
The EU and the prohibition on goods produced by child labour and forced labour

Abstract - Child labour and forced labour are practices which are almost universally prohibited. Yet, goods produced with child labour or forced labour can be legally imported into the European Union. This thesis addresses this inconsistency by exploring the feasibility of an EU prohibition on goods produced by child labour and forced labour. The thesis demonstrates that the EU has a strong responsibility to address the conditions under which the products it imports are made. Furthermore there are strong reasons to assume that a prohibition on goods produced by child labour and forced labour is not necessarily contrary to WTO rules on non-discrimination and equal treatment.

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List of acronyms

ACP Countries	African, Caribbean, Pacific Countries
CJEU	Court of Justice of the European Union
DSB	Dispute Settlement Body
DWCFA	Decent Working Conditions and Fair Competition Act
EBA	Everything But Arms
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FTC	Federal Trade Commission
GATT	General Agreement on Trade and Tariffs
GSP	Generalized System of Preferences
ICJ	International Court of Justice
ILO	International Labour Organization
MFN	Most Favoured Nation
UN	United Nations
WTO	World Trade Organization

The European Union and the conditions under which imported goods are produced

“Human dignity, freedom, democracy, equality, the rule of law and respect for human rights are the values on which the European Union is founded. Embedded in the Treaty on European Union, they have been reinforced by the Charter of Fundamental Rights. Countries seeking to join the EU must respect human rights, and so must countries which have concluded trade and other agreements with it”.¹

This phrase, taken from the website of the European Union (EU), emphasises the importance the EU attaches to human rights, not only for and within member states but also in countries with which it conducts trade. These rights are supposed to be ‘universal and indivisible’. Yet, as it turns out, human rights within the EU are not the same as those outside. For European companies there is no legal constraint on importing goods which have been produced in a way which would be considered as violations of fundamental labour rights within the EU, such as child labour and forced labour. The only reason why a company would not want to import such goods is the risk of public condemnation and perhaps the moral responsibility of its board of executives.

The recent collapse of a clothing factory in Dhaka, the capital city of Bangladesh, shows how relevant the problem regarding the exploitation of labour in many emerging economies is. More than a thousand people died in a catastrophe which has been dubbed the ‘terror of capitalism’; market forces made entrepreneurs, producing for mainly western companies, move their businesses into poorly constructed factories to reduce prices.² As a consequence, not only did these workers have to endure low wages and severe working hours; many of them lost their lives in this struggle for survival. In this particular factory in Bangladesh, working conditions resembled forced labour conditions; ‘our production manager slapped a few of us who argued that it was not safe to be there’, a 15 year old factory worker reported.³

¹ European Union – Human Rights on <http://europa.eu/pol/rights/>, accessed on 08-07-2013.

² Prashad, Vijay, ‘The terror of capitalism’ (29-04-2013) on <http://www.jadaliyya.com/pages/index/11436/the-terror-of-capitalism>, accessed on 08-07-2013.

³ Sadia, Tahmina Akhter, “They slapped us if we argued. We wiped our tears and went to work”: The

The international community responded with an outcry of despair, yet it is unclear whether this despair was directed at the working conditions in Asian sweatshops or rather an attempt to silence its own consciousness. Primark, one of the retailers that were supplied by this particular factory, announced that it would support the affected families with emergency aid and ‘long-term aid for children who lost their families as well as financial aid for those injured’.⁴ Disney realised that their image of happy children playing with Mickey Mouse toys in the United States did not correspond very well with the exploited workers in Asia producing them and decided to stop its production in Bangladesh altogether.⁵ Many major companies were quick to announce that they would sign an agreement in which they promised to finally make sure that labour rights would be respected. In a press release, the European Union, by far the biggest trading partner of Bangladesh, said it considered ‘appropriate action’. This appropriate action, however, turned out to consist of threatening with limiting trade preferences for Bangladesh (‘to incentivise responsible management of supply chains’) and urging European companies to follow the UN guidelines on conducting responsible business.⁶ After some promises of the Bangladesh government to introduce new labour regulations the EU announced that the country would keep its trading preferences.⁷ Meanwhile, accusations of Western companies using child labour and forced labour and committing other violations of basic labour rights fill the newspapers on a frequent basis.⁸ Simultaneously, some companies do seem to take up the issue with more

brutal existence of a Bangladeshi garment worker’ in *The Independent* (10-05-2013) on <http://www.independent.co.uk/news/world/asia/they-slapped-us-if-we-argued-we-wiped-our-tears-and-went-to-work-the-brutal-existence-of-a-bangladeshi-garment-worker-8611808.html> , accessed on 08-07-2013.

⁴ Buncombe, Andrew, ‘Dhaka collapse: Primark to pay victims of Bangladesh factory disaster’ in *The Independent* (29-04-2013) on <http://www.independent.co.uk/news/world/asia/dhaka-collapse-primark-to-pay-victims-of-bangladesh-factory-disaster-8595529.html> , accessed on 08-07-2013.

⁵ Greenhouse, Steven, ‘Some retailers rethink role in Bangladesh’ in *The New York Times* (01-05-2013) on http://www.nytimes.com/2013/05/02/business/some-retailers-rethink-their-role-in-bangladesh.html?_r=2& , accessed on 08-07-2013.

⁶ European Union, ‘2522nd Council meeting - External relations - Brussels, 21 July 2003’, reference: PRES/03/209 on http://europa.eu/rapid/press-release_PRES-03-209_en.htm , accessed on 08-07-2013.

⁷ <http://euobserver.com/tickers/120798>

⁸ Hodal, Kate, ‘Tate & Lyle sugar supplier accused over child labour’ in *The Guardian* (09-07-2013) on <http://www.guardian.co.uk/business/2013/jul/09/tate-lyle-sugar-child-labour-accusation?INTCMP=SRCH> , accessed on 11-07-2013; Burke, Jason, ‘Bangladesh factory tragedy gives hope to leather workers’ in *The Guardian* (07-07-2013) on <http://www.guardian.co.uk/world/2013/jul/07/bangladesh-tanneries-human-rights->

commitment. The German manufacturer of sports gear Adidas has recently introduced a system which allows its employees to file complaints and ask questions about their working conditions. The service is supposed to ‘bridge the communication gap between management and workers’ by allowing workers to ‘simply send an SMS when they feel their rights are breached’.⁹ In this way, the increased availability of technological devices to a large number of people could provide a relatively easy way to signal labour rights violations.

Recently, the European Parliament has taken up the task of pointing out the responsibilities of the European Union in the field of child labour. It discussed a report prepared by the NGO ‘Stop Child Labour – School is the best place to work’.¹⁰ In the report, the NGO has collected twelve recommendations to the EU for ending the imports of products produced by children.¹¹ Most of them concern pressure on the country where the abuse takes place and pressure on the companies with a legal base in the EU. The EU is recommended to implement a so-called Child Labour Hotline monitoring usage of child labour. Furthermore the EU is urged to ‘set up programmes eradicating child labour in the supply-chain of EU-based companies’.¹² Companies should be obliged to report on signals of child labour in their supply-chain and EU-based companies which have used child labourers should be prosecuted. Legally, however, it is very difficult to impose binding measures on companies producing clothes outside the EU’s jurisdiction.

Therefore, the aim of the thesis is to find out whether it is possible for the European Union to impose a prohibition on the imports of goods which are produced in ways which can be considered as violations of fundamental labour rights even when taking general labour conditions in developing countries into account. The main emphasis will

[violations?INTCMP=SRCH](#) , accessed on 11-07-2013.

⁹ Baetz, Juergen, ‘Adidas encourages factory workers to anonymously text complaints’ in The Huffington Post (05-06-2013) on http://www.huffingtonpost.com/2013/05/06/adidas-factory-workers-text-message-complaints_n_3223412.html , accessed on 08-07-2013.

¹⁰ Stop Child Labour – <http://www.stopchildlabour.eu> , accessed on 08-07-2013.

¹¹ Oonk, Gerard, ‘Child labour, trade relations and corporate social responsibility. What the European Union should do’, 2008. Available at http://www.europarl.europa.eu/meetdocs/2009_2014/documents/deve/dv/3childlabourtradeandcsr_/3childlabourtradeandcsr_en.pdf , accessed on 06-07-2013.

¹² Oonk, 2008, 11.

be on the legal possibilities to impose this prohibition, although practical issues will receive significant attention as well. The focus will be on two particular aspects of labour exploitation: child labour and forced labour. The reason why the research is limited to these two aspects of labour exploitation is that, as will be argued elaborately in chapter one of the thesis, there is a significant body of international law prohibiting these practices. Furthermore a prohibition on these particular violations of international labour is more enforceable than for example the right to collective bargaining or the right to assembly.¹³ The goods produced with child labour and forced labour will sometimes be referred to as ‘unfairly produced goods’, ‘unfair goods’, ‘goods produced with labour exploitation’ and similar terminology. In this thesis, this terminology does not refer to other forms of labour exploitation.

A classical risk when imposing conditions on companies producing and importing goods is that they can settle outside the jurisdiction of the EU and consequently avoid any legal obligations imposed by the EU. Hence, an EU-prohibition targeted at the imports of unfairly produced goods, as opposed to the companies importing them, has the advantage that it circumvents the risk that companies settle outside the EU to avoid strict regulations. The law would target the products that enter the EU, and not the company which imports them, as a result of which the legal location of the company is less relevant.

In research on the regulations concerning the imports of goods, the rules of the World Trade Organization (WTO) on trade will necessarily have to be taken into account. Even if there would be sufficient political will within the EU to impose restrictions on the imports of unfair products, it might turn out to be impossible under current WTO regulations. As the WTO is widely known as a neo-liberal organisation strongly committed to the promotion of free trade, it is not unthinkable that this organisation does not allow for restrictions on trade based on working conditions. Although for some organisations this has been a reason to argue for the elimination of the WTO altogether¹⁴, this thesis takes the framework of trade rules under WTO law as the

¹³ Hepple, 2005, 60.

¹⁴ Alternatives International - Declaration of the Social Movements Assembly (29-03-2013) on

context within which a realistic solution of trade-related problems should be found. Therefore it has to be established that the restrictions will be imposed as a consequence of a violation of human rights, and not in disguise of protectionist measures benefiting European producers.

The most important global actor when it comes to labour regulations is the International Labour Organization (ILO), a specialised agency of the United Nations (UN). Since currently all but eleven members of the UN (all of them being micro-states) are member to the ILO, their legislation, including the formulation of the four core labour standards, is highly relevant. The European Union, as an inter-governmental organisation, is not a member of the ILO but has cooperated with the ILO since the establishment of the European Economic Community in 1958. The obligations which the EU may or may not have towards the ILO therefore deserve closer scrutiny.

The thesis will commence with a detailed outline of the political-legal framework regarding the human rights obligations of the European Union under international law. Is there an obligation for the EU to prevent unfairly produced goods from entering the European market? The chapter is split up in three main sections. The first section will introduce and explain the most important concepts and define them for usage in this thesis. The second section will discuss human rights obligations of non-state actors in general. Under international law, treaties are usually signed by State Parties. Recently the topic of what exactly the obligations of non-state actors such as International Organisations, trans-national companies and multilateral development banks are has received an increase in scholarly attention. Necessarily the concept of customary international law will be discussed as well, since this is often the only body of law which can be applied to non-state actors. In the third section, taking the findings of the second section into account, the question will be addressed what the human rights obligations of the EU under international human rights law are, if there are any at all. After a theoretical discussion on the question how exactly the obligations of the Member States of the EU relate and potentially conflict with the competencies and obligations of the EU itself as a legal entity, an outline of the most relevant international

<http://www.alterinter.org/spip.php?article3996> , accessed on 08-07-2013.

treaties which are applicable to the EU will demonstrate that the EU does have responsibilities under international human rights law.

Chapter two discusses the ways in which international trade interacts with human rights obligations. The most important question to be addressed in this chapter is whether it is legally possible to restrict trade to protect human rights. The WTO, as the most important regulator of world trade, will be analysed in detail, in particular regarding its interaction with the EU and the ILO. Does trade liberalisation potentially lead to human rights violations? How are problems related to human rights violations addressed by the WTO? Is it possible to guarantee respect for human rights in trade agreements? The incorporation of a so-called social clause in WTO agreements will be discussed: the idea that trade obligations under WTO rules can be made conditional upon respect for labour rights. The chapter includes a discussion on the trade sanctions imposed by the EU against the military regime in Myanmar. Since these sanctions were not challenged by the WTO they have created an important precedent on restricting trade to enforce respect for human rights.

In the third chapter two practical approaches to addressing the question how the EU can prevent imports of goods produced with child labour and forced labour will be discussed. The first of these is the draft United States Decent Working Conditions and Fair Competition Act (DWCFCFA). This Act addressed the similar problems as addressed in this thesis. The Act aimed at prohibiting imports, exports and sales of so-called sweatshop labour goods. The Act never became law since it did not receive sufficient support in the United States Congress. Nevertheless, its contents can be used to explore the ways in which the EU can put a prohibition on imports of unfairly produced goods into law. The second example is the EU Timber Regulation, prohibiting the imports, exports and sales of illegally logged wood. The legislation can serve as a blueprint for labour rights legislation. The most important aspect of the EU Timber Regulation is its duality; together with making illegally logged wood in the country of origin illegal in the EU as well, it foresees for the establishment of a control mechanism which requires companies trading in timber to prove that it has been logged according

to the laws of the country of harvest. Without this proof, the timber cannot enter the EU.

Chapter 1: Legal framework

1.1 Terminology

This thesis asks why it is possible that products which have been produced under circumstances which according to international standards are considered violations of fundamental human rights can be legally imported into the European Union. This practice is known as social dumping; ‘the production and commercialisation of products whose international price is lower than the price resulting from the costs of production that the exporting country would bear should it abide by fundamental social rights and core labour standards’.¹⁵ In other words, producers lower their costs, and parallel to that, their labour standards, as far as is necessary to be competitive on the international markets.

The thesis will focus on the use of child labour and forced labour. The definitions of these concepts have been taken from the ILO. The concept of child labour consists out of two aspects: what is a child, and what constitutes child labour. The UN defines a child as ‘every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier’.¹⁶ So, it depends on national legislation to define who exactly is a child. Generally, any work below the age of twelve is considered harmful, with light work allowed for twelve to fifteen year olds and non-hazardous work for fifteen to eighteen year olds.¹⁷

Child labour is defined as ‘work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development’. Furthermore, it is work that interferes with their education, by either preventing them from attending school, or forcing them to leave school before finishing it, or forcing children to combine school with heavy physical or mental work.¹⁸ It is important to

¹⁵ Bonavita, 2011, p. 242.

¹⁶ United Nations – Convention on the Rights of the Child [1989: 1990], art. 1.

¹⁷ ILO, 2004, p. 17.

¹⁸ Ibidem, p. 16-17.

distinguish children in employment from child labour; children in employment do not suffer from the negative characteristics described above.¹⁹

Child labour is a widespread phenomenon. In 2008, globally 215.569.000 children in the age between 5 and 17 years had to perform labour which fits the definition set out above.²⁰ In numbers, the most children perform labour in Asia and the Pacific, although the relative number is far higher in sub-Saharan Africa.²¹ Not surprisingly, ‘child labour is a symptom of poverty’.²² Although popular opinion in many Western countries pictures child labour as children working long days in dirty factories, the actual situation is not as simplistic as that. Most children do not work in the manufacturing industry but in agriculture. Edmonds and Pavcnik found that ‘agriculture is the dominant sector of employment’ in nearly every of the countries under scrutiny.²³ Yet, 25 percent of employed children perform ‘market work’, i.e. work which potentially involves international trade. Globally, 60 percent of children performs labour in agriculture, 25.6 percent in services, 7 percent in industry and 7.5 percent is not defined.²⁴

Forced labour, according to the ILO, refers to ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.²⁵ It is important to clarify that the main component of the concept of forced labour is not the character of the work performed but the conditions under which this is done so. The main aspects of forced labour are therefore the involuntary character of the work combined with the threat of a penalty in the case of refusal. In the *Reitmayr v Austria case [1995]*, the European Commission of Human Rights, part of the European Court of Human Rights (ECtHR), redefined it as work which ‘must be either unjust or oppressive, or must itself constitute an avoidable

¹⁹ Diallo, 2010, p. v.

²⁰ Ibidem, p. 9.

²¹ Ibidem.

²² Edmonds and Pavcnik, 2005, p. 200.

²³ Ibidem, p. 203.

²⁴ Diallo, 2010, p. 9.

²⁵ ILO, Global estimate of forced labour, 2012, p. 19.

hardship’, as such making the character of the work important as well.²⁶

The problem of forced labour is severe. In a recent study, the ILO has estimated that in the past ten years, over twenty million persons had to perform forced labour at any given period during that time.²⁷ Out of these, 22 percent are the victim of sexual exploitation, 68 percent have to perform labour in the private economy and 10 percent have to perform forced labour imposed by the state.²⁸ By far the highest number of forced labourers is to be found in Asia and the Pacific, although per 1000 inhabitants, the number is highest in Central and South-Eastern Europe.²⁹

There are no reliable statistics on how many people have to perform forced labour in sectors that are suitable for exports. However, there are sources indicating that it is a serious problem; an article on the website of the EUObserver, for example, stated that ‘the bulk of Uzbekistan’s cotton, which is picked using forced labour, is exported and ends up in European shops’.³⁰ In 2008, undercover journalists ‘exposed forced labour and appalling living conditions in a Nike supply factory in Malaysia’.³¹

1.2 Human rights obligations of non-state actors

What exactly are the human rights obligations of non-state actors and of international organisations specifically? Are there any at all? If so, how can non-state actors be held accountable to them? If a party subjugates itself to a treaty of any kind, it means that it accepts that it can be held accountable for any violation of the contents of that treaty. From this could be logically deduced that an entity which is not a party to a treaty cannot be held accountable for human rights violations. In a way, there cannot even be

²⁶ *Reitmeir v. Austria*, 1995, p. 2.

²⁷ ILO, 2012, p. 13.

²⁸ *Ibidem*.

²⁹ *Ibidem*, p. 15-16.

