

# The External Dimension of The Protection of Human Rights by The European Union

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## Abstrak

Sejak Uni Eropa didirikan pada tahun 1957, telah terjadi perubahan berarti yang berkaitan dengan hak-hak asasi manusia di dalam Uni Eropa sendiri dan di sekitarnya. Tetapi, baru sejak tahun 1990an Uni Eropa/Masyarakat Eropa lebih memfokuskan diri pada pengembangan agenda hak-hak asasi manusia yang terkait dengan dunia luar Eropa. Promosi dan perlindungan hak-hak asasi manusia yang dilakukan Uni Eropa merupakan faktor penting, terutama dalam hal kerja sama terkait. Juga, konsep tata kelola pemerintahan yang baik merupakan bagian yang tidak dapat dipisahkan dari proses demokratisasi dalam konteks yang lebih luas pada tahun 1990an. Sarana khas dalam mencapai atau menggiatkan tata kelola pemerintahan yang baik sebetulnya merupakan sarat politis, sebagaimana dicontohkan oleh Cotonou Agreement. Sebagai gambaran khusus, ranah kebijakan pembangunan mencerminkan kondisi bahwa dimensi eksternal hak asasi manusia telah menjadi kebijakan hak-hak asasi manusia umum di Masyarakat Uni Eropa selama bertahun-tahun.

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Kata kunci: hak asasi manusia, Uni Eropa, pengadilan HAM Eropa, integrasi

## 1. Introduction

Since the foundation of the EC, which was initially established solely as an economic community in 1957, there have been significant changes in regard to the protection of human rights within and by the EC. The achievements of the last 50 years are mainly due to the jurisprudence of the European Court of Justice. With the creation of the European Union, not only has the idea of a political Union based on

common values finally been realized, but also the external protection of human rights has gained added dimension, through the establishment of a Common Foreign and Security Policy. What different fields are covered by the EC's/EU's human rights policy and how does the EC/EU pursue the objective of human rights protection in the course of its relations with third countries? Is the

external dimension of the protection of human rights and fundamental values corresponding to the internal one?

## 2. The general status and importance of human rights in EC/EU law

When the European Economic Community (EEC) was founded by the Treaty of Rome in 1957, it did not contain any provisions dealing with the protection of human or fundamental rights in the treaties<sup>1</sup>. However, due to the European Court of Justice, this situation changed gradually.

In 1969, the ECJ had decreed for the first time in *Stauder* that "fundamental human rights" are "enshrined in the general principles of Community law" and therefore "protected by the Court".<sup>2</sup> Therefore, the Court recognized the role of human rights as forming an integral part of the legal Community order.<sup>3</sup> In *Internationale Handelsgesellschaft*, the ECJ added that the protection of fundamen-

tal rights as "an integral part of the general principles of law protected by the Court of Justice ... must be ensured within the framework of the structure and objectives of the Community".<sup>4</sup> In *Nold*, the Court elaborated upon, for the first time, not only constitutional traditions common to the Member States, but also upon international treaties on human rights, "on which the Member States have collaborated or of which they are signatories".<sup>5</sup> Although the Court did not refer to the European Convention on Human Rights (ECHR) at that time, it became clear in later cases that the ECJ was primarily thinking of the ECHR in that context.<sup>6</sup>

In addition to the EU, there are two other international organizations that are actively involved in the protection of human rights in Europe: the Organization for Security and Cooperation in Europe (OSCE), and the Council of Europe. Specifically, the Council of Europe has been playing a crucial role in this area, as the

<sup>1</sup> The current Art. 141 (ex Art. 119) TEC, which was (and is still), as a part of the chapter on social policy, providing for an obligation of equal pay for male and female for equal work, could be interpreted as the only exception.

<sup>2</sup> ECJ Case 29/69, *Stauder v Stadt Ulm*, Judgment of 12 November 1969, [1969] ECR 419, at para. 7.

<sup>3</sup> See A. Rosas, "The European Union and International Human Rights Instruments", in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord Or Harmony?* (2001), 53, at 55.

<sup>4</sup> ECJ Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide*, Judgment of 17 December 1970, [1970] ECR 1125, at para. 4; see also N. A. Neuwahl, "The Treaty on European Union: A Step Forward in the Protection of Human Rights?", in N. A. Neuwahl / A. Rosas, Allen (eds.), *The European Union and human rights* (1995), 1, at 7.

