What’s in a human rights clause?

Its development, its application, and an insight into the construct of a European identity.

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Abstract:

The human rights clause, introduced to EC bilateral and co-operation treaties since 1995, offers an adequate tool for sanctioning persistent serious breaches of human rights. However, it cannot be reduced to a mere tool for treaty suspension; it is easily argued that the clause has failed in its purpose when the EC is forced to apply the suspension provision. The scope of action that can be taken under the human rights clause covers a much wider and innovative range of possible responses to violations of human rights and fundamental democratic principles.

However, the argument is that the human rights clause has effects that go well beyond what is written into its legal provisions. The creation of a legitimate legal space for preventive action and positive response to address deficient human rights standards has proven effective in several cases. Furthermore, the human rights clause has had a significant impact on the configuration of the internal institutions of the EU. But even more importantly, by making sure that human rights standards have become a central issue present in all EC dealings with third countries, it has had, and continues to have, a pivotal role in determining the personality of the EU. It plays a crucial function in defining European identity, both for the European Union itself and also in relation to other international actors.

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Introduction[1]

The human rights clause, introduced by the European Union (the EU) since 1995 to its bilateral and co-operation treaties, offers an adequate tool for sanctioning persistent serious breaches of human rights. However, it cannot be reduced to a mere tool for treaty suspension; it is easily argued that the clause has failed in its purpose when the EU is forced to resort to the suspension provision. The scope of action that can be taken under the human rights clause covers a much more diverse and innovative range of possible responses to violations of human rights and fundamental democratic principles. This is not a novel point to make. It is the aspect of positive responses to deteriorating levels of human rights standards that has, together with the legal base in EC law for the human rights clause, attracted most attention in academic writing.[2] However, not only scholarly writings, but also EU policy indicates that the human rights clause does not only allow for negative measures in case of human rights violations, but instead puts a stress on possible positive responses.

The underlying argument of this paper is that the human rights clause has effects that go well beyond what is written into its legal provisions. The creation of a legitimate legal space for preventive action and positive response to address deficient human rights standards has proven effective in several cases, and furthermore, the human rights clause has had a significant impact on the configuration of the internal institutions of the EU. But even more importantly, by making sure that human rights standards have become a central issue present in all EU relations with

[1] The first time I met Professor René Foqué in Venice, he said that for my thesis I was not in the need of a supervisor but of a support group. He was right. I wish to thank Professor Koen Lenaerts, Tim Corthaut, Professor René Foqué, Barbara Brandtner and Siddhartha Della Santina for their invaluable help and advice without which this thesis would not have been possible. Nevertheless, all mistakes are mine alone.

[2] Alston and Weiler, Brandtner and Rosas, Fierro, Lenaerts and de Smijter, Marantis, Riedel and Will, and Simma, Aschenbrenner and Schulte all cover the issues of sources of law and possible positive and negative responses to violations. Other reoccurring issues are the legal development of the human rights clause, possible enforcement mechanisms, EC practice and the coherence of EU policy.

third countries, the symbolic effect of the human rights clause has had, and continues to have, a pivotal role in determining the identity of the EU. The human rights clause communicates a clear stance on behalf of the EU on issues of human rights, in both its internal and external relations. The external and internal symbolic effect of this is an integral part of the process of constructing a European identity, and hence also a part of the development of the Union from an economic to a political one.

The ideology of human rights has been pivotal and essential in conceptualising closer political union. The role of human rights in the societies of the member states of the European Union is as old, and fundamental, as the project of setting up a union itself. Through the use of the human rights clause the principles of human rights have become externalised and what used to be implicit norms have now been made explicit values. The application of the human rights clause forced the start of a discussion that has resulted in the EU clarifying the mandate it possesses to address human rights issues. In other words, two mutually reinforcing movements are at work. One which creates the external image, of the EU as a human rights agent through the use of the human rights clause, the other, which by self-reflection in this external image provides a basis for a shared European identity. The culmination of this process of self-identification is the codification of the EU's self-perception as a Human Rights agent, through the drafting of a constitution.

At the core of this paper is the belief that law can be studied as a social phenomenon and "if we understand the nature of our legal argument better, we know better what kind of people we are."[3] In relation to the discussion of the possible construct of a European identity, an analysis of law can give us the answer to the specific nature and location of the

[3] Dworkin, R., *Law's Empire,* Cambridge - Ma, Harvard University Press, 1986, p. 11.

European political community today and in which direction European integration is moving.

Methodology

The EU has, through its policy, defined three main pillars for a functioning society today; democracy, rule of law and human rights. Despite being inextricably interlinked, this paper will concentrate primarily on the human rights pillar. The basis of the general approach of this paper is that "legal reasoning is an exercise in constructive interpretation."[4] The methodological framework is greatly indepted to the writings of Ronald Dworkin, who defines legal, constructive interpretation as the choice of an object (a legal phenomenon), the "unveiling" of its meaning, and the subsequent restructuring of the object in the light of that meaning. Through the process of "unvieling" (the deconstruction of a legal phenomenon), it is possible to use the object as the best possible example of a process in which it is an integral part.[5] The human rights clause provides an excellent example of the relationship between policy making, enforcement and normative development in the EU. The development and application of the human rights clause is a process in which value and content become entangled. The aim is to bring to light the three main components of this process, namely the issue of fact (what is), the issue of law, and the issue of normative development (what ought to be). The first two of these seem straight forward enough. However, if one looks at the extended legal scope of the human rights clause, its effects go far beyond what is explicitly written into its provisions. This leads to the third of these issues, the idea of the normative development of the EU. The main goal of this study is, by unveiling the normative aspects of the application of the human rights clause, to detect the interaction between the legal development and its effects on the construct of a European identity.

[4] Ibidem, p. xii.

[5] Ibidem, p. 52.

The study will be carried out in three stages.[6] The first part is the "pre-interpretive", in which the main focus is to identify the object of the study. This part will look at the development of the human rights clause from the early 1980s onwards, leading up to the standard format codified in 1995. The second stage is "interpretive", which provides a general justification of the main elements of the human rights clause. By providing four short case studies, Australia, China, Russia and Zimbabwe[7] the section will illustrate and support the idea of the extended scope of the human rights clause. The main points are the effects of the application of the human rights clause on the identity of the EU, both self-perceived and as perceived by others. By its application the EU has stressed heavily the image of itself as a proactive, positive 'European Human Rights Agency'. The third, "post-interpretive" stage attempts to reconstruct the human rights clause in the light of the new meaning, given by the proceeding analysis of its constituent elements. This section will link the idea of the EU as a 'European Human Rights Agency' to the process of drafting a European constitution, and ask the question of the future prospect of this approach. The concluding remarks will point to the necessity of viewing the construct of a European identity not as an end goal in itself, but as a dynamic continuous process, creating a EU prepared for change.

[6] As methodological source of inspiration I have turned to Dworkin's constructivist theory in his book *Law's Empire,* Cambridge - Ma, Harvard University Press, 1986.

[7] As a basis for making a illustrative selection of the case studies I have used Todd Landman's article *Comparative Politics and Human Rights,* in <<Human Rights Quarterly>>, vol. 24, 2002, pp. 890 - 923.

The Human Rights Clause

In countries with which the European Community has bilateral or cooperation agreements, the situation of deteriorating human rights standards and serious interruptions of democratic functions have presented challenges to the EC in terms of how to respond to these new circumstances. The problem was brought to the fore in relation to a number of situations in which the EC, despite evidence for gross human rights violations and deteriorating levels of governance, still faced payment obligations. This was the case with, for example, Uganda in the 1970s. The Vienna Convention on the Law of Treaties (VCLT) does not automatically allow for termination of treaties solely on the ground of human rights violations.[8] Hence, the lack of a direct reference to human rights made it impossible for the EC to use its potentially most powerful tool, the suspension of cooperation agreements and development support, to promote and protect the upholding of human rights obligations in situations where serious violations occur. The human rights clause was developed with the intention to provide a mechanism that would allow for the Community to suspend or terminate agreements in these particular cases.

There have been occasions when the EC has managed to suspend agreements in situations of civil war or internal unrest. In these cases the EC has had to rely on arguments based on the 'impossibility of performance' of treaty obligations on behalf of the third country or more generally on the concept of *rebus sic stantibus* (fundamental changes of circumstances)[9]. Still, for the EC to rely on these provisions proved unsatisfactory and much effort was put into the development of the human rights clause. According to the VCLT, a treaty can be suspended

[8] The VCLT is not directly binding on the EC, in the sense that the convention is only open to ratification by states but many of its provisions have become a part of customary international law and as a subject to this, these provisions are also binding on the EC.

[9] Article 61(1) VCLT.

if it is in conformity with the treaty provisions and also in case of material breaches of the treaty. Suspension of a treaty due to human rights violations can thus only take place if the level of human rights protection in the country party to the agreement is seen as an essential element of the treaty.[10] By the inclusion of a human rights clause, the reference to certain standards of human rights protection and good governance has been made an essential element of all bilateral and cooperation agreements between the EC and third countries.

The Development of the Human Rights Clause

The first step towards a human rights clause was taken in 1989 during the drafting procedure for the Lomé IV convention. Article 5 (2)(2) stipulates that 'every individual shall have the right, in his own country or in a host country, to respect for his dignity and protection by law'. Article 5 explicitly linked human rights to development and created the legal foundation to promote human rights through development programs. Lomé IV also extended the channels through which the EU could provide aid: not only through the official, governmental channels but also directly to grassroots organisations. The provisions of Lomé IV, however, did not provide a suspension clause and thus did not address the core of the problem. Furthermore, human rights were only referred to in terms of programmatic principles, not as an essential element of the agreement. Emphasis was also given to economic and social rights, partly because these rights were seen as having a closer relationship to economic development.[11] The second problem of Lomé IV was that Article 5 was written for, and only applied to, ACP (African-Pacific-Caribbean Countries) countries. The distinct geographical scope of

[10] Riedel, E., Will, M., *Human Rights Clauses in External Agreements of the EC,* in P. Alston, *The EU and Human Rights,* Oxford, Oxford University Press, 1999, p. 724.

[11] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC* in P. Alston (Ed.), *The EU and human rights,* Oxford, Oxford University Press, 1999, p. 576.

application presented a problem in terms of the coherence and cohesion of EC policy. However, what Lomé IV did do, for the first time, was to outline a positive approach to human rights, in the sense that the treaty did not put an emphasis on the traditional, negative way of exercising political influence. Instead, the emphasis was put on positive responses to human rights violations, such as the intensification of political dialogue.[12] An example of a negative approach would be the application of economic sanctions, which has been seen through out modern history. Instead a positive approach to the same situation would stress the need to continue political discussion with the government and, at the same time, maybe provide aid through the non-governmental sector. The emphasis on a positive approach is one of the most innovative elements of the Lomé IV convention and also the element that would remain at the core of the further development of the human rights clause.

Through out 1990 the European Parliament continued to press for the extended application of the human rights clause also to treaties with non-ACP countries. In that process Article 5 was found to be inadequate, this partly due to the explicit references to social rights and the system of apartheid.[13] Article 5 was replaced with what is called the *basis clause.* This clause was developed in relation to agreements with countries from South America and was introduced in the framework treaty with Argentina signed in April 1990. Article 1(1) states: "Cooperation ties between the Community and Argentina and this agreement in its entirety are based on respect for democratic principles and human rights,[14] which inspire the domestic and external policies of the Community and

[12] Article 5, Lome IV. This new element would show to have great effects on the possible sanctions available to the EU, opening up for possible positive responses to violations of treaty obligations.

[13] Social rights are referred to in sub-paragraphs (2) and (3) and references to the apartheid regime found in sub-paragraph (2) and sub-subparagraph (4).

[14] The 'rights and fundamental freedoms' that the clause refers to are those listed in the Universal Declaration of Human Rights of 1948 and further on, in the European context, the Helsinki Final Act and the Paris Charter for a new Europe.

Argentina."[15] From merely referring to the right of the individual 'to respect for his dignity and protection by law', the *basis clause* defines the relationship between the third country and the EC as "based on respect for democratic principles and human rights." This does not provide clear grounds for termination of the treaty in case of human rights violations, but it can still be seen as an improvement in relation to Article 5 in as much as it that it brings human rights and democratic principles closer to constituting essential elements of EU treaty relations.

As a result of this process the Council passed a resolution on human rights, democracy and development in November 1991. The November resolution officially stated that human rights are intrinsically linked to development and emphasised the EU commitment to this particular relationship. The resolution included the recognition of human rights and democratic principles in third countries as being essential elements of overall EC development policy and thus an explicit aim of all EU development policy.[16] The November resolution took a step further from previous EU human rights policy in its emphasis on the principle of the indivisibility of economic and social rights on one hand, and civil and political rights on the other. The positive approach to human rights, mentioned in Lomé IV, was emphasised to a greater degree in the November resolution, according to which "the Commission and its member States will give high priority to a positive approach that stimulates respect for human rights and encourages democracy."[17] But even though a positive approach to the strengthening of human rights

[15] The same clause was used in agreements with Chile, Uruguay and Paraguay.

[16] Resolution of the Council and of the member States meeting in the Council on Human Rights, Democracy, and Development of 28 Nov. 1991. *Bull. EC* 11-1991, at 122.

[17] Ibidem, Note 30 Above.

and democratisation was stressed, the November Resolution also included provisions providing for negative, sanctioning measures.[18]

The next step in the development of a standard human rights clause came through the Council declaration of 11 May 1992 in which the Council stated that the respect for democratic principles forms an essential part of agreements between the Communities and the Conference on Security and Cooperation in Europe (CSCE). New agreements with the Baltic States and Albania, agreements with the Organisation for Security and Cooperation in Europe (OSCE) and other third countries that followed the declaration included these provisions. The reference to human rights as an 'essential element' in the agreements fulfilled the conditions for suspension of the treaty as set out in Article 60(3)(b) VCLT. To emphasise the possibility of suspension in situations of failure by the third country to uphold its treaty duties, the 'essential element' clause was accompanied by a non-compliance clause, the so-called *Baltic clause.*[19] The non-compliance clause was included in the 1992 agreements with the Baltic States, Albania, Brazil and also in the Andean Pact.[20] It stated that: "The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a *serious* breach of its essential provisions occurs" (emphasis added).[21] The essential element clause together with the non-compliance clause did provide a much more clearly defined and powerful tool for suspension of treaties in the case of gross human rights violations. However, the word *serious* does leave space for political manoeuvring and thus does not provide any automaticity in the response to treaty violations.

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[18] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC,cit.,* p. 582.

[19] Lenaerts, K. De Smijter, E. *The European Community's Treaty-Making Competence,* in Barav, A., Wyatt, D. A. (Ed.), *Yearbook of European Law,* vol. 16, 1996, p. 46.

[20] COM (95)216, B.

[21] In the case of Albania, please see Art. 21(4), and in the case of the Baltic states, Art 21(3).

After 1993 the *Baltic clause* was increasingly replaced by the *Bulgarian clause*[22] that laid out a wider scope of application and more options for possible response.[23] The suspension clause read: "If either party considers that the other Party has failed to fulfil an obligation under this agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall apply the Association Council with all the relevant information required for a thorough examination of the situation with the view to seeking a solution acceptable to the parties. (…) In selection of measures, priority must be given to those which least disturbs the functioning of this Agreement: These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests."