³⁰ Ewart James, ‘EU rhetoric/EU action’, at <http://euobserver.com/opinion/119907>, accessed on 08-07-2013.

³¹ Oxfam, ‘Forced labour by Nike supplier’ at <https://www.oxfam.org.au/2008/07/forced-labour-by-nike-supplier/>, accessed on 08-07-2013.

spoken of a violation, as there is no treaty to be violated. States are the principle parties to most treaties, making them and agents acting on behalf of them accountable. This includes human rights treaties. The question how to identify relevant international human rights law applicable to non-state actors is ‘of major significance’.³² Examples of non-state actors are corporations, international organizations, multilateral development banks, multinational peace-keeping operations and even individuals, such as those in non-state armed forces.³³

Currently it has been widely accepted that non-state actors do have human rights obligations, even when they are not party to human rights treaties.³⁴ Thinking about human rights in this way, rather than in the traditional way of seeing them only as applicable to states, is a ‘paradigm shift’ which will ‘inevitably affect the implementation of a wide range of programmes and legal protection’.³⁵ However, IO’s can be responsible for violations of human rights, but they hardly can be held accountable.³⁶

This chapter will explore and clarify current thought on the human rights obligations of non-state actors. An introduction to the general principles of international law will be narrowed down to the question whether International Organisations are subject to customary international law and Jus Cogens. Subsequently, the question whether and how International Organisations are subject to human rights obligations will be answered.

After that, a problem of a rather technical character will be discussed. Since International Organisations are made up by individual Member States with their own obligations and competences, a conflict of competences between the International Organisation and the Member States cannot be ruled out. The discussion will focus on

³² Alston and Simma, 1988-1989, p. 82.

³³ Clapham, 2006, p. 1.

³⁴ Ibidem, p. 2.

³⁵ Ibidem, p. 1.

³⁶ Buchanan and Ryngaert, 2011, p. 132.

the European Union and its Member States.

Subsequently the actual legal framework as applicable to the European Union will be outlined. All the relevant treaties, conventions, charters and other policies will be scrutinized so as to come to an assessment of the responsibility of the EU to protect human rights in the fields of child labour and forced labour. Since this thesis is about the possibility of a prohibition of unfairly produced goods, both international human rights law as well as international trade law, mainly through the WTO, will be taken into account.

1.2.1 International law

International law provides a legal framework to guide the behaviour of states. It is a set of rules which stipulates what is allowed and what is not allowed when states act on the international stage. These rules can be directed towards a wide array of areas, with economic and political relations being among the most apparent.

International law is fundamentally different from domestic law because it governs relations between states rather than between individuals or between states and individuals.³⁷ In a domestic legal system, it is the legislature which creates law, the judiciary which adjudicates it and the executive which enforces it. In international law, this division is problematic. The difference between domestic and international legal orders has some notable consequences. As Goldsmith and Levinson formulate it,

“International law has no centralized legislature or hierarchical court system authorized to create, revise, or specify the application of legal norms, and as a result is said to suffer from irremediable uncertainty and political contestation. Out of deference to state sovereignty, international law is a “voluntary” system that obligates only states that have consented to be bound, and thus generally lacks the power to impose obligations

³⁷ Cassese, 2005, p. 3; Megret, 2012, p. 65.

on states against their interests”.³⁸

The international legal system has a horizontal structure, as opposed to the vertical structure in a domestic legal system, where institutions control the subjects. As a consequence, international law often either follows the desires of super powers or, if that turns out to be impossible, is simply ignored by them; the American invasion of Iraq in 2003 is an obvious example of this behaviour. This is made possible by the fact that there is hardly any authority to enforce states to conform to international law. As will be discussed in more detail later on, even the International Court of Justice, which theoretically has a relatively strong mandate to make states comply with international law, often finds itself powerless to enforce its rulings.

1.2.1.1 Creation and enforcement of International Law

So, two important questions are still open. How is international law created, and who enforces it? These questions need to be answered since they will allow us to analyse the obligations of the European Union under international law.

In a domestic system, law is created through either parliamentary legislation (in a civil law system) or through case-law (in a common law system), with some states utilising a hybrid system.³⁹ Alternatively, the sources of international law are different. There is not a single place where all applicable ‘international law’ is codified. Different forms of international law are applicable to different states, in different compositions. Therefore it can be hard to find out which laws are relevant, and under which circumstances they can be used.⁴⁰

Article 38 of the Statute of the International Court of Justice (ICJ) is generally considered as authoritative when it comes to identifying different sources of international law. The ICJ recognizes international law stemming from ‘international

³⁸ Goldsmith and Levinson, 2009, p. 1792-1793.

³⁹ Shaw, 2006, p. 69.

⁴⁰ Ibidem, p. 70.

conventions’ (i.e. treaties), ‘international custom’ (i.e. customary law), ‘general principles of law’ and, in addition, ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations’.⁴¹

1.2.1.1.1 Treaties

A conventional source of international law can be found through the signing and ratification of treaties.⁴² Often, ‘treaty law provides a solid and compelling legal foundation’ for the identification of applicable law.⁴³ Generally speaking, treaties are only binding on the states that have signed and ratified them. Two or more states negotiate on a treaty; ratifying them means that they accept that they are legally bound to adhere to its contents. Compared to law based on customs, discussed below, treaties ‘are a more direct and formal method of international law creation’.⁴⁴

1.2.1.1.2 Customary law

Another source comes from customary law and the related concept of Jus Cogens.⁴⁵ Customary law is important in the field of international law, as not all states are bound by treaties.⁴⁶ As the name says, customary law means law based on custom; its legitimacy is derived not from a codification of laws, as is the case with a treaty, but rather on ‘the needs and values of the community’.⁴⁷ A law is ‘customary’ when it fulfils two criteria; first, and logically, states must behave accordingly and second, they must do so because they believe it is law.⁴⁸ The latter requirement is not straightforward; in practice, it can be very difficult to distinguish state behaviour resulting from a legal obligation from behaviour that is the consequence of any other

⁴¹ International Court of Justice – *Statute of the International Court of Justice* on <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> , accessed on 08-07-2013.

⁴² Cassese, 2005, p. 170.

⁴³ Alston and Simma, 1988-1989, p. 82.

⁴⁴ Shaw, 2006, p. 902.

⁴⁵ Cassese, 2005, p. 153.

⁴⁶ Alston and Simma, 1988-1989, p. 82-83.

⁴⁷ Shaw, 2006, p. 73.

⁴⁸ Ibidem, p. 74.

possible motive.

The important question here is: which international human rights laws qualify as customary? The answer to this question is highly significant; as the EU is not a party to many international human rights law treaties, its commitments and obligations have to be derived by and large from customary law. Although it is difficult to strictly identify customary law, it is now ‘agreed that it does include a substantial body of rights, and most probably the entire UDHR’.⁴⁹

The opinion of the ICJ in this matter is vital. In the benchmark *North Sea Continental Shelf case [1968]*, the Court ruled that ‘before a conventional rule can be considered to have become a general rule of international law, it might be that, (...), a very widespread and representative participation in the convention might suffice of itself’.⁵⁰ So, when it comes to international human rights law applicable to EU practice, one may conclude that a treaty with a very widespread ratification and implementation worldwide is applicable to the EU as well, even when the Union is not a party to that treaty in itself. Although it is possible to be a ‘persistent objector’ to a rule of customary law, and as such to claim that it is not applicable, this ‘applies only when the customary rule is in the process of emerging’.⁵¹ It would not be hard to argue that rules prohibiting forced labour and child labour are not ‘in the process of emerging’, but it would not be necessary. As the EU itself has issued very strict rules against child labour and forced labour, it would be senseless to claim that it is a persistent objector to these prohibitions.

Jus Cogens, or a peremptory norm, is related to customary law, although it is in fact easier to grasp. A rule is Jus Cogens if it is universal and non-derogable. It is different from customary law because its standards are not set by states, although it is not entirely

⁴⁹ OHCHR, *The European Union and international human rights law*. Publication of the UN Office of the High Commissioner for Human Rights, Regional Office for Europe. Available at http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf, accessed on 06-07-2013, p. 23; Alston and Simma, 1988-1989, p. 90.

⁵⁰ North Sea Continental Shelf Case (ICJ, 1968), paragraph 73.

⁵¹ Bradley and Mitu Gulati, 2010, p. 205.

clear by what they are set instead. The prohibition on committing genocide is a proper example of a Jus Cogens norm. This is universally accepted; however that is not to say that, if a large number of states resort to committing genocide, it becomes acceptable. Therefore, Jus Cogens norms are considered to be non-negotiable. Examples of Jus Cogens norms are the aforementioned prohibition on genocide, slavery, torture and, important for this thesis, forced labour.

Furthermore, general principles and other sources can theoretically be used as to complete the international law framework. Law derived from treaties and from custom however is clearly superior to these sources.

1.2.1.2 International organisations under international law

As discussed before, international law regulates relations between states rather than between individuals. Nevertheless, apart from states, also non-state actors such as International Organisations are part of the international legal order. These non-state actors have ‘increasingly been seen as endowed with international legal personality’.⁵² This is particularly relevant for the European Union, as article 47 of the Treaty on European Union clearly states that ‘the Union shall have legal personality’. Although the EU cannot be seen as a State in the narrow sense of the word, it does possess some of the characteristics of a State. The possession of a legal personality means that the EU can enter into treaties. On the other hand, the institutional make-up of the EU does not provide for a centralised government; the European Commission may have a similar function, but significant power lies with the inter-governmental European Council. The EU can therefore be said to be a hybrid of an International Organisation and a State; any currently existing similar entities do not exist. The question is therefore highly relevant who exactly is responsible for what; is it the EU as a legal entity or are the individual Member States still in charge? Since this is a fundamental question to be addressed to decide who bears responsibility for actions of the EU abroad, this question is critical and will receive significant attention later on.

⁵² Megret, 2012, p. 66.

The recognition of a legal personality has noteworthy consequences. ‘Responsibility is a necessary consequence of international personality and the resulting possession of international rights and duties. Such rights may flow from treaties, (...), or from the principles of customary international law’.⁵³ Hence, International Organisations have already been recognised as possible violators of international customary law, such as crimes against humanity.⁵⁴

This view is reinforced by a recent report of the UN’s International Law Commission, drafted by Special Rapporteur Giorgio Gaja. The report states that it is not just the fact that an International Organisation is in the possession of a legal personality which can make it to be held responsible for violations of international law. The report adds as a second condition that ‘in the exercise of the relevant functions the organization may be considered as a separate entity from its members and that thus the exercise of these functions may be attributed to the organization itself’.⁵⁵ The EU obviously fulfils this criterion, as it has the exclusive competence to draft and enforce legislation in several areas.

1.2.2 Human rights obligations of International Organisations

Clapham identifies three approaches to analyse the human rights obligations of International Organisations.⁵⁶ The first approach is a traditional way of looking at international law. In this view, states are the only entities which could be held responsible for violations of human rights treaties. It is the state that should ensure its subjects protection against the violation of applicable human rights treaties. In this way, it is reasoned, existing human rights law should suffice in protecting subjects against any violations. Therefore it is the state that should protect its subjects against human rights violations committed by non-state actors. It should be obvious that this does not

⁵³ Shaw, 2006, p. 1311.

⁵⁴ Clapham, 2006, p. 30.

⁵⁵ Gaja, 2003, p. 15.

⁵⁶ Clapham, 2006, p. 25-29.

leave a great deal of responsibility within the hands of those non-state actors.

The second approach sees the nation-state as an increasingly irrelevant actor in a globalising world. Instead, the focus should shift to the responsibilities of international actors such as global institutions, trans-national corporations and international organisations. Central to this approach is the idea that ‘in a globalized economy, the trading which accompanies economic exploitation or civil wars is no longer in the hands of governments’.⁵⁷ Perhaps this could be rephrased to ‘no longer *exclusively* in the hands of governments’, yet the idea is clear: Although governments as signatories to the treaties are the principle protectors of human rights, there are numerous cases in which they simply are not capable of fulfilling this obligation. As will turn out later in this thesis, this is particularly apparent in the case of membership of an International Organisation. As it is difficult to impose legally binding obligations on non-state actors, this approach is of a rather normative nature. An important assumption is that ‘human rights norms have some sort of special status which is legitimized through the accepted law-making process of national and international law’.⁵⁸

The third approach suggests applying norms of international law to non-state actors as well, instead of exclusively focusing on the nation state. The difference with the second approach is that it still sees the nation state as the main actor on the international stage; legal responsibilities of non-state actors should be defined within the existing framework. Although some authors point out that it is difficult to keep International Organisations accountable for violations of human rights, Kälin and Künzli make an exception for the EU.⁵⁹ They point to the fact that in the Regina v Kirk case [1984], the Court of Justice of the European Union (CJEU) ruled that legislation to which the EU is not directly bound, but which is shared by the legal systems of all the separate member states, is still applicable to the EU.⁶⁰

⁵⁷ Clapham, 2006, p. 26.

⁵⁸ Ibidem.

⁵⁹ Kälin and Künzli, 2009, p. 86: footnote.

⁶⁰ Regina v. Kent Kirk, case 63/83 (CJEU, 1984).

Although Kälin and Künzli are sceptical about the possibilities to apply human rights law to International Organisations, they see a tendency to increase the scope of human rights law. Jus Cogens, discussed before, is considered to apply to any international actor. The scope could very well be widened to include customary international law. Although most international organisations have thus far failed to set up a system to check whether they comply with international law, Kälin and Künzli see the EU as one of the few exceptions to this situation.⁶¹

1.2.2.1 Which obligations?

Modern human rights discourse holds that there are two types of obligations; negative and positive.⁶² A negative obligation is to respect human rights. This means that parties refrain from interfering with these rights. Positive obligations can be divided in two categories: an obligation to protect human rights and an obligation to fulfil human rights. They are positive because they need action to be fulfilled. It is difficult to apply these concepts to the EU and its legal obligations under international law. Generally, the obligation to respect, protect and fulfil human rights is valid only within the jurisdiction of any party. So, to refer to the disaster in Dhaka, Bangladesh, legally it was the responsibility of the government of Bangladesh to protect the workers in the collapsed factory against exploitation.

The relatively new concept of extra-territorial obligations would in this case make no difference. Even although in the Maastricht Principles on Extra-Territorial Obligations it is made very clear that states do not only have obligations within their jurisdiction, but also externally, there would be no direct obligations for the EU.⁶³ After all, trans-national companies import the products into the EU. It can therefore hardly be said that the EU exerts ‘authority or effective control’ (art. 9(a)) over production facilities

⁶¹ Kälin and Künzli, 2009, p. 87-89.

⁶² Ibidem, p. 97.

⁶³ Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights [2012]. Available at http://www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf, accessed on 08-07-2013.

abroad. On the other hand, the aforementioned principles also apply to situations ‘over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory’ (art. 9(b)), which is also applicable to international organisations (art. 16). One could argue that it is an omission of the EU to not implement regulations which prevent the imports of unfairly produced goods into the EU, thereby violating the enjoyment of rights abroad.

This reasoning is too farfetched for the following reason. The concept of extra-territoriality is thus far rather soft law than hard law; there are no State signatories. The Maastricht Principles are indeed principles and not law. They are signed by academics and other experts in the field, and not by states. In other words, it is literally impossible to hold anyone accountable to them.

At the same time there are plenty of relatively forceful arguments to make the European Union accountable to human rights violations abroad. As Clapham formulates it, ‘one might assume that the starting point should be that an organization such as the [European] Community must be bound by the same human rights obligations to which it appeals with regard to its own identity and in its external relations’.⁶⁴ The EU cannot prohibit child labour and forced labour within its territory, urge its trading partners to do the same but simultaneously keep those practices intact because the products involved are imported to the EU in high quantities.

This is just the theory outlining the possibilities of keeping International Organisations responsible for human rights violations under international law. The second part of this chapter will identify relevant law which is applicable to the European Union. First another important matter has to be resolved; what is the relationship between the international organisation and its members? How should be identified who exactly is responsible for potential violations of human rights?

⁶⁴ Clapham, 2006, p. 178.

1.2.2.2 Enforcement of international law

A strict enforcement of international law is difficult if not impossible. This is related to the idea of state sovereignty; if sovereignty means that there is no authority higher than the state, this presents the desire for enforcement of international rules with an obvious problem.⁶⁵ Hence, the observation of Jack Donnelly in Alston and Simma that ‘the international human rights regime is extremely weak on what a lawyer would consider enforcement or remedies’ seems as applicable today as it was when he wrote those words down, almost 30 years ago.⁶⁶

Yet, this weakness does not change anything about the fact that treaties are legally binding, regardless the limited possibilities of enforcing them. As one of the fundamental concepts of international law, the idea of *pacta sunt servanda* stipulates that treaties are binding and shall be carried out in good faith.⁶⁷ Furthermore, ‘a non-state actor (...) can still be the bearer of international duties outside the context of international courts and tribunals’.⁶⁸ Nevertheless, there is a range of possibilities to resort to when a state (or another party) feels violated in its rights. These possibilities will be discussed for international trade law and international human rights law only.

The most authoritative judicial body on international law is the ICJ.⁶⁹ It is established by the UN Charter and consequentially, all UN members are subjected to it (art. 1).⁷⁰ It has the jurisdiction to adjudicate all legal disputes concerning the interpretation of treaties, questions of international law, questions of international obligations and the allocation of remedies (art. 36). Its decisions can be enforced by the UN Security Council and as such, are in theory relatively strong. However, the famous *Nicaragua v.*

⁶⁵ Goldsmith and Levinson, 2009, p. 1793.

⁶⁶ Donnelly in Alston and Simma, 1988-1989, p. 83-84.

⁶⁷ Shaw, 2006, p. 903.

⁶⁸ Clapham, 2006, p. 31.

⁶⁹ Shaw, 2006, p. 1065.

⁷⁰ United Nations – Charter of the United Nations [1945]. Available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>, accessed on 08-07-2013.

