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The Human Rights Clause in the EU's External Agreements

The EU has made good governance and the upholding of human rights an integral part of its external and development policies and insists that all trade, cooperation, dialogue, partnership and association agreements with third parties contain a human rights clause.

This Paper looks at the evolution of the human rights clause contained in EU external agreements.

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Summary of main points

- The EU concludes different kinds of trade, aid, partnership, development and cooperation agreements with third parties.

- A clause defining democratic principles and human rights as an “essential element” of EU agreements with Brazil, the Andean Pact countries, the Baltic States and Albania was introduced in 1992, and since 1995 human rights have been systematically included as an “essential element” of EU external agreements.

- Making human rights observance an “essential element” and a condition of trade terms and development aid gives the EU the ultimate right to suspend all or part of an agreement if a partner country does not fulfil its human rights obligations.

- The EU encourages a positive sanctions approach through dialogue with an offending government and the channelling of aid to non-government organisations, rather than total suspension of the agreement. The wording of the human rights clause has developed to reflect this approach.

- The legality of the human rights clause has been challenged at the European Court of Justice.

- EU insistence on the inclusion of the human rights clause has prevented the conclusion of external agreements in some cases.

- Some states have had difficulties maintaining human rights standards, but the suspension mechanism has rarely been used (a recent example of its use is Zimbabwe).

- The draft EU constitution would strengthen the EU’s commitment to human rights in its internal and foreign policies.

CONTENTS

I EU External Policy and Human Rights

The EU[1] has concluded a range of complex preferential and non-preferential trading arrangements with third countries and regional organisations, such as the African, Caribbean and Pacific (ACP) states, and the members of the Association of Southeast Asian Nations (ASEAN).[2] These include:

- Partnership and cooperation agreements (PCAs)
- Association or Europe agreements (AAs/EAs, as pre-accession agreements, see below)
- Association agreements (not connected with pre-accession, see below)
- Cooperation agreements
- Trade and cooperation agreements
- Economic partnership agreements (EPAs)
- Political dialogue and cooperation agreements
- Trade agreements
- Framework agreements
- Stabilisation and cooperation agreements (SAAs)

The EU has made good governance and the upholding of human rights an integral part of its external and development policy and insists that all trade, cooperation, dialogue, partnership and association agreements with third parties contain a human rights clause. The European Commission describes the EU's commitment to human rights in its external policy as follows:

> The importance which the European Union attaches to respect for human rights around the world was underlined by two developments in 1999. For the first time, responsibility for this area was given to one Commissioner — Chris Patten, the External Relations Commissioner. The second was the publication of the first annual report on human rights documenting the EU's policies, priorities and practices in this area.
>
> This commitment to human rights and a legal framework are reflected in the Union's common foreign and security policy provisions and in its development cooperation programme. Every new agreement between the EU and a third country includes a human rights clause allowing for trade benefits and development cooperation to be suspended if abuses are established.

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1 Strictly speaking, it is the EC and not the EU which concludes agreements with third parties, as the EU does not have legal personality. These agreements do not therefore include any cooperation in the second and third pillar areas (Common Foreign and Security Policy and Justice and Home Affairs)

2 Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam

> The Union can impose targeted sanctions as it has done against Serbia and Burma. These range from a refusal to give visas to senior members of the regime to freezing assets held in EU countries. The Union has little hesitation in speaking out against what it considers to be human rights abuses such as torture, political arrests or censorship, whether these be in China, Turkey, Cuba or Russia. But its preference is to use positive action rather than penalties.[3]

The EU is engaged in a human rights 'dialogue' with many countries as part of its external policy. The 'dialogues' emanate from a range of instruments, based on regional or bilateral agreements or treaties, in the context of the following:

- relations with EU accession states
  the *Cotonou* Agreement with the African, Caribbean and Pacific (ACP) states and the Development and Cooperation Agreement with South Africa
- relations with Latin America
- the 'Barcelona Process' (Middle East and Mediterranean countries)
- political dialogue with Asian countries in ASEAN and ASEM
- relations with the Western Balkans
- association and cooperation agreements

The EU has a dialogue based exclusively on human rights issues with China and used to have a similar dialogue with Iran. It engages in *ad hoc* dialogues on topics such as human rights with Cuba and Sudan at head of mission level, and has dialogues with countries with which it has special relations, such as the United States and Canada, "on the basis of broadly converging views".[4]

The Council of Ministers has set out the basic principles of EU human rights dialogues, as follows:

> 3.1. The European Union undertakes to intensify the process of integrating human rights and democratisation objectives ("mainstreaming") into all aspects of its external policies. Accordingly, the EU will ensure that the issue of human rights, democracy and the rule of law will be included in all future meetings and discussions with third countries and at all levels, whether ministerial talks, joint committee meetings or formal dialogues led by the Presidency of the Council, the Troika, heads of mission or the Commission. It will further ensure that the issue of human rights, democracy and the rule of law is included in programming discussions and in country strategy papers.
> 3.2. However, in order to examine human rights issues in greater depth, the European Union may decide to initiate a human rights-specific dialogue with a

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3 *The European Union and the World*, 2001 at http://europa.eu.int/comm/publications/booklets/move/23/txt_en.pdf

4 *European Union guidelines on Human rights dialogues*, Council of the EU - 13 December 2001, at http://europa.eu.int/comm/external_relations/human_rights/doc/ghd12_01.htm

> particular third country. Decisions of that kind will be taken in accordance with certain criteria, while maintaining the degree of pragmatism and flexibility required for such a task. Either the EU itself will take the initiative of suggesting a dialogue with a third country, or it will respond to a request by a third country.[5]

Two Council of Ministers Working Parties are involved in these dialogue processes: the Working Party on Human Rights (COHOM), which has established the guidelines on human rights dialogues, and the Working Party on Development Cooperation (CODEV).

II Background to the Human Rights Clause

A. The *Vienna Convention on the Law of Treaties*

The problem faced by the EC with many of its early trade agreements was what to do if the government of the third country became a major human rights violator. The *Vienna Convention on the Law of Treaties* (Vienna Convention)[6] does not provide for the automatic termination or suspension of treaties purely on the basis of human rights violations, so the EC had no concrete means of applying this sanction against an offending state. The EC did manage to suspend agreements in countries where there was civil war or internal conflict by relying on the Vienna Convention articles on termination based on the "impossibility of performance" of treaty obligations by the third country (Article 61) and the concept of "fundamental change of circumstance" (Article 62).

B. Making Human Rights an "Essential Element" of Treaties

Under the Vienna Convention a treaty can be terminated or suspended if the treaty so provides and in the case of "material breaches" of the treaty (Article 60). "Material breach" includes (a) "a repudiation of the treaty not sanctioned by the present Convention" or (b) "the violation of a provision essential to the accomplishment of the object or purpose of the treaty".[7] Suspension or termination of a treaty because of human rights violations could be upheld if the level of human rights protection in the country concerned was an "essential element" of that treaty. The decision to make the human rights clause an "essential element" of all EC trade, partnership, association and cooperation agreements provided a mechanism by which the Community could, as a last resort, suspend or terminate agreements.

Human rights aspirations were referred to in the 1989 *Lomé IV* Convention, which established economic and trade relations between the EC and the ACP states. A specific human rights element was included in Article 5 (2):

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5 http://europa.eu.int/comm/external_relations/human_rights/doc/ghd12_01.htm

6 Entered into force on 27 January 1980. Text at http://www.un.org/law/ilc/texts/treaties.htm

7 http://www.un.org/law/ilc/texts/treaties.htm

> Hence the Parties reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.
>
> Every individual shall have the right, in his own country or in a host country, to respect for his dignity and protection by the law.
>
> ACP-EEC cooperation shall help abolish the obstacles preventing individuals and peoples from actually enjoying to the full their economic, social and cultural rights and this must be achieved through the development which is essential to their dignity, their well-being and their self-fulfilment. To this end, the Parties shall strive, jointly or each in its own sphere of responsibility, to help eliminate the causes of situations of misery unworthy of the human condition and of deep-rooted economic and social inequalities.[8]

This Article explicitly linked human rights to development, but there was no sanctions mechanism in the event of serious human rights violations, and the upholding of human rights was not included as an essential element of the agreement. Economic and social rights were emphasised, as they were regarded as being closely linked to economic development.

By 1990 the human rights clauses in EC treaties with Latin American countries were formulated to comprise a more important element of the agreements. For example, the framework treaty signed with Argentina in April 1990[9] (and similarly with Chile in 1990[10], and with Uruguay[11] and Paraguay in 1992[12]) stated in Article 1(1), "Democratic basis for cooperation", that:

> Cooperation ties between the Community and Argentina and this Agreement in its entirety are based on respect for the democratic principles and human rights

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8 OJL 229, 17 August 1989 pp 19-20

9 OJL 295/90, 26 October 1990 p. 0067 – 0073 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21990A1026(01)&model=guichett

10 OJL 79/91, 26 March 1991 p. 0002 – 0011 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21991A0326(02)&model=guichett

11 OJL 94/92, 08 April 1992 P. 0002 – 0012 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21992A0408(01)&model=guichett

12 OJL 313/92, 30 October 1992 p. 0072 – 0081 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21992A1030(01)&model=guichett

> which inspire the domestic and external policies of the Community and Argentina.[13]

The human rights standards referred to here were based on three declaratory human rights instruments: the 1948 *Universal Declaration of Human Rights*,[14] and later on, the 1975 *Helsinki Final Act*[15] and the 1990 *Charter of Paris for a new Europe*.[16] Although this formula did not provide clear grounds for suspension or termination of the treaty, it was a stronger wording than the 1989 *Lomé* article.

On 28 November 1991 the Council of Ministers adopted a resolution linking human rights to democracy and development, and recognising them as an explicit aim of EC development policy,[17] but without distinguishing between economic and social rights on the one hand, and civil and political rights on the other. The Council emphasised a positive approach towards human rights in its relations with third states, with a preference for political dialogue rather than sanctions, but it included provisions for sanctions against violating states as a last resort.[18]

On 11 May 1992 the Council declared that respect for democratic principles formed an essential part of agreements between the EC and the Conference on Security and Cooperation in Europe (CSCE) countries. After this declaration EC agreements with the Baltic States, Albania and other third countries included a reference to human rights as an "essential element", in order to make a stronger case for sanctions or termination under Article 60(3)(b) of the Vienna Convention. The Albania agreement, for example, states in Article 1 that "Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a new Europe inspires the domestic and external policies of the Community and Albania and constitutes an essential element of the present agreement".[19] The 1992 agreements also contained a clause which stated that: "The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs".

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13 http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21990A1026(01)&model=guichett

14 http://www.un.org/Overview/rights.html

15 http://www.osce.org/docs/english/1990-1999/summits/helfa75e.htm

16 DEP 6520, 21 November 1990

17 Doc. no. 10107/91 at http://europa.eu.int/comm/external_relations/human_rights/doc/cr28_11_91_en.htm

18 EU annual report on human rights, 10 October 2003 13449/03 COHOM 29, at http://europa.eu.int/comm/external_relations/human_rights/doc/report03_en.pdf

19 *Agreement between the European Economic Community and the Republic of Albania, on trade and commercial and economic cooperation* OJL 343 , 25 November 1992 p.2 -9 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21992A1125(01)&model=guichett

This so-called "Baltic clause" paved the way for the "Bulgarian clause" after 1993, which widened the scope of application and options for action in the event of human rights abuses. The Bulgarian and Romanian Europe Agreement suspension clauses stated:

> If either party considers that the other Party has failed to fulfil an obligation under this agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall apply to the Association Council with all the relevant information required for a thorough examination of the situation with the view to seeking a solution acceptable to the parties.
>
> (…) In selection of measures, priority must be given to those which least disturbs the functioning of this Agreement: These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.[20]

This Agreement provided for a political dialogue to be maintained and for a conciliation mechanism, rather than immediate suspension of the agreement.[21] The requirement for consultation was excluded from agreements with Russia and the Commonwealth of Independent States (CIS) countries, where, instead, a joint declaration provided that either party could, in a special emergency, take appropriate counter-measures without having to consult within the Association Council.

The "essential element" and non-compliance clauses were included in subsequent agreements in 1995 with Vietnam, South Korea and Israel; in Association Agreements with Tunisia and Morocco and in the revised *Lomé IV* Convention[22] in 1995, Article 366a of which stated:

> If one party considers the other Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it. (…) The consultation shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days.[23]

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[20] Bulgaria's Europe Agreement was signed on 8 March 1993 and came into force on 1 February 1995, text at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=21994A1231(24)&model=guichett . Romania's EA was signed on 1 February 1993 and came into force on 1 February 1995, text at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=21994A1231(20)&model=guichett

[21] COM (95)216

[22] The Lomé and later Cotonou Conventions establish trade relations with the African, Caribbean and Pacific (ACP) states

[23] See http://www.idea.int/lome/background_documents/lomeiv.html#Article366a

C. Commission Communication, May 1995

On 29 May 1995, in response to a Commission Communication "on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries",[24] the Council of Ministers decided to include a suspension mechanism in all Community agreements with non-member countries, "to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights".[25]

> Such clauses stipulate that respect for fundamental human rights and democratic principles underpins the internal and external policies of the parties and constitutes an "essential element" of the agreement. In the event of a breach, the Commission communication of 1995 makes clear that there are a range of measures which could be considered, with the proviso that the application of measures should respect "the principle of proportionality between the breach cited and the degree of reaction". These include: alteration of the contents of cooperation programmes or the channels used; reduction of cultural, scientific and technical cooperation programmes; postponement of a Joint Committee meeting; suspension of high-level bilateral contacts; postponement of new projects; refusal to follow up partners' initiatives; trade embargoes; suspension of arms sales, suspension of military cooperation and suspension of cooperation. However, as the Commission communication of 8 May 2001[26] underlines, the inclusion of an essential elements clause is not intended to signify a negative or punitive approach. It is meant to promote dialogue and positive measures, such as joint support for democracy and human rights, the accession, ratification and implementation of international human rights instruments where this is lacking, and the prevention of crises through the establishment of a consistent and long-term relationship.[27]

The Commission Communication contained a brief history of the human rights clause in EU external agreements and an annex containing standard wording for new human rights clauses and interpretative declarations. The clause outlined in the document consisted of substantive and procedural provisions (i.e. Article X, the essential element provision; and Article Y, the non-execution procedures). Under the guidelines, the preamble to new agreements should include "general references to respect for human rights and democratic values" and references to relevant human rights instruments common to both parties, such as the Universal Declaration, and, in the European context, the Helsinki Final Act and the Paris Charter. These underpinned the domestic and external policies of the parties and constituted an "essential element" of the agreement.

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[24] COM (95)216 of 23 May 1995) at: http://europa.eu.int/comm/external_relations/human_rights/doc/com95_216_en.pdf. See Appendix.

[25] Council press release 7481/95, 29 May 1995

[26] Com 2001 (252)

[27] EU annual report on human rights, 10 October 2003 13449/03 COHOM 29, at http://europa.eu.int/comm/external_relations/human_rights/doc/report03_en.pdf

The Commission recommended that the agreement should contain a clause defining the essential elements, stating that "all provisions of the relevant agreement are based on respect for the democratic principles and human rights which inspire the domestic and external policies of all parties". This clause would be adapted to the relevant circumstances of each agreement, such as OSCE membership or market economy principles. The article on non-fulfilment[28] should refer to the relevant procedure and measures in the case of failure by one of the parties to uphold its obligations under the agreement.

In the event of a breach, a range of measures could be considered, with the provision that their application should respect the principle of proportionality between the breach and the EU reaction. An interpretative declaration should be attached to the agreement, clarifying the meaning of "cases of special urgency" and also what constituted a "material breach" of the agreement.

The Council Decision adopted the modalities for the human rights clause set out in the Commission communication, which aimed to provide consistency in the text used in external agreements and in its application. This model prevailed until *Lomé* was renegotiated in 2000 with a new version of the "essential element" clause, which set the standard for all subsequent human rights clauses.