<sup>5</sup> ECJ Case 4/73, *Nold v Commission of the European Communities*, Judgment of 14 May 1974, [1974] ECR 491, para. 13.

<sup>6</sup> L. Betten / N. Grief, *EU Law and Human Rights* (1998), at 59.

protection of human rights has always been the main priority of that organization. Whereas the European Communities were initially established with the objective of promoting the economic restoration of Europe after the Second World War, the Council of Europe was founded in 1949 with the goal of protecting democracy and human rights.<sup>7</sup> The three fundamental values forming the basis of the CoE are: human rights, the rule of law, and pluralistic democracy.<sup>8</sup> In order to ensure the protection of these rights and values, a particularly effective mechanism, based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>9</sup>, was developed.<sup>10</sup>

The observance of human rights, as

they are protected by the Convention, is guaranteed by the European Court of Human Rights. Prior to the 11<sup>th</sup> additional protocol to the Convention<sup>11</sup> was enacted, the Committee of Ministers had the duty to investigate for human rights violation claims. Currently, the European Court for Human Rights is responsible for all complaints, arising both from individuals and (very rarely) from states.<sup>12</sup>

In *Hauer*, the Court explicitly recognized the ECHR as a both source and the basis for the protection of human rights in Community law.<sup>13</sup> Although the ECJ, in *Hauer*, did not yet rule on the case on the basis of the Convention, it did guarantee the protection of human rights on the basis of ECHR provisions in subsequent decisions.<sup>14</sup>

In 1994, the Council requested the ECJ to deliver an opinion pursuant to Article 300(6) TEC on the question of whether

<sup>7</sup> See Betten / Grief, *op.cit.*, at 27, 53.

<sup>8</sup> See Art. 3 of the Statute of the Council of Europe, providing that „Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.“ According to Art. 8 of its Statute, Members seriously violating these values may even be expelled from the Council of Europe.

<sup>9</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Rome on 4 November 1950. The Convention entered into force on 3 September 1953. Cf. Betten / Grief, *op.cit.*, at 27. Meanwhile, already 14 additional protocols to the Convention have been signed. 12 of these 14 protocols have already been ratified; the 10<sup>th</sup> additional protocol did not enter into force, and the 14<sup>th</sup> additional protocol has not been ratified yet.

<sup>10</sup> M. Nowak, *Introduction to the International Human Rights Regime* (2003), 157 *et seq.*

<sup>11</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, signed on 11 May 1994, entered into force on 1 November 1998.

<sup>12</sup> For more details see Betten / Grief, *op.cit.*, at 40-41, Nowak, *op.cit.*, at 164 *et seq.*

<sup>13</sup> ECJ Case 44/79, *Hauer v Land Rheinland Pfalz*, Judgment of 13 December 1979, [1979] ECR 3727, at para. 15.

<sup>14</sup> In *Commission v Germany*, for example, the ECJ explicitly referred to the respect for family life guaranteed by Art. 8 ECHR, ECJ Case 249/86, *Commission v Germany*, Judgment of 18 May 1989, [1989] ECR 1263, at para. 10. Betten / Grief, *op.cit.*, at 60, 62.

accession of the EC to the European Convention on Human Rights would be compatible with the EC-Treaty. In its *Opinion 2/94*, the Court found that an EC accession to the ECHR "would entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order."<sup>15</sup> Given the substantial degree to which a change in the Community system for the protection of human rights would entail, a Treaty amendment would be necessary in order to enable accession of the EC to the ECHR.<sup>16</sup>

The Treaty of Maastricht finally inserted a "codification" of the ECJ's case law, concerning the protection of fundamental rights, into the new EU-Treaty: Article 6(2) provides, as already stated previously<sup>17</sup>, for an EU obligation to respect fundamental rights, as they are guaranteed by the European Convention on Human Rights, and as they result from the common constitutional traditions of the Member States, being both general

principles (the ECHR and the constitutional traditions of the Member States = MS) of Community law.