The main difference between *the Baltic clause* and *the Bulgaria clause* is the degree of sensitivity allowed for. In extreme cases *The Baltic Clause* provides for immediate suspension without consultation of any kind. The idea of a positive response to treaty violations, first introduced in the Lomé IV convention, was given much more importance in the drafting of the *Bulgaria clause*. In case of suspension of parts of a treaty, *The Bulgaria clause* is designed to provide the mechanisms for keeping a dialogue going and moreover, allowing for a conciliatory procedure to be set up.[24] The underlying idea was not to provide for sanctioning, but instead to provide a legitimate space for political discussion. Unfortunately, the strict requirements for consultation with the Association Council and the other party, poses the threat of making the *Bulgarian* non-compliance clause inoperative. This particular provision was later dropped in agreements with Russia and countries in the

[22] First used in agreements with Romania and Bulgaria.

[23] Riedel, E., Will, M., *Human Rights Clauses in External Agreements of the EC,* cit., p. 729.

[24] COM (95)216, B

Commonwealth of Independent States (CIS).[25]. In those agreements it was decided, through a joint interpretative declaration, that either party, in case of special emergency, was entitled to take suitable counter measures without going through the Association Council.[26] The essential element clause together with a non-compliance clause was used in a number of successive agreements.[27]

In 1994, when it was time for re-negotiation of the Lomé IV Convention, further references to human rights and democratic principles were included with broad support. The 'new' Article 5 read: 'Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of the Convention.' The compliance clause places more emphasis on the consultative part of the process, than what had been seen in earlier versions of the clause. In case of a breach on behalf of one party, the other party shall 'invite the party concerned (…) to hold consultations (…)'. There is a time limit of 30 days for the consultation to take place, and responses must be 'a measure of last resort'. In comparison to the joint declaration of the Russia and CIS states agreements, the Lomé IV convention imposes more restrictions in relation to unilateral responses.[28]

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[25] Kazakhstan , Ukraine, Kyrgystan, Moldavia and Belarus. All in 1994. See fotnote 43 in Riedel, E., Will, M., *Human Rights Clauses in External Agreements of the EC,* cit.

[26] Riedel, E., Will, M., *Human Rights Clauses in External Agreements of the EC,* cit., p. 730.

[27] With Vietnam, South Korea, Israel and also in Association Agreements with Tunisia and Morocco in 1995.

[28] Article 366a of Lomé IV (1995): '2. If one party considers the another Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it. (…) The consultation shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days.'

The human rights clause of the Lomé IV convention has served as a *standard clause* for the external agreements of the Community. The format was codified with the Commission Communication COM (95) 216 of the 23 May 1995 on 'the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries'. The communication clarifies the reference to human rights and democratic principles by linking them to the EU's positions on universal and regional human rights instruments. The Commission also points to the fact that these principles are to be regarded as general objectives of Community development and cooperation policy.[29] Furthermore, it takes a look at the evolution of the human rights clause and concludes that the human rights clause "is a substantial innovation in that it makes human rights the subject of common interest" and "enables the parties, when necessary to take restrictive measures."[30] Any restrictive measures should be taken in a "spirit of a positive approach" and should not only be "based on objective and fair criteria" but must also be taken with the aim to "keep a dialogue going."[31] However, and most importantly, the Commission addressed the problem of the previous incoherence of EC policy by drafting guidelines which set out the format of future human rights clauses. The Commission emphasised its concern that the use of different clauses could be interpreted as discriminatory practice, which could undermine the Commission's position in negotiations with third countries, and

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3. At the end of the period referred to in the third subparagraph of paragraph 2 if, in spite of all efforts no solution has been found, or immediately in the case of urgency or refusal of consultation, the Party which invoked the failure to fulfil an obligation may take appropriate steps, including, where necessary, the partial or full suspension of application of this Convention to the Party concerned. It is understood the suspension would balance of power a measure of last resort.

The Party concerned shall receive prior notification of any such measure which shall be revoked as soon as the reasons for taking it have disappeared.1, p. 731.

[29] COM (95)216, A.

[30] COM (95)216, B.

[31] COM (95)216, B.

concluded that the initiative would improve the "consistency, transparency and visibility" of the Community approach.[32]

The human rights clause outlined in the communication consists of substantive (the essential element article) and procedural (the article on non-execution) provisions. According to the guidelines, the preamble should include "general references to respect for human rights and democratic values" and references to relevant (regional and universal) instruments common to both parties.[33] The body of the agreement should have a clause, defining the essential elements, stating that "all provisions of the relevant agreement are based on respect for the democratic principles and human rights which inspire the domestic and external policies of all parties."[34] The clause should be adapted to the relevant circumstances of that particular agreement, as for example OSCE membership or market economy principles.[35] The agreement should also include an article on non-execution, making references to the format of the procedure and selection of measures relevant in case of the failure by one of the parties to uphold its obligations under the agreement.[36] An interpretative declaration should be attached to the agreement, clarifying the meaning of 'cases of special urgency' and

[32] COM (95)216, D.

[33] Ibidem, (a).

[34] Ibidem.

[35] Ibidem, (b), 1 The essential element article (Article X): 'Respect for the democratic principles and fundamental human rights established by (…) inspires the domestic and external policies of the Community and of **(**the country or group of countries concerned**)** and constitutes an essential elements of this agreement'.

[36] Ibidem, 2. The Non-Execution clause (Article Y): 'If either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a through examination of the situation with a view to seeking a solution acceptable to the Parties'. 'In the selection of measures, priority must be given to those that least disturb the functioning of this Agreement. These measures shall be notified immediately to the association Council and shall be the subject of consultations within the Association Council if the other party so requests'.

consequently also of what constitutes a material breach of the agreement.[37]

Communication COM (95) 216 effectively clarified the content of the human rights clause and provided a framework for future development, but it is not address the question of the legality and competence of the EC to include democratic principles and fundamental human rights as an essential element in its agreements. Portugal brought the issue in front of the European Court of Justice, challenging the notion that the implied powers of the EC included that of introducing a human rights clause into its agreements.[38] The case addressed questions arising from the newly concluded cooperation agreement between the EC and India. In an attempt to create a precedent for other pending agreements it indirectly addressed the legality of the human rights clause. The first point made by the Portuguese was that the rights referred to as 'fundamental rights' in the preamble to the Single European Act, and references in the Treaty on the European Union, were programmatic rights, only defining general objectives and not giving rise to any specific powers on behalf of the Community.[39] The second question that was brought up was the applicable treaty provisions under which the EC had the power to conclude agreements with third countries, and the effect of the relevant provision on the procedure of the conclusion of agreements. Portugal argued that the only valid basis for bilateral and cooperation agreements

[37] COM (95)216, (b), 3. The interpretative declaration in relation to the non-execution clause: '(a) The Parties agree, for the purpose of the correct interpretation and practical application of this Agreement, that the term "cases of special urgency" in Article Y means a case of material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in: (i) repudiation of the Agreement not sanctioned by the general rules of international law; (ii)violation of essential elements of the Agreements, namely its Article X. (b) The parties agree that the 'appropriate measures' referred to in Article Y are measures taken in accordance with international law. If a party takes a measure in a case of special urgency as provided for under Article Y, the other party may avail itself of the procedure relating to settlement of disputes.'

[38] Case C-268/94, The Portugese Republic v. The Council of the European Union [1996], European Court of Justice, p. I-6177.

[39] Ibidem, paragraph 16.

would be Article 308 (*ex* Article 235) of the Treaty. Since human rights only had been identified as general objectives of Community policy in Article 177 (2) (*Ex* Article 130u(2)[40] agreements based on Article 181 (*ex* Article 130y)[41] can only make general references to human rights. If this was to be the correct legal reasoning, the reference to respect for human rights as an essential element would go beyond the objective stated in Article 177 (2) (*Ex* Article 130u(2) of the treaty. Portugal's concern was partly a procedural one to the extent that the rules governing the conclusion (and suspension) of the treaties differed depending on which article the agreement is based on.

The Council, on the other hand, argued that a "development agreement between the Community and a non-member country can include provisions on specific matters without the need to have recourse to other legal bases. No complications arise in relation to participation of the Member States in the conclusion of the argument, if the essential purpose of the agreement is to pursue the objectives referred to in Article 177 (*Ex* Article 130u)(1)."[42] The article states that the provisions of the

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[40] Article 130u(2): 'Community policy (…) shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'

[41] Article 181 (ex Article 130y):Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 300. The previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.'

[42] Case C-268/94, op. cit. paragraph 4.

Article 177 *(ex* Article 130u*)* 1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster: - the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; - the smooth and gradual integration of the developing countries into the world economy;

- the campaign against poverty in the developing countries. 2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms. 3. The Community and the Member States shall comply with

specific matters cannot be such as to fall outside of the general purpose to promote development and cooperation. In relation to Article 177 (*Ex* Article 130u), the Council argued that the respect for democratic principles and human rights did not pose an obstacle to the general objective of the treaty; on the contrary it was included to enable the other provisions of the agreement to be applied.[43] Consequently the agreement would still fall under Article 177 (*Ex* Article 130u)(1) of the treaty.

Concerning the human rights mandate of the Community, the Council referred to Article 177 (*Ex* Article 130u)(2) that states: 'Community policy (…) shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'. In other words, Article 177 (*Ex* Article 130u)(2) would require the Community to include the respect of human rights in its consideration of development policy.[44] The ECJ found that the inclusion of provisions concerning the respect for human rights and democratic principles did not alter the characterisation of the agreement and that the sufficient legal basis for the incorporation of the human rights clause can be found in Article 181 (*Ex* 130y).[45] As a result, the allocation of spheres of competence between the member states and the Community in relation to treaty making and procedural arrangements did not need to be altered. The judgement thus clarified many of the substantial and procedural issues linked the competence of the EC to address human rights as related to trade and development agreements.

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the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.

[43] Case C-268/94, op. cit, paragraph 20.

[44] Ibidem, paragraph 23.

[45] Ibidem, paragraph 76.

The question of suspension is not as clear-cut. The principle of *Actus contrarius* would suggest that the bodies that have the power to conclude the treaties also have the power to suspend them.[46] This only provides a response to situations where the planned sanction is to suspend the whole agreement on behalf of the EC. The Treaty of Amsterdam provides the possibility of a solution in Article 300(2) (*ex* Article 228).[47] According to Article 300(2) a suspension of an EC agreement does not need a common position or joint action adopted according to the procedures of Article 301 (*ex* Article 228a);[48] the Council can take the decision alone. The decision has to be taken on a proposal from the Commission, on the basis of Article 300. (*ex* Article 228).[49] Hence, the form of decision-making will change depending on the treaty provisions that are being suspended.[50] However, the effectiveness is enhanced

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[46] Riedel, E., Will, M., *Human Rights Clauses in External Agreements of the EC,* cit., p. 735.

[47] Article 300 (*ex* Article 228)(2): Subject to the powers vested in the Commission in this field, the signing, which may be accompanied by a decision on provisional application before entry into force, and the conclusion of the agreements shall be decided on by the Council, acting by a qualified majority on a proposal from the Commission. The Council shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of internal rules and for the agreements referred to in Article 310.

By way of derogation from the rules laid down in paragraph 3, the same procedures shall apply for a decision to suspend the application of an agreement, and for the purpose of establishing the positions to be adopted on behalf of the Community in a body set up by an agreement based on Article 310, when that body is called upon to adopt decisions having legal effects, with the exception of decisions supplementing or amending the institutional framework of the agreement.

The European Parliament shall be immediately and fully informed on any decision under this paragraph concerning the provisional application or the suspension of agreements, or the establishment of the Community position in a body set up by an agreement based on Article 310.

[48] According to Article 301, a common position or joint action should be adopted according to the provisions of Title V of the Maastricht Treaty. 34, p. 708.

[49] Article 300 states that the Council can decide on that suspension on a proposal presented by the Commission.

[50] Treaty provisions based , for example, on Article 181 (*ex* Article 130y) EC will require only a qualified majority, while those based on Article 308 (*ex* Article 235) EC or on Article 310 (*ex* Article 238) EC require unanimity. 1, p. 739.

partly due to the fact that there is an increased tendency to accept (qualified) majority voting to decide suspension.[51]

Related to the issue of the suspension or termination of a treaty is the question of the particular nature of 'mixed agreements' concluded between the Community and one or several Member States. This is the case with, for example, the Lomé IV Convention. The division of competence between the two creates a situation in which the termination or suspension a treaty is even more vaguely defined than in the cases of the only Community being a party to a treaty. The principle of 'limited attribution', outlined in Article 5(*Ex* Article 3b)[52], suggest that the Community can only decide on suspension in cases that it possesses the competence to establish the provisions in question. The same applies to the power of the Member State. Thus, in reality, a mixed agreement can only be suspended or terminated if the Community and the Member State are in agreement. Either party can deal with certain provisions individually to the extent that the issue falls within its respective competence. Problems occur in practice since the determination of each party's competence is lacking in most agreements, resulting in disagreement and difference of opinion. The discord can lead to the inability of action on behalf of the Community and Member State.[53] The ECJ has concluded closer cooperation between Member States and the Community during the negotiation, conclusion and execution of mixed agreements can prevent similar situations in the future.[54]

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[51] COM(95)216, p. 14.

[52] Article 5: The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.

[53] Riedel, E., Will, M., *Human Rights Clauses in External Agreements of the EC,* cit., p. 738.

[54] For example see Opinion 2/91 [1993] ECR - 1061, at 1083, para. 36.

In the case of termination or suspension of a treaty by the Community there are thus legal provisions to resort to. But the suspension of the whole treaty is not necessarily the only viable option available as response to cases of human rights violations. However, the highly politicised nature of the human rights clause, which is partly due to the choice of wording, makes the question of different forms of the enforcement of treaty obligations anything but clear**.** The human rights clause refers to 'appropriate measures' to be taken and arguably suspension should only be considered in cases of gross human rights violations. In general one can say that the provisions of the human rights clause allow for both positive measures and sanctions. Annex 2 of the COM (95) 216 Council Communication provides a summary of possible measures that can be taken. The list includes alteration of the contents of cooperation programmes or the channels used, reduction of cultural, scientific and technical cooperation programmes, postponement or suspension of high-level bilateral contacts, postponement of new projects, trade embargoes or suspension of all cooperation.[55]

One problem is that the human rights clause in itself does not set out, without uncertainty, how sanctions should be applied in case of failure to uphold the treaty obligations, nor does it set out clear procedures on the internal operation of the Community in these cases.[56] The Commission puts emphasis on possible positive sanctions, like for example, entering into dialogue with the government, rather than just responding directly with negative sanctions. If the EC decides to impose negative sanctions, the decision must be made taking into consideration that "in the spirit of a positive approach, it is important that such measures should not only be based on objective and fair criteria, but they should also be adapted to the verity of situations that can arise, *the aim being to keep a dialogue*

[55] The listing is not exhaustive, for more additional possible sanctions, please see Annex 2 of COM (95)216.