III Examples of Human Rights Clauses

A. The *Cotonou* Agreement

The *Cotonou* Agreement of 23 June 2000, which updated *Lomé IV*,[29] came into force on 1 April 2003. The EU's 2003 annual human rights report stated:

> The Cotonou Agreement with 77 African, Caribbean and Pacific countries (which entered into force on 1 April 2003) includes a "state of the art" version of the essential elements clause with a new procedure for cases of violation of the essential elements including a consultation process with the third country concerned. In cases of special urgency – serious violations of one of the essential elements – measures will be taken immediately and the other party notified. The Agreement also includes a commitment to good governance as a fundamental and positive element of the partnership, a subject for regular dialogue and an area for

[28] The 'non-fulfilment' article allowed either party to withdraw from the agreement after examination, consultation and negotiation

[29] Lomé IV and all previous ACP agreements can be accessed at http://www.acpsec.org/gb/decl_e.html

active Community support. The EC and the ACP have agreed on a new procedure to be launched in serious cases of corruption.[30]

Article 9 of *Cotonou*, "Essential Elements and Fundamental Element", states:

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

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

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

The Parties reaffirm that democratisation, development and the protection of fundamental freedoms and human rights are interrelated and mutually reinforcing. Democratic principles are universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority, the legality of its actions reflected in its constitutional, legislative and regulatory system, and the existence of participatory mechanisms. On the basis of universally recognised principles, each country develops its democratic culture.
The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.

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

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

[30] EU annual report on human rights, 10 October 2003 13449/03 COHOM 29, at http://europa.eu.int/comm/external_relations/human_rights/doc/report03_en.pdf

> implementing measures aiming in particular at preventing and combating corruption.
>
> Good governance, which underpins the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute a fundamental element of this Agreement. The Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element.
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> 4. The Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance.
>
> These areas will be an important subject for the political dialogue. In the context of this dialogue, the Parties shall attach particular importance to the changes underway and to the continuity of the progress achieved. This regular assessment shall take into account each country's economic, social, cultural and historical context.
>
> These areas will also be a focus of support for development strategies. The Community shall provide support for political, institutional and legal reforms and for building the capacity of public and private actors and civil society in the framework of strategies agreed jointly between the State concerned and the Community.[31]

Article 96 of *Cotonou*, "Essential elements: consultation procedure and appropriate measures", provided for consultations to examine a conflictive situation with a view to finding a solution acceptable to both parties. If no solution is found, in emergency cases or if one party rejects consultation, 'appropriate measures' can be taken. Suspension of cooperation would be a measure of last resort. Article 96 states:

> 1. Within the meaning of this Article, the term "Party" refers to the Community and the Member States of the European Union, of the one part, and each ACP State, of the other part.
>
> 2. If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.

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[31] *Cotonou Agreement*, June 2000, at http://www.acpsec.org/gb/cotonou/accord1.htm

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

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

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

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

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

The "appropriate measures" referred to in this Article are measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort.

If measures are taken in cases of special urgency, they shall be immediately notified to the other Party and the Council of Ministers. At the request of the Party concerned, consultations may then be called in order to examine the situation thoroughly and, if possible, find solutions. These consultations shall be conducted according to the arrangements set out in the second and third subparagraphs of paragraph (a).[32]

B. Europe Agreements, Association Agreements and Cooperation and Partnership Agreements

The Europe Agreements (EAs) and the older ("first generation") Association Agreements (AAs) are all pre-accession instruments and usually lead to full membership of the EU. There is a fundamental difference between the early and later pre-accession agreements in that the AAs for Cyprus, Malta and Turkey, which date back to the 1960s and 70s, did not provide for political dialogue. For Cyprus and Malta such dialogue has taken place on the basis of a decision of the Council of Ministers, and for Turkey, on the basis of specific

[32] http://www.acpsec.org/gb/cotonou/accord1.htm

Association Council resolutions and the Conclusions of the Helsinki European Council in December 1999.[33]

Other instruments that are loosely termed "Association Agreements" are agreements concluded with the Western Balkan countries under the Stabilisation and Association Process; Development Association Agreements, such as those with the Maghreb states and other Mediterranean countries and the *Cotonou Agreement* with the ACP states; also the European Economic Area Agreement with the former European Free Trade Association (EFTA) countries, which is designed to facilitate eventual full EU membership.

Partnership and Cooperation Agreements (PCAs), on the other hand, exclude any reference to future EU membership. The preambles of the two types of instrument (EA/AAs and PCAs) demonstrate their different purpose in this respect. The preamble to the EA with Poland, for example, recognises "the fact that the final objective of Poland is to become a member of the Community and that this association, in the view of the Parties, will help to achieve this objective".[34] The preamble to the PCA with Russia, on the other hand, bears in mind "the utility of the Agreement favouring a gradual rapprochement between Russia and a wider area of cooperation in Europe and neighbouring regions".[35] In the PCAs cooperation extends into other policy areas, such as culture, education and the environment.

The EAs provide for Association Councils, which are bilateral meetings at ministerial level between the EU and the associated country, at which all matters of approximation towards the EU are discussed. The Agreements also provide for Association Committees, which are meetings at senior official level that review in more detail all areas covered by the Europe Agreements. These are complemented by various sub-committees, which hold regular, detailed technical discussions on all areas covered by the Agreements. There are also joint Parliamentary Committees which link members of the national parliaments of the associated countries with members of the European Parliament.[36]

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33 http://ue.eu.int/newsroom/newmain.asp?LANG=1. Turkey's AA dates back to 1963. In December 1997 Turkey unilaterally suspended its political dialogue with the EU, but resumed the process in late 1999. The Copenhagen European Council in 1993 set conditions for EU membership, including the establishment of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The Copenhagen summit promised to open accession negotiations with Turkey in 2004 if the European Council considered it had fulfilled all the Copenhagen criteria. At the European Council in 2002, Turkey was offered a revised Accession Partnership, a deepened customs union and increased financial aid.

34 OJL 348, 31 December 1993, at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21993A1231(18)&model=guichett

35 http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21997A1128(01)&model=guichett

36 See "The Europe Agreements" at http://europa.eu.int/comm/enlargement/pas/europe_agr.htm

Similarly, the PCAs provide for bilateral Cooperation Councils between the EU and the government concerned, and also for permanent contacts between the European Commission and the country concerned. A bilateral, inter-parliamentary Cooperation Committee is established, consisting of senior civil servants, which helps the Cooperation Council to implement the PCA. Representatives from the EP and the national legislature of the signatory state meet in the Parliamentary Cooperation Committee.

The EAs and PCAs are similar in other ways too. The preambles of both agreements emphasise the "common values" shared by the contracting parties: democratic principles and respect for the rule of law and human rights. They both contain so-called "non-fulfilment clauses", which provide for measures to be taken if either party considers that the other has failed to fulfil its obligations under the treaty.

The EAs refer to human rights in the Preamble and specific reference is made in Title II, "General Principles", as in the following EA with Bulgaria:

> **Article 6**
> Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a New Europe inspires the domestic and external policies of the Parties and constitutes an essential element of the present association.[37]

The PCAs all contain a human rights requirement in Title 1, "General Principles" along the lines of the following example from the Kazakhstan PCA:

> **Title 1: General Principles**
> **Article 1**
> - to support Kazakh efforts to consolidate its democracy and to develop its economy and to complete the transition into a market economy.
>
> **Article 2**
> Respect for democracy, principles of international law and human rights as defined in particular in the United Nations Charter, the Helsinki Final Act and the Charter of Paris for a New Europe, as well as the principles of market economy, including those enunciated in the documents of the CSCE Bonn Conference, underpin the internal and external policies of the Parties and constitute an essential element of partnership and of this Agreement.
>
> **Article 3**
> The Parties consider that it is essential for the future prosperity and stability of the region of the former Soviet Union that the newly independent states which have emerged from the dissolution of the Union of Soviet Socialist Republics,

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[37] Europe Agreement with Bulgaria, 1 March 1993, at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21994A1231(24)&model=guichett

hereinafter called "Independent States", should maintain and develop cooperation among themselves in compliance with the principles of the Helsinki Final Act and with international law and spirit of good neighbourly relations and will make every effort to encourage this process.

The mechanisms for political dialogue and discussion of all aspects of the Agreements, including the consolidation of democracy, once the Agreements are in force are set out in Title II on political dialogue. Article 93 establishes that the EU may take action if the country fails to fulfil the conditions of the Agreement.[38]

The provisions on political dialogue in Title II are generally as follows:

Title II: Political dialogue
Article 4
A regular political dialogue shall be established between the Parties which they intend to develop and intensify. It shall accompany and consolidate the rapprochement between the Community and the Republic of Kazakhstan, support the political and economic changes underway in that country and contribute to the establishment of new forms of cooperation.
The political dialogue:
- will strengthen the links of the Republic of Kazakhstan with the Community and its Member States, and thus with the community of democratic nations as a whole. The economic convergence achieved through this Agreement will lead to more intense political relations;
- will bring about an increasing convergence of positions on international issues of mutual concern thus increasing security and stability.

Article 5
At ministerial level, political dialogue shall take place within the Cooperation Council established in Article 76 and on other occasions by mutual agreement.

Article 6
Other procedures and mechanisms for political dialogue shall be set up by the Parties, and in particular in the following forms:
- regular meetings at senior official level between representatives of the Community and its Member States on the one hand, and representatives of the Republic of Kazakhstan on the other hand;
- taking full advantage of diplomatic channels between the parties including appropriate contacts in the bilateral as well as the multilateral field such as United Nations, CSCE meetings and elsewhere;
- any other means, including the possibility of expert meetings which would contribute to consolidating and developing this dialogue.

[38] http://europa.eu.int/comm/external_relations/ceeca/pca/pca_kazakhstan.pdf

> **Article 7**
> Political dialogue at parliamentary level shall take place within the framework of the Parliamentary Cooperation Committee established in Article 81.[39]

Article 93 sets out the suspension mechanism:

> **Article 93**
> 1. The Parties shall take any general or specific measures required to fulfil their obligations under the Agreement. They shall see to it that the objectives set out in the Agreement are attained.
> 2. If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Cooperation Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. In the selection of these measures, priority must be given to those which least disturb the functioning of the Agreement. These measures shall be notified immediately to the Cooperation Council if the other Party so requests.[40]

C. Trade and Cooperation Agreements

Trade and cooperation agreements provide for various kinds of cooperation in different economic sectors, although the partnership goes beyond economic relations. Some agreements with European countries have later been replaced with pre-accession agreements. The Commission, operating under decisions, regulations or negotiating mandates decided by the Council of Ministers, has negotiated around 120 of these agreements worldwide. They provide for free trade between each country and the EU phased in over 10-12 years and their "basis for cooperation" is respect for democratic principles and human rights. The EC's Trade and Co-operation Agreement with Macao in 1992,[41] for example, states in Article 1:

> Cooperation between the Community and Macao and the implementation of this Agreement are based on respect for the democratic principles and human rights which inspire the policies of both the Community and Macao.

D. Stabilisation and Association Agreements

The EU's "Stabilisation and Association Process" was launched in May 1999 with the aim of strengthening political and economic stability in the Western Balkans.[42] Stabilisation and Association Agreements (SAAs) with the countries in this region link

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39 http://europa.eu.int/comm/external_relations/ceeca/pca/pca_kazakhstan.pdf
40 Ibid
41 OJ L 404, 31 December 1992
42 Albania, Bosnia Herzegovina, Croatia, Serbia and Montenegro, Former Yugoslav Republic of Macedonia (FYROM)

aid firmly to political developments. The agreements provide mechanisms for the EU to help participating countries bring their standards closer to those of EU Member States. They focus on respect for democratic principles and the main elements of the single market, with the aim of helping the economies of the region to begin to integrate with the EU's economy. These agreements contain an evolutionary clause in the preamble, referring to the country's "status as a potential candidate for EU membership".

The SAA with the Former Yugoslav Republic of Macedonia (FYROM) contains references to human rights standards in the Preamble and states in Article 2, "General Principles":

> Respect for the democratic principles and human rights as proclaimed in the Universal Declaration of Human Rights and as defined in the Helsinki Final Act and the Charter of Paris for a New Europe, respect for international law principles and the rule of law as well as the principles of market economy as reflected in the Document of the CSCE Bonn Conference on Economic Cooperation, shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.[43]

Furthermore, Article 105 links EU assistance to democratic reform:

> The overall objectives of the assistance, in the form of institution-building and investment, shall contribute to the democratic, economic and institutional reforms of the former Yugoslav Republic of Macedonia, in line with the Stabilisation and Association process. Financial assistance may cover all areas of harmonisation of legislation and cooperation policies of this Agreement, including Justice and Home Affairs.[44]

IV EC Treaty Base

The Community has exclusive competence for trade and trade-related matters. Under Article 133 TEC (Common Commercial Policy) the Community (i.e. the Commission), rather than the individual Member States, generally negotiates trade agreements with third countries and signs them on behalf of the Member States. The Commission negotiates in consultation with a special trade policy committee, the "Article 133 Committee", which consists of high-level trade officials who advise the Commission as negotiator.

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[43] *Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part*, 6726/01, 26 March 2001 at http://europa.eu.int/comm/external_relations/see/fyrom/saa/saa03_01.pdf

[44] http://europa.eu.int/comm/external_relations/see/fyrom/saa/saa03_01.pdf

Trade and Cooperation Agreements are based on Articles 133, 300 and 308 TEC (ex-Articles 113, 228 and 235). Economic, financial and technical cooperation measures with third parties may be carried out under Articles 181 TEC (ex-Article 130y) and 181aTEC, which require a qualified majority vote on the measures to be adopted.

External agreements which include political cooperation or cooperation in the area of justice and home affairs are "mixed competence" agreements. This means that some competence lies with the Community and some competence lies with the Member States. Mixed agreements are negotiated by the Commission or by the Presidency[45], concluded by a Decision of the Commission and Council and signed following a unanimous Decision of the Council. They require the assent of the European Parliament (EP) and have to be ratified by all the Member States, as well as by the EC.

The Council voting procedure depends on the treaty article on which the agreement is based. Provisions based on Article 181TEC, for example, require a qualified majority, while those based on Article 308 or Article 310 require unanimity.

The EAs/AAs are mixed competence agreements based on Article 310 (ex-Article 238) TEC, in conjunction with Article 300 TEC (ex-Article 228). These agreements require the assent of the EP, as well as that of the Member States. Article 310 provides for "an association involving reciprocal rights and obligations, common action and special procedure". The ECJ has recognised that Article 310 seeks to create a "privileged relationship" with the associated countries.[46]

PCAs are mixed competence agreements but they are based on the Common Commercial Policy and their Treaty base is Articles 133 TEC and 308 TEC in conjunction with Article 300 TEC.

Stabilisation and Association Agreements are also mixed competence agreements, based on Article 300 and 310 TEC.

Because of the length of time that full ratification of mixed competence agreements can take,[47] the EC has taken to introducing interim agreements. These cover only matters which are within Community competence, i.e. the trade and trade-related matters, but not the

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[45] In general, the Commission speaks for the Community when areas under the EU's exclusive competence are being discussed, and the Presidency speaks when areas of mixed competence are being addressed.

[46] Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd*, ECR (1987) 3719, judgment of 30 September 1987 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61986J0012&lg=EN

[47] The Commission estimates that this takes approximately two years. See http://europa.eu.int/comm/external_relations/see/news/ip01_1503.htm

political or institutional framework. As the Treaty base for these agreements is normally Article 133(3) TEC, there is no requirement to consult the EP or obtain its assent. Nor is there any need for national ratification. They are brought into effect by a qualified majority decision of the Council of Ministers.

The Treaty of Amsterdam, which came into force in May 1999, added under Article 300(2) TEC a provision for the Community to suspend an external agreement:

> Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.
>
> By way of derogation from the rules laid down in paragraph 3, the same procedures shall apply for a decision to suspend the application of an agreement, and for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement based on Article 310, when that body is called upon to adopt decisions having legal effects, with the exception of decisions supplementing or amending the institutional framework of the agreement.
>
> The European Parliament shall be immediately and fully informed on any decision under this paragraph concerning the provisional application or the suspension of agreements, or the establishment of the Community position in a body set up by an agreement based on Article 310.

V UK Scrutiny and Ratification of External Agreements

EAs, PCAs and other external agreements are published as Command Papers and become the subject of draft Orders in Council which, if approved, have the effect of defining them as "European Treaties" under section 1(3) of the *European Communities Act 1972*. This means that any obligations arising from the agreements are legally enforceable in the UK.