At the time the Treaty of Amsterdam was approved, Article 6(1) TEU<sup>18</sup> was inserted into the EU-Treaty. While Article 6(2) refers to the protection of fundamental rights which are guaranteed by the ECHR, and common to the constitutional traditions of the Member States<sup>19</sup>, paragraph 1 mentions the term "*respect for human rights and fundamental freedoms*" and thereby is referencing the concept of the Charter of the United Nations<sup>20</sup> and the Universal Declaration of Human Rights.<sup>21</sup>

However, the ECJ's jurisdiction, which would normally have ensured the protection of the fundamental rights

<sup>18</sup> Art. 6(1) TEU states: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

<sup>19</sup> See *supra*.

<sup>20</sup> Pursuant to Art. 1(3) of the UN-Charter, one of the purposes of the United Nations is to "achieve international co-operation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion". Additionally, Art. 55(c) of the UN-Charter provides that the promotion of "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction" counts among the objectives of the United Nations.

<sup>21</sup> Universal Declaration of Human Rights, Resolution 217 (III) of the UN-General Assembly of 10 December 1948. Rosas, *op.cit.*, at 59.

<sup>15</sup> ECJ Opinion 2/94, at para. 34. For details regarding the question of Art. 235 (now Art. 308) as a possible legal basis for an EC accession to the ECHR, see *supra* in chapter 1.2.3.

<sup>16</sup> ECJ Opinion 2/94, at para. 35, see also Betten / Grief, *op.cit.*, at 113.

<sup>17</sup> For the exact wording of Art. 6(2), see fn 28.

guaranteed by Article 6 TEU, did not apply to the second pillar, meaning the Common Foreign and Security Policy. Article 46 TEU states that the second pillar is not subject to the ECJ's jurisdiction.<sup>22</sup> In regards to the protection of fundamental rights guaranteed by Article 6(2) in general, Article 46 TEU states that Article 6(2) TEU is subject to the ECJ's jurisdiction "with regard to actions of the institutions, in so far as the Court has jurisdiction both under the Treaties establishing the European Communities, and under this Treaty".<sup>23</sup>

A cornerstone in the history of the protection of fundamental rights by the legal framework of the EU was the adoption of an EU Fundamental Rights Charter. At the Cologne summit in 1999, the European Council decided to establish a Convention which was assigned the task of preparing an EU Charter of Fundamental Rights. This Convention was composed of representatives of the national governments, the European Parliament, the national parliaments, the Commission and the Council. This process

of drafting the Charter took only one year. In 2000, the "Charter of Fundamental Rights of the European Union" was adopted<sup>24</sup> and ratified by the institutions (European Parliament, Commission and Council) in the course of the European Council in Nice, in December, 2000.<sup>25</sup> Although the EU Fundamental Rights Charter was ratified and warmly welcomed by all the institutions, it was not legally binding, as the question of the legal status of the Charter was still a very controversial issue among the Member States.<sup>26</sup>

The uncertainty of the legal status of the Fundamental Rights Charter seemed to have been resolved when it was incor-

<sup>22</sup> Art. 46 TEU names the areas of the EU Treaty which are subject to the ECJ's jurisdiction. Title V (the CFSP) is not listed among them.

<sup>23</sup> Art. 46(d) TEU.

However, the ECU's competence to review decisions taken according to Art. 7 TEU is a quite limited one: it refers only to the procedural stipulations laid down in Article 7, Art. 46(e) TEU.

<sup>24</sup> The Charter draws to a considerable extent on the European Convention on Human Rights, see Rosas, *op. cit.*, pp. 54 f. In order to avoid ensure consistency between the Charter and the ECHR, Art. 53 of the EU Charter states that its provisions shall not be interpreted in as "restricting or adversely affecting human rights or fundamental freedoms" as they are recognised, inter alia, by the European Convention on Human Rights, Art. 53 Charter of Fundamental Rights of the European Union. See also J. Polakiewicz, "Relationship between the European Convention on Human Rights and EU Charter of Fundamental Rights - Some proposals for a coherent system of human rights protection in Europe", in V. Kronenberger (ed.), *The European Union and the International Legal Order: Discord Or Harmony?* (2001), 69, at 75.

<sup>25</sup> Charter of Fundamental Rights of the European Union, solemnly proclaimed on 7 December 2007, OJ 2000 C 364/1.