[56] Lenaerts, K. De Smijter, E. *The European Community's Treaty-Making Competence,* cit., p. 46.

goin"' (emphasis added).[57] Hence, retorting to negative sanctions to enforce the provisions of the human rights clause should only be seen as the last resort, but sanctions that are decided upon must feed into the process of keeping the political dialogue going.

With regard to the vague character of the clause as to the possibility of sanctions, all bilateral and cooperation agreements concluded with the EC are supposed to be based on the particular need of the country involved. This has the effect that the treaty provisions vary greatly between different agreements. As the provisions of the agreements differ, so do the possible sanctions that can be taken by the EC in response to human rights violations or serious interruptions of the democratic process. The complete suspension of a treaty should never affect humanitarian assistance and there are examples of aid continuing to be given to other actors besides the government, through so-called decentralised cooperation.[58] Decentralised aid, a system of providing aid through channels other than governmental ones, is one example of how possible sanctions can differ between countries.[59] The focus on decentralised aid changes the impact of sanctions imposed by the EC because it is dependent on activities carried out by non-governmental organisations (NGOs) and the relationship between the NGOs and the government. It could be the case that a continuation of European aid given to NGOs can be more of a sanction than the cutting of financial support to government programs.

Allowing for alternative approaches to the enforcement of the human rights clause illustrates the realisation on behalf of the EC that the possibility to exercise political influence on the system in the recipient country is greater through dialogue than through the use of threats. This

[57] COM (95)216, B.

[58] Lenaerts, K. De Smijter, E. *The European Community's Treaty-Making Competence,* cit., p. 47.

[59] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC, cit.,*p. 608.

is an insight that was lacking in the earlier EC development policy.[60] In the COM (95) Communication, the Commission pointed out as an achievement in upholding the provisions by the use of a positive approach the fact that none of the agreements with a human rights clause has been suspended.[61] In a few cases the inclusion of a human rights clause has effectively hindered the conclusion of some agreements, examples of this being Australia's refusal to sign an agreement or the postponement of the follow-up agreement with China. The non-conclusion of agreements due to the inclusion of a human rights clause must in some cases be considered a sanction and in a sense a negative measures. The distinction between negative and positive responses to human rights violations or threats to a functioning democratic system, and its effectiveness, will be dealt with, in much greater depth later on in this essay. Of importance here was to illustrate the possible enforcement mechanisms of the legal provisions outlined and analysed above.

[60] Ibidem, p. 574.

[61] COM (95)216.

Case Studies

In order to provide an illustration of the scope of the human rights clause, this section covers the experience of the relations between the EU and four other countries: China, Australia, Russia and Zimbabwe. They are chosen to represent the wide range of possibilities that exist in relation to the inclusion of a human rights clause in EU partnership and cooperation agreements.[62]

The EU's relations with China is an example of when the inclusion of a human rights clause has made it impossible for the EU to enter into a partnership agreement with the country. However, the relationship between the EU and China is also an example of the general positive approach and that non-conclusion of a treaty does not necessarily mean non-engagement on behalf of the EU. Australia is also an example of the inclusion of a human rights clause that has lead to the non-conclusion of an agreement. Australia refused to sign a partnership agreement with references to human rights as an essential element claiming that its inclusion was inappropriate in a trade and cooperation agreement, but also that its inclusion was an attack on its political integrity. In the context of this paper, the EU-Australia relationship is used as an illustration of the symbolic effect of the application of the human rights clause. The next study looks at Russia. In 1995 the EU signed a partnership agreement with Russia, in spite of evidence of the gross human rights violations taking place in that country. The experience from this relationship will be taken to represent the positive approach by the EU and its unwillingness to resort to sanctions. The situation also provides a good illustration of the disagreement arising within the EU over what constitutes an appropriate approach. The last case study looks at Zimbabwe, and the process leading up to the suspension of cooperation in the beginning of 2002. The whole process, starting with

[62] Landman, T., *Comparative Politics and Human Rights,* in <<Human Rights Quarterly>>, vol. 24, 2002, pp. 890 - 923.

political dialogue, moving on to consultations under Article 8 of the Cotonou Agreement and finally the suspension under Article 96, shows the working of the human rights clause as was envisaged when drafted. By including all four countries, the intention is to provide a good empirical basis for the discussion of the extended scope of the human rights clause that will follow in the next section.

The outline of the events taking place in relation to all four countries is not, by any means exhaustive, but instead the events included are chosen to provide a good illustration of the underlying assumptions guiding the relationships and the effects there-of.

China

"The challenge for China now is to sustain economic growth and preserve social stability while creating and open society based on the rule of law. If Europe wishes to have a role in this process, it should continue to use all available channels to promote the cause of human rights in China in an active, sustained and constructive way."
COM(1998)181, p. 9.

China is included among the case studies as an example of when a bilateral or cooperation agreement has not been signed between the EU and a third country because of the unsatisfactory levels of human rights standards in that country. China's human rights record was one of the reasons why any agreement between the EU and China could not move beyond the format of a formalised, political dialogue, but the interesting point is to see what the EU has done instead to improve the human rights situation in China. The EU's major concern when it comes to China is the lack of protection of civil and political rights; "the repression of political dissidence, arbitrary detention conditions, the extensive use of the death penalty, the repression of ethnic minorities - including Tibet, restrictions on religious freedom, rights of association and free speech, among others (…)."[63]

[63] COM (2000) 552, B.1.

In June 1989, in response to the Tianenmen Square massacre, the EU suspended all economic and political relations with China. The suspension remained active until in 1990 the Council decided to progressively normalise its relations with China and economic and political relations where resumed in early 1992.[64] An exchange of letters in 1994 set the framework governing the political dialogue between China and the EU. The format is a formal dialogue carried out between the EU ambassadors meeting with the Chinese Foreign Minister in Beijing twice a year. However, the dialogue is carried out on many different levels and also includes Troika meetings and meetings between senior officials.[65]

In 1998 the Commission published its future objectives for its relations with China in the Commission Communication - 'Building a Comprehensive Partnership with China'.[66] The aim of EU policy was to engage China further in the international community by supporting the Chinese transition to an open society. The tools conceived by the Commission were the upgrading of the political dialogue, with an added human rights dimension, and more emphasis on environmental issues and sustainable development. At this stage the Commission pointed out that there has been a lack of progress in the field of Chinese human rights standards. The standards of civil and political rights had at this point deteriorated since the start of the political dialogue even though some progress could be seen in the field of economic and social rights.[67] The first annual EU-China Summit took place in London on April 2 1998 and meetings of the human rights dialogue has since been carried out on a regular basis. The new format of the human rights dialogue also includes seminar series and projects that aim to support non-

[64] Fouwels, M., *The European Union's Common Foreign and Security Policy and Human Rights* in <<Netherlands Quarterly of Human Rights>>, vol. 15/3, 1997, p. 318

[65] COM (2000) 552, A.1.

[66] COM (1998) 181.

[67] COM (2000) 552, B.1.

governmental projects. In May 2001there was a Human Rights Seminar in Beijing on the death penalty and the right to education. The idea is that the seminars would provide the space for the exchange of ideas and through that also would contribute to finding ways to address the EU's human rights concern.

On May the 19th 2000 the EU signed the bilateral agreement which was necessary for China's accession to the WTO. This agreement was concluded within the WTO treaty regime and is of a standard format. It does not include any references to human rights standards. In September the same year, the Commission reported to the Council and the European Parliament on the implementation of the Communication "Building a Comprehensive Partnership with China."[68] Their assessment was that the "regular rounds of dialogue provided a valuable platform to engage China on sensitive issues" and that "the EU has repeatedly emphasised the need to make the dialogue more results-oriented and better connected to decision-making in China."[69] The main concern of the Commission was hence that the 'progress' in the dialogue has not been matched by improvements on the ground. At this stage the political dialogue was given additional support by a number of cooperation projects to improve its practical application. One example of the cooperation projects is that of the 'Village Governance' programme, which aims to ensure a more effective implementation of a more democratic electoral law on the grass-root level.[70] A discussion in the Council during the fall/winter 2000 indicated a consensus that the 1998 long-term objectives were still valid, a guiding principle of EU policy towards China that remains valid up until today.[71]

[68] COM (2000) 552.

[69] COM 2000) 552, B.1.

[70] COM (2000) 552, B.2.

[71] COM (2001) 265, introduction.

On May the 15th 2001, a further development of EU-China relations was presented in the Communication from the Commission to the Council and the European Parliament: the 'EU strategy towards China: Implementation of the 1998 Communication and Future Steps for a more Effective EU Policy',[72] defining concrete and practical short and medium term action points which work towards the 1998 long term objectives. The short-term and medium term objectives are supposed to be operational and also, to a certain extent, set the agenda for the political dialogue. The EU's concern for the levels of human rights standards was set to be the number one priority in the political dialogue.[73] An even further extension of the existing human rights objectives was presented in the General Affairs Council conclusion of January 22, 2002.[74] The underlying assumption remains that the only possible response to violations by the Chinese government, is further involvement by the EU and the development of more comprehensive relations. As stated by a later Commission Communication in 2002: "China is not always an easy partner for the EU, it is in the interest of the Union to engage China further on an international level. Globalisation means, among other things, that a country the size of China is both part of the problem and the solution to all major issues of international and regional concern."[75] This approach has been further solidified in the Country Strategy paper, 2002-2006.[76] The main objective outlined is the further integration into the world economy and supporting the Chinese transition into an open society based on the respect of human rights. The EU approach does not manifest itself only through its bilateral relations. The EU was ready to vote in favour, if a

[72] COM (2001) 265.

[73] COM (2002) 265, final, p. 8.

[74] European Annual Report on Human Rights 2002, adopted by the Council on 21 October 2002, Luxembourg: Office for Official Publications of the European Communities, p. 45.

[75] COM (2002) 265, final, p. 7

[76] IP/02/349

resolution on China would have come to a vote at the 58th session of the UN Commission on Human Rights. It was not tabled in the end, but the EU's pledged support shows that the EU on an international level sees no contradiction between involvement on one side, and fierce criticism on the other.[77]

The EU-China dialogue highlights a number of difficulties arising from the inclusion of human rights concerns in its relations with third countries. The Chinese human rights record is one of the strongest reasons for why there is no over-arching agreement regulating the relation between China and the EU. But the development of the EU-China Human Rights dialogue illustrates that the non-conclusion of a cooperation treaty not necessarily results in non-involvement. The major point that will be touched upon in the next chapter, and for which the experience from the dialogue with China will be seen as an illustration, is the new, comprehensive positive approach to improving human rights standards. The main concern in relation to the possible enforcement mechanism of EU policy is that for the positive approach to succeed it necessitates a strong commitment on behalf of the Chinese government. The second concern is that of the lack of a benchmarking system to identify progress and the effect of that on the credibility of the EU. EU-China relations since 1994 are at the very forefront of EU policy development and, as concluded by the Commission in 2002, "Much can be done over the coming years to fine-tune and build on what has been achieved so far and make it more effective."[78]

[77] European Annual Report on Human Rights 2002, cit., p. 47

[78] COM (2002) 265, p. 8.

Australia

"One week before the visit by the Australian foreign minister to Brussels, the International Confederation of Free Trade Unions (ICFTU) called upon the European Union to keep the human rights clause in the cooperation agreement that the EU and Australia are proposing to negotiate. Speaking of its tradition for respect for human rights, Australia had categorically refused this clause."
Agence France No. 6898, Thursday 23 January 1997.

The EU experience from the negotiations with Australia is an example of a country that refused to sign an agreement with the EU because of the inclusion of a human rights clause in the treaty. The EU has no major concerns when it comes to the human rights standards in that country, but it still opted for a joint declaration rather than dropping the human rights clause from the agreement. In this case, the choice to refuse to drop the human rights clause indicates that there are other purposes of its inclusions than just human rights concerns, and the disagreement that followed its inclusion indicates the symbolic value the clause contains.

The disagreements in the negotiations for the EU - Australia trade and cooperation agreement started in the fall of 1996. The EU, as a matter of principle following the 1995 resolution, requested for the inclusion of a human rights clause. Australia held many objections to its inclusion. Firstly, the incorporation of human rights references was, *per se*, seen as inappropriate in an agreement related to trade and cooperation. Australia did not see any problem with including references to human rights in either the preamble or in a separate political declaration. Secondly, recalling what the Australians called shared values, the Australian government stated that "no other industrialised country, including the US, Japan, Canada or New Zealand, could accept the inclusion of operative human rights provisions in the proposed framework agreement."[79] Australia saw only two solutions to the problem: either a return to Australia's proposal for an agreement without a human rights reference, or the conclusion of a less formal accord.

[79] Agence Europe, No 6901, p. 10.

The negotiations that followed quickly ended up in deadlock and were described by involved individuals as "robust", of "a difficult birth" and as "long and intensive."[80] The Europeans tried to address Australia's indignation of not being seen as a government trusted as upholding human rights by stating: "We know full well that Australia is committed in the defence of human rights, the question does not lie there. The question is that of knowing how we can formulate this commitment and how are we to progress in our relations."[81] The situation was not made any easier by the fact that NGOs became engaged in lobbying the negotiations. The International Confederation of Free Trade Unions (ICFTU) called on the EU not to back down from its stand on the human rights clause and asked the Commissions Vice-President Sir Leon Brittan to "(…) speculate on the Australian government's motivation in seeking to downgrade human rights in this way."[82] The Australian aborigines entered the fray of the negotiations, asking the EU not to renounce the human rights clause, drawing the attention of the Commission and the European Parliament to Australian plans to change the land law, giving favour to farmers' claim over those of indigenous people.[83] Since none of the parties were willing, or capable to shift position, the solution fell to the second of the two suggested by Australia, a non-binding declaration signed in June 1997 rather than a framework agreement.

The 'Joint Declaration on EU- Australia relations' was called "a new dimension to EU-Australia relations" by Sir Leon Brittan.[84] The partnership intended to promote dialogue and cooperation in areas of human rights, peace and stability, cooperation on trade and economic matters within the framework of the WTO, and issues of employment,

[80] Ibidem, No 7004, p. 6.

[81] Ibidem, No 6903, p. 8.

[82] Ibidem, No. 6898, p. 4bis.

[83] Ibidem, No. 6905, p. 8.

[84] Ibidem, No 7004, p. 6.

the environment, scientific and cultural cooperation.[85] It identified a number of areas of cooperation within a proposed system for political dialogue that would include consultation at ministerial level, consultations as appropriate between officials and summit meetings between the President of the European Council, the President of the European Commission and the Prime Minister of Australia.[86] The declaration was seen as reflecting both parties' "commitment to continue working together in international fora to support shared objectives, such as multilateral trade liberalisation and the international promotion of human rights."[87] The joint declaration is supported by a number of sectoral agreements, which have been developed during the years following the joint declaration. In 1999 a broader version of the Science and Technology agreement of 1994 was signed. The agreement allows for greater Australian participation in European research and development programmes. Today, the EU is Australia's largest trading partner and the EU is also the largest source of foreign investment in Australia.