United States case [1984] shows the limitedness of its enforcing powers.⁷¹ In this case, the Soviet backed government of Nicaragua accused the United States, and more in particular the CIA, of supporting a rebel movement which aimed at overthrowing the regime. Nicaragua decided to bring the case to the ICJ. The ICJ ruled in favour of Nicaragua and judged that the United States had to pay reparations to the Central American country. To summarise; the United States refused to comply with the ruling, denied that the ICJ had jurisdiction to adjudicate the case and blocked attempts of the UN Security Council, in which it had the power of veto, to force the United States to comply.⁷² Since the United Kingdom and France are both members of the EU and members of the UN Security Council, this seems a relevant danger. However, even in theory this situation could not occur since only states can stand in front of the Court; consequentially, an entity such as the EU can only request, or be requested upon, an advisory opinion.

When it comes to human rights law, claimants have several options to seek for remedies of violations of treaties. This depends on the treaty and on the procedures of the authoritative bodies. The UN system provides several examples. The Human Rights Council, for example, has a complaints procedure, of which individuals, groups and non-governmental organisations can make use. Furthermore, the Human Rights Council produces the Universal Periodic Review, an elaborate report on the human rights situation in all UN member states. Its power is normative; if a state chooses to ignore recommendations, there are no direct consequences. As a non-member of the UN, the EU cannot be subjected to such procedures.

When it comes to the enforcement of international trade law, the World Trade Organisation is the single most authoritative body. It currently has 159 members and 25 observers, together making up a large majority of nations in the world. Its most important aim is to promote free trade. This is to be achieved mainly through the so-called Most Favoured Nation concept; the lowest tariff regime for any member of the

⁷¹ Nicaragua v. United States of America (ICJ, 1984).

⁷² Posner, 2004, p. 9.

WTO is automatically applicable to all other WTO members as well.

When a member state fails to comply with WTO rules, it can enforce them using the dispute settlement system. This dispute settlement system ‘can be triggered easily and quickly’ and has a wide jurisdiction,⁷³ although small and developing countries may have problems utilizing it.⁷⁴ The ‘Understanding on rules and procedures governing the settlement of disputes’ formulates the procedures.⁷⁵ When a member state feels violated in its rights, it can bring the case to the dispute settlement system. If the dispute settlement body finds a violation, the defendant state should comply with the rules it has violated ‘within a reasonable time’ (art. 21(3)). If it fails to do so, the two parties, defendant and complainant, can agree on compensation for the complainant (art. 22(2)). When this fails as well, the defendant may be suspended from the treaty it violated; this may equal suspension of its WTO membership (art. 22(2)). Generally however the recommendations of the WTO Dispute Settlement Body (DSB) are implemented.⁷⁶

To link these findings to the thesis, it is important to repeat that it is generally difficult to enforce human rights law. This counts for the European Union in particular, since it is not even an official party to the vast majority of human rights treaties. Even when certain human rights law has entered the realm of customary law, it should be obvious that this complicates attempts to make the EU comply with human rights law, should that be necessary. For international trade law this is somewhat different, not in the least because the EU is an official WTO member. The EU has stood in front of the dispute settlement body frequently, both as a complainant as well as defendant and as a third party.⁷⁷

1.2.2.3 Conflict of competencies

⁷³ Marceau in Abbott, Breining Kaufmann and Cottier, 2009, p. 184.

⁷⁴ Bown, 2005, p. 287.

⁷⁵ World Trade Organization, ‘Understanding of rules and procedures governing the settlement of disputes’ on http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf, accessed on 08-07-2013.

⁷⁶ Fukunaga, 2006, p. 385.

⁷⁷ World Trade Organization, ‘Dispute settlement: the disputes. Disputes by country/territory’ on http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm, accessed on 08-07-2013.

When member-states of international organisations hand over competencies to the international organisation concerned, it is difficult to hold them accountable if they act as a result of that membership. This leads to a dilemma; what if a state is party to a treaty, but the international organisation of which it is a member is not? Should the state adhere to the treaties it is a party to as a state or should it act in accordance with the policies of the international organisation, which may very well lead to actions contrary to that treaty?

Concerns about the possibility of a conflict of competencies between different actors are neither new nor theoretical. As early as 1963, UN special rapporteur Abdullah El-Erian concluded in a special report that “the continuous increase of the scope of activities of international organizations [was] likely to give new dimensions to the problem of responsibility of international organizations”.⁷⁸ And indeed, in several cases states risked not being able to fulfil their obligations under international human rights treaties as a result of their membership of an international organisation. Related to this is the risk that states use an International Organisation as an excuse to violate obligations under a human rights treaty.

This risk will be illustrated with two examples from the ECtHR. The first one is the *M.S.S. v Belgium and Greece case* [2011].⁷⁹ M.S.S. was an asylum seeker from Afghanistan who fled to Greece in 2008. After having been detained and registered in Greece, he travelled to Belgium to apply for asylum there, as he had had positive encounters with Belgian NATO soldiers in Kabul combined with the bad reputation of Greek asylum procedures. However, under Regulation 343/2003 of the European Commission⁸⁰, regulating which Member State of the EU bears responsibility for examining an asylum application, M.S.S. was forced to return to Greece to file his

⁷⁸ Gaja, 2003, p. 2.

⁷⁹ *M.S.S. v. Belgium and Greece*, application no. 30696/09 (ECtHR, 2011).

⁸⁰ European Union – Council Regulation (EC) No 343/2003 (18 February 2003). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF>, accessed on 08-07-2013.

application for asylum with the Greek authorities. In Greece, M.S.S. was subjected to ill-treatment, being detained in a very small room, being fed insufficiently, being beaten, being refused to leave his cell and having insufficient sanitary facilities. The ECtHR ruled that, as the Belgian authorities should have been aware of the degrading circumstances under which asylum seekers in Greece are detained and treated, among others, the Belgian authorities had violated article 13 in conjunction with article 3 (on inhuman and degrading treatment) of the European Convention on Human Rights (ECHR).

The M.S.S. case is an excellent example of a Member State of an International Organisation (which in this case was the EU) trying to use that membership as an excuse for not being able to fulfil its obligations under human rights law.

A second example which is relevant in this respect is the *Bosphorus v Ireland case* [2005].⁸¹ In this case, a Turkish company named Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (“Bosphorus”) filed a complaint at the European Court of Human Rights against the Republic of Ireland. Bosphorus, a small tourist air company, had hired two airplanes from JAT, the Yugoslavian national air company, in 1992. As a consequence of a UN Security Council resolution following the war in Yugoslavia, the European Commission issued Regulation 990/93.⁸² This Regulation ordered that, among others, all aircraft in possession of a person or an undertaking in or operating from Yugoslavia had to be impounded. This included those aircraft that had been rented out to other, even non-Yugoslavian companies, of which Bosphorus was one.

As one of the aircraft hired by Bosphorus was at that time in Dublin for maintenance carried out by Aer Lingus, the Irish government ordered the aircraft to be impounded by EC legislation. As a result, Bosphorus lost three out of its four-year rental deal, leading to significant losses for the small company. As the CJEU ruled that the acquisition of

⁸¹ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, application no. 45036/98 (ECtHR, 2005).

⁸² European Union - Council Regulation (EEC) No 990/93 (26 April 1993). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993R0990:EN:PDF>, accessed on 08-07-2013.

the aircraft was lawful, Bosphorus decided to step to the ECtHR to ask for a remedy. Bosphorus claimed a violation of article 1 of Protocol 1 of the ECHR on the Right to Property. The judgment of the Court turned out to be a landmark decision. Although the Court ruled that, in this particular case, the acquisition of the aircraft was not contrary to ECHR law, the following provisions, worth copying in their entirety, are extremely important:

“(…), the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation“.⁸³

So, in principle, if a State implements certain regulations as a direct consequence of its membership of an International Organisation, this is not considered to be contrary to ECHR law. However,

“(…), any such presumption can be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the Convention's role as a “constitutional instrument of European public order” in the field of human rights”.⁸⁴

The importance of this provision can hardly be overemphasized. The ECtHR has made it very clear in this ruling that Member States of International Organisations can not hide behind their membership as an excuse for the violation of human rights under the ECHR. In a situation where protection of human rights has been ‘manifestly deficient’, the Member State is responsible for guaranteeing a proper protection of human rights. Even when implementing lawful regulations of international organisations, the ECHR has to be respected.

⁸³ Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, application no. 45036/98 (ECtHR, 2005), paragraph 156.

⁸⁴ Ibidem, paragraph 156.

1.2.2.3.1 Conflict of competences in an EU context

In the specific case of the EU, the situation is particularly delicate. As the position of the EU regarding human rights law is at the core of this thesis, this topic needs to be analysed in more detail. Sometimes, it is not clear whether it is the EU or a Member State which is competent to legislate and thus, who can be held responsible for potential violations of human rights treaties. As the EU has both legislative as well as executive powers, a human rights violation as a direct consequence of EU action is not just hypothetical.⁸⁵ Three scenarios are possible; one in which it is the member state which bears responsibility, one in which the competences are shared, and a third one in which it is the EU which has an exclusive competence to act.

In the first scenario, no problems should occur. The member state is exclusively responsible for its own actions, including actions which may be seen as violations of treaties to which it is a party. As the European Union has no competence to legislate, there is no interference of EU law. Consequently, any violation of a human rights treaty resulting from national law of a member state of the EU which is also a party to the ECHR (i.e. all Member States), is the sole responsibility of that member state. Examples of areas in which Member States have exclusive competence are tourism, industry, culture, education and health care.

The second scenario is trickier; if both the EU as well as the member states can legislate, who exactly is responsible for violations of human rights treaties? It is not unimaginable that, in a situation in which the ECtHR rules that the ECHR has been violated, the EU and the concerned Member State blame each other for the violation. Even the other way around is imaginable; both claiming to be responsible, as this would amount to an accumulation of competences. In theory, this could lead to a very dangerous situation, potentially undermining either the autonomy of the EU or the sovereignty of the Member States. Understandably, the CJEU wants to do anything within its powers to prevent that a non-EU court (such as the ECtHR) rules on who is

⁸⁵ Costello, 2006, p. 88.

competent of what within the EU.⁸⁶ How is this ‘constitutional issue of extreme sensitivity’⁸⁷ to be resolved? As it will turn out, in the same way as how problems relating to the third scenario should be resolved. Examples of areas in which the EU and the Member States have a shared competence to legislate are agriculture, transport, the environment and social policies as defined by the treaties.

In the third scenario, it is the EU who has the exclusive competence to legislate. As the EU is not a party to the ECHR, this leads to the strange situation in which a transfer of competences from Member States to the EU, or in other words, European integration, leads to a situation in which an individual who had the possibility to go to the Court in Strasbourg in case of a violation of the ECHR, is deprived of that possibility as the Member State is no longer responsible for the legislation.⁸⁸ Although the previously described Bosphorus case has shown that in case of a ‘manifestly deficient’ protection of human rights, the ECHR prevails over EU law, this is an undesirable situation. Areas in which the EU has an exclusive competence to act are, among others, the establishment of a customs union, external trade policy and monetary policy. Obviously, the fact that the EU is exclusively responsible for external trade policy is highly important in the context of this thesis.

Several solutions have been suggested to solve these problems. The first was the incorporation of the European Charter of Fundamental Rights (“EU Charter”) in EU law.⁸⁹ The EU Charter was a response to the important *Solange case [1970]*, in which the German Constitutional Court ruled that it would adjudicate EU law on its compatibility with human rights standards as long as (which in German is ‘Solange’, hence the nickname) the EU did not have its own human rights treaty.⁹⁰ In the *Solange II case [1986]*, the German Constitutional Court reformulated this to mean that as long

⁸⁶ Jacqu , 2011, p. 1012.

⁸⁷ Ibidem.

⁸⁸ Ibidem, p. 1000-1001.

⁸⁹ European Union – Charter of Fundamental Rights of the European Union [2000: 2009]. Available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed on 08-07-2013.

⁹⁰ Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle f r Getreide und Futtermittel, case 11-70 (CJEU, 1970).

as the EU would protect fundamental rights, it would no longer adjudicate its law; however it reserved the right to do so.⁹¹ The aforementioned Bosphorus case followed a similar line of reasoning.⁹² To assure that EU law would respect fundamental human rights, the European Council decided that it would adopt a European Charter of Fundamental Rights, which it did in 2000.

It was only after the coming into effect of the Lisbon Treaty in 2009 that the EU Charter became legally enforceable.⁹³ It is applicable not only to EU institutions but also to the Member States, but only when they are implementing EU law. In this way, national law would be human rights-proof through the separate membership of EU member states of the ECHR, while EU law, both when competences are shared and exclusively EU, is protected through the EU Charter. Hence, the ‘vacuum’ in which the EU operated regarding the protection of human rights would be filled.

A problem related to this, however, is that it is an EU institution (the CJEU) judging an EU Charter. Since EU law has to be approved by the Court in Luxembourg before it can be implemented by the Member States anyway, it is almost impossible that the same Court will ever find a violation of it. After all, it would be paradoxical if the Court would find no inconsistencies between EU law and the EU Charter at the time of implementation, but would do so once that very same EU law has been challenged by an individual before the very same Court. Since the EU is not a member of the Council of Europe, individuals would be deprived of the possibility to go to the ECtHR in Strasbourg when a violation of human rights as a consequence of EU law is involved.

The second proposed solution, accession of the EU to the ECHR, is to resolve that. Not only is this accession an objective of the EU; the Union is legally obliged to. Art. 6(2) of the Treaty on the European Union explicitly states that ‘the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental

⁹¹ Wünsche Handelsgesellschaft GmbH & Co. V. Federal Republic of Germany, case 69/85 (CJEU, 1986).

⁹² Piris, 2010, p. 146-147.

⁹³ Morano-Foadi and Andreadakis, 2011, p. 596.

Freedoms’.⁹⁴ This measure will subject actions and legislation of the EU to external control by the ECtHR, besides the currently existing internal control by the CJEU.⁹⁵ Legal consequences will be discussed later on in the chapter, when the legal obligations to which the EU should adhere are outlined.

1.3 The legal framework

On the previous pages, the responsibilities of the EU under international law have been explained. From which legal documents can these responsibilities be derived? As pointed out previously, there is not a single or overarching body of international law that is applicable in any given situation. One is therefore ‘faced with the problem of discovering where the law is to be found and how one can tell whether a particular proposition amounts to a legal rule’.⁹⁶ Here will follow an oversight of the most important and most relevant human rights law for the identification of the responsibilities of the European Union.

As this thesis aims at unfair working conditions, the most important relevant law with regards to either child labour or forced labour has been identified.

Charter of Fundamental Rights of the European Union [2009]⁹⁷

The Charter was signed in 2000 and entered into force together with the entry into force of the Lisbon Treaty in 2009.

Article 5 – Prohibition of slavery and forced labour

5(2) - “No one shall be required to perform forced or compulsory labour.”

⁹⁴ European Union - Treaty on European Union [1992: 1993]. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF>, accessed on 08-07-2013.

⁹⁵ Costello, 2006, p. 88.

⁹⁶ Shaw, 2006, p. 70.

⁹⁷ European Union – Charter of Fundamental Rights of the European Union [2000: 2009]. Available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed on 08-07-2013.

Article 24 - The rights of the child

12(1) - “Children shall have the right to such protection and care as is necessary for their well-being. (...)”.

12(2) - “In all actions relating to children, whether taken by public authorities or private institutions, the child’s best interests must be a primary consideration”.

Article 31 - Fair and just working conditions

31(1) - “Every worker has the right to working conditions which respect his or her health, safety and dignity”.

Article 32 - Prohibition of child labour and protection of young people at work

“The employment of children is prohibited. The minimum age of admission to employment may not be lower than the minimum school-leaving age, without prejudice to such rules as may be more favourable to young people and except for limited derogations.

Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education”.

United Nations Convention on the Rights of the Child [1989]⁹⁸

Article 32

“1. States Parties recognize the right of the child to be protected from economic

⁹⁸ United Nations – Convention on the Rights of the Child [1989: 1990]. Available at <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> , accessed on 08-07-2013.

exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.”

International Covenant on Economic, Social and Cultural Rights [1966]⁹⁹

Article 7

“The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

⁹⁹ United Nations – International Covenant on Economic, Social and Cultural Rights [1966: 1976]. Available at <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> , accessed on 08-07-2013.

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays”.

Article 10

10(3) - “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law”.

International Labour Organisation Declaration on Fundamental Principles and Rights at Work [1998]¹⁰⁰

Article 2

[The International Labour Conference]:

Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;

¹⁰⁰ International Labour Organization – Declaration on Fundamental Principles and Rights at Work [1998]. Available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO , accessed on 08-07-2013.

- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

World Trade Organisation: General Agreement on Tariffs and Trade (GATT) [1947]¹⁰¹

Article XX - General exceptions

“Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;”
- (...)
- (e) relating to the products of prison labour;

Although some have seen the explicit reference to prison labour in GATT Article XX(e) as proof that other methods of production are not covered by the exemptions under this provision, this view is now by and large abandoned; as the WTO has to take into account international customary human rights law, of which the ILO fundamental labour principles are considered to be part, labour rights do fall within the scope of Article XX(a).¹⁰² Similarly, Howse concludes that GATT Article XX(a) ‘might be invoked to justify trade sanctions against products that involve the use of child labor or the denial of workers' basic rights’.¹⁰³

¹⁰¹ World Trade Organization – General Agreement on Trade and Tariffs [1947: 1948]. Available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf, accessed on 08-07-2013.

¹⁰² Breining-Kaufmann, 2009, p. 145.

¹⁰³ Howse, 1999, p. 143.

A similar argumentation is valid for Article XX(b), which Kaufmann sees as more relevant regarding child labour; she says that ‘intolerable forms of exploitative child labour that put children’s health at risk fit within the exception of Article XX(b)’.¹⁰⁴ An important justification is that, since the UN Convention on the Rights of the Child has been signed and ratified so widely that it has become customary law, sanctions against countries exporting products made with child labour ‘would not involve a change in the official policy of other contracting parties’.¹⁰⁵ Forced labour is also included in its scope, as ‘health risks are obviously involved in the context of forced labour’.¹⁰⁶

This is a non-exhaustive oversight of the obligations of the European Union under international law in the context of the global protection of human rights, with child labour and forced labour in particular. It has been established that there is a strong legal basis to hold the European Union responsible for violations of labour rights abroad which can be linked directly to imports to the EU. It is important to make clear that being responsible is not the same as being accountable; it is unlikely that the EU can ever be brought to a Court with an accusation of a violation of fundamental labour rights.