<sup>26</sup> Polakiewicz, *op.cit.*, at 70.

porated into the "Treaty Establishing a Constitution for Europe". This was signed in Rome in October 2004.<sup>27</sup> The Charter, as Part II of the Constitutional Treaty, would have become legally binding along with the Constitutional Treaty. However, due to the widely-known problems in the ratification process, the Constitutional Treaty did not become effective.

After the failure of the idea of a constitution, the intergovernmental conference agreed on a treaty revision by the Treaty of Lisbon<sup>28</sup>, which would also - similarly - provide legally binding status to the EU Charter of Fundamental Rights.<sup>29</sup> Additionally, Article 6(1) clarifies that the Fundamental Rights Charter "shall have the same legal value as the Treaties", which means that the Charter would be legally binding. A legally binding Fundamental Rights Charter of the EU will mark the final step in the path from a purely economic community without any provisions guaranteeing the protection of

human rights, to a political union, which is based on common values, actively pursuing a human rights policy, not only in relation to the internal, but also the external dimension of human rights.

This conclusion also leads to the issue of the protection of human rights by the EU vis à vis non-EU countries. The question arises: How has the external dimension of the EU's human rights policy been developing, in particular since the establishment of the CFSP, but also as a part of the first pillar (meaning the EC)?

### 3. Human rights in the external relations of the EC/EU

References and commitments to the external protection and promotion of human rights can be found both in the EC- and the EU-Treaty.

In the framework of the EC Treaty, human rights are an element, or more accurately, a core objective of the area of development cooperation. Article 177 TEC provides that the Community policy in the area of development cooperation "shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."<sup>30</sup> This means that promoting democracy and human rights are objectives of the EC's development cooperation policy, in general.

<sup>27</sup> Treaty establishing a Constitution for Europe, OJ 2004 C 310/1.

<sup>28</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, OJ 2007 C 306/1.

<sup>29</sup> By this treaty revision, the current Article 6 of the EU-Treaty would be modified. In its paragraph 1, it would state that the Union "recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000".

<sup>30</sup> Art. 177(2) TEC.

When EU was founded by the Treaty of Maastricht, the Common Foreign and Security Policy (CFSP) was established as the "second pillar" of the EU.<sup>31</sup> Through it, the development and consolidation of democracy as well as respect for human rights and fundamental freedoms were defined as primary objectives of the CFSP, as designated in Article 11 TEU.<sup>32</sup> The manner in which these objectives are stated is very similar to the wording of Article 177(2) TEC, which means that the objectives in relation to the external promotion of democracy and human rights are the same in both the first and the second pillar of the EU.<sup>33</sup>

At the beginning of the 1990s, the EU, or more precisely, in particular the EC, had increasingly focused on the development of a corresponding external human rights agenda, which found its expression in a number of legal acts.<sup>34</sup>

Additionally, the concept of good governance emerged in the early 1990s.

In the course of that decade, good governance had become an integral part of the wider process of democratization, or the promotion of democracy.<sup>35</sup> A typical means of achieving or promoting good governance is the concept of political conditionality, as was prominently exemplified by the Cotonou Agreement.<sup>36</sup> The introduction of political conditionality by the Lomé III Convention, which ACP countries had previously resisted, brought a very significant change in the EC-ACP association process. In the Cotonou Agreement, good governance was given additional emphasis and "respect for human rights, democratic principles and the rule of law" was defined as "an essential element" of the Convention.<sup>37</sup>

<sup>35</sup> For further details, see C. Santiso, "International Cooperation for Good Governance and Democracy: Moving Toward a Second Generation?", *European Journal of Development Research* 13 (2001), 154.

<sup>36</sup> 2000/483/EC: Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000, *OJ* 200 L 317/3.

<sup>37</sup> M. Holland, *The European Union and the Third World* (2002) 42, 50. For further details on the Cotonou Agreement, see *infra*.

<sup>38</sup> Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development, 28 November 1991, available at: [http://ec.europa.eu/external\\_relations/human\\_rights/doc/cr28\\_11\\_91\\_en.htm](http://ec.europa.eu/external_relations/human_rights/doc/cr28_11_91_en.htm) (17 August 2008).

<sup>31</sup> This establishment of a Common Foreign and Security Policy meant an important boost to the external human rights policy of the EC/EU.

<sup>32</sup> Article 11(1) TEU provides: "The Union shall define and implement a common foreign and security policy covering all areas of foreign and security policy, the objectives of which shall be: ...-develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."