The choice of not concluding a Cooperation and Partnership Agreement has thus not hindered further EU-Australian relations. However, the refusal by the EU to drop the human rights clause, as well as the refusal by Australia to accept it, is a manifestation of the symbolic power it holds. If the major concern for the EU was only the levels of the human rights standards in Australia, there could have been other means to ensure that the Australians uphold their obligations. Thus, the analysis of the scope of the human rights clause must also include the symbolic purpose of its inclusion.

[85] The list is not exhaustive, only indicative of the content of the joint declaration.

[86] http://europa.eu.int/comm/external_relations/australia/intro/index.

[87] Agence Europe, No 7004, p. 6.

Russia

"Should we not recognise that the Russian Government needs greater understanding at a time when it is facing the huge tasks of making Russia more governable, of building a new political and economic order and reversing an unprecedented decline in living standards? And if so, why argue about abstract principles? Is this a whale trying to engage with an elephant?"

Christopher Patten, member of the European Commission for External Relations.

Russia is included in this study as an example of when an agreement including a human rights clause has been concluded between the EU and a third country despite evidence of gross human rights violations in that country. In relation to Russia it is the handling of the crisis in Chechnya that has been the main human rights concern for the EU. The war in Chechnya has given rise to major preoccupations regarding the treatment of civilians and of Chechen soldiers. The EU has also raised the issue of freedom of the press in Russia and its effect on the political transition that Russia is currently facing.

The process that built-up to the ratification of the Partnership and Cooperation Agreement ('the Partnership Agreement') in 1995 will provide an illustration of the problems and effects of the inclusion of the human rights clause on the internal dynamics of the EU and the external symbolism generated by its inclusion. Furthermore, it is one of the better examples of illustrating the EU in pursual of a positive approach and political dialogue, instead of imposing sanctions.

The Partnership Agreement was the end product of an almost three year long process of negotiation.[88] The provisions of the agreement cover a wide range of fields of cooperation in the political, economic and social sectors; trade, education and training, environment and energy, the transition to a market economy. The Partnership Agreement set up the legal framework for political interaction on different levels. The two

[88] The decision to concentrate on a Partnership and cooperation Agreement was made in 1992 when Jaques Delors visited Moscow in May of that year. 38, p. 280.

partners meet twice a year at a general Summit,[89] but the Cooperation Council, which meets once a year, is the main forum. There is also a Cooperation Committee that can meet whenever there is need. Furthermore, the EU-Russia Parliamentary Cooperation Committee provides the possibility for members of the European Parliament and of the Russian Duma to meet on a regular basis.

The Partnership Agreement is accompanied by an interpretative declaration through which the open provisions in the human rights clause are defined. 'Appropriate measures' are defined as measures in accordance with international law. The declaration also refers to the possibility by the parties to seek dispute settlement on issues that could arise in relation to measures taken in response to human rights violations.[90] However, if the drafting procedure was both long and difficulty, similar problems presented themselves in relation to its ratification.[91]

In January 1995 the European Parliament called for the suspension of the Partnership Agreement because of human rights violations committed by the Russian government, making direct references to the human rights clause. The resolution requested the Council and the Commission to halt ratification of an interim cooperation agreement until military attacks and human rights violations in Chechnya stopped. The interim agreement had been designed to allow for some sections of the trade related issues to enter into force, whilst waiting for the full ratification of the Partnership Agreement. The interim agreement still contained human rights references.[92] Two months later, a EU Troika

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[89] The Summit includes representatives for the Presidency, President of the Commission, President of the Russian Federation. In 2002, Summits were held in Moscow in May and in Brussels in November.

[90] Pollet, K., *Human Rights Clauses in Agreements between the European Union and Central and Eastern European Countries* in <<Revue des Affaires Européennes>>, no. 3, 1997, p.294.

[91] 17/07/1995, final decision. 9.

[92] 17/07/1995, final decision. 9.

ratified the interim agreement, but made the entering into force dependent on the fulfilment of a number of conditions: the permanent presence of OSCE in Chechnya, on allowing for humanitarian aid to enter the country, on a cease-fire, and on the presence of a serious effort to find a political solution by the Russian government.[93] Even though the OSCE mission shortly after the ratification came to the conclusion that serious violations of human rights still continued, the EU stated that they soon could envisage a ratification of the Partnership Agreement if Russia pledged to honour its obligations in the close future. The European Parliament brought up the conflicting positions arising from the Council position, not much in relation to the partnership provisions but as obligations under other international human rights treaties.[94] However, the proof of persistent human rights violations by Russia did not stop the European Council to agree in June to sign the Partnership Agreement. On the contrary, the Council argued that satisfactory progress had been made in Chechnya. The document was officially signed in July 1995 and entered into force on the 1 February 1996.[95] The cooperation treaty came into force on 30 December 1997 after endorsement by the European Parliament, which consented to the treaty due to the continuing cease-fire in Chechnya.

In 1999 the EU published the 'Common strategy of the EU on Russia', valid for four years.[96] The strategy covers issues in trade and economic cooperation, cooperation in science and technology, political dialogue and justice and home affairs. Priority is given to the consolidation of democracy, the rule of law and public institutions and the integration of

[93] Riedel, E., Will, M., *Human Rights Clauses in External Agreements of the EC*, cit., p. 742.

[94] The European Parliament pointed to violations of the Common Article 3 of the Geneva Conventions and of several OSCE principles.

[95] LEX 19995D0414, OJ L247 13/10/95, p. 1.

[96] OJ L 157, 24.6.1999 p. 1.

Russia into a common European economic and social space.[97] The EU uses all instruments available to it. In the long term, possible instruments include the use of aid, trade and political influence to foster economic, social and political conditions that mitigate the causes of conflict. In the shorter term the EU may use persuasion, influence and action in an impending or actual conflict situation, in order to see issues resolved peacefully by dialogue and agreement.[98]

The EU has refused to consider any alternative to the 'positive approach' in relation to Russia. The same concerns have been raised repeatedly by a number of different actors and the responses have been similar in each case. "It remains the firm and considered conviction of the council that the *engagement* is the best path by which the EU can work to improve the situation in the Chechen Republic of the Russian Federation. Without dialogue there would be no way for us to impress on Russia that it must fulfil its international commitments (emphasis added)."[99] The fear is to lose the political influence that the EU presently possesses and the approach has been to constantly bring the issue of human rights in Chechnya within the existing framework.

In November 2001 the EU made a number of 'representations' to the Russian authorities following serious abuses committed against the civilian populations by Russian troops at the beginning of July that year. As a response the Council insisted that the situation in Chechnya, from there on, must be discussed at all appropriate meetings between the EU and Russia and at all levels. In addition to continuing to raise the issues in the framework of its bilateral political dialogue with Russia, the Commission also officially aired its concerns over human rights abuses in Russia at the 58th session of the United Nations Human Rights

[97] Opinion of the Economic and Social Committee on "EU/Russia strategic partnership: What are the next steps?", OJ C125, 27/05/2002, pp. 39 - 43.

[98] OJ C 081 E, 13/03/2001, pp. 24 - 25.

[99] OJ C 364 E, 20/12/2001 pp. 35 - 36.

Commission in Geneva. It appears that the political pressure exercised by the EU had some effect on Russian policy. In April 2002 the Russian government set up the office of the Presidential Representative for Human Rights in Chechnya, Mr Kalamakov.[100] Following this response, the EU acknowledged some progress in the situation but continued to raise the question of Chechnya and alleged human rights violations at all political dialogue meetings with Russia. "The Council believes that there is growing recognition of this [that the fight against terrorism must be carried out within the framework of the rule of law and full respect for human rights] in Russia. Indeed, some steps have been taken in the right direction, albeit belatedly and not going far enough."[101] This is the situation at the moment, the dialogue is continuing, the EU is regularly pressing the issue of human rights with mixed success.

The experience from the political dialogue with Russia has proved to be one of the more complex situations arising in this context. The EU's fundamental belief that Russia needs support through its current stage of transition into a market economy and democracy has proven difficult to support in the light of the massive violations of human rights in Chechnya. The European Parliament has been on a direct collision course with the Council and the Commission on issues arising from the refusal by the latter to go beyond the use of political dialogue to influence the situation.

[100] OJ C 052 E, 06/03/2003 p. 7.

[101] OJ C 205 E, 29/08/2002, pp. 102 - 103.

Zimbabwe

"The Commission believes that the political dialogue must be constructive and positive and that time has not yet come to have recourse to Article 96 consultations and sanctions."

Mr Nielsen on behalf of the Commission on July 13th, 2001.[102]

The cancellation of EU cooperation with Zimbabwe under Article 96 of the Cotonou agreement is an example of when sanctions have been imposed under the human rights clause as a reaction to deteriorating human rights standards. It was in the light of the deteriorating situation under the government of Mugabe, and the virtual suspension of the rule of law in 2001 and 2002 that called for the EU to act. The situation provides a good illustration of the possibility of applying sanctions to the government, whilst continuing support to the non-governmental sector. Furthermore, it illustrates the problem with the EU's positive approach when there is no will to cooperate on behalf of the third country's government.

In March 2001, as a response to the deteriorating situation in Zimbabwe, the EU called for the setting up of a political dialogue with Zimbabwe under Article 8 of the Cotonou Agreement. The EU stressed that the dialogue must be constructive and positive and concluded that the time had not yet come to make recourse to Article 96 consultations and sanctions.[103] In June 25 the same year the Council meeting noted a lack of substantial progress in the dialogue with Zimbabwe and expressed its deep concern over recent developments in the country. The Council stressed that the dialogue should yield "rapid and tangible results."[104] In answer to a written question the Office for External Relations explained the chosen policy by saying that the EU, through consultations with Mr Tsvangirai, leader of the opposition, has understood that at this stage

[102] Answer given by Mr Nielsen on behalf of the Commission to written question by Glenys Kinnock (PSE), OJ C040 E, 14/02/2002, pp. 99 - 100.

[103] OJ C 040 E, 14/02/2002, pp. 99 - 100.

[104] OJ C 081 E, 04/04/2002, pp. 22 - 23.

sanctions could be counter productive. However, sanctions would be applied in responses to further deterioration of the situation and in particular in the case of a suspension of the constitution or cancellation of presidential elections.[105]

In the summer of 2001, EU relations with Zimbabwe were one of cooperation and support, however the aid extended to Zimbabwe did not cover budget support and did not contribute to the productive sectors. Instead, an effort had been made to refocus EU support on the social sector.[106] The Commission did not provide any humanitarian assistance or food aid to Zimbabwe. The development and cooperation assistance consisted of projects on HIV/AIDS prevention and control, basic health, and primary education programs.[107] At this time the coming into force of the Cotonou Agreement was still pending, which meant that the aid provided, under Lomé provisions, was given to the government.[108] Mr. Tsvangirai continued to encourage the union to proceed on the "path of engagement and dialogue" rather than imposing sanctions.[109] However, later in the year, in response to further deterioration of the situation, the decision was taken to enter into consultations with Zimbabwe with reference to article 8 of the Cotonou Agreement.

On January the 11th 2002, consultations took place with the participation of a number of countries from the South African Development Community (SADC). The EU was not satisfied with the outcome and therefore asked the Zimbabwean government to communicate a detailed plan of action to the EU within a week. This arrived and complied with demands by the EU by providing some points for further action.[110] In

[105] OJ C 340 E, 04/12/2001, pp. 118 - 119.

[106] OJ C 340 E, 04/12/2001, pp. 118 - 119.

[107] OJ C 172 E, 18/07/2002, pp. 16 - 17.

[108] OJ C 081 E, 04/04/2002, pp. 22 - 23.

[109] OJ C 040 E, 14/02/2002, pp. 99 - 100.

[110] OJ C 160 E, 04/07/2002, pp. 132 - 134.

spite of this, the Council decided that it would be appropriate to implement targeted sanctions if the Government of Zimbabwe in any way prevented the deployment of an election observation mission or the access of international media in relation to the up-coming elections. The situation in Zimbabwe at the time saw continued political violence, serious human rights violations and grave restrictions on media.

The Council decided that the time had come to conclude consultations with Zimbabwe in February, arguing that Mugabe's government continuously violated essential elements of the cooperation agreement.[111] The commitment on behalf of the Zimbabwean government was seen as insufficient in regard to the possibility of ending the violence and holding free and fair elections. The refusal of the Zimbabwean government to grant access to international media was one of the major concerns. Under Article 96 of the Cotonou Agreement, the Council decided to adopt 'appropriate measures', which meant the cutting of all financial support to the government. An effort was made to reorientate as much as possible of financial aid towards projects in direct support of the population and especially the social sector. The scheduled signature of the 9th European Development Fund National Indicative Programme was also suspended. None of the measures taken affected humanitarian aid and some regional projects were to be continued on a case-by-case basis. The Council stressed that all, measures would be revoked as soon as conditions that guarantee the respect for human rights and democratic principles were present in Zimbabwe.

Elections took place in Zimbabwe on March 9-10. The European Council decided to dispatch a high level troika to the countries of the SADC region to discuss the EU's concerns regarding Zimbabwe. The troika visited Mozambique, South Africa and Malawi from May 19 to 22 and reported back on June 17. Subsequently, the ACP-EU Joint

[111] OJ L 050, 21/02/2002, pp. 64 - 65.

Parliamentary Assembly met in Cape Town, South Africa. The Assembly called upon the international community to provide large scale support to Zimbabwe when rule of law and respect for human rights were reinstalled and, in the meanwhile, asked the world community to respond with urgency to any genuine and clearly non-partisan appeal for food.[112] Continuous references to the need for a genuine commitment on behalf of Zimbabwe as a basis for any possible solution were made emphasised that 'real' improvements must be seen on the ground.[113] In mid-March Zimbabwe was suspended from the Commonwealth, a further illustration of its diplomatic isolation.

The process leading up to the suspension of the cooperation between the EU and Zimbabwe provides an illustration of how far the EU can, and is willing to go with political instruments alone before imposing sanctions. It also demonstrates how difficult it is to obtain any progress from this process if the government involved is unwilling to cooperate.

The Extended Scope of the Human Rights Clause

The analysis of the scope of the human rights clause involves an examination of the existing possibilities for a positive approach by the EU, and the internal and external effects of its application. The negative measures were covered in the first section on the development of the human rights clause and will not be explicitly addressed again in this section. By looking at the different policy choices that the EU made in relation to the four case studies, the conclusion is that the EU is consciously working towards creating an identity founded on being a proactive human rights agent in international politics.

[112] OJ C 231, 27/09/2002, pp. 30 - 31.

[113] OJ C 160 E, 04/07/2002, pp. 132 - 134.

Positive Policy Options under the Human Rights Clause

Positive measures are supposed to facilitate an environment conducive to the over-all goal of establishing the conditions for democracy and sustainable development, based on the active participation of the local government and the national non-governmental sector.[114] The need for a positive approach can be found in its essence in the Annual Report on Human Rights from 2002 that states that "rights defended must be nurtured."[115] The idea of possible positive measures are given clear preference over sanctions in the body of official documents that were issued in relation to the development of the human rights clause. A communcation from the Commission to the Council and the European Parliament on the European Union's role in promoting human rights and democratisation in third countries states that; "The EU's insistence on including essential elements clauses is not intended to signify a negative or punitive approach."[116] This seems to be the reading shared by the Council and is supported by the way that the EU has addressed human rights violations in third countries since the human rights clause came into existence.[117] To be able to address the question of 'what there is' in the human rights clause it is necessary to explicate what the EU is referring to when they talk about positive measures.