For example, the Europe Agreement with Bulgaria was published as Cm 2336 and laid before the House of Commons on 7 February 1994 (along with other draft S.I.s relating to similar agreements with the Czech and Slovak Republics and Romania). Calls for a reference to a Standing Committee on Statutory Instruments were negatived on 22 February 1994.[48] On 28 February 1994 the Foreign Office Minister, Douglas Hogg, moved a motion

[48] http://pubs1.tso.parliament.uk/pa/cm199394/cmhansrd/1994-02-22/Debate-1.html

to approve the *Draft European Communities (Definition of Treaties) (Europe Agreement establishing an Association between the European Communities and their Member States and the Republic of Bulgaria) Order 1994*,[49] which was approved after debate.[50] The S.I. needed a resolution of each House for approval and was debated on a similar motion in the House of Lords on 10 March 1994. The S.I. was made on 15 March 1995.[51] After its entry into force the EA was re-published in the European Treaties series as Cm 3273, Treaty 45 (1996) on 19 June 1996.

Interim agreements may be considered in one of the EU Standing Committees, along with the main agreements.

VI Use of the Human Rights Clause

A. EU scrutiny of the clause

The human rights situation in third countries is monitored by the heads of diplomatic missions of the EU Member States, who send regular reports to the Presidency. The human rights clause specifically has been the subject of scrutiny by the EP and NGOs for some time. The EP made proposals on the clause in 2000, which were described in detail in its Annual Report in 2002.[52] The EP has looked at how the clauses are implemented and the purpose they serve. For example, the Committee on Foreign Affairs, Human Rights and the Common Security and Defence Policy reported new developments in the clause in the Cotonou, AA and PCA agreements in 2003.[53] MEPs have asked a number of parliamentary questions about the clause in general and its use in specific cases. For example, Olivier Dupuis (NI) asked the Commission in January 2004 about the Tunisian regime's "repressive measures targeting human rights activists" and suggested it was time to impose sanctions under the human rights clause.[54] In September 2003 Miet Smet (PPE-DE) asked the Commission about the "Suspension of cooperation agreements and postponement of their signature".[55] The Commission replied:

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49 S.I. 1994/758, 1993/94

50 http://pubs1.tso.parliament.uk/pa/cm199394/cmhansrd/1994-02-28/Debate-1.html

51 http://www.legislation.hmso.gov.uk/si/si1994/Uksi_19940758_en_1.htm#fnf001

52 EP *Annual Report on human rights in the world in 2002 and European Union's human rights policy*, Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy 16 July 2003 at http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+A5-2003-0274+0+DOC+XML+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y

53 http://www.europarl.eu.int/meetdocs/committees/afet/20040308/515413en.pdf

54 Written Question E-0189/04 19 January 2003 at http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+WQ+E-2004-0189+0+DOC+XML+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y. The Commission's reply is at http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=71816&LEVEL=4&SAME_LEVEL=1&NAV=S&LSTDOC=Y

55 Written Question E-2903/03 23 September 2003 at http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+WQ+E-2003-2903+0+DOC+XML+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y

> The Commission places great emphasis on the human rights clause in agreements of the Community with third countries as a positive instrument to promote human rights and democracy. Structured exchanges on the basis of the clause with third countries offer a more realistic way of realising the goals of the human rights' clause than the application of rigid criteria for the suspension of parts of an agreement. Nevertheless, the Commission agrees that there are circumstances when punitive measures may be required. Where such measures are eventually taken after careful assessment of the prevailing particular situation in a country, it is important that timely consideration is given not only to the impact of the measures but also as to what conditions will govern their lifting.
> Since 1996, the human rights clause has been invoked on a number of occasions, including in the case of the countries mentioned by the Honourable Member, for justifying the request for formal consultations with a third country, or suspending cooperation and imposing other sanctions. In all of these cases, the political, democratic and human rights situations in the respective country were carefully assessed. In doing so, the Commission avoided employing any "mechanistic" or "typological" approach, which would have failed to provide the necessary comprehensive appreciation of a precarious situation in third country concerned.
> The Commission pursues the same approach in deciding on whether to slow down or suspend negotiations on a bilateral agreement or the signature of such an agreement, as mentioned by the Honourable Member.[56]

B. How often is it used?

The EU human rights report for 2003 summarised the use of the human rights clause, as follows:

> The human rights' clause has been invoked on a number of occasions since 1996 as the basis for consultations, suspension of aid or other measures, including with respect to the following countries: Niger, Guinea Bissau, Sierra Leone, Togo, Cameroon, Haiti, Comoros, Côte d'Ivoire, Fiji, Liberia and Zimbabwe.
>
> The European Parliament and NGOs have set out their views on how the clause should be implemented on several occasions, a recent example being the Human Rights Forum in Copenhagen in December 2002 […] where several recommendations were made by the working group dealing with this issue. The draft annual report by the European Parliament on human rights in the world in 2002 also includes several recommendations on the clause.[57]

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[56] Chris Patten for the Commission, 25 November 2003 at http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=69875&LEVEL=4&SAME_LEVEL=1&NAV=S&LSTDOC=Y

[57] EU annual report on human rights, 10 October 2003 13449/03 COHOM 29, at http://europa.eu.int/comm/external_relations/human_rights/doc/report03_en.pdf

C. What sanctions have been applied?

1. "Appropriate measures"

The human rights clauses generally refer to "appropriate measures" being taken in the event of human rights abuses, but this does not necessarily mean suspension or termination of the whole treaty; it could mean applying sanctions such as those described in Annex 2 of the Commission Communication (e.g. changing the cooperation programmes or the channels used, reducing cultural, scientific and technical cooperation, postponing or suspending bilateral contacts or new projects, trade embargoes or suspending all cooperation).[58]

The human rights clause itself does not establish how sanctions should be applied, nor how the Community should proceed in these cases. The Commission emphasises positive sanctions, such as entering into a dialogue with the government concerned, rather than negative sanctions, such as suspension or termination. This should be a sanction of last resort and should not affect humanitarian assistance to non-government channels.[59]

2. *Lomé* and *Cotonou*

The EU's annual human rights reports record how the human rights clause has been used, outlining all *Lomé* Article 366a consultations. For example, on 18 May 1999, after a *coup d'état* in Niger in April, the EU held talks with the Niger Government and the ACP states under *Lomé* Article 366a. Following the consultations the Niger Government committed itself to a transition to democracy, which the EU has since monitored, making progress in the restoration of democracy and the rule of law pre-requisites for a normalisation of EU-Niger relations. Also in May 1999, the EU condemned the latest outbreak of violence in Guinea-Bissau and called upon the authorities to respect the observance of democratic principles. The EU continued to monitor the situation, holding further consultations in September 1999. The EU held Article 366a consultations with the Government of Togo in 1998 and with the military Government of the Comoros after the coup there in April 1999.[60]

The EU has used the unilateral suspension of *Lomé* benefits in several ACP countries. In 1994 Community aid to eight ACP states was suspended or restricted because of the security situation and the states' failure to move towards democracy or observe human rights.[61]

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58 See Annex 2 of COM (95)216 in Appendix I

59 Ibid

60 *European Union Annual Report on Human Rights*, 1998/99, at http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eu-annual-report-1999_en.pdf

61 *The Courier* 1996: 3

The Article 96 consultation procedure has been used in relation to Haiti. After the general elections in 2000, the observer mission of the Organisation of American States (OAS) noted various irregularities and fraud. This constituted a breach of the essential element clause of the *Cotonou Agreement* and the EU invited the Haiti Government to enter into consultations under Article 96. Haiti did not respond to the EU's concerns and the Council adopted a Decision on 29 January 2001 to take "appropriate measures", in accordance with Article 96(2).[62] These measures included suspending direct budgetary aid and withholding future aid from the European Development Fund (EDF). This Council Decision was renewed in December 2001 and in 2002 and early 2003. When it came up for the fourth renewal, the EU proposed that the measures to withhold EDF aid should be amended but not rescinded, allowing existing aid to be redirected to civil society groups to help the growing humanitarian crisis in Haiti. The amendments would also allow Haiti's National Indicative programme to be signed, giving the country access to funds allocated to it under the 9th EDF (2000-2007), on condition that proper electoral and democratic reforms were carried out.[63]

The case of Zimbabwe is considered in Section VIII (D).

VII Views on the Human Rights Clause

For some, the human rights clause does not go far enough, while for others it goes too far. Some view human rights conditionality as legally unacceptable, morally unjustifiable or outside the competence of the EC. Others have questioned its effectiveness. Its existence and use have given rise to considerable debate, both within and outside the EU.

A. The Portuguese Legal Challenge

In an action at the European Court of Justice to annul Council Decision 94/578/EC of 18 July 1994 on the conclusion of an EC Cooperation Agreement with India,[64] the Government of Portugal challenged the Treaty base for the human rights clause and the concept of the EC's implied competence to introduce such a clause into its external agreements.[65] Portugal questioned the legal base for EC action in this area, claiming that recourse should have been made to Article 235 TEC (now 308, the 'catch-all' article), requiring a unanimous decision of the Member States.[66] Portugal also maintained that the rights referred to as 'fundamental' in the preamble to the Single European Act (SEA) and

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62 DEC 2001/131/EC, OJL 48, 17 February 2001

63 16181/2003, 17 December 2003

64 OJL 223, 27 August1994 p. 23 at http://europa.eu.int/comm/external_relations/india/intro/agree08_94.pdf

65 Case C-268/94, *The Portuguese Republic v. The Council of the European Union* [1996], ECJ Reports p. I-6177, at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0268

66 Case C-268/94 para 13

references to the TEU were 'programmatic', defining only general objectives and not giving rise to any specific Community powers.[67] Portugal further argued that, since Article 130u(2)TEC (now Article 177(2)) made human rights a general objective of Community policy, agreements based on Article 130y (now 181)[68] could only make general references to human rights. Reference to human rights as an "essential element" of such agreements would therefore go beyond the remit of the Article 177(2) objective of the Treaty.[69]

The Council, on the other hand, argued that a development agreement between the Community and a non-member country could include provisions on specific matters without recourse to other legal bases. The "essential element" Article (Article 1(1) of the Agreement with India) was a corollary of the requirements of Article 130u(2) TEC, and since human rights was an essential element of development policy, it was logical to mention it in the Agreement with India.[70] The Council also argued, referring to Article 60 of the Vienna Convention, that a provision of this kind in a cooperation agreement enabled the Community to suspend the application of the agreement for infringement of an essential provision, when there was evidence of serious abuse of human rights by the contracting party.[71]

The Danish Government, which supported the human rights clause, added that Article 235 (308) would constitute the proper legal basis for the conclusion of a specific agreement with a non-member country, the main purpose of which was to safeguard human rights. That was not, however, the object of the EC-India Agreement. It considered that Article 1(1) of the Agreement was included for the sole purpose of enabling the other provisions of the agreement to be applied.[72]

The Council also maintained that Article 130u(2)TEC *required* the Community "to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation"[73] and that the wording of Article 1(1) of the Agreement "demonstrates the importance to be attached to respect for human rights and democratic

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67 Case C-268/94 para 16

68 Article 181: "Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300. The previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements".

69 Case C-268/94, *The Portuguese Republic v. The Council of the European Union* [1996], ECJ Reports p. I-6177, at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0268, para 17

70 Ibid para 18

71 Ibid para 19

72 Ibid para 20

73 Ibid para 23

principles, so that, amongst other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles".[74]

The ECJ found that the inclusion of provisions on respect for human rights and democratic principles did not alter the characterisation of the Agreement and that Article 130y (181) provided a sufficient legal basis for the incorporation of the human rights clause.[75] It concluded:

> *3 So far as concerns Article 1(1) of the Agreement providing for respect for human rights and democratic principles, Decision 94/578 concerning the conclusion of the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development could be validly based on Article 130y of the Treaty and did not require recourse to Article 235 as the legal basis. In that respect, the mere fact that the provision in question describes respect for human rights as an essential element of cooperation does not justify the conclusion that it goes beyond the objective stated in Article 130u(2) of the Treaty, the very wording of which demonstrates the importance to be attached to respect for human rights and democratic principles, so that development cooperation policy must be adapted to the requirement of respect for those rights and principles.*
>
> *4 A development cooperation agreement concluded between the Community and a non-member country and adopted on the basis of Article 130y of the Treaty may lay down provisions on specific matters without there being any need to have recourse to other legal bases, or indeed to participation of the Member States in the conclusion of the agreement, in so far as the essential purpose of the agreement is to pursue the objectives referred to in Article 130u(1), and on condition that the clauses concerning specific matters do not impose obligations so extensive that they in fact constitute objectives distinct from those of development cooperation.*
> *In that respect, the cooperation provided for by the Cooperation Agreement between the European Community and the Republic of India on Partnership and Development is specified - in the provisions concerning the Agreement's objectives - in terms that take particular account of the needs of a developing country and, consequently, amongst other things, contributes to furthering the pursuit of the objectives mentioned in Article 130u(1) of the Treaty.*
> *As regards more particularly the provisions of the Agreement which relate to specific matters concerning energy, tourism and culture (Articles 7, 13 and 15), drug abuse control (Article 19) and intellectual property (Article 10), those provisions establish the framework of cooperation between the contracting parties and are limited to determining the areas for cooperation and to specifying certain of its aspects and various actions to which special importance is attached, but do not for that reason contain anything that prescribes in concrete terms the*

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74 Case C-268/94 para 24
75 Ibid para 29

> *manner in which cooperation in each specific area envisaged is to be implemented.*
> *The mere inclusion of provisions for cooperation in a specific field does not therefore necessarily imply a general enabling power to serve as the basis of a competence to undertake any kind of cooperation action in that field, with the result that it does not predetermine the allocation of spheres of competence between the Community and the Member States or the legal basis of Community acts for implementing cooperation in such a field. From the point of view of the incorporation into the Agreement of Articles 7, 10, 13, 15 and 19, it must be concluded that it was possible for Decision 94/578 on the conclusion of the Agreement, to be validly adopted on the basis of Article 130y of the Treaty*[76].

The application was dismissed, the judgment having clarified many of the substantial and procedural issues surrounding human rights clauses.

B. European Parliament

The EP has expressed its concerns about the implementation of human rights clauses in EC treaties, particularly the suspension mechanism. In a Resolution in 2001 on "Conditionality and international diplomacy for human rights" the EP:

> 13. Reiterates its concern about the fact that many international agreements by which the EU is bound and which include human rights clauses do not include implementing rules governing the suspension mechanism, as provided for in the ACP-EU Partnership Agreement, and insists, therefore, that adequate regulations should be adopted where necessary;
> 14. Notes that, formally, the Commission has the exclusive right of initiative as regards the invocation of the human rights clause, but calls on the Commission to respect Parliament's requests concerning the initiation of consultations foreseen in the suspension process;
> 15. Believes that criteria for the implementation of the clause need to be applied in a flexible manner; emphasises, however, that interpreting such clauses positively and flexibly should never become a justification or a pretext for inaction, especially in cases of gross violations of human rights, in cases of torture, which should never be negotiable;
> 16. Reiterates that the current policies of "blind" sanctions must be replaced by policies of smart" sanctions more appropriate to the specific circumstances of each country; urges the Council and Commission to develop further tools and mechanisms to target assets illegally expropriated by corrupt heads of governments or their entourages and to promote coordinated international efforts to restore such assets to the country of origin as soon as a genuine process of democratisation has started;
> 17. Calls on the Member States to ensure that their actions are consistent with the Union's measures in the field of external relations and, in particular, to suspend

[76] http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0268

> their bilateral cooperation with any country with which the Union has suspended its cooperation and to maintain their suspension for the same length of time as the Union;
> 18. Believes that the political dialogue should reflect a real partnership in which both sides learn from each other; calls on the Council to come to an agreement with the partner countries in order to address questions concerning human rights and democracy, the rule of law, respect for minorities, good governance and gender equality in its dialogues on a systematic and regular basis;
> 19. Calls on the Council to formulate concrete objectives for the human rights dialogue, to ensure that its results are regularly evaluated and that Parliament is systematically informed about the agenda and the results;
> 20. Calls on the Council and the Commission to ensure the coherence of their external action, irrespective of the existence or otherwise of agreements and suspensory or implementing clauses on respect for human rights … .[77]

In May 2003 the EP Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy adopted another resolution in which it called for stricter implementation mechanisms. The Committee:

> 4. Calls on the Council and the Commission to present the human rights clause as a commitment by both parties to the agreement to respect human rights and to use the clause primarily to induce positive change;
> 5. Calls on the Council and the Commission effectively to implement restrictive measures adopted by the EU, so that they do not remain simply as expressions of disapproval;
> 6. Considers that the implementation of the human rights clause in association and cooperation agreements depends primarily on the political will of the EU to exert adequate pressure on the country concerned, and on assigning priority to human rights issues over economic, security and other political interests;
> 7. Stresses, however, that the lack of a clear implementation mechanism further hinders the effectiveness of the clause; considers the implementation mechanism of the Cotonou Agreement as exemplary for its provisions on consultations, suspension and participation by civil society;
> 8. Stresses the importance of providing the human rights clause with a well defined implementation mechanism in order to maintain explicit pressure for significant improvements of the human rights situation in the countries concerned and to encourage sections of society that are in favour of promoting democracy and respect for human rights;
> 9. Calls on the Commission and the Council to set up and make public guidelines for incentive and restrictive measures to be applied, in order to enhance openness and credibility in the process of implementing the clause;
> 10. Urges the Council and the Commission to set in motion structured dialogue procedures for the regular assessment of compliance by partner states with their human rights obligations;

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[77] 1317/2000 - C5-0536/2000 and C5-0628/2000 - 2000/2105(INI)) European Parliament resolution on human rights in the world in 2000 and the European Union Human Rights Policy

> 11. Calls on the Council to set up, in its function as part of the Association and Cooperation Councils, specific subcommittees on human rights which are clearly linked to the highest level of political dialogue, with a view to implementing Article 2 of the Agreement;
> 12. Calls on the Commission and the Council to establish working groups or Human Rights Round Tables as part of a systematic methodology to implement the human rights clause; those working groups should aim at monitoring the country's human rights situation on the basis of existing monitoring instruments, propose specific action for improvement, including timetabling and benchmarking; the working groups should include representatives of civil society, NGOs, human rights institutions from the EU and the partner country; Members of Parliament should be invited to participate;
> 13. Calls on the Commission to collect and assess, together with EU Missions, information on specific violations of human rights, with particular attention to women's rights and children's rights in third countries, as an essential part of its monitoring role, in particular with regard to those countries who are bound by a human rights clause as part of their agreements with the EU;
> 14. Deplores once again the fact that Parliament is not involved in the decision-making process for initiating consultations or suspending an agreement; strongly insists, therefore, on being fully informed in good time of any such measures being taken; insists furthermore that its views on the type of clause to be negotiated in future agreements should be taken into due consideration … .[78]

C. European Commission

The European Commission believes the human rights clause could be used more effectively:

> The Commission is exploring ways in which to use the human rights clause more effectively. The idea of using the clause to establish dedicated working groups on human rights with third countries is being piloted: in 2003 a Subgroup on Governance and Human Rights was established for the first time under the Cooperation agreement with Bangladesh. The group provides an opportunity for in-depth exchanges on human rights issues between EU and Bangladeshi officials. Its first meeting took place on 19 May 2003 in Dhaka and addressed a wide range of issues, including the death penalty, the judicial system, support to electoral processes and the creation of a Human Rights Commission. The possibility of providing further support for human rights projects was also explored.
>
> As noted in the section on mainstreaming, the Commission Communication of 21st May 2003 on « Reinvigorating EU actions on human rights and democratisation with Mediterranean partners » also draws on the clause in order

[78] *Draft Annual Report on human rights in the world in 2002 and European Union's human rights policy* (2002/2011(INI)) Committee on Foreign Affairs, Human Rights, Common Security and Defence, 6 May 2003 at http://www.europarl.eu.int/meetdocs/committees/afet/20030616/493327en.pdf

> to pioneer a more developed approach to human rights and democratisation in the region. The Communication identifies ten areas for improvement including the development of National and Regional Action Plans on Human Rights, a more operational focus on human rights in political dialogue and greater attention to human rights and democratisation issues in CSPs and National Indicative Programmes.[79]

The Commission issued a Communication on Governance and Development in October 2003, which evaluated the use of the human rights clause:

> (28) Prior to the introduction in 1995 of the consultation procedure, co-operation was de facto fully or partially suspended for a number of countries. Since 1995, consultations have so far been used in 12 cases, involving 10 ACP countries[80] A recent example relates to Zimbabwe where consultations were undertaken pursuant to Article 96 of the ACP-EC agreement, following which targeted sanctions were applied, including freezing of funds and assets of individual members of the Government, a ban on their travel/transit, and a ban on exports of equipment for repression and training related to military activities.[81]
>
> (29) On the basis of the experience, some key elements for the success of consultations, i.e. to finding a solution acceptable by the two parties and/or implementing the measures necessary to remedy the situation, can be highlighted. The basic framework should be formed by: (a) the commitment of the authorities to return to a situation of normality is fundamental, in particular after a coup d'état, and (b) the coherence of EU position and co-ordination between donors. In order to ensure a proper monitoring of the process, the concrete violations of the essential elements must be identified, the sectors in which corrective measures are required from the authorities must be defined and a close political dialogue is to be kept during and after the formal meeting of consultations. Finally, the adoption of positive measures such as the strong and active EU involvement in the crises/conflict resolution is necessary.
>
> (30) The Commission is exploring ways in which to use the human rights' clause more effectively. The idea of using it to establish dedicated working groups on human rights with third countries is being piloted. In 2003 a Sub-group on Governance and Human Rights was established for the first time under the Co-operation agreement with Bangladesh. The group provides an opportunity for in-depth exchanges on human rights' issues between EU and Bangladeshi officials. Its first meeting took place on 19 May 2003 in Dhaka and addressed a wide range of issues, including the death penalty, the judicial system, support to electoral processes and the creation of a Human Rights' Commission. The possibility of

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79 http://europa.eu.int/comm/external_relations/human_rights/gac.htm#hrz280102

80 Niger, Guinea Bissau, Togo, Haiti, Comoros, Ivory Coast, Fiji, Liberia, Zimbabwe and Central Africa Republic

81 Council Common Position and Council Regulation 310/2002 of 18th February 2002

> providing further support for human rights' projects was also explored. In addition, the Communication on "Reinvigorating EU actions on human rights and democratisation with Mediterranean partners"7 also draws on the clause in order to pioneer a more developed approach to human rights and democratisation in the region. The Communication identifies ten areas for improvement including the development of National and Regional Action Plans on Human Rights, a more operational focus on human rights in political dialogue and greater attention to human rights and democratisation issues in CSPs and National Indicative Programmes.[82]

D. House of Commons Foreign Affairs Committee

The Commons Foreign Affairs Committee (FAC), in its Sixth Report, *South Caucasus and Central Asia*, 20 July 1999, thought the PCAs needed to be strengthened to allow for suspension in the event of non-compliance with human rights obligations:

> Para 140. There is a risk, in the absence of specific targets for improvement, that the commercial interests of the EU will over-ride human rights considerations, and that the dialogues within the PCA frameworks will be an excuse for inaction. While the United Kingdom may be concerned about "getting out ahead" of its EU partners in its insistence on human rights standards, we believe that this is an area in which the Government can usefully take a lead. The PCAs are mixed agreements, and thus the United Kingdom may seek to enforce their conditions bilaterally as well as through the European Council. **We recommend that the Government work both bilaterally and with its European partners to ensure that the human rights elements of the EU's Partnership and Cooperation Agreements (PCAs) are fully respected, and that pressure on those countries in the region with poor human rights records is maintained through the mechanisms established by the PCAs, to the extent that states which consistently fail to meet their obligations should have their PCAs suspended. We also recommend that the Government should ask its European partners to take a stronger position in future on securing actual progress on human rights before EU Partnership and Co-operation Agreements are entered into.[83]**

In a Standing Committee debate on Orders to implement EC agreements with the Republic of Korea and Mexico[84] Michael Trend commented that, under the *Economic Partnership, Political Co-ordination and Co-operation Agreement* between the EC and its Member States and Mexico, "the observance of human rights does appear to be not an objective but a pre-supposed condition that Mexico has, in theory at least, already

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[82] *Commission Communication on Governance and Development*, 20 October 2003, COM(2003) 615 final, at http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0615en01.pdf

[83] http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmfaff/349/34913.htm

[84] Sixth Standing Committee on Delegated Legislation, 12 May 1999 at http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmstand/deleg6/st990512/90512s01.htm

fulfilled, although it must also continue to fulfil its obligations".[85] He pointed out that Article 58(1) (on the fulfilment of obligations) was intended to include article 1 (on respect for democratic principles and human rights) within the remit of the Joint Council's mandate, but that Article 58(1)(3) was vague on the sanctions that might be taken by the Council in the event of a breach of Article 1, referring only to "appropriate measures" as measures "to be taken in accordance with international law".[86] He asked: "Will the agreement make any difference?[87]

The then Minister for Europe, Joyce Quin, took the view that a dialogue about human rights within the framework of an agreement was better than strict conditionality preventing the conclusion of an agreement:

> Various organisations, including Oxfam, have expressed concern about human rights in Mexico. However, as with all human rights difficulties, there often is a hard choice to make between saying, ``We are not happy about human rights in particular areas so we do not want to enter into a closer agreement", and saying, ``This closer agreement allows a much better framework within which the issues can be discussed and therefore we feel it is better to adopt this approach." We have had discussions with opposition groups in Mexico, with civil society groups and with interested non-governmental organisations. It seems to us that the preponderance of opinion has been very much in favour of the agreement, despite the concerns that have been expressed.[88]

The FAC commented again in 2000 on the need to strengthen the human rights clause and the suspension mechanism in PCAs:

> 25. The EU has a number of Partnership and Co-operation Agreements (PCAs) which confer substantial economic and commercial advantages upon signatories. In our earlier Report on the South Caucasus and Central Asia we commented on the failure of the EU to demand improvements in the human rights situation in a number of countries within the region prior to signing the PCA.[89] Once a PCA has been signed the EU has surrendered a major negotiating card since it is almost certainly harder to suspend a PCA than it is to sign it in the first place. The Government's Response to our Report did little to alleviate our concern about the way in which the human rights clauses within these Agreements are monitored and we are not sure that all signatories take their human rights obligations under

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85 http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmstand/deleg6/st990512/90512s01.htm

86 http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=22000A1028(01)&model=guichett

87 Ibid

88 http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmstand/deleg6/st990512/90512s02.htm

89 Sixth Report of the Foreign Affairs Committee, South Caucasus and Central Asia, Session 1998-99, HC 349-I, paras. 133-140

> these agreements very seriously.[90] Mr Hain's statement that "if you have a clause in a trade agreement and you never activate it then there is not much point in having it" was welcome. We hope that our European partners share this admirable view. **We recommend that the Government work both bilaterally and with its European partners to ensure that the human rights elements of the EU's Partnership and Cooperation Agreements are fully respected. PCAs should have teeth and, when appropriate, the teeth should bite. States which consistently fail to meet their obligations should have their PCAs suspended.** [91]

In June 2003, Donald Anderson, who chairs the Commons Foreign Affairs Committee, questioned the effectiveness of human rights clauses, pointing out that

> … none of the clauses in the relevant agreements with third countries in respect of human rights have been activated. Is there not also a need to have personnel with serious human rights experience—such as those from non-govermental organisations—in the EU's key foreign policy structures?[92]

The FCO Mininster, Bill Rammell, acknowledged that "the EU must constantly seek to do more", but noted that the human rights clause had been activated in the case of Zimbabwe, which the Government had "pushed for […] strongly, and very much welcome". He added: "However, there is no doubt that there are further matters that we need to push and press, and we shall do so".[93]

The effectiveness of the clause as an incentive to improve human rights was also raised in relation to Algeria. When Lord Avebury asked in November 1998 whether the Government considered that Algeria was "in a state to comply with the standard human rights clause in an association agreement with the European Union", the FCO Minister, Baroness Amos, took the view that establishing a process for dialogue was a way of improving the situation.[94] When, nearly two years later, Lord Moynihan asked the Government if they thought the human rights situation in Algeria had improved since the EU signed the AA in April 2002, Baroness Amos's reply that the Agreement had not yet come into force and was not legally binding[95] was not particularly reassuring. During the

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90 Government Response to the Sixth Report of the Foreign Affairs Committee (1998-99), South Caucasus and Central Asia, Cm 4458

91 Foreign Affairs Committee First Report, *Annual Report on Human Rights*, Summary of Conclusions and Recommendations, 25 January 2000, at http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/41/4103.htm

92 HC Deb 10 June 2003 c 529 at http://pubs1.tso.parliament.uk/pa/cm200203/cmhansrd/vo030610/debtext/30610-03.htm#30610-03_spnew1

93 Ibid

94 HL Deb 19 November 1998 c 215WA at http://pubs1.tso.parliament.uk/pa/ld199798/ldhansrd/vo981119/text/81119w10.htm#81119w10_sbhd1

95 HL Deb 17 July 2002 c 151-2WA at http://pubs1.tso.parliament.uk/pa/ld200102/ldhansrd/vo020717/text/20717w01.htm#20717w01_sbhd1

period of the AA negotiations with Algeria the human rights organisation, Human Rights Watch, recorded many serious human rights abuses by the Algerian security forces (albeit acknowledging a decrease since 2001).[96] An EU delegation under the Spanish EU Presidency in the first half of 2002 had raised the issue of 'disappearances' with the Algerian Government, but six months after the AA was signed, the EU has still not received from the Algerian authorities any verifiable information on the whereabouts or status of any of the cases.

E. ACP Objections

The human rights conditionality introduced into the *Lomé* framework caused controversy in the ACP countries, which regarded it as an attack on their sovereignty and hypocritical on the part of the EU. One analyst noted in a paper on the EU's role in the global economy:

> The ACP pointed to the existing commitment to the Universal Declaration on Human Rights and questioned the EC's narrow interpretation of human rights as only civil and political, ignoring economic, social and cultural rights.[97]

An article in *Bridges between Trade and Sustainable Development* in 1999 looked at the ACP reaction to human rights conditionality:

> 'Good governance' – a term often used as a euphemism for fighting corruption – is another thorny issue. The EU wants to make 'good governance' one of the 'essential elements' of the future framework treaty (the other essential elements are promotion of democracy, respect for human rights and the rule of law). The violation of an 'essential element' can lead to the suspension of official development assistance (ODA) under the so-called 'non-execution clause'. ACP countries consider the inclusion of good governance in the non-execution clause paternalistic, as well as superfluous as the other three essential elements already cover the area. ('Democracy, respect for human rights, protection of the rule of law we accept. "Good governance" with all its subjectivities and variances is another matter; we believe it appropriate for political dialogue – on both sides, good governance in Europe no less than in ACP countries. We will not have it hung around our necks as a conditionality collar fashioned for the ACP countries alone').[98]
>
> At the Brussels meeting, ACP countries said that they were willing to consider a reference to good governance in the new treaty only if it was not added to the essential elements of the non-execution clause. According to the meeting's

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96 *Human Rights Watch World Report 2003*, Algeria, at http://www.hrw.org/wr2k3/mideast1.html

97 Sophia Price, "The political economy of the EU's external relations: The historical evolution of the Lomé Convention", at http://www.unige.ch/ieug/B8__Price.pdf

98 Anthony Hylton, cited in *Bridges* Year 3 No.1 page 12. The human rights clause was not fashioned for the ACP countries alone, but was to be included in all the EC's external treaties.