<sup>33</sup> Also Article 181a TEC (Economic, financial and technical cooperation with third countries) repeats this formulation.

<sup>34</sup> Rosas, *op.cit.*, p. 54.

In one of the resolutions of the Development Council in 1991<sup>39</sup>, the EU committed itself to the promotion of democracy "at the heart of its external relations".<sup>39</sup> In this resolution, the Council stressed the importance of a common approach of both the Community and Member States in regard to the promotion of human rights and democracy, especially in developing countries. Such a common approach would also lead to more cohesion and consistency of the initiatives taken in order to achieve this aim. Moreover, the Council emphasized the importance of good governance, which plays a particularly important role in the area of development cooperation. Especially important tools are the so-called human rights clauses<sup>40</sup>, which are regularly included not only in trade and cooperation agreements, but also in association agreements and in autonomous legislative Community acts.<sup>41</sup>

### 3.1 Human rights as an important aspect of association and development cooperation

The promotion and protection of human rights by the EU has been playing a

crucial role especially in the area of development cooperation. As stated previously, a typical means of achieving or promoting the objective of good governance is the concept of political conditionality, as it was described in the *Cotonou Agreement*. Political conditionality had already been introduced by the Lomé III Convention in the 1980s, previously, the ACP countries had resisted the inclusion of this concept into the ACP partnership agreements.<sup>42</sup>

The Cotonou Agreement defines the "respect for human rights, democratic principles and the rule of law" as "an essential element" of the agreement and gives additional emphasis to the concept of good governance. According to Article 9(3) of the Cotonou Agreement, good governance forms the fundamental basis of the ACP-EU Agreement as a whole.<sup>43</sup> The concept of good governance is already referred to as a key concept in the preamble of the Cotonou Agreement, with the signatories "acknowledging that a political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance is part and

<sup>39</sup> R. Youngs, "European Union Democracy Promotion Policies: Ten Years On", *European Foreign Affairs Review* 6 (2002), 355, at 355.

<sup>40</sup> For further details on human rights clauses, see *infra* in chapter 2.2.2.

<sup>41</sup> Resolution of the Council and of the Member States meeting in the Council on Human Rights, paras. 2 and 4.

<sup>42</sup> See Holland, *op.cit.*, at 42, 50.

<sup>43</sup> "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", Art. 9(3) Cotonou Agreement.



parcel of long term development.”<sup>44</sup> The overall approach of this agreement is characterized by the strengthening of “the institutions necessary for the consolidation of democracy, good governance and for efficient and competitive market economies.”<sup>45</sup>

Another specific tool of the EU’s external human rights policy can be found in the conditions formulated in the Generalized System of Preferences (GSP) program<sup>46</sup>. Under this program, the EU grants additional tariff preferences to developing countries, linking these preferences to certain conditions, which can be both positive<sup>47</sup> and negative<sup>48</sup>. Regulation 980/2005 has also introduced

a new GSP program<sup>49</sup>, which foresees the possibility of additional benefits to be granted to developing countries having “ratified and effectively implemented” certain key international conventions on human and labour rights as well as environmental standards listed in the annex of Reg. 980/2005.<sup>50</sup>

### 3.2 Human rights clauses in international agreements

Specific tools of particular importance in regard to the EU’s external human rights policy are, as already mentioned above, the so-called human rights clauses.

In 1995, a standard human rights clause was collectively approved.<sup>51</sup> The Commission issued a “*Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements*

<sup>44</sup> This approach is also reflected in the political dialogue, which “...shall also encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.” *Ibid.*, Art. 8.

<sup>45</sup> *Ibid.*, Art. 20.

<sup>46</sup> The GSP is implemented through Council regulations, e.g. (the latest one) Council Regulation (EC) No 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences, OJ 2005 L 196/1.

<sup>47</sup> Special incentives (meaning lower duties) for countries complying especially with labour and environmental standards can be granted.

<sup>48</sup> If a country benefiting from trade preferences does not comply with certain norms and standards (e.g. labour protection norms), trade preferences granted under the GSP can be withdrawn. Myanmar has for example been suspended from the GSP since 1997; See L. Bartels, *Human rights conditionality in the EU’s international agreements* (2005), 68.