The recurring examples that are given of possible positive policy options are the promotion of a political dialogue, and the possibility of giving aid through alternative non-governmental channels and potentially to bring projects closer to the population.[118] By establishing enduring and

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[114] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC*, cit., p. 582.

[115] European Annual Report on Human Rights 2002, cit., Annex 6.

[116] COM(2001)252, p. 9.

[117] Brandtner, B., Rosas, A., *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice* in <<European Journal of International Law>>, vol. 9, 1998, p. 483.

[118] COM(2001)252, p. 9.

stable human rights oriented political dialogues with the government of the third country, and the broadening of this dialogue to include NGOs, the EU holds that a part from its intrinsic value, this also constitutes a conflict prevention mechanism. The link to long-term conflict prevention must also be included in the scope of the human right clause.

The effects of the EU approach to positive measures stem from the very nature of the agreements that they are based on. The agreements are not relationships in which one party has decided to ratify a multilateral treaty, giving rise to obligations only on behalf of that country. Instead they are contractual agreements giving rise to obligations for both parties. The relationships are based on the principle of partnership and it is the belief of the EU that this different environment is a very well suited structure for carrying out an active and pro-active policy of support and encouragement of human rights.[119] The following analysis of the different elements of the positive approach will put emphasis on the use of political dialogue, since this is the policy option that the EU has relied on in most cases as a response to human rights violations in third countries. The use of demarchés, public statements and resolutions will not be treated in isolation, but only in relation to the different approaches mentioned above.

The use of EU funding

The 1991 November Resolution stressed the importance of the policy of rewarding progress, an EU policy option that needs to be mentioned in the context of positive responses. The formula allows for certain funds to be made available to projects working for institutional reform, aiming at the realisation of the essential elements of the agreements such as the consolidation of democracy or the establishment of the rule of law. The funds are released when the country in question has earmarked some of

[119] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC*, cit., p. 587.

the money already provided by the EU for human rights focused projects; this is the case with, for example, the funds provided under the Cotonou Agreement.[120] What this particular choice of approach illustrates is the realisation of how the most important partners in these relationships are the receipient countries themselves, and that it is only through active support of change that any of the EU's goals can be achieved.[121]

Decentralised cooperation

Decentralised cooperation is also called horizontal cooperation. It denotes a new approach to development aid that proposes not only the giving of aid to the government of a country but instead a focus on project aid aimed at assisting development initiatives in the non-governmental sector of society. By increased participation by the citizens and their representatives it aims at achieving the main targets of the agreement; to promote civil society, consolidating trust in the electoral process, to enhance the efficiency and legitimacy of the rule of law and to create an independent media.[122] The overall goal is to support a participatory development process that is based on, and satisfies, the needs of the population in the recipient country.[123] The establishment, through support of non-governmental organisations is also a key component in EU support of the consolidation of democracy. Furthermore, aid that is provided through decentralised cooperation projects give birth to a multitude of possible responses to human rights violations, which all fall short of sanctioning. In the case of Zimbabwe aid to civil and social projects continued to be erogated through some

[120] EU-China dialogue on human rights, General Affairs Council 2327th Council meeting - Brussels, 22-23 January 200, p. 17.

[121] Ibidem, p. 18.

[122] COM(2001)252, p. 11, para. 3.2.

[123] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC*, cit., p. 609.

reprogramming of existing funds, cutting aid to the government itself. Close connections were kept with the leader of the opposition Mr. Tsvangirai, and his opinion of what was best for the people was taken into account in some of the EU's documents. Thus, decentralised aid creates the possibility for the EU to continue being present in a conflict situation, even in the absence of diplomatic relations. In relation to the issue of the possible effects of sanctions, one of the main criticisms of economic sanctions is the hardship they inflict on the population. Decentralised cooperation has provided a possible solution to part of the problem by allowing for continued relations with the population while at the same time retaining the possibility of sanctioning the government. Moreover, the consolidation of a civil society independent of the government could support the transition towards democracy. For example, in its relations with China, the EU has supported the creation of a EU-China academic network, in its aim to stregthen three weaknesses in the Chinese system : the level of transparency, the regulation of the media and the institutional mechanisms for facilitating the exercise of human rights.[124]

Political Dialogue

The idea of conducting a long-standing political dialogue in which the EU could place emphasis on human rights issues has been more or less present through-out the development of the human rights clause. The aim is to provide legitimate political space for an "open and constructive dialogue"[125] within which human rights issues can be raised and dealt with. The use of formalised dialogue should convince treaty partners of the necessity of respecting human rights. The effect is not only the creation of an open channel for addressing human rights, but that the joint identification of procedures and processes engenders an

[124] European Annual Report on Human Rights 2002, cit., p. 47

[125] Resolution of the Council and the member States meeting in the Council on Human Rights, Democracy and Development of 28 Nov. 1991, *Bull. EC* 11-1991, at. 122.

environment where these issues are a lot easier to discuss without risking the alienation of the other party. Thus, a formally established dialogue provides a flexible tool to establish mutual understanding and contributes to the stability of the relations between the parties.[126] The idea is that the dialogues also should facilitate presenting criticism of the EU by any of its partners, even though it is rarely used both ways. Besides this, which includes discussion of human rights issues carried out within set cooperation frame-works, the EU also carries out particular 'Human Rights Dialogues' with countries with which the EU has no agreement and/or where the agreement does not include a human rights clause. This is the case with, for example, the EU's engagement with China and Iran.[127]

The format of the dialogue itself varies to a certain degree depending on the over all relationship between the EU and the other party. For example, the format of a dialogue held under the Cotonou agreement is already set in the treaty itself, and forms, together with trade and investment issues and development cooperation projects, one of the three main components of the agreement. In the agreement, the assumption that the respect of human rights is an integral part of development is explicitly written out. Highest priority is given to gender equality and improving the capacity for good governance.[128] The dialogue should actively work to achieve these goals.

The use of political dialogue for addressing human rights issues is a novel approach to foreign policy in that it gives a certain degree of relativity to the principle of non-interference, however, at the same time its very existence reinforces the notion of the sovereign state. On the

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[126] Marantis, D. J., *Human Rights, Democracy, and Development: The European Community Model,* in <<Harvard Human Rights Journal>>, vol. 7, 1994, p.26.

[127] European Union Guidelines on Human rights dialogues, Council of the EU, 13 December 2001, www.europa.eu.int/comm/external_relations/human_rights/doc/ghd12_01.htm.

[128] COM(2001)252, p. 23

other hand, the EU regards it as legitimate not only to address its concern about violations of rights but also request improvements.[129] To address human rights standards can no longer be considered as interference in the internal affairs of a State, and hence constitutes an important and legitimate part of the dialogue with third countries.[130] Derived from these assumptions the Commission concludes that "the most effective way of achieving change is therefore a positive and constructive partnership with governments, based on dialogue, support and encouragement."[131]

The EU has recognised the relationship between promoting human rights and development, and the political dialogue aims to set up a process through which the other party will reach the same realisation. One of the aims of conducting a political dialogue is to achieve empowerment of the human rights standards that are being referred to, and to establish recognition of the relationship between the government policy and improvements on the ground. Recognition is the *sine qua non* without which no further improvements can be made. The problem that the process is build to solve is the gap between the acknowledgement of a human right and the realisation on behalf of the party that for anyone to be allowed to exercise his or her right freely, the government need to develop a set of promoting policies.[132] Hence, one problem that arises is the classic dichotomy between political rhetorics and practice. The problem of less productive political dialogues point to the underlying

[129] The EU has also used the dialogue to press for the ratification for international human rights treaties by the other party in the cases that this has not been done. This has been the case in the dialogue held with China.

[130] Opinion of the Committee on Development and Cooperation for the Committee on foreign Affairs, Security and Defence Policy, conclusion of 21 February 1996, p. 1.

[131] European Union Guidelines on Human rights dialogues, cit.

[132] Dias, C., Mainstreaming Human Rights in Development Assistance. *Moving from Projects to Strategies* in H. Helmich. (ed.), *Human Rights in Development Cooperation* - SIM Special No. 22, Utrecht, 1998, p. 105

weakness of the instrument; for the dialogue to have any effect at all, it requires a genuine commitment from the other party.

The EU is aware of the problem of lack of commitment on behalf of some of its partners, and the Commission states that a "Prerequisite for success is that these states are genuinely ready to cooperate. The EU should pursue this approach wherever possible, while recognising that in some cases the third country may have no genuine commitment to pursue change through consultations, and negative measures may therefore be more appropriate."[133] What remains ambiguous is when, and on what grounds, the EU can conclude that the means of dialogue is no longer producing the desired result. The issue of what constitutes progress has been a major source of controversy in the case of both China and Russia. In the Russian case, the opinions held by the Council and the Commission on one hand, and the opinion held by the EP on the other, differed greatly on whether any progress could be seen in Russia. What the experience from dealing with China and Russia illustrates is that to be able to assess the progress of a political dialogue, there is a need for developing some kind of a benchmarking system. Such a system could also potentially ensure a certain degree of coherence in EU human rights policies. In trying to trace the relationship between policy-making, implementation and enforcement it is hard to see at what speed, and according to what benchmark, progress should be judged.

The EU has addressed the lack of a benchmarking system but the development of such a system encounters a number of extreme difficulties.[134] Human rights have a certain degree of comparative normative specificity, as far as it is easier to establish cases of violations than is the case with more imprecise fields such as development. However, in relation to the EU's positive approach, a benchmarking

[133] COM(2001)252, p. 8

[134] One early example is the European Parliament Resolution on Human Rights, Democracy and Development, Nov. 22 1991. OJ C326/259, 1991 at 269, para. 5.

system should be based on identifying progress and not only violations. The question that becomes apparent is what happens when the EU applauds a country with an appalling human rights record for the improvement they have achieved, and at the same time sanctions a country with a better record that has regressed but still provides a more extensive protection? The EU views its dialogue with China as progressing and encourages the further development of China. The advancement of human rights most often referred to is that China is slowly starting to join the various international regimes and is undertaking some institutional or legal reforms.[135] At the same time, the EU criticises countries with far better human rights record. The situation could potentially constitute a threat to EU credibility in its protective and promotional activities.

What could a future benchmarking system look like? Should it be based on absolute standards or should it be relative to each country? The underpinning EU assumption that engagement yields a higher degree of influence than sanctions can be refined to the assumption that action is always preferable to inaction. In establishing an absolute benchmarking system the problem is that of determining at which level the criteria should lay. If the criteria are set at a higher level, reflecting the ambitions of the EU human rights rhetoric, the EU would probably have cut its dialogue with a number of countries. In the light of the fact that the EU believes that engagement is preferable to inaction, this solution does not seem to be the best option. On the other hand, if the criteria are set very low, the EU could continue to remain involved with a large number of countries. The criteria could also be set at a minimum level and be tightened up as achievements on the ground are seen. However, the question is how much improvement can be achieved if the general levels of the bench marking system are low. One alternative is adopt an approach similar by that adopted to the International Covenant on

[135] European Annual Report on Human Rights 2002, cit., p. 46

Economic, Social and Cultural Rights (ICESCR) in which progress in a government's work on human rights is evaluated. However, the work under the ICESCR has proven extremely difficult.

Two other problematic aspects of the application of the human rights clause are the problem of making sure that real improvements are made on the ground and the problem of credibility of the EU in terms of different approaches to different situations. In spite of this, the EU is of the official opinion that conducting a dialogue is the most effective instrument to address EU concerns. The decision of the EU to condemn the human rights violations by Russia in Chechnya, and the decision not to turn to sanctions is based on exactly the belief that continued engagement is always better then disengagement. In relation to Russia, it is difficult to perceive the exact effects of the EU approach. However, the political dialogue did manage to 'keep the discussion going' and produced some improvements.

The discussion of how to guarantee that the political commitment is followed by protective or encouraging policy changes has been tending to move towards introducing some kind of reporting system. The basic idea of setting up a system like this is to try to change the provisions of the human rights clause to include specific provisions giving rise to a treaty obligation to report regularly on the local human rights situation. The procedure would need to incorporate some kind of verification mechanism.[136] Whether this is achievable or even desirable is not really clear. The basic assumption underlying the development of using political dialogue for addressing human rights issues is to create a participatory procedure that by involvement of both parties would make alienation less likely. If a reporting procedure is set up, the difference between the EU approach and the approach taken under a number of

[136] Report from the Commission to the Council and the European Parliament, Common principle for future contractual relations with certain countries in South-Eastern Europe, COM (96) 476 final, October 2, 1996.

international human rights instruments will become less marked. Other alternatives considered have been for the EU to report on the progress of the human rights process in their partner countries, a difference of approach that would not make much of a difference.[137] Firstly, if the reports would be made public, they would face the same political constraints as any other public statement by the EU and would not necessarily draw attention to genuine problems. Secondly, if the reports were made confidential, it could directly insult the country in question and make them object to what they might construe as interference with the 'openness' of the dialogue. The introduction of a report mechanism into the human rights clause could open up room for criticism along the lines that human rights are imposed Western values. The European 2002 Annual Report on Human Rights drew attention to the problem of how to handle criticism of this kind and that the EU should by all means avoid addressing human rights issues in a manner that could give rise to it.[138] The EU makes a stand by including a human rights clause in all its bilateral and cooperation agreements, the very stand that Australia opposed. As illustrated above, the current approach is one of partnership and open-dialogue aiming at, through involvement, developing positive policy changes in the third country. It is not sure that a reporting procedure would work towards the same ends.

Today, the European Union uses a system of one annual report on human rights. It covers everything from the internal policies of the EU, the last years' international initiatives by the EU, the international context within which the EU operates to comments on the general standards of human rights in countries with which the EU deals. The last published report, covering the year 2002, does all this in 137 pages. In other words, it is not very detailed and does not go in depth on any of the issues. The report is considered one of the tools to enhance the level of

[137] COM(95)0216 - C4-0197/95, para. 9.

[138] European Annual Report on Human Rights 2002, cit., p. 11

public participation in human rights issues and furthermore, it is intended to increase the level of transparency and accountability on the side of the EU.[139] To be able to claim to achieve both of these goals, the EU will have to put substantially greater effort into their reporting system.