However, the previous pages have shown that the EU cannot simply hide behind the two conventional arguments against imposing an import prohibition, firstly that it is the responsibility of the state where the production facilities are located to protect their citizens against abuse, and secondly that it is the responsibility of the trans-national corporations to make sure that their suppliers respect fundamental human rights. Although the previous statements are definitely valid as well, the EU should act in a stronger way than it has done so until now.

The next chapter will make a start with sorting out which possibilities the EU has at its disposal to do so. This will be done through an assessment of its relations with and policies of the two most important institutions on this matter; the World Trade

¹⁰⁴ Breining-Kaufmann, 2009, p. 147.

¹⁰⁵ Ibidem.

¹⁰⁶ Ibidem.

Organization and the International Labour Organization.

Chapter 2: International trade and human rights: The WTO, the ILO and the EU

This thesis investigates the possibility for the EU to prohibit imports of goods produced with child labour and forced labour. Whenever one speaks about international trade, the WTO is the single most important organisation to take into account. In the context of a possible prohibition of imports in particular, the rules and regulations of this organisation cannot possibly be ignored.

By and large absent in the days of GATT, the set of trade rules which now comprises a fundamental part of the ‘constitution’ of the WTO, the establishment of the latter in 1994 paved the way for a new area of scholarly research; the relationship between international trade rules and human rights.¹⁰⁷ This research has been put on the agenda mainly by NGOs. The general thrust of the discourse can be summarised without complexity; the accusation is that ‘trade regulation impairs the advancement of human rights’.¹⁰⁸

This chapter will discuss how the liberalisation of international trade can lead, and has led, to human rights violations. As the main protagonist of trade liberalisation, the policies of the WTO will be scrutinised critically. Regarding the protection against child labour and forced labour, the ILO provides a counter balance against the policies pursued by the WTO. To complete the triangle, both these international institutions’ policies will be taken into account with regards to the EU. The questions to be answered are therefore the following. What exactly are the consequences of the trade liberalisation discourse of the WTO on the protection of human rights worldwide? How does the EU combine its dedication to trade liberalisation on the one hand with its self-proclaimed role as global protector of human rights on the other? What are the possibilities for the EU to impose trade sanctions on its trading partners when they commit apparent violations of human rights? The chapter will end with an assessment

¹⁰⁷ Cottier, 2002, p. 100.

¹⁰⁸ Ibidem, p. 111.

of the EU's approach towards Myanmar. This country has severely violated a range of human rights for decades, leading to trade sanctions by among others the EU. As will be demonstrated, these sanctions are allowed under WTO rules, making a strong case for further measures against human rights violators.

2.1 International trade and human rights

Although ideally the obligations under different treaties, both in the areas of labour rights and international trade law, complement each other, in practice they are rather conflicting.¹⁰⁹ Indeed, there is evidence that 'promoting trade liberalization and protecting producers' interests in the context of an increasingly globalized economy may conflict with social policies such as labor standards (...)'.¹¹⁰ The reason is simple; a utilitarian approach to trade involves the maximisation of profits, and one of the ways to achieve this is by lowering labour standards. This has been referred to as a 'race to the bottom'¹¹¹; an attempt to win competition by reducing production costs. It is apparent that trade liberalisation fosters this process; trade liberalisation leads to a greater exposure to competition and thus to an ever stronger desire to lower production costs. The collapse of the poorly constructed garments factory in Bangladesh is just one of many sad consequences of the desire to lower production costs.

On the other hand, it has been argued that 'a more open trading system generally tends to promote most of the concerns that come under the rubric of human rights'.¹¹² This hypothesis, however, is built on the following assumptions from which not necessarily the same conclusions have to be derived; the first is that 'trade liberalization raises living standards in the aggregate'¹¹³ and the second is that 'wealthier societies will tend to expend more resources (proportionally) on the creation and protection of human rights'.¹¹⁴ Although it is not exceptional to see a positive correlation between trade

¹⁰⁹ Breining-Kaufmann, 2007, p. 87.

¹¹⁰ Abbott, Breining-Kaufmann and Cottier, 2009, p. 4.

¹¹¹ Breining-Kaufmann, 2007, p. 88.

¹¹² Sykes in Abbott, Breining-Kaufmann and Cottier, 2009, p. 70.

¹¹³ Ibidem.

¹¹⁴ Ibidem, p. 71.

openness and economic growth,¹¹⁵ this assumption has been strongly challenged.¹¹⁶ Furthermore, there is a long way to go from economic growth to welfare growth. A second proposition is based on the human rights situation in ‘more developed nations’,¹¹⁷ however one could conclude the exact opposite by pointing at wealthy but restrictive nations such as Singapore and several Arab nations. Indeed, when it comes to social and economic rights, the United States and several other ‘developed nations’ provide examples where a higher average income did not lead to a proper protection of social rights. As mainly neo-liberal authors almost exclusively focus on civil and political rights, the proposition that trade openness automatically leads to a better record on human rights, and on labour rights in particular, is at least doubtful.

The direct influence of international trade on child labour and forced labour and the contribution of the latter to the former has already been discussed briefly in chapter one, so the most important issues at stake will just be repeated quickly here. It has been argued that globalisation can contribute to the prevalence of child labour and forced labour as it reinforces the quest for cheap labour. On the other hand, trade has the potential to raise family incomes, and as such lowering the use of child labour; evidence of this interplay between trade and child labour has been found in for example Vietnam.¹¹⁸ The same study, however, saw the opposite development in Nicaragua, where the benefits of trade failed to trickle down to the actual labourers and thus resulted in a rise in child labour. However, it has to be borne in mind that the most important issue in this thesis is not to come to a verdict whether international trade does or does not stimulate the prevalence of child labour and forced labour; it is to answer the question whether it is possible for the EU to prohibit products that are made with it.

A major problem when addressing human rights in the context of international trade is the ‘institutional segregation’ of the two areas in focus.¹¹⁹ Whereas the field of human

¹¹⁵ Irwin, 2009, 52-54; Winters, 2004, F4.

¹¹⁶ Chang, 2003, p. 1.

¹¹⁷ Sykes in Abbott, Breining-Kaufmann and Cottier, 2009, p. 71.

¹¹⁸ Edmonds and Pavcnik, 2005, p. 213.

¹¹⁹ Cottier, 2002, p. 112.

rights is covered mainly by institutions of the UN on a global level and by governments on a national level, international trade is regulated through the WTO. Those two systems were, at least until very recently, almost completely segregated. The UN system of human rights did not concern itself with trade, and the WTO was blind to human rights, leaving those to the discretion of its member states.

2.1.1 The WTO and human rights

The World Trade Organisation is the cornerstone of the international trade framework. It was established in 1995, although the document which it is based on, the GATT, was negotiated in 1948. Its main functions are the agreement of trade negotiations, overseeing the implementation of these and to settle disputes between member states.¹²⁰ Importantly, its major aim is the global reduction of barriers to trade, and as such it is dedicated to trade liberalisation. Its most important tools are a prohibition on discrimination between trade partners and the so-called Most Favoured Nation (MFN) principle. The latter means that every member of the WTO is obliged to impose the lowest tariff regime to all other members of the WTO. As a result, WTO members face difficulties when they want to raise tariffs, for example to protect infant industries. With its current 159 members, including all the major economies, it can be said to cover a substantial part of global trade.

Despite widespread membership, it can hardly be said to be a very popular player on the international stage; Clapham's finding that there is 'a perception among some that the WTO represents a serious threat to the enjoyment of human rights' is an evident understatement.¹²¹ Indeed, international trade can have a profound effect on living standards of ordinary citizens. In this respect one could think of the practice of dumping, patents on medicines, imports of goods which directly affect public health, environmental issues and, indeed, labour standards.¹²² The latter is being captured in the

¹²⁰ World Trade Organization, 'Understanding the WTO' on http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm, accessed on 08-07-2013.

¹²¹ Clapham, 2006, p. 162.

¹²² Ibidem.

concept of social dumping, discussed previously in this thesis. Furthermore, more indirectly, the lowering of tariffs can lead to the destruction of local economies and consequently lead to unemployment and all the negative consequences associated with it.

Sykes breaks the vast criticism on the WTO down to three broad streams.¹²³ The first one focuses on the decreased ability to keep members of the WTO accountable for human rights violations and punishable with sanctions once they are member. This would be the case mainly because of the aforementioned MFN clause, which in principle does not allow for arbitrary discrimination. The second stream is related to the concept of social dumping and the ‘race to the bottom’. It has already been argued that this was a consequence of trade liberalisation, and since that is exactly what the WTO aims at, this should be repeated here as a direct form of criticism on WTO policies. Thirdly, it is suggested that a liberal trade regime has a negative influence on welfare distribution and thus fosters inequality in society.

The concept of social dumping from a WTO perspective is worth discussing in a little more detail. Contrary to the common perception, the practice of dumping is not prohibited by the WTO, although it is ‘to be condemned if it causes or threatens material injury’ in the territory of any other Member States.¹²⁴ The reason for this is that dumping is done by companies which are outside of WTO jurisdiction. Art. VI of the 1947 GATT therefore rather regulates the accepted behaviour of states who feel that they are the victim of dumping practices by other WTO members instead of regulating the actual practice of dumping itself. Could it be argued that allowing work which is ‘done in iniquitous conditions in order to make products which can be sold at a lower price compared to that which can be required by the observance of the minimum international labour standards’¹²⁵ is a matter of dumping which allows for state action under GATT Art. VI? The answer seems to be straightforward: no. The main reason is

¹²³ Sykes in Abbott, Breining-Kaufmann and Cottier, 2009, p. 69.

¹²⁴ World Trade Organization – General Agreement on Trade and Tariffs [1947: 1948]. Available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf, accessed on 08-07-2013; Art. VI.

¹²⁵ Ndlovu, 2010, p. 31.

that the circumstances under which the WTO allows for action against dumping do not cover the conditions under which the product is produced. Dumping occurs when the price of an export product is lower than the price charged for the like product in the domestic economy. When there is no such domestic ‘like product’ (and thus no like price), dumping occurs when the price of an export product is lower than the price charged for exports of the like product to any third country or when the price charged for the product is less than the cost of production.¹²⁶ The determining factor, in short, is the difference between the production costs and the price for which the product is sold on another market. The fate of the workers producing these goods is irrelevant as a factor in determining whether dumping is being practised or not.

So from a human rights perspective, there are good reasons to put more weight on human rights law in the context of the WTO. This has been stressed by the UN High Commissioner on Human Rights in several reports. In a 2003 special report, the Commissioner made clear that ‘all WTO members have undertaken obligations under international human rights law’ and thus ‘should promote and protect human rights in the processes of negotiating and implementing trade law and policy’.¹²⁷ This is not always straightforward, as international trade aims at competition with ‘winners’ and ‘losers’, whereas the basic principle of human rights law is rather equality and a level playing field.

However, not only from the perspective of the Member States but also from that of the WTO itself human rights law should be respected. The WTO has ‘sufficient international personality to be bound by the international customary law of human rights’.¹²⁸ Furthermore, the WTO DSB has to take into account all relevant international law applicable to the parties who want to settle a dispute.¹²⁹ This means that the WTO DSB cannot simply ignore human rights treaties which are binding to either or both of

¹²⁶ World Trade Organization – General Agreement on Trade and Tariffs [1947: 1948]. Available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf, accessed on 08-07-2013; Art. VI (a-b).

¹²⁷ OHCHR, 2003, p. 4.

¹²⁸ Clapham, 2006, p. 163.

¹²⁹ Petersmann, 2004, p. 608.

the parties; they have to be respected. Importantly, ‘binding’ does in this context not just mean as a signatory to a treaty, of which there are not many in the particular case of the EU, but also under international customary law. It has been suggested that the treaties which are concluded between the two parties in dispute should get particular attention.¹³⁰ In the case of the EU and with regards to the topic of this thesis, this would only make a stronger case as the EU routinely includes human rights provisions in its trade agreements with developing countries. Consequentially, a violation of these provisions by one of the contracting states would make a case for the EU to impose sanctions.

So, theoretically, if there is a direct link between a trade rule and a violation of human rights under one of the applicable treaties, the member state can try to suspend its obligations under WTO rules as long as it is not a disguised measure of protectionism. This could be done under the ‘exemption clause’ in GATT article XX, outlined in chapter one. The problem is that such a case has never been brought to the WTO DSB when it comes to human rights violations, a consequence of which ‘there is some uncertainty over whether the WTO regime allows for states to impose trade sanctions on WTO members in order to enforce or encourage respect for human rights’.¹³¹ As long as this is still the case, there is therefore no reason to assume that the WTO DSB will prohibit trade sanctions based on human rights violations.

2.1.2 Trade sanctions

This thesis aims at investigating whether it is possible for the EU to prohibit imports of goods produced with forced labour or with child labour. This means, in other words, that the EU would seek to impose economic sanctions on those companies who fail to comply with fundamental labour rights and who fail to protect their workers against

¹³⁰ Clapham, 2006, p. 169.

¹³¹ Ibidem, p. 174. See also: World Trade Organization, ‘3rd WTO Ministerial Conference. Top 10 reasons to oppose the World Trade Organization? Criticism, yes... Misinformation, no!’ on http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/03lab_e.htm, accessed on 08-07-2013.

exploitation. Generally, however, economic sanctions have been heavily criticised for their ineffectiveness.

There has been an increase in the use of economic sanctions since the end of the Cold War. Generally, ‘the purpose and emphasis of such sanctions lies in modifying behavior, not in punishment’.¹³² So, sanctions aim at making a country comply with desired behaviour in the future instead of punishing it for a failure to do so in the past. The idea is that the pressure which is brought about by the sanctions on civilians, will lead the civilians in that country to put pressure on their government and demand change. Proponents see them as ‘the liberal alternative to war’; equally forceful, but with less casualties.¹³³ As such, they can be seen as in between soft power, such as political condemnations, and hard power (i.e. force). Theoretically, the UN Charter has given the UN Security Council the exclusive right to decide ‘what measures not involving the use of armed force are to be employed to give effect to its decisions’.¹³⁴ There are, however, numerous examples of sanctions imposed outside the UN system.

In its report on economic sanctions, the UN Economic and Social Council makes a difference between trade sanctions and financial sanctions.¹³⁵ Trade sanctions aim at a restriction of imports and exports and can be directed against a wide range of goods or only against particular products. Financial sanctions aim at blocking the financial assets of the targeted regime, for example by freezing bank accounts abroad and limiting financial flows. Obviously, the type of sanctions under scrutiny here is trade sanctions.

There are several reasons why trade sanctions have often not worked in the past.¹³⁶ Targeted regimes translate the sanctions against the regime in sanctions against the country, as such enhancing support for the regime instead of setting the population up against it. Sanctions can increase the profitability in trade in sanctioned goods on the

¹³² Reinisch, 2001, p. 851.

¹³³ Pape, 1997, p. 90.

¹³⁴ United Nations – Charter of the United Nations [1945]. Available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf>, accessed on 08-07-2013; Art. 41.

¹³⁵ Bossuyt, 2000, p. 5.

¹³⁶ Reinisch, 2001, p. 851-852.

black market, creating very profitable trade opportunities for the country's elites, which often also belong to the ruling class. Furthermore, it is possible that trade sanctions not just put pressure on a population but lead to a humanitarian disaster in itself: indeed, one author described the sanctions against Saddam Hussein's Iraq in the 1990's as a 'genocidal tool', turning the whole country into 'a vast refugee camp, a concentration camp, a nightmare'.¹³⁷

These arguments may not be applicable on the sanctions proposed in the case of the EU. The most important and also most straightforward reason is that the sanctions would not be directed against a country or a regime, as traditional economic sanctions would, but against trans-national companies making use of child labour and forced labour, and then only those among them who export to the EU. Whereas as stated before traditional sanctions aim at putting pressure on a regime through pressure on civilians, this mechanism would put pressure on companies exploiting their employees. Furthermore, the imposition of the sanctions would happen through the WTO and not through the UN. The justification for imposing sanctions would have to be drawn from WTO law as explained previously.

2.1.2 The WTO and the ILO social clause

For some time, there has been a debate on the question whether the WTO should do more to protect human rights, and labour rights in particular, in the international trade framework. One of the main proponents of this approach is the ILO which has created a solid framework of labour rights which have to be respected. It has tried to enforce respect for these rights through amendments in WTO law; this is known as the incorporation of a social clause. On the following pages, a short introduction to what exactly the functions of the ILO are will lead to a discussion of the incorporation of a social clause in WTO trade agreements, which would automatically make those agreements subject to legally enforceable human rights.

¹³⁷ Simons, 1999, p. 169.

2.1.2.1 The International Labour Organization

The International Labour Organisation is a specialised UN agency established in 1919 in Versailles at the end of the First World War. The ILO's fundamental principle is the idea that 'universal and lasting peace can be established only if it is based upon social justice'.¹³⁸ In pursuit of this goal, the ILO has four main objectives: to promote decent working standards, to stimulate decent employment and income, to enhance social protection and to enable a social dialogue.¹³⁹ To do so, the organisation brings together the major stakeholders on labour: governments, employers' organisations and workers' organisations. Membership of the ILO follows from UN membership; any UN member just has to make explicit acceptance of the ILO constitution without further negotiations. As a consequence, practically all UN members except for North-Korea and some microstates are also member of the ILO; currently 185 in total. It therefore can be said that the ILO has a strong mandate to address global labour issues.