<sup>49</sup> See Section 2 of Reg. 980/2005, which is called “Special incentive arrangement for sustainable development and good governance”.

<sup>50</sup> Art. 9 Reg. 980/2005. The new system is called “GSP+”. For more details on the new „GSP+” arrangement, see also European Commission, *Generalised System of Preferences: EU “GSP+” granted to an additional 15 developing countries*, Brussels, 21 December 2005, available at: [http://ec.europa.eu/trade/issues/global/gsp/pr211205\\_en.htm](http://ec.europa.eu/trade/issues/global/gsp/pr211205_en.htm).

<sup>51</sup> See Youngs, *op.cit.*, p. 356. Before, there had been different types of human rights clauses, depending on the time when an agreement was concluded and the country it was concluded with, e.g. the Baltic clause or the Bulgarian clause, see F. Hoffmeister, *Menschenrechts- und Demokratiekláuseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (1998), 606.

*Between the Community and Third countries*<sup>52</sup>. Since then, the so-called "human rights clauses", which state that the respect for human rights and democratic principles is an essential element of the agreement, has been included in all agreements with third (non-EU) countries<sup>53</sup>. If there is a finding of a serious violation of human rights or of the democratic process in general, sanctions may be imposed on the contracting partner country. Nevertheless, the principal function of human rights clauses has to be understood in the context of the creation of a basis for positive EU engagement on human rights and democracy issues with third (non-EU) countries.<sup>54</sup>

Before a standard human rights clause was accepted and approved in 1995, there were several different types of human rights clauses that had been included into international agreements beginning in late 1980's.

While earlier versions of human rights

clauses did not contain specific provisions on the suspension of agreements in the case of serious violations of human rights, the wording of those provisions has become more detailed in this respect since the early 1990's. The difficulties the EC faced in connection with the suspension of the agreement with Yugoslavia<sup>55</sup> illustrated the need for a clause which would also allow for the suspension of agreements. These more specific clauses clarified the way in which human rights were defined, that is, as an "essential element" of the agreement. The more advanced wording of the "essential element" clause provides for a consultation procedure before the abrogation of an agreement.<sup>56</sup>

<sup>52</sup> Commission of the European Communities, *Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries*, COM(95) 216, 23 May 1995.

<sup>53</sup> The only exceptions are sectoral agreements and agreements with industrialised countries.

<sup>54</sup> European Union - Council of Ministers, European Commission, *EU Annual Report on Human Rights 2006* (2006), at 20, also available online at: [http://ec.europa.eu/external\\_relations/human\\_rights/doc/report\\_06\\_en.pdf](http://ec.europa.eu/external_relations/human_rights/doc/report_06_en.pdf).

<sup>55</sup> Because of the ongoing hostilities in the former Yugoslavia, the Co-operation Agreement between the EC and Yugoslavia, was first suspended and then denounced by the EC in 1991 (Council Decision 91/602/EEC of 25 November 1991 denouncing the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia, OJ 1991 L 325/23), B. Brandtner / A. Rosas, "Trade Preferences and Human Rights", in P. Alston / M. R. Bustelo / J. Heenan (eds.), *The EU and human rights* (1999), 699, at 709.

<sup>56</sup> Especially since 1992, more specific provisions characterised human rights as an "essential element" of the respective international agreements, European Parliament, *Report on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries* (COM(95)0216 - C4-0197/95), 26 June 1996, Doc. No. A4-0212/96, Explanatory Statement.

As the ECJ had in its *Opinion 2/94* refused the existence of a general Community power to "enact general rules ... or to conclude international conventions" in the area of human rights<sup>57</sup>, it was not clear whether human rights clauses included in international agreements did, in fact, have a legal basis in EC law. However, in *Portugal v. Council*<sup>58</sup>, the ECJ confirmed that a human rights clause defining the respect for human rights as an essential element of an agreement, has a legal basis in Community law, based on Article 177(2) TEC. According to the ECJ, "the mere fact that Article 1(1) of the Agreement<sup>59</sup> mandates that respect for human rights and democratic principles "constitutes an essential element" of the Agreement does not justify the conclusion that that provision goes beyond the objective stated in Article 130u(2)<sup>60</sup> of the Treaty." The wording of this provision demonstrates the Court's viewpoint regarding the importance to be attached to respect for human rights and democratic principles. This also suggests that a development cooperation policy would have to be adapted to the important requirement of respect for human

rights and democratic principles.<sup>61</sup>

Illustrative examples indicating human rights clauses being defined as "essential clauses" are the provisions contained in cooperation, partnership and association agreements, such as in the ACP-EU partnership agreement.