The last major problem of the use of a formal dialogue is that the flexibility in relation to both the general approach and the choices of response could potentially create great difficulties in terms of EU credibility. To achieve greater credibility, the EU needs to intensify its work on creating further coherence in its policy, both in relation to the acts of member states, and in the standards of human rights as being universal and indivisible. This is closely linked to the hierarchy of the EU foreign policy interests. If human rights are the major concern in its relations with one country, it cannot be a secondary priority in its relations with another. This is a problem that has not only been brought up by outside actors, but has also been the reason for an on-going internal discussion. In an opinion of the Committee on Development and Cooperation to the Committee on Foreign Affairs, Security and Defence Policy from 1996, the Committee expressed its concerns by stating that 'there is sufficient evidence of the EU bodies applying double standards in reacting to human rights abuses in different countries depending on their economic and strategic potential'.[140]

The proposed solution is the creation of clear and independent criteria for the decisions taken in relation to EU human rights approach. The problem of this approach has been touched upon already, and thus it is natural to ask how the EU can continue to be a credible human rights actor even in the absence of such criteria. One response is to make the

[139] Ibidem, p. 18

[140] Opinion of the Committee on Development and Cooperation for the Committee on foreign Affairs, Security and Defence Policy, conclusion of 21 February 1996, para 1, end.

whole process, within the EU, transparent to a higher degree than what is presently the case. One way of adding power to the political dialogue and at the same time increasing EU credibility would be to give the process much more publicity, which would put pressure on both the EU and its treaty partners. By involving the public, the EU could address the problems now affecting the human rights centred dialogue. For this to happen, the argument assumes that the EU can stand behind its claim of the supremacy of human rights in relation to other EU interests and secondly, that it is ready to answer to the whole population of the EU.

A Proactive Policy

The EU's positive approach to the protection and promotion of human rights, as outlined in the human rights clause and as seen in the policy carried out by the EU, is not only a reactive approach to already existing problems. Instead it also provides a possibility for the EU to act proactively in the field of human rights. The existing possibility of signing partnership agreement with the EU can constitute an encouragement for states to address their human rights problems. Furthermore, between the signing and the ratification of a treaty there can be an anticipatory effect as far as the EU can continue, and also intensify, its human rights activities during this time. This was the case in the period between the signing and the ratification of the EU-Russia Partnership Agreement. The situation in Chechnya caused debate within the EU, and the EU also intensified its efforts to influence the Russians. In the end, the agreement was signed and approved in the light of a continuing cease-fire and what the Commission called 'improvements' in the efforts of the Russian government. The procedure to sign and ratify the EU-Russian agreement hence allowed for the EU to address human rights issues on a high level even before the entry into force of a human rights clause.

However, the EU goes further by linking the positive approach to human rights issues to the EU's conflict prevention scheme. As stated in the 2001 Commission Communication to the Council and the European Parliament the idea is that "a long-term dialogue on human rights and democratisation is also an element in the EU's conflict prevention strategy."[141] The assumption is that by monitoring the standards of human rights through a political dialogue, an early warning system is implicit by drawing attention, at an early stage, to situations that can quickly deteriorate. An early warning would allow for the EU to address potential political crisis and threats to human rights and to the stability of a country at an earlier stage than what is possible today. It would be proactive in as far as it would be able to avert a reversal in the development achieved in human rights and democratic standards.[142]

The use of EU funds, de-centralised cooperation and political dialogue to achieve the respect and promotion of human rights in recipient countries puts an emphasis on the fact that the need to turn to sanctions is seen as a failure. If the measures had been successful, the need to apply sanctions would be a lot less likely. And if they achieve their goal of supporting the process of establishing and consolidating democracy and the rule of law, then positive measures constitute the backbone of EU conflict prevention. The underlying assumption is that development in recipient countries is not independent of accountable governments and functioning democracies. A positive approach is dependent on the overall political context. Unless the government, party to the agreement, is co-operating on a few basic points, then the whole approach is rendered without any power to influence the situation. Australia, in refusing to sign an agreement including a human rights clause, did at the same time exclude any possibility to apply a positive approach in

[141] COM(2001)252, p. 9.

[142] Dias, C., *Mainstreaming Human Rights in Development Assistance. Moving from Projects to Strategies*, cit., p. 77.

relation to human rights issues. Today, there is a contact on a regular basis, but human rights are not an integral part of that relationship.

The effects of the human rights clause on the Internal and External relations of the EU

It is necessary to address the effect of the use of the human rights clause on the internal institutional relations of the EU in the context of the scope of the clause, because the concern with external policy obligates a cautious reflection of its internal policy dimensions. Any type of external policy needs to be underpinned by a coherent internal policy. If the element of coherence is lacking, the principles of universality and indivisibility would be threatened when it comes to EU human rights policy. Thus, unless the development of external policy is not accompanied by a development of internal policy, it is very unlikely that it will have the desired effect. In relation to the human rights clause this has been the case, especially in as much as the development of the human rights clause and its use has forced to the EU to carefully consider the legal and political dimensions of its human rights mandate.

The internal effects of the development and inclusion of the Human Rights Clause

The effect of the inclusion of the human rights clause into EC agreements has had several effects on the internal dimension of EU policy. The judgement in the case Portugal vs. the Council cleared most of the legal ambiguities arising from the question of a EU mandate to address human rights in relation to trade and development agreements. The definition of the EU human rights mandate and its legal base also brought some clarity to the procedures applicable, and thus also to the roles to be played by the different institutions, especially in terms of the articles of EC law under which the conclusion of a treaty including human rights references is possible. The development of the EU human

rights policy has resulted in a comprehensive approach allowing for the EU to use its influence to promote human rights. However, there is no equivalent initiative aimed at EU institutions themselves, nor towards the member states. The question that remains, which needs to be addressed is that if human rights do not fall within internal EU competence, how can it be an internationally credible defender of these rights?[143] The EU, for example, does not take responsibility for human rights abuses that originate from EU funded projects in third countries. In Uganda, during a European funded project that ran from 1988 to 1995, the Kibale Forest and Game Corridor caused major human rights violations. The Commission denied all responsibility of the large numbers of evictions that resulted from the project. [144] The incident can be seen as either an indicator of badly chosen human rights projects, and hence an evaluation process of potential programs that is not of an appropriate standard, but it is also an indicator that the EU accepts responsibility for one part of a project, in this case, the funding stage, denying any responsibility for over-all effects. Both are signs of a badly flawed policy.

The issue of coherence does not only involve the assessment of EU external policy. Here, coherence and consistency has applied first of all to the actions of the different EU institutions, but secondly to the relations between EU policy and the policy of its member states. The question of coherence is not only a question of efficiency but according to Article 178 (*Ex Article 130v*) of the TEU, it is a question of legal obligation. The process of the development of the human rights approach of the EU has now reached the stage at which human rights and democracy are parts of the planning, design, implementation, and

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[143] Alston, P., Weiler, J.H.H., *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights* in P. Alston (Ed.), *The EU and human rights,* Oxford, Oxford University Press, 1999, p, 15.

[144] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC*, cit., p. 618.

monitoring of all EU policies and programmes.[145] The effect has been that contact between the institutions has intensified work towards consistency.

In terms of policy making it is the Council and the Commission in accordance with EC law that take major decisions. The Parliament has, and is playing, a very important role by pressing the other institutions to put human rights on the agenda. It can do this through resolutions, declarations, and through its prerogative to asking questions. During the drafting process, and whilst the ratification of the Partnership Agreement with Russia was pending, the Parliament was very active in pushing the human rights aspect of the negotiations. The final signature was approved only after Russia had reached a cease-fire with the Chechen army.[146] Hence, the Parliament does influence the treaty-making processes with third countries. It also undertakes human rights missions and draws reports, for example, the Annual Report on Human Rights.[147] The Parliament has taken a role in providing a check on the other institutions in relation to the effect of EU policy on human rights issues. The Special Rapporteur Mr. Carnero Gonzalez stated in his comment of the COM(95)216 that "the insistence on certain standards in human rights is not a casual matter for the European Parliament; on the contrary, it is intrinsic to a modern vision of humanity. It is intrinsic to the democratic nature of the European institutions, and it is a policy which confers prestige and moral authority on the European Union."[148] The work by the Parliament has lead to improvements in relation to issues of coherence in EU action. For example, the European Parliament will henceforth be consulted on priorities of human rights funding and much effort has been put into creating a system of greater coherence

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[145] Alston, P., Weiler, J.H.H., *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, cit., p. 20.

[146] See p. X.

[147] European Annual Report on Human Rights 2002, cit., p. 15.

[148] COM(95)0216 - C4-0197/95, part B, 'Concluding Remarks'.

with member states' funding. However, guaranteeing coherence between different EU policy and also between the EU and its member states remains one of the main challenges in the fields of EU human rights policy.[149]

The self-identification by the EU with human rights and the External Effects of the development and application of the human rights clause

The culture and methodology of human rights have today become an integral part of EU policymaking and thus constitutes a defining trait of its development. The development of the human rights clause is closely linked, and is an expression of, the development of the EU from merely an economic union to a political union.[150] The human rights clause plays a very specific role in this process of cultural self-definition of the European polity because of its very public nature. This forward looking process of including human rights considerations in the area of trade and cooperation emphasise the legal, political and normative values that make up a European identity. The effect of the human rights clause on the self-identification of the EU is by some authors seen as the major effect of the development of the clause. Lenaerts states that "It is however clear that the insertion of such an axiom in all international agreements primarily confirms the European Union's perception of itself as a political identity."[151] The decision not to drop the human rights clause in the agreement with Australia, even though the EU does not have any major concerns for the human rights standards in Australia, shows that it holds a symbolic value besides being an instrument for promoting human rights. The human rights clause is one of the ways

[149] Simma, B., Aschenbrenner, J.B., Schulte, C., *Human Rights Considerations in the Development Cooperation Activities of the EC*, cit., p. 618.

[150] Marantis, D. J., *Human Rights, Democracy, and Development: The European Community Model,*cit., p. 5.

[151] Lenaerts, K. De Smijter, E. *The European Community's Treaty-Making Competence*, cit., p. 45.

through which the EU has created an identity based on the promotion of human rights.

The idea of an identity based on human rights and respect for democratic principles has now been made a common part of official policy papers. The standard references to human rights, together with the values expressed through the use of the human rights clause illustrates the underlying basic principle of the EU approach, which is that of universality, indivisibility and the interdependence between human rights, democracy and development.[152] However, there exists a link between the centrality of human rights in relation to a European identity and the general emphasis on a proactive and positive approach to the promotion of human rights. The continuous emphasis on a positive and proactive approach to violations of human rights indicates that the EU considers that is has a duty, on a global level, to actively promote and uphold human rights. As stated in the 'European Guidelines on Human Rights dialogues', the EU takes this obligation seriously: "Girded with a political commitment built on universal and regional texts, and with a wide range of instruments and substantial resources at its disposal, the Union is under the *obligation* to focus its efforts on defining and implementing a strategy guaranteeing the consistency, impact and efficiency of its activities in this field, and the openness and transparency of its dealings(emphasis added)."[153] Hence, upholding and promoting human rights in its external relations is not a matter of choice, but it is the "international responsibility"[154] of the EU.

The current EU approach to this 'responsibility' of promoting human rights can be differentiated from historical projects of the imposition of Western values through the use of strict conditionality by the very nature of the agreements in which the human rights clause is included. The

[152] European Union guidelines on Human rights dialogues, cit.

[153] Ibidem.

[154] European Annual Report on Human Rights 2002, cit., Annex 6.

partnership and cooperation agreements are based on an idea of partnership rather than traditional paternalism.[155] The basic assumption of a partnership is the core concept constantly emphasised by the EU in its approach to human rights issues. The Commission notes in a 2001 Communication that "there is no monopoly of wisdom when it comes to analysing human rights and democratic problems, or their implications for the European Union's relations with a country. The real challenge for any institution is to use the information in a productive manner, and to have the political will to make difficult decisions."[156] This is arguably a good indication of what can be considered a genuine value base of the EU approach. The statement points back to the problem of legitimacy and credibility, but also towards the end-goal of creating a 'European Human Rights Agency'.

The creation of what could be called a 'European Human Rights Agency' clearly positions the EU in relation to other actors on the international arena. As the Council of the EU puts it: "in an international environment in which the universal nature of human rights is increasingly emphasised, the European Union has gradually come to define itself in terms of the promotion of those rights and democratic freedoms."[157] Likewise, the EU itself has begun to identify to a greater extent with this obligation to promote human rights in its external relations. Even though constant emphasis is put on the partnership aspect of the EU approach, it is hard to avoid preaching. A messianic strain in the EU's promotion of human rights can be seen in frequently used formulations such as "we are the heirs of the long struggle of humanity to achieve the recognition of human dignity."[158] The role of Europe in the world is to lead by example, holding for true that the "positions taken

[155] Dillon, S., International Trade and Economic Law and the European Union, Oxford, Hart Publishing, 2002, p. 15.

[156] COM(2001)252, p. 20.

[157] European Union guidelines on Human rights dialogues, cit.

[158] COM(95)0216 - C4-0197/95, p. Part B.

by the European Union and its institutions on human rights are a significant point of reference both inside and outside the EU."[159] The view that the EU is the role model in the human rights context probably has more effect on the self-identification by the EU with human rights than it has on relations with third countries. The reason for, and the role played by human rights as the ethos of the EU will be addressed in greater depth in the discussion of the construct of a European identity that will shortly follow.

In relation to the greater project of promoting human rights, the importance of the human rights clause is demonstrated by the visibility of the clause. The first part of the essential element clause demonstrates the attachment of the parties to human rights. Its inclusion shows the importance given to the values referred to. By including human rights in all its external contractual agreements, the EU also enhances the visibility of its own initiatives.[160] The innovative use of the "specific clauses in the main body of the agreements concluded with third countries places the European Community in the vanguard of the international community's endeavours in this field and highlights the parallel importance of adopting a positive approach."[161] This type of declaratory diplomacy in relation to human rights is not completely futile, since it creates a clear stand on behalf of the EU.[162] The EU refers to the human rights clause itself as "one of the most visible ways in which it demonstrates its commitment to the issue."[163]

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[159] Ibidem, C.

[160] COM 95 (216), C (b).

[161] COM 95 (216), C end.

[162] King, T., *Human Rights in European Foreign Policy: Success or Failure for Post-Modern Diplomacy?* In <<European Journal of Intenational Law>>, vol. 10, 1999, p. 336.

[163] European Union guidelines on Human rights dialogues, cit.

The relationship between the constitution, human rights and the construct of European Identity

In the previous chapters it has been argued that the human rights clause, by providing an ethical dimension to its external relations, has played an integral part in the continuous self-identification of the EU. Now on the post-interpretative level of analysis, these findings will be placed in a wider context. The first step will be to see if the move towards a proactive human rights identity reflected in the use of the human rights clause can be found in the draft constitution. Concluding that the draft constitution largely supports this view of a European identity, the remaining part of this paper will be devoted to looking at the role envisaged for human rights in further European integration, and the potential problems that might arise from this approach. Crucial in this discussion is how human rights can play the role of a European *telos* that does not impinge on national identity, and thus provides the EU not only with a present *ethos* but also a historical goal. It is a discussion that reaches beyond the domain of law in trying to explain the relation between the draft constitution, human rights and the construction of a European identity.