Yet, for a long time the ILO was by and large marginalised in the arena of world politics.¹⁴⁰ This is partially the consequence of the fact that the ILO was and still is in a weak position to impose the protection of fundamental labour rights on its members. For this reason, the ILO is sometimes seen as a toothless organisation.¹⁴¹ Therefore, an important and perhaps even decisive moment in the history of the ILO was in June 1998 when the organisation adopted the Declaration on Fundamental Principles and Rights at Work, in which among others the rights prohibiting child labour and forced labour as described in chapter one of this thesis are formulated. Indeed, 'the Declaration makes achievement of compliance with fundamental labor rights an obligation arising from the very status of membership in the ILO', whereas until then this was conditional on the

¹³⁸ International Labour Organization – Constitution of the International Labour Organization and selected texts. Available at <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>, accessed on 08-07-2013; Preamble.

¹³⁹ International Labour Organization, 'Mission and objectives' on <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>, accessed on 08-07-2013.

¹⁴⁰ Blackett, 1999-2000, p. 10.

¹⁴¹ Kabiru Ishola, 2013, p. 19.

signing and ratification of several ILO protocols.¹⁴² The question how to enforce this compliance remained difficult to resolve; the ILO ‘remains tied to state-centric models of the international legal order, in which social progress requires voluntary action by the state’.¹⁴³ As was explained in Chapter one, the possibilities to enforce compliance with international law are usually limited.

Yet, article 33 of the ILO constitution does authorise the ILO to take ‘such action as it may deem wise and expedient’ to ensure compliance with its recommendations after repeated and blatant labour rights violations.¹⁴⁴ This however has only happened once in the history of the ILO; the case of sanctions against the dictatorial regime of Myanmar (Burma) provides a unique and highly important example and will therefore be analysed in detail at the end of this chapter. Nevertheless, the ILO lacks the jurisdiction to adjudicate whether trade sanctions as a consequence of violations of labour rights are in conflict with WTO trade rules. Understandably, the question whether it can judge that these sanctions are allowed and thus that the protection of labour rights overrules trade agreements is even more farfetched.¹⁴⁵ The suggested solution to the problems related to this clash of jurisdictions between the ILO and the WTO was the incorporation of a so-called social clause in WTO agreements, which would automatically be activated in the case of labour rights violations of members of both organisations.

2.1.2.2 Social Clauses

Although as previously mentioned the systems of international trade through the WTO and the protection of human rights in the UN are by and large divided, there have been attempts to integrate the two areas with each other. This has been tried by incorporating a ‘social clause’ in WTO agreements: ‘the linking of labour standards with trade

¹⁴² Howse, 1999, p. 133.

¹⁴³ Alston, 2005, p. 15.

¹⁴⁴ International Labour Organization – Constitution of the International Labour Organization and selected texts. Available at <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf>, accessed on 08-07-2013; Art. 33.

¹⁴⁵ Howse, 1999, p. 134.

liberalization’.¹⁴⁶ These attempts are not new. The 1948 Havana Charter, which was supposed to create the International Trade Organization, explicitly recognised that ‘all countries have a common interest in the achievement and maintenance of fair labour standards’ and as a consequence should ‘take whatever action may be appropriate and feasible’ to achieve the elimination of unfair labour conditions.¹⁴⁷ The Havana Charter, however, was never ratified and as a consequence the ITO never came into being, leaving the world with just the GATT and its rules on world trade without any reference to labour conditions except for the possibility to prohibit trade in goods produced with prison labour in article XX(e) of the latter document.

When the WTO finally came into being in 1995, there were some prudent attempts to raise the issue again. These attempts were not to be expected from the side of the WTO, however. This is illustrated by the preamble to the Marrakesh Agreement, which established the WTO. Although the preamble explicitly recognises the desire to protect and preserve the environment, the protection of human labour is not mentioned.¹⁴⁸ It is therefore fair to say that addressing labour-related problems in the context of international trade and the WTO is controversial: ‘The interrelationship between trade policy and labor rights is among the most contentious issues that the world trading system faces today’.¹⁴⁹

This contentiousness can be best illustrated with an anecdote from the WTO Ministerial Conference in Singapore in 1996. The Ministerial Conference, the ‘highest WTO authority’¹⁵⁰, is a biannual meeting of all WTO members; the 1996 meeting in Singapore was the first since the establishment of the WTO. It can take decisions on a wide range of issues, including the adoption of multilateral trade agreements. One of the guest speakers was supposed to be Michael Hansenne, the then-Director General of the

¹⁴⁶ Leary, 1997, p. 118.

¹⁴⁷ United Nations – Conference on Trade and Employment. Final act and related documents (‘Havana Charter’) (April 1948). Available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf, accessed on 08-07-2013; Art. 7(1).

¹⁴⁸ Hepple, 2005, p. 133-134.

¹⁴⁹ Howse, 1999, p. 132.

¹⁵⁰ Leary, 1997, p. 118.

ILO, to urge the attendants to set up a committee or a working party on trade and labour standards. However, due to resistance of mainly developing countries, the invitation to Hansenne was withdrawn and the proposal to a stronger commitment to labour rights was bluntly rejected.¹⁵¹ Instead, the Ministerial conference formulated a ‘commitment to the observance of internationally recognized core labour standards’.¹⁵² There were no fundamental changes and thus the idea of inserting a social clause in WTO agreements died before it was born, or indeed was never even fertilised as there have never been any explicit proposals for legislation. Yet, despite these drawbacks, it could be seen as a very small step in the direction of the recognition of global labour standards since it was the very first official WTO document which explicitly refers to labour rights.¹⁵³ Perhaps as a consequence, the ILO has never abandoned the idea of a social clause¹⁵⁴ and furthermore there are examples of social clauses in bilateral and multilateral trade agreements which did become reality.¹⁵⁵ It is therefore worth looking at it in closer detail as understanding the full concept of a social clause could bring us closer to envisaging how the EU could protect labour rights in its trade framework.

What exactly does a social clause entail? Raju defines it as ‘a legal provision in a trade agreement aimed at removing the most extreme forms of labour exploitation in exporting countries by allowing importing countries to take trade measures against the exporting countries which fail to conform to a set of internationally agreed minimum labour standards’.¹⁵⁶ As most trade agreements are agreed upon in the WTO framework, the latter would necessarily have to be involved. The addition of the term ‘legal’ in the definition of a social clause is therefore important, since it would have the consequence that countries could step to the WTO DSB when they accuse a country of violating fundamental labour rights. Indeed, would a social clause have become part of all WTO

¹⁵¹ Leary, 1997, p. 119.

¹⁵² World Trade Organization – Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC. Available at http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf, accessed on 08-07-2013; p. 2.

¹⁵³ Leary, 1997, p. 120.

¹⁵⁴ Maupain in Alston, 2005, p. 126.

¹⁵⁵ Hepple, 2005, p. 129-130.

¹⁵⁶ Raju, 2002, p. 2.

agreements on a routine basis, this thesis would have been irrelevant; the possibilities for the EU to constrain trade in products which are made in abuse of two of the rights described would have been secured.

The most likely candidate for the set of internationally agreed minimum labour standards as mentioned in the above definition of a social clause is the one composed of the rights enshrined in the previously mentioned ILO Declaration on Fundamental Principles and Rights at Work: freedom of association and the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. Not surprisingly therefore, it has been the ILO who has been most active in trying to incorporate a legally enforceable social clause in trade agreements.¹⁵⁷

The inclusion of a social clause in WTO agreements has been envisioned in several ways.¹⁵⁸ One of them is to give the WTO itself the power to impose sanctions on a country violating the then legally enshrined labour rights; this would include an amendment to the currently existing GATT agreement. The role of the ILO would be to signal and channel labour rights abuses and complaints to the WTO. A potential problem could be that not all ILO members have signed and ratified the relevant provisions securing the fundamental labour rights; however it has already been argued in chapter one of this thesis (and, for that matter, by the ILO itself) that the four fundamental labour principles are part of the ILO constitution and are therefore applicable to all members.

A second possibility would be to give the ILO itself the power to impose sanctions on violating Member States. This, however, is not viable as it has been demonstrated that, first of all, the ILO does not have the jurisdiction to adjudicate WTO law, and secondly,

¹⁵⁷ Leary, 1997, p. 121.

¹⁵⁸ Howse, 1999, p. 167.

the ILO has a tradition ‘which emphasizes diplomacy and consensualism’.¹⁵⁹ On the other hand, the ILO constitution does allow for action against countries failing to observe their obligations.¹⁶⁰ A third possibility, and probably the most promising for this thesis, is that WTO members themselves impose sanctions on violating countries. In this scenario, the WTO could step in but only to prohibit the sanctions if they were considered to be economically protectionist rather than aimed at the protection of labour rights. The role of the ILO would, in this scenario, be to set the standards of the violations of labour rights and to assist the WTO in adjudicating whether violations had actually occurred or were indeed rather protectionist.

The WTO, however, has for long refused to take any responsibility for the protection of core labour standards.¹⁶¹ It has done so for a number of reasons. The first reason has to do with the characteristics of the international trading system under WTO rules. The WTO aims at the promotion of trade through the elimination of discrimination and the global lowering of barriers to trade, or in other words, through trade liberalisation. Morally objectionable or not, sanctions based on labour standards in exporting countries do constitute a barrier to trade. It has been argued that the WTO has gone too far in this respect; ‘GATT/WTO jurisprudence (...) evoked constraints that may go far beyond what is needed to prevent abuse of labor rights for "protectionist purposes”’.¹⁶²

Secondly, it has to be remembered that the WTO is a member-driven organisation pur sang. Decisions are usually not taken by majority vote but by consensus. Unlike organisations such as the World Bank and the International Monetary Fund, the WTO does not have a strong central board which can take decisions on its own behalf. It would indeed be strange if a Member of the WTO would either refuse or fail to protect its domestic workers against exploitation, but at the same time would agree to ratify legislation which can potentially lead to sanctions against their own companies. So, obviously the institutional set-up of the WTO constrains the possibilities to establish

¹⁵⁹ Howse, 1999, p. 167.

¹⁶⁰ Hepple, 2005, p. 131.

¹⁶¹ Howse, 1999, p. 134.

¹⁶² Ibidem.

radical changes in the international trading system.

This is related to the third point. As was illustrated during the WTO 1996 Singapore Ministerial Conference, it is exactly those countries where labour standards are the lowest who are the strongest opponents to the inclusion of a social clause, which they perceive as hidden protectionism from developed countries. Therefore, less-developed WTO Members ‘insist that core labor standards and human rights should be left to specialized organizations like the ILO and the UN human rights institutions, and trade policies and human rights should remain separate’.¹⁶³ Indeed, the 1996 Singapore Ministerial Declaration rejected ‘the use of labour standards for protectionist measures’ and agreed ‘that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question’. The argument that ‘economic growth and development fostered by increased trade and further trade liberalization contribute to the promotion of these [labour] standards’, was rather used as a convenient excuse instead of a compelling argument to ignore labour standards.¹⁶⁴

Although it is not unthinkable that trade liberalisation may contribute to economic growth, an increase of welfare and respect for fundamental labour rights, it is simply not sustainable to argue that this is some sort of a natural law. Ignoring the potential negative influence of trade liberalisation on fundamental labour rights is mainly in the interest of the producers in the exporting countries and the consumers in the importing countries and can have devastating effects on the lives of workers in exporting countries. This has been proven by the incidents in Bangladesh recently. Furthermore, it has been argued that it is possible to ensure labour rights without losing out to other producers who do not; ‘respect for labour rights does not lead to comparative disadvantage’.¹⁶⁵ However, the quotes in the previous paragraph are taken from the 1996 Ministerial Declaration, which is almost two decades ago; although a legally

¹⁶³ Petersmann, 2004, p. 608.

¹⁶⁴ World Trade Organization – Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC. Available at http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf, accessed on 08-07-2013; p. 2.

¹⁶⁵ Howse, 1999, p. 168.

enforceable social clause never came into being, the ILO and the WTO did reinforce their mutual commitments since.

Relations between the ILO and the WTO were not exactly the friendliest, not to say ice cold recalling the events of the 1996 Singapore Ministerial Conference, but the two institutions did work together on a number of issues. The two organisations now attend each other's meetings and have published a number of joint reports on several issues touching on both labour as well as international trade. The most important of these is perhaps the 2011 joint publication 'Making globalization socially sustainable'. The report discusses 'how trade and employment and labour market policies can be shaped to make globalization socially sustainable'.¹⁶⁶ A more obvious break from the traditional institutional and ideological separation between the ILO and the WTO is hardly imaginable. At the very least, it is an indication that the WTO is now more willing to consider the consequences of international trade and the desire for trade liberalisation.

The relations between the ILO and the European Union are far more intensive and date back to the origins of the European Economic Community in 1957. As the Treaty of Rome proclaiming the EEC declared that 'one of the essential objectives of the EEC was to improve the living and working conditions of its people', it should not come as a surprise that the ILO was involved.¹⁶⁷ This involvement has resulted in a relatively strong relationship. One example symbolising this relationship is the official exchange of letters between the European Commission and the ILO in 2001.¹⁶⁸ In this exchange, the EU commits itself to some of the core commitments of the ILO, such as the implementation within and the promotion outside the EU of the 1998 Declaration on

¹⁶⁶ Bacchetta and Jansen, 2011, p. xi.

¹⁶⁷ Novitz in Alston, 2005, p. 217.

¹⁶⁸ European Union - Corrigendum to the exchange of letters between the Commission of the European Communities and the International Labour Organization, (2001/C 165/12), 08-06-2001, in *Official Journal of the European Communities*. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:165:0023:0027:EN:PDF> , accessed on 11-07-2013.

Fundamental Principles and Rights at Work.¹⁶⁹ The two organisations agreed to organise high level meetings annually, leading to a memorandum of understanding between the EU and the ILO in 2004. They agreed to establish ‘a strategic partnership in the field of Development (...) with the aim of enhancing and increasing the effectiveness of both partners in their efforts to achieve their common goals and objectives in this field’.¹⁷⁰ The effects of the cooperation between the EU and the ILO can be seen in the case of Myanmar, which will be discussed at the end of the chapter.

2.2 The EU and human rights in international trade

In its pursuit of imposing human rights standards on its trading partners, the EU has traditionally used the carrot rather than the stick; it focuses on ‘capacity-building and co-operative programmes, rather than negative sanctions’.¹⁷¹ In a 2003 EU Council Conclusion, the EU recalled ‘its constant rejection of protectionism and of a sanction-based approach to the promotion of core labour standards as well as its strong support for an incentive based approach to this issue’.¹⁷² In practice this comes down to using trade incentives to promote fundamental human rights standards. The EU has several means at its disposal to do so, which will be discussed here briefly.

Conditionality on the protection of fundamental human rights has been apparent in the EU’s external trade policy since the Lomé IV Convention of December 1989. The Lomé Conventions regulated trade between the EU and a group of former European colonies known as the ACP (‘African, Caribbean, Pacific’) countries. Since the signing of the Mauritius Agreement of 1995, which amended the Lomé IV Convention, human rights provisions have become standard annexes in most of its external agreements.¹⁷³ Indeed, ‘the use of human rights clauses in external agreements became a condition of

¹⁶⁹ European Union – Memorandum of Understanding between the European Commission and the International Labour Organization, 2004. Available at http://ec.europa.eu/europeaid/what/social-protection/documents/memorandum_of_understanding_ec_ilo_en.pdf, accessed on 11-07-2013; p. 2.

¹⁷⁰ Ibidem, p. 1.

¹⁷¹ Hepple in Bercusson and Estlund, 2007, p. 169.

¹⁷² European Union – 2522nd Council meeting (External Relations), C/03/209, 21-07-2003. Available at http://europa.eu/rapid/press-release_PRES-03-209_en.pdf, accessed on 11-07-2013; p. 24.

¹⁷³ Hepple in Bercusson and Estlund, 2007, p. 167.

the agreement’, and the conditions themselves became more standardised.¹⁷⁴ This tendency was reinforced after the signing of the Cotonou Agreements in 2000, which replaced the Lomé IV Convention.

The 2000 Cotonou Agreements, also with the ACP countries, went even further, including a special clause on Trade and Labour Standards. In this clause, the parties specifically emphasised their mutual commitment to the aforementioned ILO Declaration on Fundamental Principles and Rights at Work, and as such, included special attention for the abolition of forced labour and the elimination of (the worst forms of) child labour.¹⁷⁵ Thus, in the Cotonou Agreements, ‘the promotion and protection of human rights and democracy are explicitly set forth as both goals and bases of the agreement’.¹⁷⁶ In bilateral agreements with other countries which are not part of the ACP group of countries, similar clauses can usually be found.

Whereas the Cotonou Agreements were specifically designed for particular groups of countries, the EU has other tools at its disposal to combine human rights promotion in trade more generally. One of the most important ones is the Generalized System of Preferences (GSP), which allows the EU, or any other trading entity, to exempt developing countries from the general MFN rule which says that no discrimination is possible between trading partners. Fundamentally, these provisions are allowed under WTO rules. Similar programmes are the Everything But Arms (EBA) programme and the GSP+, which give even more extensive trade advantages. The GSP+ programme is an excellent example of the EU using trade incentives to promote respect for human rights; admissibility to GSP+ is conditional on the signing and ratification of a large number of human rights and labour rights provisions. As such, the EU can threaten to withdraw the preferential treatment when a country fails to comply with specific rights. Eligibility for GSP is conditional upon the stage of development according to World Bank criteria.¹⁷⁷ The GSP+ is open only to those countries which are considered to be

¹⁷⁴ Nadakavukaren Schefer in Abbott, Breining-Kaufmann and Cottier, 2009, p. 309.

¹⁷⁵ Hepple in Bercusson and Estlund, 2007, p. 167.

¹⁷⁶ Nadakavukaren Schefer in Abbott, Breining-Kaufmann and Cottier, 2009, p. 310.

¹⁷⁷ European Union – Regulation (EU) No 978/2012 (25 October 2012). Available at

‘vulnerable’¹⁷⁸ and the EBA program is accessible for the group of Least Developed Countries (LDCs),¹⁷⁹ which is a World Bank classification as well.

Although an assessment of the current tools to influence the human rights conditions, and more specifically the labour conditions, in countries with which the EU conducts trade is not at the core of this thesis, it is necessary to briefly summarise the heavy criticism that these policies have generally received; this will make it more clear why the current system the EU uses to promote fundamental rights is simply insufficient and thus, why the creation of a mechanism to prohibit certain products from entering the EU is necessary.