> second co-chair, Benin's Culture and Information Minister Séverin Adjovi, the inclusion of good governance to the non-execution clause would allow the EU to suspend aid in case of wrongdoing by a single minister. 'The suspension of assistance is justified when the aid recipient is guilty of institutional corruption or extortion. Nevertheless, the suspension must be based on consultation and not on a unilateral determination,' Minister Adjovi said.[99]

F. Human Rights Organisations

In a submission to the Convention on the Future of Europe in 2002 (see Section X), the World Organisation Against Torture (OMCT) was critical of the effectiveness of the human rights clause:

> Considered today as the main tool in order to foster the respect for human rights in third countries, the human rights clause has so far represented the core of the EU Association and Cooperation agreements with third countries, being presented as a *condicio sine qua non* for the implementation of these agreements, at least formally. In reality, however, it does not seem that this EU "human rights conditionality" exists as such.
>
> **The main problem concerning the human rights clause is today the lack of an effective mechanism to make it operational and therefore to ensure that States comply with their human rights obligations**. Indeed, we cannot but acknowledge that no concrete and effective substance has been given to the human rights clause until now, as the situation of human rights in many of the third countries concerned is still very worrying12. This proves that in order to ensure its effectiveness, the human rights clause requires concrete mechanisms and procedures, which shall go far beyond the usual dialogue on human rights that is taking place at the Joint Councils and Committees meetings13. In this task, human rights shall not be considered as a disguised form of protectionism or additional conditionality, but rather as essential safeguards guaranteeing social justice and sustainable development. Furthermore, more transparent and formalised mechanisms should also help in avoiding an approach based on double standards according to economic and national interests. Finally, it is too often forgotten that the human rights clause is based on the principle of **reciprocity**, as it applies for all the countries involved in the agreement, including the EU Member States.[100]

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[99] *Bridges between Trade and Sustainable Development*, Year 3 No. 6, International Centre for Trade and Sustainable Development (ICTSD), July-August 1999 at http://www.ictsd.org/English/BRIDGES3-6.pdf

[100] Third OMCT contribution on *The EU and the Human Rights in the World* 16 December 2002 at http://europa.eu.int/futurum/forum_convention/documents/contrib/other/0117_c2_en.pdf

G. EU Human Rights Discussion Forum

At the 4th EU Human Rights Discussion Forum in Copenhagen on 20-21 December 2002,[101] which brought together parliamentary, academic and NGO human rights experts, Morten Kjærum, Executive Director of the Danish Centre for Human Rights, was critical of the inconsistency with which the clause had been applied:

> To my knowledge human rights clauses are not used consistently, to the detriment of human rights development in those countries where this focus is not given priority; to the detriment of the of the work of the local human rights defenders; and to the detriment of the principle to treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.[102]

The forum argued that the human rights clause in PCAs that were based on the 1995 Commission Communication should be extended to all EU agreements with third parties, as the clause was not universally applied. It also thought that the up-dated *Cotonou* clause should be introduced into all Association Agreements and Framework Cooperation Agreements "through renegotiations or as joint declarations, as it clarifies procedures and promotes mutual trust between the parties".[103]

The majority view in the discussion was that implementation of the human rights clause depended primarily on the political will of the EU institutions to use it, which had not always been evident. The Commission was accused of under-applying the clause (the case of Israel was emphasised) and it was suggested that this body should take more initiative in bringing breaches of the clause to the attention of the Council. The conference thought the absence of any concrete criteria for when the Council should act was also a problem. Working Group 1 of the conference recommended measures that might improve the clause:

> The discussion went on to look at how the human rights clauses could be given flesh or be provided with appropriate instruments that would help decision makers to implement proactive human rights policies. In this regard it was emphasized that the more clear the EU is in its application of positive measures to implement the human rights clause the easier it also becomes to adopt gradual, negative measures and thus to fill out the gap between 'no action' and 'suspension' in current practices.
>
> The participants agreed that the implementation of the human rights clause first of all should consist of a series of positive measures, thus providing the

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[101] The human rights clause was also discussed at EU-Human Rights Discussion Fora in November 2000 under the Finnish Presidency, December 2000 under the French Presidency and in November 2001 during the Belgian Presidency.

[102] http://www.um.dk/udenrigspolitik/menneskerettigheder/eu/eu-forum_2002_web.pdf

[103] Ibid

Commission with added capacity and resources, and that the implementation process of human rights should take three factors into consideration:

- Local conditions, such as power relations, the level of education, the social and economic situation, etc.
- The time horizon for implementation.
- A realistic assessment of the resources available to the process (the size of the carrot).

It was agreed that seven elements should be taken into account in the implementation of the human rights clause:
1. Systematic monitoring – the essential element of any serious human rights policy (cf. the accession process).
2. A systematic approach to assessment/evaluation, targets and benchmarks with a view to effective application of instruments and resources as well as to mainstreaming human rights considerations into country strategies.
3. Coherence and complementarity (between institutions and with member states or international governmental organisations).
4. Serious engagement with civil society and national human rights institutions.
5. Systematic focus in political dialogue.
6. Transparency.
7. Reciprocity. In this regard the Council Resolution on Indigenous Peoples was mentioned as an example of uneven relations, as it only refers to indigenous people in developing countries and not to those living in the developed world.[104]

VIII Examples of States with Human Rights Problems

A. Russia

The intention to work on a PCA with Russia was announced in 1992, when the then European Commission President, Jacques Delors, visited Moscow. After nearly three years of negotiations the PCA was signed in 1994. The PCA is centred on the Common Commercial Policy and its treaty bases are Articles 113 and 235 TEC in conjunction with Article 228(2,3) TEC.[105] A Joint Declaration appended to the PCA confirms that respect for human rights constitutes an essential element of the Agreement.[106]

Shortly afterwards, an interim agreement was reached to enable the trade-related elements to enter into force, pending full ratification of the PCA. The interim agreement also

[104] http://www.um.dk/udenrigspolitik/menneskerettigheder/eu/eu-forum_2002_web.pdf
[105] Articles 113 and 235 TEC had been the legal bases of the Trade and Cooperation Agreement with the USSR that the PCAs with Russia and the CIS states replaced.
[106] Joint Declaration in relation to Articles 2 and 107, at http://europa.eu.int/comm/external_relations/ceeca/pca/pca_russia.pdf

contained human rights references in Article 1 ("General Principles").[107] When Russian forces intervened in the secessionist North Caucasian republic of Chechnya in December 1994, the European Commission responded by suspending the process of ratification. On 19 January 1995 the EP, referring directly to the PCA human rights clause in Title 1, Article 2, approved "the [European] Commission's decision to suspend the process of ratifying the interim agreement" and called on the Council "not to make any further progress with the final ratification of the Partnership Agreement with the Russian Federation".[108] The EP requested the Council and Commission to halt ratification of an interim cooperation agreement with Russia until military attacks and human rights violations in Chechnya had ended.

During early 1995 the Council set out conditions for Russia to meet before the interim agreement would be signed. These were requirements for:

- A genuine ceasefire
- Discussions on a political solution to the conflict involving all sides
- Free passage of humanitarian aid convoys; and
- The establishment of a permanent mission of the Organisation for Security and Cooperation in Europe (OSCE) in Chechnya

In mid-1995 the OSCE mission reported that serious human rights violations were continuing, but the Council wanted ratification of the interim agreement to proceed if Russia pledged to honour its obligations in the near future. The EP discussed the conflicting positions arising from the Council position in relation to Russia's obligations under international human rights treaties (e.g. Article 3 of the Geneva Convention on "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties",[109] and several OSCE principles), but the European Council in Cannes in July 1995 went ahead and signed the interim agreement, arguing that "progress has been made with regard to the situation in Chechnya".[110] The interim agreement entered into force on 1 February 1996.

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[107] OJL 247, 13 October 1995 pp 2-29 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21995A1013(01)&model=guichett

[108] Resolution on the situation in Chechnya, OJ p.80 T0249 Session doc. B4-0031/95 OR Recommendation of the European Parliament to the Council on the development of relations with the Russian Commission to the Council and the European Parliament on Federation and the situation in Chechnya OJ p. 90, Session doc A4-0134/95

[109] Geneva Convention relative to the Treatment of Prisoners of War, adopted 12 August 1949, entered into force 21 October 1950, at http://www.unhchr.ch/html/menu3/b/91.htm

[110] Cannes European Council Presidency Conclusions, 26- 27 June 1995, Press: Nr: 00211/95 at http://ue.eu.int/en/Info/eurocouncil/index.htm

The entry into force of the PCA itself was delayed until December 1997 after the EU temporarily suspended the ratification process because of the conflict in Chechnya.[111] The EP finally consented to the PCA because of the continuing cease-fire in Chechnya and with the start of peace negotiations in Chechnya the ratification process resumed. In November 1996 the PCA was ratified by the Russian State Duma and Federation Council and the ratification process in the Member States was completed in October 1997. The aims of the agreement are outlined in the following extract from the EU Moscow Delegation web site:

> The PCA represents a visionary commitment from both sides. It is ambitious in scope, covering almost all aspects of European Community-Russia trade, commercial and economic relations, and instituting political communication up to the highest levels. It places a respect for human rights and democratic processes at the very core of the relationship. It is truly comprehensive: covering subjects as diverse as the exchange of best practice and know-how on the management of postal systems, to the conservation and preservation of sites and monuments.[112]

The EU adopted a Common Strategy on Russia at the Cologne European Council in June 1999.[113] The strategy concerns trade and economic cooperation, cooperation in science and technology, political dialogue and justice and home affairs issues. It emphasises the consolidation of democracy, public institutions and the rule of law and the integration of Russia into a common European economic and social space.[114] Part II Article 1(a) declares the EU's aim of:

> supporting Russian efforts to meet its international human rights commitments including those to the Council of Europe, the UN and the OSCE, and by promoting joint EU-Council of Europe activities regarding Russia in the fields of the rule of law and human rights; by giving assistance in safeguarding human rights, including those of women, children and minorities, and by enhancing programmes to promote the abolition of the death penalty.[115]

Events in Chechnya led to a suspension of the EU's Technical Assistance Programme (TACIS)[116] in early December 1999 and some of the funds were diverted to humanitarian

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[111] OJL 327, 28 November 1997 pp 3-69 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21997A1128(01)&model=guichett

[112] http://www.eur.ru/eng/euru/docs_pca.html

[113] 1999/414/CFSP OJL 157 24 June 1999 at http://europa.eu.int/comm/external_relations/ceeca/com_strat/russia_99.pdf

[114] Opinion of the Economic and Social Committee on "EU/Russia strategic partnership: What are the next steps?", OJC 125, 27 May 2002 pp. 39 – 43

[115] http://europa.eu.int/comm/external_relations/ceeca/com_strat/russia_99.pdf

[116] TACIS was launched in 1991 to provide grants for technical assistance to 13 countries in Eastern Europe and Central Asia (Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgystan, Moldova, Mongolia, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan). It aims to help the transition process in these countries.

assistance.[117] In January 2000 a new Regulation was adopted concerning the provision of assistance to the TACIS partner states for 2000-2006.[118] The Commission stated:

> The new regulation is based on an understanding that co-operation is a reciprocal process, encouraging a move from 'demand-driven' to 'dialogue-driven' programming. More flexibility in the way that Tacis is structured will allow potential technical assistance to be mobilised and implemented according to the capacity of each partner country.[119]

The 2000 Regulation concentrates TACIS activities on fewer areas of cooperation, namely:

- Institutional, legal and administrative reform
- Private sector and economic development
- Consequences of changes in society, infrastructure networks
- Environmental protection
- Rural economy
- Nuclear safety.[120]

In September 1999 Russian forces returned to Chechnya, again drawing attention to Russia's human rights record. A report by the Commons Foreign Affairs Committee in February 2000 on *Relations with the Russian Federation* looked at the PCA in some detail.[121] While the Committee concluded that "non-compliance with human rights standards is a serious impediment to partnership with Russia", it made no mention of imposing sanctions on Russia by means of the human rights clause in the PCA. However, it did acknowledge that "if clear improvements [were] not identified in the performance of TACIS, consideration should be given to investigating how funds can be transferred from TACIS to better run programmes".[122] The Committee also recommended that the Government

> … assess the restrictions on trade between Russia and the EU, report to us on the justification for those restrictions in all cases, and consider how the commitment of the Partnership and Co-operation Agreement and the Common Strategy to move towards a free trade area with Russia can be brought into practice if and when relations with Russia improve.[123]

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117 For more information, see Library Research Paper 00/14, *The Conflict in Chechnya*, 7 February 2000, pp.21-22

118 Council Regulation 99/2000, 29 December 1999

119 Commission External Affairs website at http://europa.eu.int/comm/external_relations/ceeca/tacis/index.htm

120 Ibid

121 Foreign Affairs Committee Third Report, *Relations with the Russian Federation*, HC 101, at http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/101/10102.htm

122 http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmfaff/101/10112.htm

123 Ibid

In November 2001 the EU made several representations to the Russian Government, following reports of serious human rights abuses committed against the civilian population in Chechnya by Russian troops in July 2001. The Council insisted that from then on the situation in Chechnya had to be discussed at all appropriate bi-lateral EU-Russia meetings and at all levels. The Commission also voiced its concerns over Russia's human rights abuses at the 58th session of the United Nations Human Rights Commission in March-April 2002.[124]

In April 2002 the Russian Government appointed a Presidential Representative for Human Rights in Chechnya (a post which was abolished in January 2004). The Council of Ministers acknowledged that some progress had been made but continued to raise human rights issues at bi-lateral meetings, insisting that the fight against terrorism had to be carried out "within the framework of the rule of law and full respect for human rights" and that "some steps have been taken in the right direction, albeit belatedly and not going far enough".[125]

The political dialogue continues with mixed results. The Council's and the Commission's view that the EU must support Russia in its transition to democracy has been difficult to sustain in the context of the conflict in Chechnya, and the EP would like to use tougher measures against the Russian Government. However, the Council's decision to condemn Russia's actions in Chechnya rather than apply sanctions appears to be based on the aim of engagement through dialogue, rather than disengagement through sanctions.

B. Belarus

The EU signed a PCA with Belarus in 1994, but this did not come into force until after the EU condemned President Alexander Lukashenko's regime in 1996 for its failure to establish democratic political institutions. The EU has suspended all cooperation with Belarus and EU aid has been removed, except for humanitarian projects and support for democratisation. The EP commented:

> … since the Partnership and Cooperation Agreements were originally negotiated in 1993/4, the underlying parameters of economic development have failed to provide any comfort to the democratic political forces and therefore public confidence in democratic, progressive and reformist practices has been seriously undermined. Corruption has become widespread, and demagogic and extremist political forces maintain a high profile in Belarus in particular, where a democratically elected parliamentary institution was abolished following a

[124] See EU human rights report for 2002 at http://www.eumap.org/library/datab/Documents/1069265481.64/rt02_en.pdf. The EU initiated various country resolutions, including one on Chechnya, which was defeated.

[125] OJ C 205 E, 29 August 2002, pp 102 - 103

seriously flawed referendum in November 1996. In September 2001 President Lukashenko was re-elected to serve a second term, in elections which Opposition and Western observers declared to be unfair and undemocratic. The Agreement with Belarus therefore remains effectively suspended, because of the serious breach of democratic principles coupled with persistent human rights violations and intimidation of democratic political forces. Consequently the Parliamentary Cooperation Committee (PCC) with Belarus – which provides a framework for parliamentary involvement in the Agreement - is not operational.[126]

C. Israel

1. The Euro-Mediterranean Partnership

In November 1995 the 15 EU Member States and 12 countries and territories in the Mediterranean region (including Morocco, Algeria, Tunisia, Egypt, Israel, Jordan, the Palestinian Authority, Lebanon, Syria, Turkey, Cyprus, and Malta) adopted the so-called "Barcelona Declaration".[127] This launched the third phase in EU-Mediterranean cooperation.[128] The 27 signatories undertook to create an area of peace and shared prosperity and to improve mutual understanding between their peoples. The follow-up to this was the Euro-Mediterranean "charter for peace and stability" to implement strengthened political and security cooperation in areas such as drug trafficking, terrorism, immigration, conflict prevention and human rights. The EC has also negotiated bilateral association agreements with Mediterranean partners.

A human rights element has been introduced into the financial aid provided to the region, which is channeled through the Euro-Mediterranean Partnership, or MEDA, programme. Under Article 3 of the Regulation,[129] democratic principles, the rule of law and human rights constitute an essential element "the violation of which […] will justify the adoption of appropriate measures", the procedures for which are set out in Article 16. Under the MEDA Regulation there is no requirement for information and consultation. These two articles are needed because many Mediterranean countries do not yet have an Association Agreement and the old Cooperation Agreements do not include a human rights clause.

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[126] DG for Committees and Delegations, EP Delegation for Relations with Ukraine, Belarus and Moldova, Notice of activities, 17 December 2001 at http://www.europarl.eu.int/meetdocs/delegations/ukra/20020219/458002EN.pdf

[127] 27-28 November 1995 at http://europa.eu.int/comm/external_relations/euromed/bd.htm

[128] The first phase was a series of individual cooperation agreements with Mediterranean states in the 1970s, replacing trade agreements dating back to the 1960s. The second phase was the so-called "New Mediterranean Policy", which started in 1991.

[129] EC Regulation 1488/96, 23 July 1996 at http://www.euromedrights.net/english/Download/MEDAREGULATIONS_EN.doc

2. The EU Association Agreement with Israel

The *Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (Association Agreement)*[130] was signed on 20 November 1995 and entered into force on 1 June 2000. Substantial delays occurred during the ratification process by national parliaments, particularly in France and Belgium.[131] Adoption of the Agreement followed the 1993 Oslo Accords between Israel and the Palestinians on the establishment of Palestinian self-rule.

Article 1 of the EU-Israel Agreement states that the basis for the Agreement is:

> Respect for democratic principles and fundamental human rights proclaimed by the Universal Declaration of Human Rights, underpins the domestic and external policies of both Parties and constitutes an essential element of this Agreement.