The relation between a constitution, collective identity and the European Union

An organised society and its form of government are the two elements that constitute a polity, which in turn is composed of a demos, a common people identifying with the polity within which they live. A constitution generally forms the basic legal order regulating the activities within a polity. It provides a functional framework for a society that aspires to political unity. A constitution can also facilitate social integration by fixing a society's basic consensus as to the principles of co-existence of its members. As a formative framework of social interaction within society, the role of a constitution in shaping and

forming a polity is one that is intrinsically linked to the idea of the collective identity of that particular society. In this context 'identity' will be referred to as a distinctive mode of consciousness, a consciousness that in most situations in Europe today, is based on a particular national conception of history, citizenship and also of historical *telos*.[164] Gellner illustrates the relationship between nationalism and collective identity by saying; "nationalism is about entry to, participation in and the identification with, a (…) culture which is co-extensive with an entire political unit and its total populations."[165]

The idea of providing the EU with a constitution engenders certain conceptual difficulties in connection to the relationship between a polity, its demos and a constitution. The state, as a unified polity based on the construction of a homogeneous demos has been the most obvious answer to the question of the nature and location of a political community since the peace of Westphalia.[166] The supranational nature of the EU calls for a re-definition of these concepts. However, this does not mean that the process of European integration differs in essence from that which created national identities. Consequently, the unity of popular perception and consciousness on a European level must differ from, but also

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[164] Deirdre M. Curtin refers to Gellner when making this definition. For the topic of this thesis, it seems like a correct and fitting definition.

Curtin, D.M., *Postnational Democracy - The European Union in search for a political philosophy,* The Hague, Kluwer Law International, 1997.p. 14.

[165] Gellner, E., *Nations and Nationalis*m, Oxford, Blackwell Publishers, 1983, p.95.

However, even if national identities are the reality on which the EU builds its identity, they are the outcome of a process of nation building similar to that of creating a European collective identity. Citizenship as a concept has its origin in both German romanticism and French enlightenment thought. French enlightenment thought is based on an idea of citizenship as a part of the condition for human universal civilisation which should be open to anyone being a part of the community of the state and who puts some belief into the credo of '*liberté*, *égalité* and *fraternité'*. German romantic view of nationhood is based on the concept of the *volk,* a people that is characterised by an ethnic, cultural and linguistic homogeneity. In the current European setting the two approaches to citizenship exist in a dialectic relation, both in purpose and principle.

[166] Curtin, D.M., *Postnational Democracy - The European Union in search for a political philosophy,* cit., p. 12.

manage to co-exist, with national identities. This is partly the reason for the emphasis put on human rights, a sentiment that can provide cross-national identification with certain norms and values. The aim of drafting a constitution in the process of constructing a European polity can never move beyond these preconditions; "European Identity can in any case mean nothing other than unity within national diversity."[167] The relationship between national identities and the development and a European consciousness is potentially a confrontational one, but the transformation of the EU from an economic union to a political union requires that the nascent European identity is one that is able to complement national identities rather than supplant them.

The philosophical ideas that underscored the unification of Europe did not envisage the necessity of this subtlety. Not surprisingly has the functionalist school lost its ideological standing in relation to European integration. The main goal of the functionalist vision of European union was informed by the theory of a self perpetuating process that initiated and facilitated a switch of loyalty from the national level to the European level. David Mitrany believed that through close cooperation in a number of policy sectors, a further understanding and a sense of solidarity would arise among the peoples of Europe.[168] From what we can see today, this has not happened to the extent envisaged by the Functionalist thinkers, but it is possible to conclude that the current drive towards providing the EU with a constitution aims at similar goals but not through the same mechanisms.

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[167] Habermas, J., *Does Europe Need a Constitution? Response to Dieter Grimm,* in <<European Law Review>>, vol. 1, 1995, p. 287.

[168] A good introduction to David Mitrany's work can be found in Mitrany, D., *The Functional Theory of Politics*, New York, St. Martin's Press, 1975.

The Current State of Affairs

The EU does not have a constitution in the same sense that the United States does, but polity defining norms can be derived from a wide variety of sources; the founding treaties, the jurisprudence of the European Court of Justice and also secondary legal acts.[169] The fundamental norms and values are found in what is called the *acquis communitaire.* Article 2 of the The Treaty on European Union (TEU) refers to the maintenance and development of the *acquis communitaire* as being one of the objectives of the EU. The exact meaning of the concept has not, in Treaty meaning, been clearly defined. However, the content of *acquis communitaire* can be seen as core rules and principles that are seen as fundamental for the existence of the EU which are "not capable of transformation."[170] Among the principles referred to as being fundamental we find 'the respect and promotion of human rights'. The TEU placed human rights at the centre of its external relations. Article J.1(2) of the TEU states that one of the objectives of the Common Foreign Security Policy should be "to develop and consolidate democracy, and the respect for human rights and the rule of law." Further development in both policy-making and the jurisprudence of the European Court of Justice reinforces the idea of human rights as one of the core values of the EU.[171] The *acquis communitaire* does thus include the respect for human rights as one of the norms that should govern European integration. The important issue, in relation to role of human rights in constructing a European identity is that human rights are mentioned from the very beginning of European unity as one of the normative values underlying European integration.

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[169] Verhoeven, A., *The European Union in Search of a Democratic and Constitutional Theory,* in <<European Monographs>>, vol. 38, 2002, p. 76

[170] Weatherill in A, Verhoeven, ibidem, p. 145

[171] The outline in of the development of the human rights clause, starting on page 5, is a good illustration of this.

The Draft Articles

An accurate indicator of the continuation of European integration that the EU itself envisages is found the work of the Conference on the Future of Europe and the draft articles produced as a result of its efforts. The human rights references in the future constitution will provide further formality to the EU human rights policy, and hence provide the possibility for the explicit recognition of the normative development that has taken place within the EU.[172]

The Conference and its working groups are the results of the process started through the declaration accompanying the Treaty of Nice and continued through the Laeken Declaration on the Future of the European Union.[173] On April 23, the draft articles on the EU's external relations[174] were published and on May 26 the Revised text of Part One followed.[175] These are the two documents that will be used for this study. The draft provisions do not have any legally binding force, but still provide an appropriate object for study as they serve as a good illustration of where the process is heading.

Human Rights References in the Draft Articles - The Revised text of Part One

'Title one' of 'Part One' of the draft constitution introduces the definition of the EU and its objectives. The respect for human rights is mentioned together with the protection of human dignity, liberty, democracy and the rule of law as the 'defining values' of the EU, and

[172] The Presidency Conclusions of the European Council, held in Thessaloniki on June 19 – 20, states that the presentation of the draft convention marks the end of the task set out in Laeken.

[173] The Declaration on the future of Europe was included with the final act of the conference in Nice, December 2000.

[174] CONV 685/03.

[175] CONV 724/03.

they are also supposedly held by all the member states.[176] The Union's objectives are related to the previous defining values and include a diverse number of goals ranging from the promotion of peace and sustainable development to the promotion of equality between women and men and the protection of Europe's cultural heritage. The reference to liberal democratic principles, and common European cultural heritage illustrates that human rights are one of a number of references that aim to create a common European identity. Human rights are also referred to as fundamental rights in relation to the European Convention on for the Protection of Human Rights and Fundamental Freedoms. ('The European Convention'). Article 1 - 7 states that the Union "shall seek accession" to the European Convention and that the Fundamental rights as guaranteed by the European Convention "shall constitute general principles of law." Part One of the draft constitution seems to reinforce the general approach by the EU to human rights, as also seen in the development and application of the human rights clause. The decision to include a provision allowing for the inclusion of the Convention does not only add additional weight to the otherwise general references to human rights and hence constitutes a very important step towards clarifying the EU's human rights mandate, the reference is also essential in that it gives greater legitimacy to the EU human rights approach.

The Draft Articles of Part II, Title B: The Union's External Action[177]

The articles covering external relations in the future constitution are located in 'Part two', 'title B' of the draft convention. The principles and objectives are outlined in Article 1. The article refers not only to "democracy, the rule of law, the universality and indivisibility of human

[176] CONV 724/03, Article 1-2.

[177] This paper will focus on the articles covering the objectives and principles of the external action of the EU and not go into detail of the Common foreign and security policy nor the Common security and defence policy. The articles on the external relations provide sufficient illustration of the argument.

rights and fundamental freedoms, the respect for human dignity, equality and solidarity" as the guiding principles of EU action, but also as "the principles which have inspired its own creation."[178] These references transcend the weight previously given to human rights in EU policy documents and previous references to human rights in the founding treaties. The language of the human rights references in this part of the draft constitution reinforces the 'messianic' approach to the project of promoting human rights taken by the EU. Even more importantly, and one of the main reasons for the emphasis given to the role of human rights in the process of European integration is that the human rights 'project' can provide a *telos* for the EU, end goal for the process of integration. But the *telos* of promoting human rights, as seen in the draft articles does not only provide a future goal but also an ethical beginning for European integration.

Article 1 continues by calling for the EU to "seek to develop relations and build partnership with countries, and regional and global organisation, which share these values."[179] The article provides codification of what has been EU practice (as illustrated by the application of the human rights clause), and continues by stating that all common policies and Union action "shall consolidate and support democracy, the rule of law, human rights and international law."[180] Article 3 aims at guaranteeing consistency between different types of EU approaches. The idea of drafting the principles and objectives in one single article was put into practice with the purpose of deleting the specific list of objectives attached to each policy area, further reinforcing the stress on coherence and consistency.

The draft constitution and the process that has lead up to it can provide an interesting insight into the future role of human rights in the EU and

[178] CONV 685/03, Article 1.

[179] CONV 685/03, p. 24, Article 1.

[180] Article 2(b).

in its external relations. The two main questions are if legal developments support the emphasis put on human rights in EU policy and whether the approach to human rights taken in the draft constitution supports the idea of the need to formalise these legal and political developments. Weiner presents four determinative variables of classifying a constitutional treaty, looking at whether the process had been a process of 'Constitutionalisation' or of 'legislation' and whether the approach has been based on 'symbolic' values or if it has been guided by 'substance'. 'Constitutionalisation' indicates a process that has been concentrating on trying to define common norms and identity on which to build political unity. It is a horizontal approach that takes both social and legal issues under consideration. 'Legalisation' is the legal practice of creating arrangements that progressively gain in binding force. It involves taking a legal, vertical approach to drafting a constitutional treaty and focuses the aim at establishing law-like rules, institutions and understandings. The two additional, determinative variables are whether the guiding principle of the drafting has been 'form', a more 'symbolic' approach or if the approach has been guided by 'substance'. Both approaches are concerned with mobilising emotions, expectation and also political identities, but they differ on the role given to the public's relation to the constitution. [181]

By looking at Weiner's idea, the effect of the constitutionalisation of the role of human rights in the EU is rather uncertain. The emphasis on human rights indicates that the necessity of an ethos has been relevant to the drafting process and that the approach to the constitution has, in parts been 'substance focused'. Compared to the earlier founding treaties, the draft constitution has a stronger normative strand. However, the lack of encouragement on behalf of the EU to create any space for public deliberation on issues related to the drafting of the constitution has

[181] Wiener, A., *Evolving Norms of Constitutionalism,* in <<European Law Review>>, vol. 9, 2003, p. 6.

resulted in low levels of public participation that indicates that the drafting of the constitution has been a 'legislative' process. On the issue of whether it has been a process guided by substance, or symbolic values, the draft articles are the outcome of an approach falling in between the two. The emphasis placed on human rights clearly indicates that the constitutional project aims to create a substance-based constitution, only that without a consistent and coherent EU human rights policy these references will never move beyond being mere symbols. Nevertheless, the fundamental provisions for a 'thick' constitution are there. Thus, there exists a possibility to create a EU and a European identity based on values with which its citizens can identify with. The space and weight given to human rights in the draft constitution mirrors the image of a proactive, 'European Human Rights Agency' derived from the application of the human rights clause. The conclusion of the centrality of human rights in the normative and political development of the EU inevitably leads to the question of how human rights can be conceived of as playing an integral part in the process of further European integration.

The Role of Human Rights in the process of further European integration

The challenge is to add a new dimension to the EU to prove to its citizens that it possesses relevance on a political level as well as on an economic one. The essence of this process of further European integration must be to create a EU that people can identify with. The need for finding a shared European identity was very well illustrated by Jaques Delors when he said 'you cannot fall in love with the common market'.[182] The aim for the EU at this stage must be to turn a previously descriptive approach into a normative approach where goals and ideals are transformed into practice. This switch in approach would create a

[182] Jaques Delors in Verhoeven, A., *The European Union in Search of a Democratic and Constitutional Theory*, cit. p. 170.

Europe much easier to feel for, and hence also get involved in. People do not need to fall in love with the EU, but for its politics to gain legitimacy it must prove to carry some meaning in the eyes of its citizens.

The need for a European ethos, as the source of legitimacy for further integration and for the project of providing the EU with a constitution, is an issue of contention. Habermas maintains that legitimacy is not located in a shared morality, but in constitutional institutions, and that the base for a collective identity must originate exclusively from identification with but with democratic procedures. However, just as democratic institutions are important, they are not effective before the individual displays self-identification with the polity. One look at the EU today, when the EU bureaucracy has complicated the possibility of public, political involvement, illustrates the weak point of this argument. For a constitution to be successful, it does not only need to provide an institutional setting, but it needs to radically redefine the institutional process and also the popular conception of the EU. It is important to realise that public affinities are not the product of political mechanics and that "affinities are not gifted, they are felt."[183] European popular consciousness must become more involved in European politics, and this can happen by creating a content-centred European identity, thus giving a meaning to what it implies to be European. This applies as well to the process of drafting the European constitution.

Chris Patten directly supported the instrumental role of human rights in the process of defining a European identity when he said 'our concrete actions in the field of human rights (…) epitomise the transformation of the EU from an Economic into a political body.'[184] The human rights

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[183] Ward, I., *Identity and Democracy in the New Europe* in Bankowski, Z., A. Scott, *The European Union ans Its Order - the Legal Theory of European Integration,* Oxford, Blackwell Publishers Ltd, 2000, p. 206.

[184] Patten, C., *Complementarity in the Human Rights Arena/ Strengths and Weaknesses of the European Union,* in <<Human Rights Journal>>, vol. 21, 2000, p. 311.

discourse, and its normative language, could provide a basis for a shared European political identity and thus provide the essential unity in diversity that is now lacking on a European level. Human rights would also provide a transnational discourse that could help against the effects of the inclusion and exclusion caused by the definition of the overarching European polity. This is not only an issue of identity, but as much a question of legitimacy and governance on a European level. A human rights oriented European identity could provide the EU with the mandate to further European integration, and the possibility to complete the transformation from an economic to a political union. Arguably, Human rights can prove to be the ethos that will provide the EU with a meaning in popular consciousness but the emphasis put on human rights in this process also carries with it potential sources of criticism and also some weaknesses. By returning to the previously mentioned split between internal and external levels of analysis the remaining part of this chapter will be used to provide a critical analysis of the development of the EU human rights policy.

Human rights and the internal normative development of the EU

The human rights clause has been used in this paper to illustrate the European approach to constructing a political identity, and eventually thus also a demos. The human rights clause is not only a good illustration of the positive process itself, but also an accurate illustration of the shortcomings of the EU's approach. The major shortcoming of the human rights clause, which is also applicable to EU's constitutional approach, is that the clause contains no provisions that require any transparency in the process determining the application and enforcement of the clause. The lack of transparency is the main obstacle for public participation and hence also public identification with EU policy.