First of all, there often is a lack of will to act. As correctly formulated by Nadakavukaren Schefer, ‘the partnership agreements and other bilateral or regional trade relations agreements, (...), can only be used to ensure the protection of human rights if there is the political will to invoke the conditionality clauses’; unsurprisingly, ‘this will is often absent’.¹⁸⁰ Reasons for this absence are often economic, for example the supply of oil or other natural resources. If there would be a complaints mechanism which would be activated after complaints by any of the stakeholders, the absence of political will to act would be irrelevant as there would be an independent system to take action. Furthermore, the author notes that the decision to judge whether the human rights provisions are violated or not lie exclusively with the European Commission, even regarding, for example, several of the ILO Conventions.¹⁸¹ This makes the danger of an entanglement of interests relevant. A consequence is that a complaints mechanism would have to have a certain degree of independence; it should be activated once any of the stakeholders files a complaint and not just when the EU feels like taking action. This is of course a difficult point, to be discussed more elaborately in chapter 3, since it

http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf, accessed on 08-07-2013;

paragraph 9.

¹⁷⁸ European Union – Regulation (EU) No 978/2012 (25 October 2012). Available at http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf, accessed on 08-07-2013;

paragraph 11.

¹⁷⁹ Ibidem, paragraph 16.

¹⁸⁰ Nadakavukaren Schefer in Abbott, Breining-Kaufmann and Cottier, 2009, p. 312.

¹⁸¹ Ibidem, p. 313.

means that the EU would give up a certain degree of independence to act.

Moreover, since there is no legal commitment to make use of a GSP scheme vis-à-vis developing countries, the EU can withdraw the preferences unilaterally. This creates an uncertain economic environment and prevents investors to commit themselves for a long period of time to one of the countries under the GSP scheme. After all, if the EU would withdraw the preferential treatment, this would mean that the advantages of investing in that country could have disappeared. This threat is all the more problematic since it has appeared to be occurring mainly when the developing country was actually benefitting from the preferential access, as a result saw its imports to the EU increase, after which the EU concluded that it might be in competition with EU produced goods.¹⁸² This seems to be a more likely incentive to cancel trade preferences than, for example, a violation of human rights.

In one case, the EU did invoke human rights to impose trade sanctions on a country. Since it is of elementary importance whether this was allowed under WTO law, this case will be discussed in detail.

2.3 EU sanctions against Myanmar: WTO proof?

As stated before, the sanctions regime against the government of Myanmar can be seen as a unique case. In the final part of this chapter, several questions will be answered. The first of these questions is why exactly Myanmar was targeted with such severe measures and what exactly those measures constituted. This is necessary since it allows for a more precise definition of when the EU is apparently willing to take more serious action compared to either lifting trade preferences or putting political (soft) pressure on a country. The second and more important question is whether and why the imposed sanctions were allowed under WTO rules. This can lead to an assessment to which kind of sanctions are currently apparently legally enforceable without being in breach of WTO rules. This knowledge will be used in chapter 3 to outline a realistic approach

¹⁸² Özden and Reinhardt, 2005, p. 2.

towards the creation of an EU mechanism sanctioning those companies which violate labour rights.

It was expected that Myanmar's richness in natural resources would lead to a rapid economic development after its independence from the British Empire in 1948. Poor economic policies combined with a devastated society in the aftermath of the Second World War prevented this development. As a consequence, the civilian government was overthrown in 1962 and replaced by a repressive military regime, which implemented a centrally planned economic policy. After independence, legislation inherited from the British colonisers had remained intact. This included a Penal Code prohibiting the 'unlawful compulsion of forced labour' but also an act which gave Village Heads the power to supply the army and the police with resources, including human, thus making forced labour 'lawful'.¹⁸³ Although Myanmar had ratified Convention no. 29 prohibiting the use of forced labour, the military regime refused to amend its legislation. Moreover, after another military regime change in 1988, the refusal to respect the outcome of the 1990 elections and a strong increase of the use of forced labour in its wake, complaints were filed in the ILO against Myanmar. Other accusations of human rights violations include the use of child soldiers, summary executions, torture and rape and violence against ethnic minorities.¹⁸⁴ This list is far from complete, and abuses have been conducted on a large scale and during a long period of time.¹⁸⁵

Thus, an ILO complaints procedure was started against Myanmar in 1997. The conclusions of the Commission of Inquiry were exceptionally condemning, finding 'a saga of untold misery and suffering' and 'a story of gross denial of human rights'.¹⁸⁶ Theoretically, there were two options for the military rulers of Myanmar: either comply with the recommendations of the Commission of Inquiry, or refer its conclusions to the International Case of Justice. The Myanmar regime did neither, resulting in the ILO invoking the previously discussed art. 33 of the ILO constitution in 2000, which allows

¹⁸³ Alston, 2005, p. 97-98.

¹⁸⁴ Chow, 2007, p. 155.

¹⁸⁵ Genser and Howse, 2008, p. 169-174.

¹⁸⁶ Alston, 2005, p. 98-99.

for stronger measures. It is in this context that the EU considered imposing its own sanctions regime.

The EU sanctions regime against Myanmar started before the ILO initiated a procedure under art. 33 of its Constitution. In 1997, the EU decided to suspend Myanmar's access to the GSP, a move which is routinely used to make countries comply with human rights standards. Furthermore, through several EU Council Resolutions adopted between 1996 and 2004, the Union decided to impose an arms embargo against Myanmar, to expulse military personnel, to prohibit members of the regime to obtain visa for any EU country, to stop non-humanitarian development aid and to impose a limited ban on investments.¹⁸⁷ These measures were as WTO-proof as that they were ineffective. Although military personnel were send out, civil employees were not, so that Myanmar could still maintain its embassies in the EU. The arms embargo was pointless since the regime managed to obtain its weaponry through non-EU countries such as China, India and Russia. There were exemptions regarding the stop on development aid when these concerned projects aimed at human rights protection, which made up the majority anyway. Moreover, the so-called ban on investments included restrictions on some juice companies and a brewery, but excluded among others the state oil company and the state timber company.¹⁸⁸ Unnecessary to say that these 'sanctions' had very little effect, if any at all.

However, this is where it starts getting really interesting. The aforementioned sanctions were not a breach of WTO-rules, or, at least, no complaints were filed against it, which has the same effect. In 2007, the EU found that the then-current sanctions regime was indeed insufficient and implemented a further reaching regime through its 2007 Council Common Position on restrictive measures against Myanmar.¹⁸⁹ This includes, inter alia,

¹⁸⁷ Genser and Howse, 2008, p. 175.

¹⁸⁸ Ibidem, p. 175-176.

¹⁸⁹ European Union – Council Common Position 2007/750/CFSP of 19 November 2007 amending Common Position 2006/318/CFSP renewing restrictive measures against Burma/Myanmar in *Official Journal of the European Union* (24-11-2007). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:308:0001:0080:EN:PDF> , accessed on 11-07-2013.

an extended restriction on exports, now including timber, wood and precious stones and metals. The restrictions also included a prohibition on trade in equipment allowing for the production of these goods. Furthermore, the flaws of the previous sanctions regime as described before were by and large resolved. All in all, at first sight these sanctions were a clear violation of the WTO's core rules, such as non-discrimination and the MFN clause.

The sanctions of the EU, however, can be fit perfectly within the WTO's exemption clause.¹⁹⁰ As outlined in chapter 1, article XX(a) of the GATT provides for the imposition of trade restrictions when public morals are under scrutiny. This is only so when these restrictions do not impose a disguised measure of protectionism and when they are necessary for the goal pursued. First of all, public morals have to be defined. A first aspect of the definition concerns the margin of appreciation of WTO members; 'public morals' can vary in time and in space and thus WTO members enjoy some freedom in defining what exactly they are according to their own standards. In a previous case on this issue, the WTO Appellate Body broadly defined public morals as 'standards of right and wrong conduct maintained by or on behalf of a community or nation',¹⁹¹ thus articulating this margin of appreciation. Furthermore, it should be possible to see the concept of public morals reflected in national and international legislation, including human rights law. It is not hard to see the appalling human rights abuses by the Myanmar regime as opposing public morals when seen in the context of international customary human rights law.

Secondly, it has to be demonstrated that the trade restriction is necessary.¹⁹² This requirement can be split up into three segments. First of all, the importance of the goal pursued has to be deemed sufficient. Looking at the widespread ratification of human rights treaties, in particular those treaties covering the violations conducted by the regime in Myanmar, it is clear that the goals pursued by the EU sanctions regime are sufficiently important. Secondly, other factors influencing the measures, or influenced

¹⁹⁰ Genser and Howse, 2008, p. 184.

¹⁹¹ Ibidem, p. 185.

¹⁹² Ibidem, p. 188.

by the measures, have to be taken into account. The most important of those is the question whether the measure is aimed directly at the goal pursued and, related to that, whether the measure does not have disproportional side effects. As the sanctions of the EU were aimed at those goods which were the most important sources of revenue of the Myanmar regime, this fulfils the second criterion. Finally, alternatives to the measures have to be analysed to see whether the goals pursued cannot be reached in a way which is less harmful for international trade. As trade sanctions are usually, and in the case of the EU definitely, a measure of last resort, possible alternatives had already been exhausted. In this respect, one could think of pressure through the ILO and the UN on Myanmar, as well as several forms of softer trade sanctions imposed by the EU before the 2007 measures.¹⁹³

Thus, the EU sanctions regime towards Myanmar provides an excellent example of how trade sanctions based on human rights violations can be allowed under currently existing WTO rules. Nevertheless, it is revealing that this is the only case in which the EU has imposed such far-reaching sanctions on another member of the WTO. The human rights violations in Myanmar had an exceptional severe, enduring and encompassing character. Central to this thesis is an approach to confront labour rights abuses in a systematic way, and not on a case-by-case approach which leads to sanctions after a decades-long period of human rights violations. Although it was indispensable to prove that sanctions are possible under WTO rules, next chapter will envisage how the EU can provide for a system of structural and quick protection of labour rights within its trading partners.

¹⁹³ Genser and Howse, 2008, p. 190.

Chapter 3: Practical approaches

In the previous chapters, two general points have been made. In chapter one it has been argued in detail that the EU, despite that as an International Organisation it is not a party to many human rights treaties as a signatory, is still bound by a wide array of international customary human rights law and thus is obliged to protect and respect human rights. Regarding a prohibition on imports of goods produced with forced labour or child labour, it cannot be said that the EU can be held accountable for violations of these rights, yet there is a strong case to hold the EU responsible. In the second chapter, an analysis of the relationship between human rights and international trade in the framework of WTO legislation has led to the conclusion that there is room to utilise the currently existing WTO rules to impose a prohibition of the aforementioned goods to protect public morals and human life. This conviction has been further strengthened by the positive example of sanctions against Myanmar, which was not challenged by the WTO.

Thus, after having established that the EU should and could act to prevent imports produced with forced or child labour, this third and final chapter will examine how this could be done in practice. To do so, two examples will be analysed to outline the possibilities for the EU to formulate legislation itself. The first is an excellent example of what this legislation could look like. In 2006 and 2007, there were several attempts to prohibit the imports of unfairly produced goods into the United States through the Decent Working Conditions and Fair Competition Act (DWCFCFA). Although the DWCFCFA did not gain sufficient support to become law, the language and the reasoning used in the draft bills give an excellent oversight of how a prohibition could be framed.

The second example is set by the EU itself, albeit in another area. The EU Timber Regulation, which came into effect in March 2013, prohibits the imports of illegally harvested wood. Importantly, it allows the EU to act when the harvest of wood is illegal under legislation of the country of harvest. How did the EU circumvent a prohibition by

the WTO on this legislation? How does the EU control whether wood is harvested legally or illegally? How does the EU cooperate with the countries in which the illegal harvest takes place? Those are all questions which, once answered, can give a valuable insight in the possibilities for EU legislation on imports of unfairly produced goods.

3.1 Decent Working Conditions and Fair Competition Act

The DWCFA was first introduced in the United States Senate in 2006 and later again in 2007. Both times the draft bill died after it was referred to several Committees of the US Congress. Its contents will be discussed here.

The full and official name of the draft bill, which is worth mentioning as it is more explicit, was ‘H.R. 1992 - To amend the Tariff Act of 1930 to prohibit the import, export, and sale of goods made with sweatshop labor, and for other purposes’.¹⁹⁴ As indicated by this title, the purpose of the bill is to ‘prohibit the import, export, or sale of goods made in factories or workshops that violate core labor standards’ and ‘to prohibit the procurement of sweatshop goods by the United States Government’.¹⁹⁵

In the draft bill, the following findings were presented. First of all, the introducers found that ‘violations of core labor standards, as defined under the laws of the United States and the International Labor Organization, are widespread in factories that produce goods for sale in the United States’.¹⁹⁶ These violations are found to be ‘morally offensive to the American people both in their roles as consumers and investors’ and ‘degrading to workers forced to labor under sweatshop conditions’.¹⁹⁷ The draft bill therefore recognises the following rights:¹⁹⁸

- ‘Workers have a right to be free of sweatshop working conditions’.

¹⁹⁴ US Congress – Decent Working Conditions and Fair Competition Act: S.367 (23 January 2007). Available at <http://www.govtrack.us/congress/bills/110/s367>, accessed on 08-07-2013.

¹⁹⁵ Ibidem, paragraph 3(b).

¹⁹⁶ Ibidem, p. 2, paragraph a(1).

¹⁹⁷ Ibidem, p. 2, paragraph a(3).

¹⁹⁸ Ibidem, p. 2, paragraph a.

- ‘Consumers have a right to know that the goods they purchase are not produced in sweatshops’.
- ‘Businesses have a right to be free from competition with companies that use sweatshop labor’.
- ‘Shareholders have a right to know that their investments are not supporting sweatshop labor’.

Looking at this list, it seems that the drafters of the bill have tried to enhance the legitimacy of the bill by making it applicable to a large number of stakeholders. When looking at these rights in the light of the aforementioned article XX on exceptions of WTO rules, it can be argued that the right of workers to be free of sweatshop working conditions can be covered by Art. XX(a) to protect human life. The right of consumers to know that the goods they purchase are not produced in sweatshops and the right of shareholders to know that their investments are not supporting sweatshop labour would rather be covered by Art. XX(b) to protect public morals. The rights of businesses to be free from competition with companies that use sweatshop labour can even be said to appeal to the anti-dumping regulations of the WTO, even though this line of thinking is not likely to be shared by the WTO, as discussed in chapter 2. Yet, the drafters of the bill had built in another security to ensure compliance with WTO rules:¹⁹⁹

‘Prohibiting the sale, manufacture, offer for sale, transportation, and distribution of sweatshop goods, regardless of the source of the goods, is consistent with the international obligations of the United States because the prohibition applies equally to domestic and foreign products and avoids any discrimination among foreign sources of competing products’.

From this it follows that the prohibition of the bill would not constitute a violation of WTO rules as the rule would be applicable to both producers within the United States as well as outside. However, even if a country would file a complaint with the WTO

¹⁹⁹ US Congress – Decent Working Conditions and Fair Competition Act: S.367 (23 January 2007). Available at <http://www.govtrack.us/congress/bills/110/s367> , accessed on 08-07-2013; p. 3, paragraph a(9).

Appellate Body against the US on charges of discrimination (for example because it is quite evident that for some industries the bill is directed against foreign producers and not against domestic producers), the US could justify the measures based on the WTO Art. XX exemption clause.

Importantly, the draft bill aims not at just making imports and exports of sweatshop products illegal, but also selling those goods. This is important because a mere prohibition on imports and exports would render persecution of a company involved in this imports and exports not feasible as the company might be based outside of the jurisdiction of US courts. The conditions of punishment of companies who would violate the bill have been set out. It is important to analyse these as it may indicate possibilities for the European Union to firstly notice possible violations and secondly to act accordingly. There are two ways which could lead to punishment after an alleged violation of the bill. The first is through the US Congress; the Federal Trade Commission (FTC) shall ‘investigate any complaint received from a worker alleging a violation of this title with respect to a good, ware, article, or merchandise produced by that worker’.²⁰⁰ It is unclear how exactly the FTC is supposed to receive these complaints. This could mean that any form of complaints signalling labour abuse could lead to investigation. It does not take into account, however, how workers in, say, Asia, who do not possess the means to contact a far-away trade commission, should file their complaints. This is an essential aspect of the approach and therefore will receive additional attention further in the chapter.

The second way leading to investigation and possible punishment is through direct action by stake-holders, or ‘private right of action’. This is an interesting road to explore. In the wording of the bill, ‘a person with standing to sue under subsection (c) may bring a civil action against any seller of goods, wares, articles, or merchandise’ produced with sweatshop labour as defined in the bill.²⁰¹ The legal persons entitled to

²⁰⁰ US Congress – Decent Working Conditions and Fair Competition Act: S.367 (23 January 2007). Available at <http://www.govtrack.us/congress/bills/110/s367> , accessed on 08-07-2013; p. 10, paragraph c(3).

²⁰¹ US Congress – Decent Working Conditions and Fair Competition Act: S.367 (23 January 2007).

take civil action are competitors to the retailer trading in sweatshop goods, investors in these retailers, employees of these retailers, or labour organisations representing employees involved in the production or selling of sweatshop goods. This direction of taking action would basically leave the initiative to take action to the market. Ironically, and ideally, this would lead to the very opposite of a race to the bottom, as competition between retailers would now include enhancing labour standards in order not to be sued by a competitor. Whether this would happen in reality or whether conglomerates of retailers would rather prefer to protect each other in order to keep production costs low for all is debatable, but it does have the potential of significantly shifting the emphasis of production methods from being the cheapest to avoiding being sued for labour exploitation.