The Commons Foreign Affairs Committee Report on UK foreign policy and human rights in December 1998 contained a Memorandum submitted by a Palestinian human rights body, the Centre for International Human Rights Enforcement (CIHRE),[132] which was critical of the British Government's attitude towards the human rights clause in the EU-Israel Agreement:[133]

> 4. During the course of the Agreement's passage through Parliament, considerable interest was demonstrated in the implications of its human rights content in light of continuing Israeli governmental policies and practices that have long been held illegal by Britain and its EU partners. In response, the then government made a number of clarifications.
>
> (a) generally, that assent to the EU-Israel Association Agreement did not imply acceptance by the Government or by Parliament of Israel's current standard of human rights practice, nor indeed of Israel's conduct under certain key provisions of the existing EU-Israel Interim Agreement on trade and trade-related matters.
>
> (b) on the relationship between Article 2 and Article 76 (the "state security clause"[…]), the Government clarified that "measures taken under article 76 would need to be consistent with international law, including human rights."

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130 http://europa.eu.int/eur-lex/pri/en/oj/dat/2000/l_147/l_14720000621en00030156.pdf

131 See *Guardian* 14 March 2001 "Europe turns heat on Israel: France leads call for action over blockades of Palestinian cities and human rights abuses as EU seeks greater role in Middle East" at http://www.guardian.co.uk/israel/Story/0,2763,451602,00.html

132 This organisation is based in Ramallah and has worked with Human Rights Watch in reporting on the situation in the Middle East

133 Appendix 7, Foreign Affairs Committee, First Report, "Foreign Policy and Human Rights", 10 December 1998, 1998-99, Memorandum submitted by the Centre for International Human Rights Enforcement http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmfaff/100/100ap08.htm

(c) on the implications for the operation of the Agreement of breaches of Article 2, the then Foreign Office Minister Jeremy Hanley stated that:
"A break of human rights [. . .] would be material breach of the Agreement. As human rights issues fall within the competence of member states, a decision to suspend or withdraw from the agreement on such a ground would involve the member states deciding by unanimity. A fundamental breach would require unanimity, but I believe that the Commission would probably decide that something on the trade side would be decided by majority . . ."
(Second Standing Committee on Delegated Legislation, Wednesday 19 February 1997, c.22).

(d) On the need to set up an adequate monitoring and reporting system to scrutinize implementation of the human rights content of the Agreement, both the Government and the Opposition at the time gave commitments to follow-up:

"Mr Hanley: It is vital to ensure that monitoring is as effective as possible. The human rights provisions of the Association Agreement reinforce that requirement. I shall raise the issue of official monitoring with those who will examine monitoring and decide how a mechanism can be established."
(Second Standing Committee on Delegated Legislation, Wednesday 19 February 1997. c6).
"Mr Fatchett: We have always said that human rights will be an important element of the foreign policy of a Labour Government. That commitment applies to these trade arrangements. I have already been vigilant in ensuring that we will push the monitoring process. Europe needs a much more effective monitoring mechanism to ensure that the parts of the agreement dealing with human rights are properly implemented." (above ref. c.9).

5. During the debate in the Standing Committee, a number of specific practices and policies of the Israeli government were raised as matters for concern by the then Foreign Affairs Minister and by other Members. These included the extended closure of the Occupied Territories and the restrictions on movement of people and goods; settlements, and in particular the construction and expansion of settlements round East Jerusalem and discriminatory policies on residency rights and building permits for Palestinians in the city; torture; the use of force in South Lebanon.

6. One very important point that was not clarified by the Government during the Standing Committee debate concerns what standards are to be understood as referred to in the phrase "respect for human rights". In particular, it was not clarified that the phrase includes not only the terms of international human rights law but also of international humanitarian law, which protects fundamental human rights during times of war, civil strife and belligerent occupation. This point needs to be clarified not only in light of the law and in the interests of consistency, but to allow the Agreements fuller potential as an instrument helping to protect human rights in the region.

> 7. The manner of implementation of the human rights clause will be a matter of interest to a number of domestic, regional and international constituencies as well as to the governments of those states concluding Association Agreements with the EU. It is particularly important that the UK and its European partners equip themselves to respond to this interest with clarity and adequate transparency, and that they avoid any appearance of having recourse to the human rights content of the Agreements on the basis purely, or even largely, of short-term political expediency. It is crucial to make clear the UK's commitment, together with its EU partners, to basing the application of the human rights-related provision of the Israel Agreement—and the other Association Agreements—on the non-selective application of the standards and duties placed upon states by the existing instruments of international human rights and humanitarian law by which they are bound. In the absence of a coherent policy in these regards, and without a transparent and politically independent monitoring and reporting mechanism, the human rights clause is unlikely to function as an effective instrument for helping to prevent or remedy human rights abuses.

The CIHRE thought the Committee might seek to clarify a number of points:

> (1) Clarify for the record that the phrase "respect for human rights" in Article 2 of the Euro-Mediterranean Association Agreements, includes the duties and standards embodied in the instruments of international human rights and humanitarian treaty law by which the Parties to the Agreements are bound;
> (2) Consider to what extent there already exists a coherent strategy for the non-selective and effective implementation of the human rights content of the Euro-Mediterranean Association Agreements, what input the Government has had or intends to have in this regard, and what further information might be required to assist in the formulation of such a strategy for the more effective prevention of human rights abuses;
> (3) Consider to what extent progress has been made on the establishment of a politically independent, adequately transparent monitoring and reporting mechanism for the EU-Israel Association Agreement in light of the specific undertakings made in this regard, bearing in mind the desirability of building into this framework the participation of human rights organisations, development agencies and other groups on the ground in the region with first-hand knowledge of the human rights situation.[134]

In December 2000 Lord Hylton asked whether the Government considered that Israel had complied in full with the human rights requirement of the AA, to which the Foreign Office Minister, Baroness Asthal, replied:

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[134] http://www.parliament.the-stationery-office.co.uk/pa/cm199899/cmselect/cmfaff/100/100ap08.htm

> We have serious concerns about the human rights situation in the Occupied Territories, and would expect the European Union to raise human rights issues with the Israelis in the context of the EU-Israel Association Agreement. Article 2 must of course be read in conjunction with the rest of the EU-Israel Association Agreement, including Article 76, on security.[135]

In April 2002 Israeli troops reoccupied parts of the Palestinian territories in the West Bank, which had been handed over to Palestinian control under the Oslo Accords. There was heavy fighting in the town of Jenin and allegations of mass killings, and a siege at the Church of the Nativity in Bethlehem. On 10 April 2002 the EP voted by 269 votes to 208 for the suspension of the EU-Israel Agreement if Israel failed to comply with the latest UN resolutions on the Middle East Peace Process[136] and if it did not give a positive response to the EU peace efforts. In April 2002 the UN High Commissioner for Human Rights, Mary Robinson, cancelled a fact-finding mission to the Middle East after Israel declined to cooperate. The Israeli Government subsequently agreed to an independent UN-led investigation of the events in Jenin, which concluded that 51 Palestinians had died in the fighting.

The EU Employment and Social Affairs Commissioner, Anna Diamantopoulou, visited Israel and the Occupied Territories (OTs) in September 2002, and while she noted that the situation in the OTs was 'desperate', she made clear to the Palestinians "the EU's total condemnation of the suicide bombings and terrorism which has taken place".[137] She also noted that the conditions in the Territories were rapidly deteriorating and were "a breeding ground for hatred and violence".

Human rights organisations called for the suspension of the EU-Israel Agreement. The International Federation for Human Rights (FIDH) maintained that Israel was ignoring the application of the territorial scope of the Agreement and was applying it to all the territories under Israeli administration.[138] This was having a detrimental effect on the Palestinian economy and the EU-Palestinian Authority Interim Agreement was not benefiting the Palestinian people because in practice the EU-Israel Agreement continued to cover goods produced in the Occupied Territories. The FIDH called on the EU to take negative measures under the Agreement, such as the suspension of Israel's trade benefits. The FIDH was supported by the Euro-Mediterranean Human Rights Network (EMHRN)

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[135] HL Deb 18 December 2000 c 28WA at http://pubs1.tso.parliament.uk/pa/ld200001/ldhansrd/vo001218/text/01218w01.htm#01218w01_sbhd2

[136] The UN Security Council adopted three resolutions during March and April 2002: S/RES/1397 of 12 March 2002, S/RES/1402 of 30 March 2002 and S/RES/1403 of 4 April 2002

[137] 11 September 2002 at http://domino.un.org/unispal.nsf/0/debae461fec551d685256c33004b6cb7?

[138] See also EP Written Questions and Commission answer, 1 September 2000, OJC 103 E Vol44, 3 April 2001, at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/ce103/ce10320010403en02160217.pdf

and the World Organisation Against Torture (OMCT), which in October 2002 accused Israel of "excessive and disproportionate use of force" in its treatment of Palestinians.[139]

The EU-Israel Agreement has not been suspended. The Commission's view is as follows:

> The EU's policy is based on partnership and cooperation, and not exclusion. It is the EU's view that maintaining relations with Israel is an important contribution to the Middle East peace process and that suspending the Association Agreement, which is the basis for EU-Israeli trade relations but also the basis for the EU-Israel political dialogue, would not make the Israeli authorities more responsive to EU concerns at this time. It is also a well-known fact that economic sanctions achieve rather little in this respect. Keeping the lines of communication open and trying to convince our interlocutors is hopefully the better way forward.[140]

In a Parliamentary Answer in March 2004 the Minister for Europe, Denis MacShane, took a similar view:

> The Government do not intend to raise the suspension of the EU/Israel Association Agreement in upcoming discussions with EU counterparts. The Government believe that, as a friend of Israel and the Palestinians, close engagement provides us with the greatest chance of encouraging both sides to take the necessary steps. We do not believe that suspension of the EU/Israel Association Agreement would bring the parties any nearer to a peaceful resolution.[141]

A little later the International Development Secretary, Hilary Benn, said in reply to a proposal that Israel should be warned that its EU Agreement might need to be reconsidered that the Government thought such a step would not be helpful. He continued:

> I would also say […] that international pressure, support and interest are extremely important but, in the end, there has to be a negotiated settlement between the two parties. While we are doing all that we can to encourage that negotiation to take place, the two parties have to want it to happen. Sadly, that is what is lacking at the moment.[142]

3. The EU Interim Agreement with the Palestine Authority

The trade provisions of the EU-Israel Agreement did not cover the whole of the territories occupied by Israel in the West Bank, Gaza and Golan Heights. The areas transferred to

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[139] Euro-Mediterranean Human Rights Network (EMHRN) Press Release, 18 October 2002 at http://www.euromedrights.net/english/emhrn-documents/pressreleases/18_10_2002.htm

[140] "The EU and the Middle East Peace Process", updated 5 August 2002, at http://europa.eu.int/comm/external_relations/mepp/faq/index.htm#6

[141] HC Deb 26 March 2004 c1119W

[142] HC Deb 31 March 2004 c 1581

the Palestinian Authority under the Oslo Accords concluded a separate Euro-Mediterranean Interim Association Agreement in February 1997, which did not need ratification.[143] The Preamble to the Interim Agreement refers to "the importance which the Parties attach to the principles of the United Nations Charter, particularly the observance of human rights, democratic principles and political and economic freedoms which form the very basis of their relations",[144] and Article 2 constitutes the human rights essential element, as in the full Association Agreements:

> Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the universal declaration on human rights, which guides their internal and international policy and constitutes an essential element of this Agreement.[145]

Article 2 states:

> Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement.[146]

The Association Council regulates the relationship between the two parties. This meets at ministerial level once a year to "examine any major issues arising with the framework of this Agreement and any other bilateral or international issues of mutual interest."[147] Article 79(2) states:

> If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take ***appropriate measures*** [emphasis added]. Before so doing, ***except in cases of special urgency***, it must supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.
>
> In the selection of measures, priority shall be given to those which least disturb the functioning of the Agreement.

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[143] Decision 97/430/EC on the conclusion of the Euro-Mediterranean Interim Association Agreement, 2 June 1997, OJ L 187, 16 July 1997, pp 3-135 at http://www.delwbg.cec.eu.int/en/partnership/ecplo.htm

[144] http://www.delwbg.cec.eu.int/en/partnership/ecplo.htm

[145] EU-PA Interim Agreement

[146] Ibid

[147] Ibid, Article 67

D. Zimbabwe

In March 2001, as the political situation in Zimbabwe deteriorated, the EU called for the establishment of a political dialogue with the Government under Article 8 of the *Cotonou* Agreement. The EU emphasised that the dialogue had to be constructive and positive, concluding that the time had not yet come to resort to Article 96 consultations and sanctions.[148] On 25 June 2001 the Council of Ministers noted "the lack of substantial progress in the on-going political dialogue with the Government of Zimbabwe and expressed its deep concern over recent developments in Zimbabwe".[149]

The Council emphasised that the dialogue should yield "rapid and tangible results."[150] At this stage the EU believed, after consultations with the opposition leader, Morgan Tsvangirai, that EU sanctions could be counter-productive. However, they would be applied if the situation under President Robert Mugabe deteriorated further and particularly in the case of a suspension of the constitution or the cancellation of presidential elections.

In July 2001 the Commission said it would suspend the application of the *Cotonou* Agreement to Zimbabwe, using procedures under Article 96 of the Agreement.[151] On 28 January 2002 the General Affairs Council concluded that the essential elements defined in Article 9 of Cotonou were not being respected and that the Article 96 consultations had not remedied this situation. It decided to close Article 96 consultations and implement targeted sanctions if there was a serious deterioration in the situation on the ground, in terms of a worsening of the human rights situation or attacks on the opposition or if the election was assessed as not being free and fair.[152] The Zimbabwean Government's refusal to grant access to international media and its objections to EU election observers were among the EU's main concerns. In 2002 travel restrictions were applied and during 2002 the accounts of more than 70 members of the leadership were frozen. A year later, the situation had not improved and the sanctions were extended in February 2003. Financial support to the Government was stopped. EU aid continued but was directed towards helping the population through NGOs, and humanitarian aid was not affected. The signing of the 9th European Development Fund National Indicative Programme was suspended. In February 2004 the Council agreed to renew sanctions with an extended list of 95 ZANU-PF politicians and officials. The ban was confirmed on 19 February 2004.[153]

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148 *The Courier* 1996: 3

149 Council Press Release, 25 June 2001 at http://ue.eu.int/newsroom/newmain.asp?LANG=1

150 http://ue.eu.int/newsroom/newmain.asp?LANG=1

151 Poul Nielsen, for the Commission, in reply to written question from Glenys Kinnock (PSE), OJC 40 E, 14 February 2002, pp. 99 - 100.

152 GAC Conclusions, 28 January 2002 at http://europa.eu.int/comm/external_relations/human_rights/gac.htm#hrz280102

153 See General Affairs Council Conclusions, 23 February 2004 at http://ue.eu.int/pressData/en/gena/79149.pdf. The Council's conclusions on Zimbabwe and human rights can be found in Council press releases and from 2002 onwards at http://europa.eu.int/comm/external_relations/human_rights/gac.htm

There is a full account of EU sanctions on Zimbabwe in Standard Note SN/IA/2945, *Zimbabwe: EU and US Sanctions*, 9 March 2004, which can be accessed at http://hcl1.hclibrary.parliament.uk/notes/iads/snia-02945.pdf.

IX Where the Clause has Prevented the Conclusion of a Bilateral Agreement

A. China

At present there is only one regular, institutionalised dialogue devoted solely to human rights between the EU and a third country, and that is with China, with which the EU does not have an external agreement. The Commission has stated:

> This is a highly structured dialogue held at the level of senior human rights officials. […] This type of dialogue, focusing solely on human rights, has so far only been used with countries with which the European Community had no agreement and/or where the agreement contained no "human rights" clause. The fact that such dialogue exists does not preclude discussion of the human rights issue at any level of the political dialogue … .[154]

In June 1989, in response to the Tiananmen Square massacre, the EU suspended all economic and political relations with China. The suspension remained in place until 1990, when the Council decided gradually to restore normal relations with China. Economic and political relations were resumed in early 1992 and an exchange of letters in 1994 established the framework for a political dialogue between the EU and China. This took the form of a formal dialogue between EU ambassadors meeting twice a year with the Chinese Foreign Minister in Beijing and at other levels, including EU Troika and senior officials' meetings.[155]

In 1998 the Commission published its objectives for the EU's relations with China in a Communication entitled *Building a Comprehensive Partnership with China*.[156] The EU's aim was to support what it saw as Chinese moves towards an open, more democratic society and thereby engage the country further in the international community. It would help China by enhancing the political dialogue, adding a human rights dimension and emphasising environmental issues and sustainable development. The Commission pointed to the lack of progress in human rights standards in China, particularly in civil

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154 http://europa.eu.int/comm/external_relations/human_rights/doc/ghd12_01.htm

155 "Building a comprehensive partnership with China", COM (2000) 552 at http://europa.eu.int/comm/external_relations/china/com_00_552/com2000_0552en01.pdf

156 "Building a Comprehensive Partnership with China", COM (1998) 181 at http://europa.eu.int/comm/external_relations/china/com_98/com98_a.htm

and political rights, although it acknowledged that there had been some progress in economic and social rights.[157]

The first EU-China Summit took place in London on 2 April 1998 and there have since been regular annual meetings in the context of the human rights dialogue. The dialogue includes seminars[158] and support for non-governmental projects.