In relation to the public identification of the development of a legal system, Nonet and Selznick put forward the concept of 'responsive law' in their book '*Law and Society in Transition'*. Responsive law indicates a conception of law that is more sensitive to social needs and the theory provides an expanded view of legal participation by looking at legal development as the outcome of the dialogue between the needs of a society and the purpose of providing order. In the view of Nonet and Selznick, the legal system can become a more dynamic instrument by taking a responsive approach to its own legal development. This is especially true in relation to an institution that is strongly committed to a distinct mission, since the idea of a mission provides the needed guiding principles. In relation to the EU and human rights, the EU has clearly stated that it views the protection of human rights as a mission. Problems can arise if the guiding principle is given such weight that it creates a system that loses its sensitivity to changing circumstances and decreases in general openness. But a guiding principle can also provide self-regulation of the legal system by setting the standards according to which it can be criticised. This means that the standards articulated through the use of the human rights clause sets the criteria that the EU itself can be judged by and that the explicit display of normative standards makes the EU more vulnerable to criticism. If the EU proves to be unable to respond to this type of criticism this could eventually lead to fragmentation of the polity. The only safeguard against fragmentation is if legal development is supported by the proper political capacity to face criticism and potential problems. The most critical phase in the process of creating a responsive system of law is the "translation of general purpose into specific objectives,"[185] which is the stage that the EU could be seen as being at now. The quest for a system built on the idea of 'responsive law' is a normative project and it aims at creating a system more responsive to the social needs of the society which it

[185] Nonet, P., Selznick, P., *Law and Society in Transition - Toward Responsive Law,* New York, Harper Colophon Books, 1978., p. 83.

governs. 'Responsive law' provides an expansive view of legal participation that would allow for the public participation badly needed if any concept of a European identity would gain in legitimacy. Recalling the earlier discussion on the need for a content oriented approach to human rights leads to the conclusion that "ultimately, the continuing affirmation of purpose requires energy and resources that cannot be called forth by legal invention alone."[186] Hence, human rights can provide the purpose that can create a self-regulating, responsive legal system that is built on legal participation. The view of human rights as the purpose of the EU, as reflected in the words of the constitution, needs supportive policy to do be able to gain enough credibility to make possible the translation into clear, practical objectives. The question of the priority of the EU's interests and the ranking of importance of commitments is the key to identify the potential problem that the inability to support its human rights commitment can lead to.

The case studies of the EU experience with Russia, China, Australia and Zimbabwe showed that the application of what are considered by the EU as normative, absolute values, is everything but coherent and consequent. Human rights is one of a few normative frameworks that the EU has accepted to adhere to; other ones are for example the principle of national sovereignty and the free market ethos.[187] The EU has repeatedly made this clear by linking human rights to democracy, and liberal democracy to the operation of the international market. The idea of a system of free market economics was one of the normative values that inspired the very creation of the EU. It is still a founding and essential element for its existence, and it's a determinant factor in its approach to international relations. The EU carries obligations under the

[186] Ibidem., p. 86

[187] John Richardson provides a good discussion on the diversity of different values in his article *The European Union in the World – a community of values* in <<Fordham International Law Journal>>, vol. 26, 2002, pp. 12 – 35.

World Trade Organisation ('the WTO') that makes it impossible to include human rights references in its dealings within the WTO framework. The EU did not sign a cooperation agreement with China due to continuous human rights violations, but it chose to sign a Bilateral Accession Treaty with China necessary for Chinese entrance into the WTO. If human rights are to provide further European integration with a purpose, the EU has to carefully consider if there exists a political commitment strong enough to assert the primacy of human rights not only internally, but also externally. Otherwise there is a risk, according to Nonet and Selznick, that the previous unifying values turn into to a source of fragmentation.

If human rights, in the constitution, are given the weight of a principle inspiring the very creation of the EU, and if this is the basis for a substance-focused constitutional identity, the EU practice must support this stand. Unless the EU identifies with its own constitutional principles, neither will its citizens.

Human rights and the normative development of the EU's external policy[188]

The construct of a European identity, here illustrated in the light of the human rights clause and by the drafting of a European constitution, has gained more legitimacy in the external relations of the EU than within the EU. The reason for why the perception of the EU differs between the internal and external spheres can be explained by looking at the difference displayed at the two levels of relationship between legitimacy, sovereignty and identity. The relationship between a government and its people on the European level is based on the idea of popular sovereignty and that political power ought to rest with the will and consent of the people.[189] The effect is that internal legitimacy must be based on an individual identification with the European polity. On the other hand, legitimacy in international relations is a level of authority granted by international law and not by the people. In international relations the EU can be conceived of as being conceptually beyond the nation-state. As a

[188] The basic approach to what constitutes an identity of an actor in international relations is derived from the constructivist theory of international relations. The constructivist theory assumes that international actors operate within a system of shared subjective understanding and norms, which determines the identity, and what constitute appropriate action, of the actor. These norms and understandings are generated and communicated by a number of actors, not only including states but also intergovernmental organisations and non-governmental organisations. Even though the actors themselves create norms and values that govern the international system, the norms and values redefine the system and also the actors, and in this sense, international relations are viewed as an organic process. When looking at the effect of legal doctrines, the constructivist theory sees law as only one of many normative expressions. Studies should include also practice, and take into consideration the historical and political context. This approach allows for a number of possible sources for change in the system. The key to analysing this process is to look at how such actions affect the shared norms and understandings governing international relations.

In relation to the role of identity, this means that an actor does not have a defined identity until interacting with other actors within the same normative system. The interaction is hence instrumental. The EU has pushed human rights to the forefront of all the external relations progressively since the beginning of the 1980s. The human rights clause shows how the normative values that the EU identifies with as the core of its policy have been made a condition for this type of interaction as described above.

[189] McCormick, N., *On Sovereignty and Post-Sovereignty* in N. McCormick *Questioning Sovereignty. Law, State and Nation in the European Commonwealth,* Oxford, Oxford University Press, 1999, p. 130

unified, supranational actor it has the potential of enhancing the external legitimacy of the total of its member states.[190] Much of the perceived unity has been found in a normative source and that norm-based unity has been exercised in the EU's external relations. By putting the human rights clause in all its external bilateral and cooperation agreements the EU has been very successful in promoting itself as a 'European Human Rights Agency'. Philip Alston, writing on the normative value of human rights oriented rhetoric in international relations, argues that "product differentiation and efforts to build distinctive name recognition are assumed to be important elements in the strategies pursued by different international agencies."[191] However, this perceived enhanced power is found in the unity of Europe exactly. The clashes of different attitudes and convictions, illustrated by for example the European responses to the War on Terrorism and the war in Iraq, show that unity is not a pre-given absolute, and in spite of some success, the EU still has far to go. The process of achieving that goal is directly linked to the construction of a European identity.

Even if the legitimacy base of a European identity in international relations displays different characteristics from what can be seen on the internal level, the EU's approach faces the same problem of consistency. To be able to create a credible policy in international relations, the EU has to act consistently in its approach to human rights issues. It still remains to be shown, for the sake of credibility, that the human rights commitment goes further than just skin-deep. If the EU cannot provide credible support for its commitment to human rights the situation will most probably give rise to critique against the EU for using human rights only as a political instrument. Makau Wa Mutua places most international organisations in the category of human rights approaches

[190] Ibidem., p. 133.

[191] Dias, C., *Mainstreaming Human Rights in Development Assistance. Moving from Projects to Strategies,* cit., p. 98.

that he calls "the political strategists or instrumentalists,"[192] one of four existing typologies of users of human rights discourses. The political strategists view human rights as a policy instrument in foreign policy to be deployed to further the general objectives of the organisation that do not need to be human rights oriented. In a sense, human rights becomes the norm with which countries must comply because it is in the interest of the organisations that make use of them, to acquire political leverage. The most pressing point according to Makau Wa Mutua is that the use of general human rights rhetoric leads to "its abstraction and apoliticisation [that] obscure the political character of the norms that it seeks to universalise."[193] The criticism of human rights being Western values imposed only in the interest of the Western world has plagued the human rights discourse since the start. To remain credible, the EU has to convince itself as well as others that its belief in human rights is 'true' and that the EU is not only co-opting these values and standards for furthering its own interests. The use of human rights to reinforce a European identity as a proactive promoter of the values and norms that inspired its own creation should also imply that the EU, according to the same standards, scrutinises its own acts. The role of self-criticism is essential in the process of creating a European identity, and human rights provide the basis of a self-reflective system; cross-cultural understanding can only be found in relation to self-reflection on both the internal and external level of European identity. Without self-reflection the promotion of human rights can never lead to a dialogue between actors, "a credible human rights policy must assiduously avoid unilateralism and double standards."[194] The Common Agricultural Policy is a good

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[192] The other ones are conventional doctrinalist, constitutionalists and cultural agnostics. Mutua, M. W., *Politics and Human Rights: An Essential Symbiosis,* in M. Byers, *The Role of Law in International Politics - Essays in International Relations and International Law,* Oxford, Oxford University Press, p. 151.

[193] Ibidem, 173.

[194] Alston, P., Weiler, J.H.H., *An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights*, cit., pp. 8 – 9.

example. Despite the myriad reasons why the EU is reticent about reforming it, it remains extremely damaging for those agricultural economies that find Europe's markets closed to them and thus remains a favourite issue for which the EU is criticised for hypocrisy and contradiction. If the EU bases a common European identity on the language and methodology of human rights this cannot only be as a political instrument. The human rights standards are vulnerable to criticism, in the lack of consistent and coherent application, that in the end it would prove to be a very shaky foundation. Crucial to the issue of the credibility of the EU human rights approach is that it can never be allowed to come across as a 'default basis' for European identity. Instead, it must be seen as a normative project reaching and covering new ground.

The issue of credibility in relation to a European collective identity based on human rights is closely related to the view of the nature and shape of human rights *per se.* Human rights cannot be treated as absolutes, or as a static end product, but must instead be viewed as a process. In the words of Dworkin: "Our understanding of social change is incomplete if we do not seek out the modes of adaptation that create new and potentially viable historical alternatives."[195] If the EU aims to support its identity through the use of human rights then the characterisation of human rights must be seen as a living process. In this context the human rights clause is an innovative instrument, built on dialogue and partnership, but based on a static view of international relations. If this is going to effectively create both internal and external authority, it has to cut itself loose from the methods of power politics. If human rights are to constitute a guiding principle for European integration and also be able to do this without being the target of criticism, in that it could be construed as Western ideological

[195] Nonet, P., Selznick, P., *Law and Society in Transition - Toward Responsive Law*, cit., p. 24.

imperialism or political aims cloaked in normative values, the EU needs to support its claim with innovation and creativity.

The two levels of internal and external identity, and legitimacy, cannot be completely detached. The end goal of this process is to establish the same idea of an active, human rights oriented union on the internal, regional level. If the EU stands unified on human rights issues in world politics, there will be a symbolic feedback into the internal system. Lord David Hannay of Chiswick, former Permanent Representative to the EC and the UN, points to this when he says; "even the elusive goals of legitimacy and public support may be more easy to achieve through effective action to strengthen Europe's role in world affairs than by another round of institutional reforms."[196] The interconnection between the EU's internal and external relations allows for a return to the issue of the process of the EU's normative development. This paper has tried to illustrate the process of how implicitly recognised norms, through their externalisation, which necessarily requires their explication and definition, become the basis for internal normative development. The process needs to take place because the development of the EU from a primarily economic to a political community needs to be accompanied by a normative development to support the construction of a European identity. The role of human rights in the EU's external relations illustrates how the European conception about its empirical external reality feeds back into its own normative development. Human rights are only one set of norms and values that provide the ideological foundation for this development. The draft constitution mentions liberal democratic values and common cultural heritage as mutually reinforcing values. As seen in the discussion of the role of human rights, it is clear that human rights play an integral part in this development. Human rights is a conviction that provides not only an *ethos* but also a *telos* for European

[196] Hannay, D., *Strengthening Europe's Role in World Affairs: Foreign Policy, Security and Immigration,* in <<European Foreign Affairs Review>>, vol. 7, 2002, p. 365.

integration, giving European integration a 'spiritual historical' goal and direction.

Concluding remarks

This essay has tried to analyse one aspect of the role of human rights in the process of European integration. The drafting procedure and the application of the human rights clause show how explication of the EU's human rights mandate in its external relations has had direct effects on the internal and external self-identification of the EU. The internal and external dimensions of the European human rights discourse constitute two mutually reinforcing forces, both feeding into the process of creating a European identity. The discussion that arose from the inclusion of human rights concerns in its external relation also encouraged the general discussion of the relation between the EU and human rights. The public discussion originating from the use of the human rights clause thus resulted in a clearer formulation of the EU's human rights approach. The process of externalising its human rights commitment in order to allow for further internal, normative development is eloquently described in this passage by Hannah Arendt: "Every activity performed in public can attain an excellence never matched in privacy; for excellence, by definition, the presence of others is always required, and this presence needs the formality of the public (…)." [197]

The discussion on the possibility of providing the EU with a human rights based approach to creating a European identity inevitably leads to the issue of the need of a redefinition of the European demos, and hence also the European polity in times of changing political realities. The project of creating a European Union in the post-war period was informed by the belief that integration was an historical 'inevitability'.

[197] Arendt, H., *The Human Condition,* Chicago, The University of Chicago Press, 1959, p. 49.

Accordingly, Europe was defined by a respect for difference; the sovereign nations made up the fundamental building blocks of European integration. In light of this 'inevitable' integration the discourse has been dominated by questions of legitimacy and identity. Today the EU is trying to re-define itself as a whole, fully formed polity. The creation of a European identity, both internally and externally, is carried out through an ethos-focused process, illustrated by the weight given to ideas of human rights. However, if the post-war European setting was conceptually built on a wide belief in the inevitability of integration, our social and political reality today is characterised by the realisation that the possibility of disintegration is ever present.[198] This forces Europe to re-imagine or re-conceive its fundamental, shared understandings. One of the fundamental realisations from any analysis of European integration is that the commitment to create a European demos and hence also a European identity can never be seen as an end-goal in itself. It must be thought of as a process; a permanent self-transformation in which identity can never be a static definition but instead it must be an identity that allows for constant changes.

The effect of this discussion, the gradually increased emphasis on human rights in most aspects of EU activities, provides a good illustration of the normative development of the EU which is an integral part of the development of the EU from an economic to a political union. Furthermore, this development necessitates a strengthening of the identification by the individual *vis-à-vis* the EU. Hence the discussion of the normative development of the EU needs to look at the development of a collective identity on a European level. This essay has looked at what role human rights can play in this process. Human rights references found in the draft constitution indicate that human rights can, and are perceived of as providing, a *telos* for European integration. A *telos* that not only places the project of a unified Europe 'in history' but that also

[198] Ward, I., *Identity and Democracy in the New Europe*, cit. p. 191-192.

positions it in relation to the rest of the world. There are dangers with putting a great emphasis on the language and methodology of human rights in the normative development of the EU. The EU's commitment to human rights must be supported by a strong enough political commitment to be able to respond to criticism and thus it necessitates a *sound* amount of self-reflection. Unless the EU is ready to enter into discussions concerning its human rights commitment, unification under the banner of the human rights can instead turn out to be a source of fragmentation.

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