Punishment as set out in the draft bill is a minimum fine of ten thousand Dollars, or the equivalent of the ‘fair market value of the goods, whichever is greater’.²⁰² Taking into account the enormous amounts of goods yearly being imported from low-labour cost countries, it is obvious that this market value is likely to exceed the minimum fine of ten thousand Dollars. Perhaps far greater could be the damage done to the image of a company standing for a US Court on charges of labour exploitation. One problem which is not addressed by the bill is how to fine a company which is not based in the United States. For legal reasons a state has very few options to force a company which is not based within its jurisdiction to pay a fine. This is related to the problem of accountability in international law that was described in chapter two of the thesis. A simple block on importing the actual product could therefore prove more effective.

One could ask what exactly the purposes of this act have been. More than once, developing countries have expressed their concern over pressure by mainly Western countries to enforce stricter regulation of labour conditions. In the previously

Available at <http://www.govtrack.us/congress/bills/110/s367> , accessed on 08-07-2013; p. 10, paragraph a.

²⁰² US Congress – Decent Working Conditions and Fair Competition Act: S.367 (23 January 2007).

Available at <http://www.govtrack.us/congress/bills/110/s367> , accessed on 08-07-2013; p. 11, paragraph d(1).

mentioned 1996 Singapore Ministerial Declaration, developing countries rejected ‘the use of labour standards for protectionist measures’ and agreed ‘that the comparative advantage of countries, particularly low-wage developing countries, must in no way be put into question’. Since the draft bill explicitly states that ‘it is a deceptive trade practice and a form of unfair competition for a business to sell sweatshop goods’ (p. 3, pp. a(8)),²⁰³ this ‘comparative advantage’ of developing countries is not only ‘put in question’ but explicitly criticised and rejected. It is therefore not unthinkable that the drafting of the bill is partly motivated by pressure from producers based in the United States who tried to eliminate cheap competitors abroad. At the same time, many products which will be targeted by the draft bill are not even produced in the United States. Furthermore, the United States does have a tradition of civil action against sweatshop labour abroad.²⁰⁴

The draft bill was eventually rejected. Among the reasons was fear that the transparency of trans-national corporations on their suppliers might decrease, as they would be afraid to be uncovered as companies being involved in the exploitation of labour. Furthermore, there were some ideological differences of opinion on the costs and benefits of liberal trade and globalisation as discussed previously in this thesis. To quickly repeat the arguments; the sponsors of the bill thought that globalisation and free trade had worsened the labour conditions of workers in developing countries as a consequence of the ‘race to the bottom’, while others argued that an open trade regime would eventually lead to better working conditions. As now-president Barack Obama supported the bill when he was still a senator it was expected that the bill would see a re-introduction, but this has hitherto not happened.²⁰⁵

The draft bill shows how a prohibition on the imports of child labour and forced labour products could be formulated. That is not to say that it would simply be a matter of

²⁰³ US Congress – Decent Working Conditions and Fair Competition Act: S.367 (23 January 2007). Available at <http://www.govtrack.us/congress/bills/110/s367> , accessed on 08-07-2013; p. 3, paragraph a(8).

²⁰⁴ Russell, 2004, p. 217.

²⁰⁵ Maryanov, 2010, p. 243-244.

transforming the text of this bill to a European context. As the bill was never adopted, it cannot be argued that the prohibition is allowed under WTO rules.

3.2 EU Timber Regulation

It is very tricky to compare environmental issues with labour issues in the WTO legal framework. As was explained previously, the 1995 Marrakech Agreement establishing the WTO specifically mentioned environmental protection as a priority whilst being silent about the protection of human life. Yet, the idea behind the EU policy on the imports of illegally logged timber is similar to my proposal to prohibit the imports of child labour products and forced labour products. The most important aspect of the 2010 EU Timber Regulation is that ‘the placing on the market of illegally harvested timber or timber products derived from such timber shall be prohibited’.²⁰⁶ This is an important aspect of the regulation; since it is ‘simply a provision to make timber produced illegally (overseas or at home) also illegal in the home country’ it should ‘not raise any WTO issues’.²⁰⁷ Traders in timber are required to be able to identify the operators or traders from whom they have purchased the timber²⁰⁸ and to provide detailed information on the country of harvest, the quantities, the supply chain and proof that the timber has been harvested in accordance with local legislation.²⁰⁹ Without this type of legislation, there is nothing to prevent timber logged illegally in country A to be put on the market of country B. This is exactly what has been argued in this thesis as one of the undesired aspects of current trade between the EU and countries which do not respect labour laws. Goods produced under illegal labour conditions should therefore be illegal on the domestic market, too, to avoid claims of discrimination.

Unfortunately, it is not just that simple. A big difference is of course that environmental

²⁰⁶ European Union – Regulation (EU) No 995/2010 (20 October 2010). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:295:0023:0034:EN:PDF>, accessed on 08-07-2013; Art. 4.

²⁰⁷ Brack, 2013, p. 4.

²⁰⁸ European Union – Regulation (EU) No 995/2010 (20 October 2010). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:295:0023:0034:EN:PDF>, accessed on 08-07-2013; Art. 5.

²⁰⁹ Ibidem, Art. 6.

protection is specifically mentioned in WTO Article XX as an valid incentive for exceptions whereas respect for labour rights (in fact specifically, too) is not. The same goes for the aforementioned Marrakesh Agreement. Read in conjunction with WTO law, it is therefore more difficult to make a distinction between a t-shirt made with sweatshop labour and one that is not than that it is to make a distinction between an illegally logged tree and one that has been harvested according to the laws of the country of logging. Yet, even though many low labour cost countries emphasise that the conditions under which a product is made should not be questioned, they have to adhere to legal obligations flowing from treaties on human rights and labour rights they have signed. It is therefore futile to hide behind the argument that labour rights are not covered by WTO exception clauses and therefore not a valid argument for trade restrictions; every member state of the ILO has to respect, protect and fulfil the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Since almost all UN members are member of the UN Convention on the Rights of the Child, ‘measures aiming at banning importation of products made using exploitative child labour would not involve a change in the official policy of other contracting parties’.²¹⁰ The important consequence is that a prohibition on products made with child labour and forced labour would therefore not put any obligations on the EU’s trading partner which were binding on them already anyway. It is therefore impossible that the WTO would find a violation of GATT rules.

A very complicated problem that had to be solved to effectively ensure that only legally logged timber would enter the European market is relevant for this thesis as well. How was to be determined whether timber was logged legally or not? This question is difficult to answer both from a practical as well as from a legal point of view. Practical because, as is pointed out by Brack, ‘exporting and importing companies may not be aware that they are handling illegal products – and, even if they are, standard shipping documentation is often easy to falsify’.²¹¹ In a globalised world of non-transparent supply chains, how is one to prove that a product is legal or not? How does the EU

²¹⁰ Breining-Kaufmann, 2007, p. 147.

²¹¹ Brack, 2013, p. 4.

control that?

There are legal complexities too because the requirement of proving legality of the timber is a potential cause for violation of WTO regulations.²¹² As a prohibition of unequal treatment is a fundamental WTO principle, the EU would have to require that either all manufacturers are required to prove the legality of their products or none of them at all. So, first of all, to ensure equal treatment, all exporters to the EU would have to be required to prove compliance with labour standards, and not just the countries in which problems with labour standards are the most apparent. Secondly, to avoid discrimination, the requirement of proof of legality would have to be applicable equally to domestic and to foreign producers.

Both problems have been attempted to be solved with a dualistic solution: the 2005 EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT) combined with the aforementioned 2010 EU Timber Regulation. The latter prohibits the placement of illegally harvested products on the European market. The former aims at signing bilateral voluntary partnership agreements (VPAs) with countries that are most vulnerable to illegal logging.²¹³ It is very important to fully understand the concept here. The EU Timber Regulation prohibits illegal timber, based on legislation in the exporting country, on the European market but does not require exporting countries to prove the origins of the timber and is therefore not in conflict with WTO rules. FLEGT aims at signing VPAs which prohibit exports of unlicensed timber to the EU: ‘Imports into the Community of timber products exported from partner countries shall be prohibited unless the shipment is covered by a FLEGT licence’.²¹⁴ As they are not enforced on the exporting country but voluntarily signed, they, neither, are in conflict with WTO rules.

²¹² Brack, 2013, p. 4.

²¹³ European Union – Council Regulation (EC) No 2173/2005 (20 December 2005). Available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF>, accessed on 08-07-2013; Art. 2(3).

²¹⁴ Ibidem, Art. 4.

The task of proving that FLEGT licensed timber is factually legal is thus delegated to the country with which the EU has signed the VPA.²¹⁵ This has two main consequences. The first is that the EU is not burdened with controlling the origins of timber. This is a major practical advantage. It is a safe assertion that controlling this would be a very difficult, time consuming, costly and bureaucratic endeavour for the EU. The second is that the system is susceptible to fraud and the EU would have no direct control on confronting this. As part of the VPAs, ‘partner countries develop control systems to verify the legality of their timber exports to the EU’ and ‘the EU provides support to establish or improve these control systems’.²¹⁶ As the EU Timber Regulation only became effective in March 2013, it has to be seen whether this is sufficient to guarantee legality or not. With regards to prohibiting products manufactured with either child labour or forced labour however, some doubt is justified. The system put in place by the EU begs for the question why countries which currently are either unwilling or unable to assure that their export products are child labour and forced labour free, will or can do so once they signed an agreement on licensing those same products. If, indeed, they would be willing to sign such an agreement at all.

²¹⁵ As of now, countries which have either signed a VPA or are involved in the process of doing so are Cameroon, Central African Republic, Côte d'Ivoire, Democratic Republic of Congo, Gabon, Ghana, Guyana, Honduras, Indonesia, Liberia, Malaysia, Republic of Congo (Brazzaville), Thailand and Vietnam. See http://www.euflegt.efi.int/portal/home/vpa_countries/, accessed on 24-06-13.

²¹⁶ European Union – FLEGT Voluntary Partnership Agreement between Indonesia and the European Union. Briefing note, May 2011. Available at http://www.efi.int/files/attachments/euflegt/briefing_note_indonesia_en.pdf, accessed on 11-07-2013; p. 1.

Conclusions

The main question of this thesis was whether a European Union prohibition on imports of products made with child labour or forced labour is feasible. The reason why this question is relevant is because as for now, there are no enforceable legal obligations on companies importing those goods to stop doing so. In their quest for cheaper production methods, lowering labour standards is among the most apparent, and simultaneously can have the most disturbing consequences on the workers involved. The issue had to be analysed from two main perspectives; the legal perspective and the political perspective.

It has been demonstrated that the EU does have a responsibility on preventing that goods produced for its market are made with child labour or forced labour. Although the EU is not a party to many human rights treaties itself, there is no dispute that non-state actors, which the EU despite possessing some characteristics of a State still is, do have human rights obligations under international law. The fact that the EU has been endowed with a legal personality means that it bears responsibility to respect human rights law. As a consequence the EU cannot hide behind the argument that it is dependent on its Member States; as external trade policy is an exclusive competence of the Union, the EU is responsible for the rules regulating it.

Since the EU is not a party to many international human rights treaties, the applicable body of human rights law has to be derived from customary international law and the legislation of the EU itself. Among others, the 1989 UN Convention on the Rights of the Child, the 1966 International Covenant on Economic, Social and Cultural Rights and the 1998 ILO Declaration on Fundamental Principles and Rights at Work provide a body of legal obligations on both child labour and forced labour which are so widely ratified that there is not much doubt that they constitute customary international law. The entry into force in 2009 of the Charter of Fundamental Rights of the European Union, which reiterates many of those rights and often reinforces them, only makes the normative obligations of the EU on this matter stronger.

Under current thought on international law it cannot be argued that the EU has the positive obligation to protect human rights outside its jurisdiction by actively interfering with the policies of its trading partners. However a case can be made that it does have the negative obligation to respect human rights within the jurisdiction of its trading partners. Although the EU does not directly violate those rights itself, it does encourage violations by allowing companies to import goods produced with child labour and forced labour to the Union. Furthermore it can be said that the EU has a positive obligation to undertake action to put a halt to those imports to protect public morals within the EU.

The framework within which to do so is that of the World Trade Organization, which regulates almost all international trade. Although until recently a strict separation existed between trade law and labour rights, the areas have come closer to each other, mainly due to the efforts of the International Labour Organization. Although a social clause never became an incorporated part of WTO legislation, the two organisations intensified their cooperation, leading to a stronger acknowledgement by the WTO that labour rights are affected by international trade and that therefore they could be addressed as such. This could happen within currently existing trade law. The 1947 GATT agreements on international trade leave open the possibility to restrict trade to protect public morals and human life. Practically, it has to be demonstrated that a prohibition on imports of unfairly produced goods is necessary to protect either public morals or human life. It can be strongly argued that public morals in the EU include a rejection of the usage of child labour and forced labour. Furthermore it has been argued that both child labour and forced labour may invoke GATT article XX(b) to protect human life. Import prohibitions on unfairly produced goods are not beforehand excluded from these measures and may be legal within the WTO framework. This has been demonstrated by the case of Myanmar.

The most important question to be answered is whether the prohibition is necessary to achieve the goal pursued. It has to be sufficiently important, other factors influenced by

the measures have to be taken into account and all other alternatives have to be exhausted. There is no question that an attempt to prevent products made with child labour or forced labour from entering the EU is sufficiently important. This is demonstrated by the legislation within the EU aimed at preventing these practices. It can be safely said that there is a wide consensus, in particular within the EU, that child labour and forced labour are harmful. Furthermore EU citizens have the right to know that products they purchase are not made with unfair labour. Similarly there are arguments to contend that there are no real alternatives. The problems of child labour and forced labour are widespread and evidently, the attempts of the EU thus far have not solved these problems. On the contrary, trading practices of the EU, which normatively condemns child labour and forced labour, but in practice stimulates it by importing the products concerned, have rather helped to keep the problems intact. Other factors influenced by the measures are important. Particularly concerning child labour the question whether the children involved are helped when they lose their income altogether is justified. Any measure would therefore have to be combined with additional measures regarding particularly, but not exclusively, education.

Two practical examples have suggested directions in which the EU could look to formulate a prohibition on the imports of unfair products. The US draft Decent Working Conditions and Fair Competition Act has shown that a prohibition on sweatshop goods is a realistic option. Analysis of the contents of the draft bill revealed that a prohibition is not necessarily contrary to WTO regulations, although certainty on this question can only be acquired after the WTO adjudicates the bill. Since there was insufficient political support for the draft bill, it never became law. The EU FLEGT Action Plan and the EU Timber Regulation on the contrary did become law. The action plan prohibits illegal timber from entering the EU with a dualistic approach; a general prohibition on placing illegal timber on the European market combined with voluntary agreements with timber exporting countries to require prove that the timber they export has been logged in a legal way. A similar approach could be used to prohibit unfair goods.

Generally, what the EU should do to prevent imports of unfairly produced goods is to

make them illegal on the European market. As long as the circumstances under which those goods are produced are illegal in the exporting country too, there should be no problems with WTO regulations. It has been demonstrated that child labour and forced labour are near-universally prohibited due to wide ratification of relevant treaties as well as membership of the ILO. A similar system as with the FLEGT mechanism could be implemented; the requirement that goods are proven child labour and forced labour free. A complaints mechanism which makes use of the technological possibilities of mobile phones, social media and internet in general could serve to signal potential violations.

There are several constraints which need to be addressed adequately. The most important and most comprehensive of these is practical. It is probably not feasible to just implement a prohibition on the imports of the general category of unfair goods, although that is exactly what was aimed at with the DWCFCFA. More likely is that it is necessary to address every single product group separately. Consequentially, before legislation could be endorsed, there needs to be detailed information on which product groups are most vulnerable to involving labour exploitation. On every product group, the EU would have to implement separate legislation on prohibiting the illegal product on the European market. On every product group, the EU would have to negotiate agreements with the major exporting countries to require them to prove legality. Even if this would succeed, controlling whether licensed products are actually legal could turn out to be very difficult. The bureaucracy involved in implementing the measures would be enormous.

Related to this, but also a constraint in itself, can be the lack of political will to act. There are multiple reasons why political will would be absent. The first is as a consequence of the bureaucracy involved with implementing a prohibition. The second could be the result of differing opinions on the consequences of free trade, similarly to the debates on the US DWCFCFA. Thirdly, even though the results of this approach turned out to be insufficient in the past decades, European politicians might want to stick to soft power by incorporating labour rights obligations in trade agreements.

Fourthly, lobbying by major European companies, which are not keen on the costs related to protecting labour conditions combined with the costs of proving that they did so, may constitute a strong force against a prohibition.

However, normatively the EU does have a responsibility to prevent unfairly produced goods from entering the EU. Legally, there are sufficient reasons to assume that this import barrier is feasible.

Bibliography

Cases

Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, application no. 45036/98 (ECtHR, 2005).

Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, case 11-70 (CJEU, 1970).

M.S.S. v. Belgium and Greece, application no. 30696/09 (ECtHR, 2011).

Nicaragua v. United States of America (ICJ, 1984).

North Sea Continental Shelf Case (ICJ, 1968).

Paul Reitmayr v. Austria, application no. 23866/94 (ECtHR, 1995).

Regina v. Kent Kirk, case 63/83 (CJEU, 1984).

Wünsche Handelsgesellschaft GmbH & Co. V. Federal Republic of Germany, case 69/85 (CJEU, 1986).

Primary sources

European Union – 2522nd Council meeting (External Relations), C/03/209, 21-07-2003. Available at http://europa.eu/rapid/press-release_PRES-03-209_en.pdf, accessed on 11-07-2013.

European Union, ‘Acts adopted under Title V of the EU Treaty’, pp. L 308/1 – L 308/80 (24-11-2007) in *Official Journal of the European Union* on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:308:0001:0080:EN:PDF>, accessed on 08-07-2013.

European Union – Charter of Fundamental Rights of the European Union [2000: 2009]. Available at http://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed on 08-07-2013.

European Union - Corrigendum to the exchange of letters between the Commission of the European Communities and the International Labour Organization, (2001/C 165/12), 08-06-2001, in *Official Journal of the European Communities*. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:165:0023:0027:EN:PDF>, accessed on 11-07-2013.

European Union – Council Common Position 2007/750/CFSP of 19 November 2007 amending Common Position 2006/318/CFSP renewing restrictive measures against

Burma/Myanmar in *Official Journal of the European Union* (24-11-2007). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:308:0001:0080:EN:PDF> , accessed on 11-07-2013.