On 19 May 2000 the EU signed a bilateral agreement to allow China to accede to the World Trade Organization. The agreement, which is a standard format for WTO membership, did not include reference to human rights standards.

In September 2000 the Commission reported to the Council and EP on the implementation of the Comprehensive Partnership with China Communication. The Commission concluded that the "regular rounds of dialogue provided a valuable platform to engage China on sensitive issues" and that "the EU has repeatedly emphasized the need to make the dialogue more results-oriented and better connected to decision-making in China."[159] The Commission was concerned, however, that the 'progress' in the dialogue had not been matched with improvements on the ground and the dialogue was supported by cooperation projects in an attempt to improve its practical application. One of these was the 'Village Governance' programme, which aimed to help implement a more democratic electoral law.

On 15 May 2001 a Commission Communication on the *EU strategy towards China: Implementation of the 1998 Communication and Future Steps for a more Effective EU Policy*,[160] defined practical short- and medium-term action points with a view to achieving the 1998 Communication objectives. The attainment of higher human rights standards was the priority in the political dialogue.[161] The 2001 Commission Communication stated:

> China is not always an easy partner for the EU, it is in the interest of the Union to engage China further on an international level. Globalisation means, among other things, that a country the size of China is both part of the problem and the solution to all major issues of international and regional concern".[162]

On 22 January 2002 the General Affairs Council outlined a further extension of the existing human rights objectives.[163] In the Country Strategy paper 2002-2006[164] the

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157 COM (2000) 552

158 In May 2001, for example, there was a human rights seminar in Beijing on the death penalty and the right to education.

159 COM (2000) 552

160 COM (2001) 265, 15 May 2001 at http://www.delchn.cec.eu.int/en/eu_and_china/com01_265.pdf

161 Ibid p. 8

162 Ibid p. 7

163 *Annual Report on Human Rights 2002* p. 45, adopted by Council 21 October 2002

164 IP/02/349

Commission's objectives for China were further integration in the world economy and supporting the Chinese transition into an open, democratic society based on respect for human rights.

China's poor human rights record is the main reason for the EU not concluding a PCA-type agreement, although the non-conclusion of a PCA does not necessarily mean non-involvement by the EU or a lack of interest in the country.

The British Government is critical of China's human rights record but believes that engagement is better than isolation. The Foreign Office Minister, Bill Rammell, said in March 2004:

> We have serious concerns about a wide range of human rights issues in mainland China including: the extensive use of the death penalty; the continuing harassment of political dissidents; religious practitioners and adherents of the Falun Gong spiritual movement; the situation in Tibet; severe restrictions on freedoms of speech, association and religion. We believe, however, that the best way to improve the situation "on the ground" is to engage critically with, rather than isolate, China. We do this through the bi- annual UK China Human Rights Dialogue. We raise our concerns through ministerial contacts and public statements. We also raise our concerns through EU mechanisms.[165]

B. Australia and New Zealand

Negotiations with Australia and New Zealand on a Framework Agreement ran into difficulties in 1997 because the two countries objected to EU insistence on the (by then) routine inclusion of the human rights clause.

Article 1 of the draft agreement declared respect for universal human rights an essential element of the agreement and draft Article 32, the so-called "non-fulfilment" article, would have allowed either party to withdraw from the treaty in instances where the other party had failed to fulfil an obligation under the agreement. Withdrawal was not automatic. Except in circumstances of special urgency, the party seeking to withdraw from the agreement had to supply the other with all relevant information required for a thorough examination of the situation, with a view to seeking a solution acceptable to both parties.

The EU was not concerned about Australia's human rights record, but the symbolic significance the Australian Government attached to the clause and the EU's refusal to abandon it meant that a fully-fledged agreement was not concluded. Instead, less binding Joint Declarations were agreed with Australia in 1997 and with New Zealand, which was

[165] HC Deb 31 March 2004 c1450-1W

similarly peeved, in 1999. These Declarations established frameworks for political and economic relations between the EU and each of the two countries.

An *Agence Europe* report of 28 January 1997, quoting from a note sent by the Australian ambassador in Brussels to the EU Member States, explained Australia's position on the inclusion of the human rights clause: "The existence of operative human rights and non-fulfilment provisions as proposed by the Community remains in Australia's view inappropriate in an agreement on trade and co-operation".[166]

Australia did not object to a reference to human rights being included in the preamble to the agreement, or in a joint political declaration, as an "expression of shared political values and interests between Australia and the European Community",[167] but the Ambassador stated that the Australian Government was "…not prepared to accept the Commission's proposal for an operative human rights clause and non-fulfilment provision in the proposed framework agreement".[168] The Ambassador's note also stated that:

> In our view no other industrialised country, including the US, Japan, Canada or New Zealand, could accept the inclusion of operative human rights provisions of the type proposed by the Community in a framework co-operation agreement.[169]

The Australian Ambassador claimed he had been given to understand that the Decision requiring the inclusion of a standard formulation on human rights was not intended to apply to "countries such as Australia, with which the EU and Member States share similar values and approaches".[170]

The Australian Government's view did not go unchallenged in the Australian Parliament either. Speaking in a debate on agreements with the EU, Senator Bourne (Democrat, New South Wales) moved a motion of urgency on:

> The need for the government to accept that:
> "Respect for the democratic principles and basic human rights, as proclaimed in the Universal Declaration of Human Rights, underpins the internal and international policies of . . . Australia" and to agree to the inclusion of that form of words in any trade agreement with the European Community.[171]

Mr Bourne believed that "The level of a nation's commitment to human rights, whether in domestic practices or in foreign policy, is the litmus test for the quality of its democracy" and he questioned the strength of Australia's commitment to human rights. The

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166 *Agence Europe* 28 January 1997
167 Ibid
168 Ibid
169 Ibid
170 Ibid
171 Senate debates, 11 February 1997, c 457 at http://www.aph.gov.au/hansard/senate/dailys/ds110297.pdf

Government thought human rights matters were "properly a concern of the joint political declaration, not of the trade agreement"[172] and did not in principle support the linking of trade with human rights and objected to a treaty which could be suspended or terminated "unilaterally on the basis of undefined criteria".[173] Government Senators also made the point that Australia's trade relations were governed by its membership of the WTO, which did not make the linkage between trade and human rights. This, agreement, on the other hand, was not about trade, "but about sectoral agreements in relation to cultural matters, education, customs policies and things like that"[174] and Australia would "not sell one more pound of beef, one more grain of wheat, one nut or one bolt if we sign this agreement with the European Commission. It does not affect trade at all— that is one of the great misnomers of the day".[175]

Human rights are mentioned in the Joint Declarations. The Australia Declaration states in the Preamble that the parties have "regard … to our shared commitments to the respect and promotion of human rights, fundamental freedoms, democracy and the rule of law which underpin our internal and international policies".[176] The New Zealand Preamble states that the parties are "steered by their shared commitment to human rights, fundamental freedoms, civil liberties and democracy".[177] Part 2 of the Declarations reaffirm that they will work together to "Support democracy, the rule of law and respect for human rights and fundamental freedoms".[178]

X Draft European Constitution

A. Convention on the Future of Europe

The Convention on the Future of Europe Working Group on External Action, headed by Jean Luc Dehaene, discussed the EU's external action and concluded among other things that the EU needed to "organise itself in order effectively and coherently to promote fundamental values, defend common interests and contribute to the overall objective of global peace, security, and sustainable development."[179] The Group agreed a text for incorporation into the future European constitution, which read:

Principles and Objectives of EU External Action

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[172] Senator MacGibbon (Liberal, Queensland), c 463
[173] Senator MacGibbon c 464
[174] Ibid
[175] Ibid. The Senate divided with a majority of one in favour of the motion.
[176] European Commission delegation to Australia and New Zealand website, at http://www.ecdel.org.au/eu_and_australia/jointdeclaration/jointdeclaration.htm
[177] http://www.ecdel.org.au/nz/jointdeclarationnz.htm
[178] European Commission delegation to Australia and New Zealand website
[179] Working Group final report, CONV 459/02, 16 December 2002 at http://register.consilium.eu.int/pdf/en/02/cv00/00459en2.pdf

1. The Union's action on the international stage will be guided by, and designed to advance in the wider world, the values which have inspired its own creation, development and enlargement: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the principles of human dignity, equality and solidarity, and respect for international law in accordance with the principles of the Charter of the United Nations. The Union will seek to develop relations and build partnerships with countries, and regional or global organisations, who share these values. It will promote multilateral solutions to common problems, in particular in the framework of the United Nations
2. The European Union will define and pursue common policies and Union actions, and will work for a maximum degree of cooperation in all fields of international relations,
in order:
(a) to safeguard the common values, fundamental interests, independence and integrity of the Union;
(b) to consolidate and support democracy, the rule of law, human rights and international law;
(c) to preserve peace, prevent conflicts and strengthen international security, in conformity with the principles of the United Nations Charter;
(d) to foster the durable economic and social development of developing countries, with the primary aim to eradicate poverty, in particular in low income countries;
(e) to encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade;
(f) to develop international measures to preserve the environment and global natural resources, and ensure sustainable development;
(g) to assist populations , countries and regions confronting man-made or natural disasters;
(h) to promote an international system based on stronger multilateral cooperation and good global governance. [180].

B. Submissions to the Convention

A submission to the Convention by the Civil Society Contact Group in 2002 called on the EU to ensure that "protection of human rights and the prevention of conflict are mainstreamed into all EU policies and actions and be actively and rigorously pursued through, among others, an effective implementation of the human rights clauses and regular human rights impact assessments".[181]

The World Organisation Against Torture made the following recommendations to the Convention:

[180] CONV 459/02
[181] "Tool-kit for NGOs" May 2002 (up-dated November 2002) at http://www.solidar.org/English/pdf/Toolkitupdated1.pdf

• The human rights clause should be included in all EU external agreements, that is not only in the "economic and cooperation agreements", but also in the "**sectoral agreements"**
• According to the principle of **reciprocity** and in order to guarantee **transparency**, a regular and formalised dialogue should be established between the EU, the third countries authorities and their respective civil societies, according to the experience of the first "European Union-Mexico Civil Society Dialogue" Forum[14]
• **An Annual Report on the human rights clause** should be foreseen in order to better assess its **practical implementation**, which could be partly based on the follow-up work of the EP (see below)
• The **monitoring of the implementation of the recommendation made by relevant international human rights bodies**, including UN treaty bodies, UN Special Rapporteurs, the international Labour Organisation, etc., should be included in the mandate of The Joint Council and the Committee, as well as:
• The monitoring of ratification and reservation made to human rights covenants and conventions
• The monitoring of the freedom of action of human rights defenders to act and speak freely, while implementing their task of defending human rights
• The monitoring of **individual cases of human rights violations.**[182]

C. Final Draft Constitutional Text

The draft European constitution as agreed by the Convention on 18 July 2003[183] contains articles on the EU's external relations in Article III-193. The principles and objectives are outlined in this Article are in line with the Working Group recommendation and state that the EU's guiding principles and the principles that inspired its own creation are based on "democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, the respect for human dignity, equality and solidarity, and for international law in accordance with the principles of the United Nations Charter".[184] Article III-193 calls for the EU to "seek to develop relations and build partnerships with countries, and regional and global organisations, which share these values." The article codifies existing EU practice (in the application of the human rights clause), and states that common policies and Union action "shall consolidate and support democracy, the rule of law, human rights and international law".

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[182] Third OMCT contribution on *The EU and the Human Rights in the World* 16 December 2002 at http://europa.eu.int/futurum/forum_convention/documents/contrib/other/0117_c2_en.pdf
[183] Cm 5897, August 2003; CONV 850/03, 18 July 2003 at http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf
[184] Cm 5897 p.102

Appendix 1 1995 Commission Communication

COMMISSION COMMUNICATION COM (95)216 of 23 May 1995

ON THE INCLUSION OF RESPECT FOR DEMOCRATIC PRINCIPLES AND HUMAN RIGHTS IN AGREEMENTS BETWEEN THE COMMUNITY AND THIRD COUNTRIES

INTRODUCTION

A commitment to respect, promote and protect human rights and democratic principles is a key element of the European Community's relations with third countries.

These issues have been gradually incorporated into the Community's activities over a period of time through a series of commitments culminating in the insertion of explicit references to human rights and democratic principles in the body of the Union Treaty.

To help it meet those commitments the Community has a broad range of instruments at its disposal, including Union intervention in international forums and specific operations aimed at bolstering the rule of law and respect for human rights in the context of the Community's relations with non-member countries. Taking account of human rights in contractual relations with third countries is one of those instruments.

It is on this latter instrument that the communication focuses.

A. FOUNDATIONS AND REFERENCES

References to human rights in agreements with third countries are based on the positions the Community has taken by:

- subscribing to universal and regional instruments and assuming responsibility for promoting the principles of democracy, the rule of law and respect for human rights (paragraph 5 of the preamble to the Single European Act);

- making respect for, and promotion of, these principles one of the general objectives of Community development cooperation policy (Union Treaty, Article 130U) and one of the objectives of the common foreign and security policy (Union Treaty, Article J1 (2));

- defining the main components of a hands-on strategy through its development cooperation policy and by inserting clauses on human rights into economic and cooperation agreements with third countries (Luxembourg European Council's Declaration on Human Rights, June 1991, paragraph 11);

- jointly identifying guidelines appropriate to the different types of agreement:

  - in its relations with developing countries, by adopting guidelines, procedures and practical measures and including clauses on human rights in its cooperation agreements (paragraph 10 of the resolution on human rights, democracy and development of the Council and the Member States meeting within the Council, 28 November 1991);

- in its relations with CSCE countries, by recognizing democratic principles and human rights as an essential element of its contractual relations with those countries by incorporating the appropriate provisions into the agreements concerned; these provisions allow the Community to take action in cases of special urgency, including any failure to meet the obligations deriving from the agreement (Council Declaration of 11 May 1992).[1]

These commitments as a whole are consistent with the opinions voiced by Parliament in its various human-rights-related initiatives, including its annual resolutions on the world human rights situation.

B. EVOLUTION

The Community's growing commitment to the promotion of human rights and democratic principles is reflected in the evolving nature of the references to these issues in the relevant agreements.

Initially they were mentioned either not at all or only in passing in the preamble of some agreements. The first reference in the body of a contractual document was in Article 5 of the fourth Lomé Convention, concluded in December 1989. In this way the European Community and its Member States tangibly demonstrated their commitment to human rights in their relations with third countries. In the ensuing three years, this stance was confirmed as such references gradually began to appear in cooperation agreements, defining respect for democratic principles and human rights as one of the foundations of the parties' relations.

However, Article 5 of Lomé IV and similar articles in other agreements do not provide a clear legal basis to suspend or denounce agreements in cases of serious human rights violations or interruptions of democratic process.

It is for this reason that a clause defining democratic principles and human rights as an "essential element" of the agreements with Brazil, the Andean Pact countries, the Baltic States and Albania was introduced in 1992 (see Annex 1-1).

This is a substantial innovation, in that:

- it makes human rights the subject of common interest, part of the dialogue between the parties and an instrument for the implementation of positive measures, on a par with the other key provisions;

- it enables the parties, where necessary, to take restrictive measures in proportion to the gravity of the offence (see Annex 2). In the spirit of a positive approach, it is important that such measures should not only be based on objective and fair criteria, but they should also be adapted to the variety of situations that can arise, the aim being to keep a dialogue going;
  In the selection and implementation of these measures it is crucial that the population should not be penalised for the behaviour of its government;
- it allows the parties to regard serious and persistent human rights violations and serious interruptions of democratic process as a "material breach" of the agreement in

[1] 6326/92 (Press 71G).

line with the Vienna Convention,[2] constituting grounds for suspending the application of the agreement in whole or in part in line with the procedural conditions laid down in Article 65.[3] The main condition involves allowing a period of three months between notification and suspension proper, except in "cases of special urgency", plus an additional period of grace if an amicable solution is being sought.

