cosmopolitan order that aspires to be a world organization, but rather one that subjects its actions to the constraints of a higher ranking law. What is also interesting about the EU is that it does not have a system for norm implementation of its own but is relying on national political systems - national administrations - in order to put its measures into effect. This diminishes the tremendous leeway for both legislators and courts at the supranational level. Moreover, the putative democratic system of lawmaking and norm interpretation at the European level imply that the EU does not run into the well-known risks of a despotic Leviathan at the world level. It does not grant the citizens unmediated membership in a world organization but rather respect the allegiance to particular communities – the nation states. It represents a constraint upon brute state power and excessive nationalism.

Conclusion

According to cosmopolitans, the urgent task is to domesticate the existing state of nature between countries by means of human rights, the transformation of international law into a law of global citizens. The EU is the most promising example of a post-national powerful regional organisation and one which increasingly becomes a role model for other regions (in Asia, South America and Africa). The effort to include the EU Charter of human rights in the new Constitutional Treaty is a strong indication of heightened consistency between externally projected and internally applied standards. The parameters of power politics have already changed in Europe, a fact that actually seems to have influenced the external relations of the Euro-polity, viz., the foreign and security policy of the EU.

The principle of popular sovereignty is, thus, in a way in the process of transformed into a law for the citizens of the world. We witness the abolishment of force through right, to talk with Hans Kelsen (1944), a development that was initiated by modernity.

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