European Union - Council Regulation (EEC) No 990/93 (26 April 1993). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993R0990:EN:PDF> , accessed on 08-07-2013.

European Union – Council Regulation (EC) No 343/2003 (18 February 2003). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:050:0001:0010:EN:PDF> , accessed on 08-07-2013.

European Union – Council Regulation (EC) No 2173/2005 (20 December 2005). Available on <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF> , accessed on 08-07-2013.

European Union – FLEGT Voluntary Partnership Agreement between Indonesia and the European Union. Briefing note, May 2011. Available at http://www.efi.int/files/attachments/euflegt/briefing_note_indonesia_en.pdf , accessed on 11-07-2013.

European Union – International Labour Organization Memorandum of Understanding (2004). Available at http://ec.europa.eu/europeaid/what/social-protection/documents/memorandum_of_understanding_ec_ilo_en.pdf , accessed on 08-07-2013.

European Union – Memorandum of Understanding between the European Commission and the International Labour Organization, 2004. Available at http://ec.europa.eu/europeaid/what/social-protection/documents/memorandum_of_understanding_ec_ilo_en.pdf , accessed on 11-07-2013.

European Union – Regulation (EU) No 995/2010 (20 October 2010). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:295:0023:0034:EN:PDF> , accessed on 08-07-2013.

European Union – Regulation (EU) No 978/2012 (25 October 2012). Available at http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150025.pdf , accessed on 08-07-2013.

European Union - Treaty on European Union [1992: 1993]. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0013:0046:en:PDF> , accessed on 08-07-2013.

International Labour Organization – Constitution of the International Labour Organization and selected texts. Available at <http://www.ilo.org/public/english/bureau/leg/download/constitution.pdf> , accessed on 08-07-2013.

International Labour Organization – Declaration on Fundamental Principles and Rights at Work [1998]. Available at http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453911:NO , accessed on 08-07-2013.

Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights [2012]. Available at http://www.fian.org/fileadmin/media/publications/2012.02.29_-_Maastricht_Principles_on_Extraterritorial_Obligations.pdf , accessed on 08-07-2013.

United Nations – Charter of the United Nations [1945]. Available at <http://treaties.un.org/doc/Publication/CTC/uncharter.pdf> , accessed on 08-07-2013.

United Nations – Conference on Trade and Employment. Final act and related documents (‘Havana Charter’) (April 1948). Available at http://www.wto.org/english/docs_e/legal_e/havana_e.pdf , accessed on 08-07-2013.

United Nations – Convention on the Rights of the Child [1989: 1990]. Available at <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> , accessed on 08-07-2013.

United Nations – International Covenant on Economic, Social and Cultural Rights [1966: 1976]. Available at <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> , accessed on 08-07-2013.

US Congress – Decent Working Conditions and Fair Competition Act: S.367 (23 January 2007). Available at <http://www.govtrack.us/congress/bills/110/s367> , accessed on 08-07-2013.

World Trade Organization – Agreement Establishing the World Trade Organization (‘Marrakesh Agreement’) [1994]. Available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf , accessed on 08-07-2013.

World Trade Organization – General Agreement on Trade and Tariffs [1947: 1948]. Available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf , accessed on 08-07-2013.

World Trade Organization – Singapore Ministerial Declaration, adopted on 13 December 1996, WT/MIN(96)/DEC. Available at http://www.wto.org/english/thewto_e/minist_e/min96_e/singapore_declaration96_e.pdf , accessed on 08-07-2013.

Secondary sources

Abbott, Frederick, Breining Kaufmann, Christine and Cottier, Thomas (eds.), *International trade and human rights: Foundations and conceptual issues*. Michigan: University of Michigan Press, 2009.

Adidas Group, *Sustainability progress report 2012*, downloaded from http://www.adidas-group.com/SER2012/downloads/adidas_SPR2012_full.pdf , accessed on 08-07-2013.

Alston, Philip (ed.), *Labour rights as human rights*. Oxford: Oxford University Press, 2005.

Alston, Philip and Simma, Bruno, ‘The sources of human rights law: custom, jus cogens and general principles’, pp. 82 – 108 in *Australian Year Book of International Law*, vol. 82, 1988-1989.

Bacchetta, Marc and Jansen, Marion, *Making globalization socially sustainable*. International Labour Organization/World Trade Organization joint publication. Geneva: International Labour Organization/World Trade Organization, 2011.

Baetz, Juergen, ‘Adidas encourages factory workers to anonymously text complaints’ in The Huffington Post (05-06-2013) on http://www.huffingtonpost.com/2013/05/06/adidas-factory-workers-text-message-complaints_n_3223412.html , accessed on 08-07-2013.

Bercusson, Brian and Estlund, Cynthia (eds.), *Regulating labour in the wake of globalisation: New challenges, new institutions*. Portland: Hart Publishing, 2007.

Blackett, Adelle, ‘Whither social clause? Human rights, trade theory and treaty interpretation’, pp. 1 – 80 in *Columbia Human Rights Law Review*, vol. 31, 1999-2000.

Bonavita, Valeria, ‘The EU Charter of Fundamental Rights and the social dimension of international trade’, pp. 241 – 264 in Federico, Giacomo di, *The EU Charter of Fundamental Rights. From declaration to binding instrument*. Dordrecht: Springer, vol. 8, 2011.

Bossuyt, Marc, *The adverse consequences of economic sanctions on the enjoyment of human rights*. Working paper prepared by the Commission on Human Rights of the UN Economic and Social Council, E/CN.4/Sub.2/2000/33, 2000. Available on [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c56876817262a5b2c125695e0050656e/\\$FILE/G0014092.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c56876817262a5b2c125695e0050656e/$FILE/G0014092.pdf) , accessed on 08-07-2013.

Bown, Chad, ‘Participation in WTO Dispute Settlement: complaints, interested parties, and free riders’, pp. 287 – 310 in *World Bank Economic Review*, vol. 19, no. 2, 2005.

Brack, Duncan, ‘Combating illegal logging: Interaction with WTO rules’, pp. 1 – 16 in *Chatham House Briefing Paper* (EER BP 2013/01), May 2013.

Bradley, Curtis and Mitu Gulati, Gaurang, 'Withdrawing from international custom', pp. 202 – 275 in *Yale Law Journal*, vol. 120, 2010.

Breining-Kaufmann, Christine, *Globalisation and labour rights. The conflict between core labour rights and international economic law*. Portland: Hart Publishing, 2007.

Buchanan, Holly and Ryngaert, Cedric, 'Member state responsibility for the acts of international organizations', pp. 131 – 146 in *Utrecht Law Review*, vol. 7, no. 1, 2011.

Buncombe, Andrew, 'Dhaka collapse: Primark to pay victims of Bangladesh factory disaster' in *The Independent* (29-04-2013) on <http://www.independent.co.uk/news/world/asia/dhaka-collapse-primark-to-pay-victims-of-bangladesh-factory-disaster-8595529.html> , accessed on 08-07-2013.

Burke, Jason, 'Bangladesh factory tragedy gives hope to leather workers' in *The Guardian* (07-07-2013) on <http://www.guardian.co.uk/world/2013/jul/07/bangladesh-tanneries-human-rights-violations?INTCMP=SRCH> , accessed on 11-07-2013.

Cassese, Antonio, *International law*. Oxford: Oxford University Press, 2nd edition, 2005.

Chang, Ha-Joon, 'Kicking away the ladder' in *Foreign Policy In Focus*, 2003. Downloaded from <http://www.fpif.org/files/1248/SRtrade2003.pdf> , accessed on 08-07-2013.

Clapham, Andrew, *Human rights obligations of non-state actors*. Oxford: Oxford University Press, 2006.

Costello, Cathryn, 'The Bosphorus ruling of the European Court of Human Rights: fundamental rights and blurred boundaries in Europe', pp. 87 – 130 in *Human Rights Law Review*, vol. 6, no. 1, 2006.

Cottier, Thomas, 'Trade and human rights: A relationship to discover', pp. 111 – 132 in *Journal of International Economic Law*, vol. 5, no. 1, 2002.

Diallo, Yacouba et al., *Global child labour developments: measuring trends from 2004 to 2008*. Report on International Programme on Elimination of Child Labour. Geneva: ILO, 2010.

Edmonds, Eric and Pavcnik, Nina, 'Child labor in the global economy', pp. 199 – 220 in *The Journal of Economic Perspectives*, vol. 19, no. 1, 2005.

European Union press release – 'Joint Statement by HR/VP Catherine Ashton and EU Trade Commissioner Karel De Gucht following the recent building collapse in Bangladesh' on [http://europa.eu/rapid/press-release MEMO-13-395_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-13-395_en.htm?locale=en) , accessed on 08-07-2013.

Ewart James, Joanna, 'EU rhetoric/EU action: ending forced labour in Uzbek cotton industry' in *The EUobserver* (23-04-2013) on <http://euobserver.com/opinion/119907> , accessed on 08-07-2013.

Ewing-Chow, Michael, 'First do no harm: Myanmar trade sanctions and human rights', pp. 152 – 180 in *Northwestern Journal of International Human Rights*, vol. 5, no. 2, 2007.

Fukunaga, Yuka, 'Securing compliance through the WTO dispute settlement system: implementation of DSB recommendations', pp. 383 – 426 in *Journal of International Economic Law*, vol. 9, no. 2, 2006.

Gaja, Giorgio, 'First report on responsibility of international organizations'. *Special report prepared by the International Law Commission of the UN General Assembly*, A/CN.4/532, 2003. Available on http://untreaty.un.org/ilc/documentation/english/a_cn4_532.pdf, accessed on 08-07-2013.

Genser, Jared and Howse, Robert, 'Are EU trade sanctions on Burma compatible with WTO law?', pp. 165 – 196 in *Michigan Journal of International Law*, vol. 29, 2008.

Goldsmith, Jack and Levinson, Daryl, 'Law for states: international law, constitutional law, public law', pp. 1791 – 1868 in *Harvard Law Review*, vol. 122, no. 7, 2009.

Greenhouse, Steven, 'Some retailers rethink role in Bangladesh' in *The New York Times* (01-05-2013) on http://www.nytimes.com/2013/05/02/business/some-retailers-rethink-their-role-in-bangladesh.html?_r=2&, accessed on 08-07-2013.

Hepple, Bob, *Labour laws and global trade*. Portland: Hart Publishing, 2005.

Hodal, Kate, 'Tate & Lyle sugar supplier accused over child labour' in *The Guardian* (09-07-2013) on <http://www.guardian.co.uk/business/2013/jul/09/tate-lyle-sugar-child-labour-accusation?INTCMP=SRCH>, accessed on 11-07-2013.

Howse, Robert, 'The World Trade Organization and the protection of workers' rights', pp. 131 – 172 in *The Journal of Small and Emerging Business Law*, vol. 3, 1999.

International Labour Organization, *Better work Indonesia: garment industry baseline report. Worker perspectives from the factory and beyond*. Geneva: ILO, 2012. Downloaded from <http://betterwork.com/global/wp-content/uploads/Impact-Research-Indonesia-Baseline-Report-Worker-Perspectives-from-the-Factory-and-Beyond.pdf>, accessed on 08-07-2013.

International Labour Organization, *Child labour: a textbook for university students*. Geneva: International Labour Office, 2004.

International Labour Organization, *ILO Global estimate of forced labour: results and methodology*. Geneva: International Labour Office, 2012.

Irwin, Douglas, *Free trade under fire*. Princeton: Princeton University Press, 2009.

Jacqué, Jean Paul, 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', pp. 995 – 1023 in *Common Market Law Review*, vol. 48, 2011.

Kabiru Ishola, Genty, 'ILO and the international labour standards setting: A case of Nigeria labour acts', pp. 15 – 20 in *Journal of Human Resource Management*, vol. 1, no. 1, 2013.

Kälin, Walter and Künzli, Jörg, *The law of international human rights protection*. New York: Oxford University Press, 2009.

Leary, Virginia, 'The WTO and the social clause: post-Singapore', pp. 118 – 122 in *European Journal of International Law*, vol. 8, 1997.

Maryanov, Debra Cohen, 'Sweatshop liability: Corporate codes of conduct and the governance of labor standards in the international supply chain', pp. 397 – 450 in *Lewis & Clark Law Review*, vol. 14, 2010.

Mégret, Frédéric, 'International law as law', pp. 64 – 92 in Crawford, James and Koskeniemi, Martti, *The Cambridge companion to international law*. New York: Cambridge University Press, 2012.

Morano-Foadi, Sonia and Andreadakis, Stelios, 'Reflections on the architecture of the EU after the Treaty of Lisbon: the European judicial approach to fundamental rights', pp. 595 – 610 in *European Law Journal*, vol. 17, no. 5, 2011.

Ndlovu, Lonias, 'An assessment of the WTO compliance of the recent regulatory regime of South Africa's dumping and anti-dumping law', pp. 29 – 40 in *Journal of International Commercial Law and Technology*, vol. 5, no. 1, 2010.

OHCHR, *Human rights and trade*. 5th WTO Ministerial Conference, Cancún, Mexico. 2003.

OHCHR, *The European Union and international human rights law*. Publication of the UN Office of the High Commissioner for Human Rights, Regional Office for Europe. Available at http://www.europe.ohchr.org/Documents/Publications/EU_and_International_Law.pdf, accessed on 06-07-2013.

Oonk, Gerard, 'Child labour, trade relations and corporate social responsibility. What the European Union should do' (23 June 2008), downloaded from http://www.europarl.europa.eu/meetdocs/2009_2014/documents/deve/dv/3childlabourtradeandcsr_3childlabourtradeandcsr_en.pdf, accessed on 06-07-2013.

Özden, Caglar and Reinhardt, Eric, 'The perversity of preferences: GSP and developing country trade policies, 1976 – 2000', pp. 1 – 21 in *Journal of Development Economics*, vol. 78, 2005.

Pape, Robert, 'Why economic sanctions do not work', pp. 90 -136 in *International Security*, vol. 22, no. 2, 1997.

Petersmann, Ernst-Ulrich, 'The 'human rights approach' advocated by the UN High Commissioner for Human Rights and by the International Labour Organization: is it relevant for WTO law and policy?', pp. 605 – 627 in *Journal of International Economic Law*, vol. 7, no. 3, 2004.

Piris, J-C., *The Lisbon Treaty. A legal and political analysis*. New York: Cambridge University Press, 2009.

Posner, Eric, 'Is the International Court of Justice biased?', *John M. Olin Law & Economics Working Paper* no. 234, 2004. Available at http://www.law.uchicago.edu/files/files/234.eap_icj-bias.pdf , accessed on 08-07-2013.

Prashad, Vijay, 'The terror of capitalism' (29-04-2013) on <http://www.jadaliyya.com/pages/index/11436/the-terror-of-capitalism> , accessed on 08-07-2013.

Raju, K.D., 'Social clause in WTO and core ILO labour standards: concerns of India and other developing countries'. Paper presented to the *Federation of Indian Chamber of Commerce and Industry* (FICCI) on 20 December 2002.

Reinisch, August, 'Developing human rights and humanitarian law accountability of the Security Council for the imposition of economic sanctions', pp. 851 – 872 in *The American Journal of International Law*, vol. 95, no. 4, 2001.

Russell, Jim, 'Locating the publicity of US-based anti-sweatshop activism', pp. 217 – 221 in *Antipode*, vol. 36, no. 2, 2004.

Sadia, Tahmina Akhter, 'They slapped us if we argued. We wiped our tears and went to work': The brutal existence of a Bangladeshi garment worker' in *The Independent* (10-05-2013) on <http://www.independent.co.uk/news/world/asia/they-slapped-us-if-we-argued-we-wiped-our-tears-and-went-to-work-the-brutal-existence-of-a-bangladeshi-garment-worker-8611808.html> , accessed on 08-07-2013.

Shaw, Malcolm, *International law*. Cambridge: Cambridge University Press, 6th edition, 2006.

Simons, Geoff, *Imposing economic sanctions: Legal remedy or genocidal tool?* Pluto Press: 1999.

Winters, Leonard Alan, 'Trade liberalisation and economic performance: An overview', pp. F4 – F21 in *The Economic Journal*, no. 114, 2004.

Websites

Alternatives International - Declaration of the Social Movements Assembly (29-03-2013) on <http://www.alterinter.org/spip.php?article3996> , accessed on 08-07-2013.

European Union, '2522nd Council meeting - External relations - Brussels, 21 July 2003', reference: PRES/03/209 on http://europa.eu/rapid/press-release_PRES-03-209_en.htm , accessed on 08-07-2013.

European Union, 'FLEGT Voluntary Partnership Agreements: VPA Partner Countries on http://www.euflegt.efi.int/portal/home/vpa_countries/ , accessed on 08-07-2013.

European Union – Human Rights on <http://europa.eu/pol/rights/> , accessed on 08-07-2013.

International Court of Justice – *Statute of the International Court of Justice* on <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0> , accessed on 08-07-2013.

International Labour Organization, 'Mission and objectives' on <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> , accessed on 08-07-2013.

Oxfam, 'Forced labour by Nike supplier' (15-07-2013) on <https://www.oxfam.org.au/2008/07/forced-labour-by-nike-supplier/> , accessed on 08-07-2013.

Stop Child Labour – <http://www.stopchildlabour.eu> , accessed on 08-07-2013.

World Trade Organization, '3rd WTO Ministerial Conference. Top 10 reasons to oppose the World Trade Organization? Criticism, yes... Misinformation, no!' on http://www.wto.org/english/thewto_e/minist_e/min99_e/english/misinf_e/03lab_e.htm , accessed on 08-07-2013.

World Trade Organization, 'Dispute settlement: the disputes. Disputes by country/territory' on http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm , accessed on 08-07-2013.

World Trade Organization, 'Understanding of rules and procedures governing the settlement of disputes' on http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf , accessed on 08-07-2013.

World Trade Organization, 'Understanding the WTO' on http://www.wto.org/english/thewto_e/whatis_e/what_we_do_e.htm , accessed on 08-07-2013.