In application of a General Affairs Council declaration, since May 1992 all agreements concluded with CSCE countries include an innovative provision in addition to the "essential element" clause.

This additional clause (see Annex 1-2) provides for an immediate response, diverging from the procedure laid down in Article 65 of the Vienna Convention. It takes one of two forms:

- an explicit suspension clause authorising the suspension of the application of the agreement in whole or in part "with immediate effect" in cases of serious breach of essential provisions; this, so-called "Baltic clause" was used only in the first agreements with the Baltic States, Albania and Slovenia; or

- a general non-execution clause known as the "Bulgarian clause" which provides for appropriate measures should the parties fail to meet their obligations, following a consultation procedure "except in cases of special urgency"; this clause was used in the agreements with Romania, Bulgaria, the Russian Federation, Ukraine, Kyrgyzstan, Moldavia, the Czech Republic, Slovakia, Kazakhstan and Belarus.

The difference between the two formulas resides in the degree of sensitivity allowed for. The "Baltic clause" is more severe in that it provides only for extreme cases warranting immediate suspension without consultation of any kind. The "Bulgarian clause" not only provides for a conciliation procedure and a range of different options but is also designed to keep the agreement operational wherever possible. It asserts that immediate suspension should be envisaged only in cases of special urgency.

In January 1993, in response to the disparate nature of the references in the relevant agreements, the Commission, determined to adopt a non-discriminatory approach, drafted guidelines on these issues (Decision of 26 January 1993, MIN (93)1137, point XIV), stipulating that draft negotiating directives for association agreements and economic cooperation agreements should incorporate the following:

(a) in the body of the agreement:

- a clause specifying that relations between the Community and the country concerned and all provisions of the relevant agreement are based on respect for the democratic principles and human rights which inspire the domestic and external policies of the

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2 Vienna Convention, Article 60(3): "A material breach of a treaty, for the purposes of this Article, consists in:
(a) a repudiation of the treaty not sanctioned by the present Convention; or
(b) the violation of a provision essential to the accomplishment of the objective or purpose of the treaty."

3 Vienna Convention, Article 60(1): "A material breach of a bilateral treaty by one of the parties entitles the other party to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part."

Community and the country concerned and which constitute essential elements of the agreement;

(b) in the preamble:

- general references to respect for human rights and democratic values;

- references to the universal and/or regional instruments common to both parties.

An explicit suspension clause or a general non-execution clause may be included in specific cases.

The main points of these guidelines featured in a letter from Mr Van den Broek to the Council, Parliament and the Member States.

C. ASSESSMENT[4]

Although the Commission guidelines have been respected, the objective of a systematic approach has not yet been achieved.

As regards the preamble, the practice of using different references depending on the regional location of the party concerned, when not supplemented by universal references, can appear to contradict the principle of universality; references to the market economy in agreements with OSCE countries create a different perspective having no direct connection with human rights, a fact that could be prejudicial to the aim of consistency.

References to human rights and/or democratic principles as an essential element, although systematically included in all recent agreements of a general nature,[5] have been positioned differently (Article 1, Article 6, etc.) depending on whether or not the agreements in question provide for political dialogue, and also supplemented with other references.

The "Baltic" clause was last used in October 1992, since when the preferred formula has been the "Bulgarian" clause, in some cases supplemented by one of two types of interpretative declaration (see Annex 1-3):

- joint declarations (Annex 1-4.i) in which the parties agree that a "case of special urgency" means a material breach of the agreement, i.e . the breach of an essential element of the agreement or repudiation of the agreement not sanctioned by the general rules of international law;

- unilateral declarations by the Community (e.g. the agreement concluded in July 1993 with the Czech Republic, Annex 1-3.i) that subsequently became bilateral declarations (for the first time in the agreement signed with Russia in June 1994, Annex 1-3.ii); these declarations emphasise the inclusion in the agreement of the "essential element" clause and the reference to "cases of special urgency" resulting

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4 See table in Annex 3 showing different types of references to human rights and democratic principles in the Community's agreements with third countries.

5 In the case of Turkey, a Decision of the Association Council of 6 March implemented the additional protocol to the association agreement of 1963, which entered into force in January 1973, and which provides for the creation of a customs union between the two parties within 22 years.

from the Council Declaration of 11 May 1992 on the Community's relations with its CSCE partners;

- in the case of the partnership and cooperation agreement with Russia, a joint declaration (Annex 1.4.ii) in which the parties agree that the "appropriate measures" referred to in the non-execution clause mean measures taken in accordance with international law, and that when one party takes measures in cases of special urgency, the other may avail itself of the dispute settlement procedure.

The use of two different formulas (the "Baltic" and "Bulgarian" clauses) in the same part of the world could be interpreted as a discriminatory practice, putting the Commission in a difficult position in its negotiations with third countries. There is also a growing tendency to regain the margin of flexibility lost in the clauses themselves through an increasingly varied range of interpretative declarations.

Nevertheless, the innovative use of specific clauses in the main body of the agreements concluded with third countries places the European Community in the vanguard of the international community's endeavours in this field and highlights the parallel importance of adopting a positive approach.

This impact of this initiative has been positive in a number of ways:

(a) the additional clause initially intended for the OSCE countries has, at the Council's behest, gradually been applied to other geographical areas, e.g. the Lomé IV review, Morocco and Tunisia, South Korea and Nepal.

(b) enshrining human rights as an essential element of the Community's relations with third countries enhances cooperation and improves the visibility of its initiatives, many of which are entrusted to specialist organisations, such as the reinforcement of the rule of law, the consolidation of the legal system, support for freedom of expression, the defence of vulnerable groups and support for the grassroots.

(c) it has introduced a range of restrictive measures (see Annex 2) that is sufficiently broad to enable the parties to respond in a manner appropriate to the gravity of the case in question; to date, none of the agreements with an "essential element" clause, with or without an additional clause, has had to be suspended in any way.

D. CONCLUSIONS

The concern expressed by the European Parliament[6] and the Council[7] with regard to the issue of human rights and the Community's contractual relations with third countries and the experience acquired in this area would suggest that there is a need for a number of initiatives to improve the consistency, transparency and visibility of the Community approach and to make greater allowance for the sensitivity of third countries and the principle of non-discrimination.

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6 Most recently in the Resolution of 12 April 1995 on the world human rights situation in 1993/94 and the Union's human rights policy (Rapporteur, Mr Imbeni): paragraphs 47, 62-65.

7 This question was discussed in two meetings of the External Relations Group (13 March and 24 April 1995), and was the only item on the agenda of the COREPER meeting of 27 April.

The following conclusions set out the basic references to human rights and democratic principles. They provide for the following mechanism:

In all new draft negotiating directives for Community agreements with third parties, the following should be included:

(a) in the preamble:

- general references to human rights and democratic values;[8]

- references to universal and regional instruments common to both parties;

(b) in the body of the agreement:

1. Insertion of an Article X, defining the essential elements, to be adapted according to circumstances (e.g. OSCE membership, market economic principles, etc.):

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

   The same applies to the principles of market economy as they are defined in the CSCE Bonn conference document on economic cooperation[9].

2. Insertion of an Article Y on non-execution:

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

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

3. Insertion of interpretative declarations on Article Y:

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

   (i) repudiation of the Agreement not sanctioned by the general rules of international law;

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8 The recitals could also mention the rule of law and good governance and the Vienna human rights conference of June 1993.

9 This provision applies to all OSCE participants, and to other countries at the discretion of the Council.

or

(ii) violation of essential elements of the Agreement, namely its Article X.

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

In the Commission's opinion the application of this mechanism comes within the ambit of respect for the principle of proportionality between the breach cited and the degree of reaction. Use of the concept "special urgency" opens an option without creating an obligation and it is in this context that it is for the parties to gauge what measures they should take.

This may entail building on the standard provisions on human rights and democratic principles to strengthen or clarify the nature of the commitments involved, without altering the legal scope of the text. The wording given for Article X should feature among the first articles of the "General principles" title, and it should not be altered or diluted by inclusion in a more general provision.

This Communication will be be addressed to the Council and to Parliament.

ANNEX 1

Standard wording for clauses on human rights and the relevant interpretative declarations

1. Essential element clause

Article X: [General principles or General/Political Dialogue]

"Respect for the democratic principles and human rights established by [the Helsinki Final Act and the Charter of Paris for a New Europe] [as well as the principles of market economy] [as defined at the Bonn CSCE conference] inspires the domestic and external policies of the Community and of [third country] and constitute an essential element of this agreement."

2. Complementary clause

Article Y:
(a) explicit suspension or "Baltic" clause

"The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs"

(b) general non-execution or "Bulgarian" clause

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

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

3. General interpretative declarations

i. Unilateral declaration by the European Community (agreement with the Czech Republic, July 1993)

"The reference to the respect for human rights as an essential element of the Agreement and to the cases of special urgency has been included in the Agreement as a result of the policy followed by the Community in the area of human rights pursuant to the Council Declaration of 11 May 1992 which foresees such reference in the Cooperation or Association Agreements between the Community and its partners in the Conference on Security and Cooperation in Europe."

ii. Joint declaration (agreement with the Russian Federation, June 1994)

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"The Parties declare that the inclusion in the Agreement of the reference to respect for human rights constituting an essential element of the Agreement and to the cases of special urgency flows from
*** the Community's policy in the area of human rights, in conformity with the Declaration of the Council of 11 May 1992 which provides for the inclusion of this reference in cooperation or association agreements between the Community and its CSCE partners, as well as**
*** Russia's policy in this field and**
*** the attachment of both Parties to the relevant obligations, arising in particular from the Helsinki Final Act and the Charter of Paris for a New Europe."**

4. Interpretative declarations accompanying a general non-execution clause

i. Standard joint declaration

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

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

ii. Joint declaration (agreement with the Russian Federation, June 1994)

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

ANNEX 2

Summary of measures that may be taken in response to serious human rights violations or serious interruptions of democratic process:

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

References to human rights and democratic principles in Community agreements with third countries
KEY

A. Regional European framework

1. The provisions and principles of the following should be fully implemented:

(a) the Conference on Security and Cooperation in Europe (CSCE)
(b) the Helsinki Final Act, the concluding documents of the Madrid and Vienna conferences
(c) the closing document of the Copenhagen meeting
(d) the Charter of Paris for a New Europe, particularly in respect of the rule of law, democracy and human rights (November 1990)
(e) the Bonn CSCE conference document on economic cooperation

2. Recognising the importance of guaranteeing ethnic and national minority rights

(a) in line with the commitments entered into in the context of the CSCE
(b) and of establishing a system based on pluralism and free and democratic elections
3. Aware of the importance of strengthening their democratic institutions and supporting the economic reform process
4. Reference to the European Convention on the Protection of Human Rights and Fundamental Freedoms

B. Attachment to the principles of the United Nations Charter

1. to democratic values and respect for human rights
2. and wishing to express their mutual desire to maintain and strengthen their friendly relations on the basis of those principles

C. Attachment to the principles of equality, freedom and justice

1. and asserting their shared wish to help initiate a new phase of economic cooperation and to facilitate the development of their respective human and material resources on the basis of those principles
2. and asserting their shared wish to promote the development of their human and physical resources in a context of freedom, equality and justice
3. and emphasising their shared attachment to the promotion of international economic relations based on freedom, equality, justice and progress

D. Other references

1. welcoming the transformation of the country into a democratic and multiracial society and the importance attached to human rights
2. recognising that in the wake of recent political developments the country wishes to stabilise and consolidate democracy and promote economic and social progress
3. the importance attached by the parties to respect for the human rights, democratic principles and economic freedom that underpin this agreement
4. attachment to democratic values and respect for human rights
5. whereas the main beneficiary of cooperation is man, and these rights should therefore be promoted

Appendix II EU third party agreements

The following lists provide information on and links to EU external agreements:[185]

1. Africa, Caribbean, Pacific

- *Cotonou Agreement*, 23 June 2000 at
- EU-South Africa Agreement on Trade, Development and Cooperation, 29 July 1999, OJL 311, 4 December 1999, pp 3-297 at http://europa.eu.int/eur-lex/en/archive/1999/l_31119991204en.html
- For details of EU agreements with individual African countries, see http://europa.eu.int/comm/development/body/country/country_en.cfm

2. Asia/Far East

- India, Co-operation Agreement, OJL 223, 27 August 1994 at http://europa.eu.int/comm/external_relations/india/intro/agree08_94.pdf
- Pakistan, Cooperation Agreement signed on 24 November 2001 but not yet in force
- Sri Lanka, Co-operation Agreement on Partnership and Development, signed 18 July 1994, came into force on 1 April 1995, at http://www.dellka.cec.eu.int/en/eu_and_country/agreements.htm
- Bangladesh, Co-operation Agreement signed 22 May 2000, came into force 1 March 2001, OJL 118, 27 April 2001 at http://www.eudelbangladesh.org/en/documents/0104Coopagree2001.pdf
- Nepal, framework Co-operation Agreement came into force June 1996
- 1980 Co-operation Agreement between the EC and member countries of ASEAN: Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam, see http://www.deltha.cec.eu.int/en/eu_thailand_sea/asean_cooperation_agreements.htm
- Protocols for the accession of Laos and Cambodia to the Agreement signed July 2000 and are in the process of ratification
- Vietnam, Cooperation Agreement, OJL 136, 7 June 1996 pp 29 – 36 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=en&numdoc=21996A0607(01)&model=guichett
- Cambodia, Co-operation Agreement, signed April 1997, entered into force 1 November 1999, OJL 269, 19 October 1999 at http://www.delkhm.cec.eu.int/en/eu_and_country/ec_cambodia.pdf
- Laos, Trade and Co-operation Agreement, April 1997
- China, Trade and Economic Cooperation, 1985 at http://europa.eu.int/comm/external_relations/china/intro/1985_trade_agreement.htm
- Macau, Trade and Co-operation Agreement, signed 14 December 1992, came into force 1 January 1993 at
- Japan, Joint Declaration, 18 July 1991, at http://europa.eu.int/comm/external_relations/japan/intro/joint_pol_decl.htm
- Mongolia, Trade and Co-operation Agreement signed 16 June 1992 and entered into force March 1993

[185] This list is not exhaustive. See also the Commission's External Relations website at http://europa.eu.int/comm/external_relations/human_rights/intro/index.htm#4

- South Korea, Framework Agreement on Trade & Co-operation, signed October 1996, entered into force 1 April 2001, OJL 90, 30 March 2001 at http://www.delkor.cec.eu.int/en/eukorea/7-L90-P45.pdf

3. Europe Agreements with Accession States[186]

- Bulgaria, signed 1 March 1993, OJL 358, 31 December 1994 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21994A1231(24)&model=guichett
- Cyprus, signed 19 December 1972, OJL 133, 21 May 1977
- Czech Republic, signed 6 October 1993, OJL 360, 31 December 1994 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21994A1231(34)&model=guichett
- Estonia, signed 12 June 1995, OJL 68, 9 March 1998 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21998A0309(01)&model=guichett
- Hungary, signed 16 December 1991, OJL 347, 31 December 1993 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21993A1231(13)&model=guichett
  http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21993A1231(13)&model=guichett
- Latvia, signed 12 June 1995, OJL 26, 2 February 1998 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21998A0202(01)&model=guichett
- Lithuania, signed 12 June 1995, OJL 51, 20 February 1998 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21998A0220(01)&model=guichett
- Malta, signed 5 December 1970, OJL 61, 14 March 1971 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31971R0492&model=guichett
- Poland, signed 16 December 1991, OJL 348, 31 December 1993, at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21993A1231(18)&model=guichett
- Romania, signed 8 February 1993, OJL 357, 31 December 1994 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21994A1231(20)&model=guichett
- Slovakia, signed 6 October 1993, OJL 359, 31 December 1994 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21994A1231(30)&model=guichett
- Slovenia, signed 10 June 1996, OJL 51, 26 February 1999 at http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=21999A0226(01)&model=guichett

[186] http://europa.eu.int/scadplus/leg/en/lvb/e40001.htm

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