As previously mentioned, the concept of good governance forms the basis for the entire Cotonou Agreement.<sup>62</sup> Respect for human rights, in addition to a democracy based the rule of law, and transparent, accountable governance, are the key elements making up the political dimension of this agreement. Incidences of violations of these three elements, which are considered essential elements for the ACP-EU partnership, will be subjected to a violation procedure emphasizing the responsibility of the respective country.<sup>63</sup>

In summary, it can be said that the promotion of the respect for human rights and of democratic principles is the primary objective of the Cotonou Agreement.<sup>64</sup>

<sup>57</sup> See ECJ Opinion 2/94, at para. 27.

<sup>58</sup> ECJ Case C-268/94, *Portugal v Council*, Judgment of 3 December 1996, [1996] ECR I-6177.

<sup>59</sup> "The Agreement" refers to a Cooperation Agreement concluded between the EC and India.

<sup>60</sup> Now Art. 177(2).

<sup>61</sup> ECJ Case C-268/94, at para. 24. See also E. Fierro, "Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?" *European Law Journal* 7 (2002), 41, at 44.

<sup>62</sup> "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", Art. 9 para. 3 Cotonou Agreement.

<sup>63</sup> Europa SCADPlus, *Activities of the European Union - Summaries of Legislation, Cotonou Agreement*, available at: <http://europa.eu/scadplus/leg/en/lvb/r12101.htm>; see Art. 9 of the Cotonou Agreement.

The same can, however, not be said in relation to Association and Cooperation Agreements. These agreements do not have the objective of promoting the respect for human rights, although there are, however, statements leaning in that direction which can be found in some of them.<sup>65</sup>

Nevertheless, respect for human rights plays an important role in the relations with countries which are currently, or potentially, attempting to accede to the EU. The fulfilment of certain human rights standards is a general condition for accession to the Union.

### 3.3 Human rights as a condition for accession to the EU

Article 49 TEU provides that "Any European State which respects the principles set out in Article 6(1) may apply to become a member of the Union".<sup>66</sup> There-

fore, the fulfilment and the guarantee of human rights standards, as they have been ensured by the ECJ's jurisdiction, and codified in the EU-Treaty, is an absolute prerequisite for countries applying for EU membership, in order to be accepted as candidate countries and, finally, member states of the Union.

In 1993, the European Council decided, especially as a result of the applications for accession from ten Central and Eastern European countries, to formulate a number of "political criteria" that must be fulfilled by countries wishing to accede to the EU.<sup>67</sup> These principles have become well-known as the so-called "Copenhagen criteria". There are three categories of criteria: political stability, economic stability (a functioning market economy) and the ability to adopt the *Acquis Communautaire*.<sup>68</sup> The criteria of political stability

<sup>64</sup> In February 2005, a so-called "ICC clause", stating a commitment to the ICC, into the Cotonou Agreement, was included into the revised Cotonou Agreement. Such ICC clauses have also been included into Action Plans with Jordan, Moldova and Ukraine in the framework of the European Neighbourhood Policy (ENP), see European Commission, *The EU's External Human rights and Democratisation Policy, The International Criminal Court & the fight against impunity*, available at: [http://ec.europa.eu/external\\_relations/human\\_rights/icc/index.htm](http://ec.europa.eu/external_relations/human_rights/icc/index.htm) (20 August 2008). This insertion of the ICC clause, which happened upon the Commission's initiative, shows that the EC is also using such clauses in order to pursue its foreign policy interests.

<sup>65</sup> The EC-Romania Association Agreement states for example that one of the aims of the agreement is the consolidation of Romania's democracy. See Bartels, *op.cit.*, at 87.

<sup>66</sup> Art. 49(1) TEU.

<sup>67</sup> See M. Nowak, "Human Rights Conditionality in Relation to Entry to, and Full Participation in, the EU" in P. Alston / M. R. Bustelo / J. Heenan (eds.), *The EU and Human Rights* (1999), 687, at 898.

<sup>68</sup> "Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union." European Council, *Presidency Conclusions Copenhagen European Council*, 21 and 22 June 1993, Council Doc. No. SN 180/1/93 REV 1, p. 14.

requires the candidate countries to be a functioning and stable democracy, guaranteeing the rule of law, the respecting of human rights and the protection of minorities.

The principles listed in Article 6(1) TEU<sup>69</sup> can, to a certain extent, be seen as a confirmation of the Copenhagen criteria, as they were incorporated into the EU-Treaty.<sup>70</sup>

In the meantime, the Copenhagen criteria have gained considerable practical relevance. The practical importance of the fulfilment of human rights standards, as they are formulated in the political Copenhagen criteria, was emphasized in 1997, when the Commission included a chapter on democracy and the rule of law, as well as on human rights and the protection of minorities, in the Opinions it published on the then ten Central and Eastern European candidate countries.<sup>71</sup> The evaluation of the observance of human rights standards as a part of the Copenhagen political criteria was subsequently continued in the relevant

progress reports.<sup>72</sup>

The generally outstanding role of human rights in the stabilization and association process is also illustrated by the importance the EU is attaching to the constructive cooperation with the International Criminal Tribunal by (the former) Yugoslavia (ICTY), which is an essential condition of the entire process. In May 2006, negotiations between the EU and (at that time) Serbia and Montenegro were suspended due to a lack of willingness on the part of both of those countries to cooperate with the ICTY.<sup>73</sup>

<sup>72</sup> See for example the report on Romania of 2004, Commission of the European Communities, *2004 Regular Report on Romania's progress towards accession*, COM(2004) 657 final, 6 October 2004, Chapter B.1: Political criteria, at 13 *et seq.*

<sup>73</sup> European Union-Council of Ministers, European Commission, *EU Annual Report on Human Rights*, *op.cit.*, at 69. Meanwhile, the negotiations have been resumed separately with Serbia (on 13 June 2007) and with Montenegro (on 24 June 2006), the Council adopted a mandate for the negotiation of a SAA with Montenegro), see Europa - Press Releases, *Commission resumes negotiations on a Stabilisation and Association Agreement with Serbia*, 13 June 2007, Press Release, IP/07/818, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/818&format=HTML&aged=0&language=EN&guiLanguage=en> and European Commission, *Enlargement, Montenegro, EU - Montenegro relations*, available at: [http://ec.europa.eu/enlargement/montenegro/eu\\_serbia\\_and\\_montenegro\\_relations\\_en.htm](http://ec.europa.eu/enlargement/montenegro/eu_serbia_and_montenegro_relations_en.htm).

<sup>69</sup> See *supra* in chapter 2.1.

<sup>70</sup> These principles are not completely identical compared to the Copenhagen criteria, as the criterion of the protection of minorities cannot be found in Art. 6(1) TEU, see Nowak, *op.cit.*, at 692.

<sup>71</sup> See B. Brandtner / A. Rosas, "Human rights and the external relations of the European Community: an analysis of doctrine and practice", *European Journal of International Law* 9 (1998), 468, at 484.

#### 4. Conclusion

Although a legal basis for the protection of human rights and fundamental values was only inserted into the EC's/EU's legal framework by the Treaty of Maastricht in 1992, the EC has been trying to achieve that goal already for many years, by various means and ways.

This article attempted to highlight the fact that the "external dimension" of human rights has become a highly significant aspect of the general human rights policy of the EU. Especially over the course of the last few years, the "external dimension" of human rights has become a more significant aspect of the general human rights policy of the EU. This evolution is reflected, in a particularly illustrative manner, through the development policy of the EC on one hand, and in its relationship with countries with which it has concluded a Stabilization and Association Agreement, on the other hand.

An important step in the Union's efforts to demonstrate that the EC/and EU has evolved into a community of values, which has continually strived to improve its human rights policy, was the establishment of a European Fundamental Rights Agency. The task of this new agency is to provide support both the Community and its Member States when implementing measures or formulating courses of action within their spheres of competence, in order to ensure the respect of fundamental rights. And even if the

question of the future legal status of the Fundamental Rights Charter has not been solved in a satisfactory way yet, it marks the beginning of a new era, which guarantees a high level of fundamental rights protection. □

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