

**The Ethical Foreign
Policy of the European
Union: A Legal
Appraisal.**

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PhD

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ABSTRACT:

This thesis is an attempt to analyse, in legal terms, the theory and implementation in practice of an “ethical foreign policy” by the European Union. It focuses on relations between the Union and certain developing States. The thesis is primarily composed of two distinct substantive parts.

The first substantive part is composed of two chapters. This part firstly investigates which international legal rules authorise or oblige the Union, the European Community or the Member States to promote certain values in third States or in certain circumstances take action. It further examines the legal limits which under international law constrain such policies. It then goes on to examine policy and practice from a Union/Community law perspective. Here the thesis analyses: the relationship between the Union and Community pillars; the instruments available to the Union and Community in the pursuance of foreign policy objectives; and the scope of the Community and Union’s competence in implementing an ethical foreign policy.

The second substantive part of thesis examines practice. It analyses the importance attached to ethical values and their relationship with other priorities and objectives. Chapter Four examines relations with Myanmar, Nigeria and Pakistan. Chapter Five looks at relations with the Palestinian Authority and Israel in the overall context of the Middle East Peace Process. Chapter Six examines the Union’s policy of humanitarian and emergency aid.

The thesis finally attempts to draw some conclusions, as to the efficacy of the policies and instruments utilised and the approaches adopted in practice. It is argued that the Union should concentrate its efforts on certain specific rights and territories and abandon the all-encompassing policy it is currently attempting to implement.

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I have sought to state the law and facts as they stood on 31st May 2004. Due to its importance, however, I have tried to incorporate into the discussion the ICJ’s Advisory Opinion of 9 July 2004 *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.

Urfan Khaliq
19 July 2004.

ABBREVIATIONS:

AC	Appeal Cases
ACHR	American Convention on Human Rights, 1969
ACP	African, Caribbean and Pacific Group of States
<i>Actualités du Droit.</i>	Revue de la Faculté de Droit de Liège
<i>AEL</i>	Academy of European Law
<i>AIDI</i>	Annuaire de l'institut de Droit International
<i>AJCL</i>	American Journal of Comparative Law
<i>AJIL</i>	American Journal of International Law
<i>AJICL</i>	African Journal of International and Comparative Law
<i>AJPS</i>	American Journal of Political Science
ALA	Asian and Latin American (States)
ALL ER	All England Law Reports
<i>American UJILP</i>	American University Journal of International Law and Politics
<i>ASIL Proc.</i>	American Society of International Law Proceedings
ASEAN	Association of South East Asian Nations
<i>AYBIL</i>	Australian Yearbook of International Law
<i>Boston College ICLR</i>	Boston College International and Comparative Law Review
<i>Brooklyn JIL</i>	Brooklyn Journal of International Law
<i>BYBIL</i>	British Yearbook of International Law
<i>California Western ILJ</i>	California Western International Law Journal
<i>Case W. Res. JIL</i>	Case Western Reserve Journal of International Law
CCP	Common Commercial Policy
<i>CDE</i>	Cahiers de Droit Européen
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women, 1979
CEECs	Central and Eastern European Countries
CFSP	Common Foreign and Security Policy
<i>CJEL</i>	Columbia Journal of European Law
<i>CLP</i>	Current Legal Problems

<i>CMLR</i>	Common Market Law Reports
<i>CMLRev.</i>	Common Market Law Review
COHOM	Council Working Party on Human Rights
<i>Columbia HRLR</i>	Columbia Human Rights Law Review
<i>Columbia JEL</i>	Columbia Journal of European Law
<i>Columbia JTL</i>	Columbia Journal of Transnational Law
<i>Columbia LR</i>	Columbia Law Review
<i>Conn. JIL</i>	Connecticut Journal of International Law
CUP	Cambridge University Press
DAC	Development Assistance Committee (of the OECD)
<i>Denver JILP</i>	Denver Journal of International Law and Policy
<i>Dick. JIL</i>	Dickinson Journal of International Law
ECHO	European Community Humanitarian Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950
ECJ	European Court of Justice
ECPT	European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1987
ECR	European Court Reports
EDF	European Development Fund
<i>EFARev.</i>	European Foreign Affairs Review
<i>EHRLR</i>	European Human Rights Law Review
<i>EJIL</i>	European Journal of International Law
EIDHR	European Initiative for Democracy and Human Rights
<i>ELJ</i>	European Law Journal
<i>ELRev.</i>	European Law Review
EPC	European Political Cooperation
<i>EPL</i>	European Public Law
ESC	European Social Charter
ETS	European Treaty Series
FAO	Food and Agriculture Organisation (of the United Nations)
<i>Fordham ILJ</i>	Fordham International Law Journal
GAC	General Affairs Council

GAEXREL	General Affairs and External Relations Council
<i>Geo JICL</i>	Georgia Journal of International and Comparative Law
<i>Geo Wash JILE</i>	George Washington Journal of International Law and Economics
<i>GYBIL</i>	German Yearbook of International Law
<i>Harvard LR</i>	Harvard Law Review
<i>Harvard ILJ.</i>	Harvard International Law Journal
<i>Hastings ICLR</i>	Hastings International and Comparative Law Review
<i>HHRJ</i>	Harvard Human Rights Journal
<i>HPG</i>	Humanitarian Policy Group (of the ODI)
HRC	Human Rights Committee
<i>HRQ</i>	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights, 1966
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice
<i>ICLQ</i>	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
<i>IHL</i>	International Humanitarian Law
<i>IHT</i>	International Herald Tribune
<i>IJCLL & IR</i>	International Journal of Comparative Labour Law and Industrial Relations
<i>IJEL</i>	Irish Journal of European Law
ILA	International Law Association
ILC	International Law Commission
ILCASR	International Law Commission's Articles on State Responsibility, 2001
ILO	International Labour Organisation
<i>IRRC</i>	International Review of the Red Cross
<i>ILJ</i>	Industrial Law Journal
<i>IMR</i>	International Migration Review

<i>Iowa LR</i>	Iowa Law Review
<i>Israel LR</i>	Israel Law Review
<i>Israel YBHR</i>	Israel Yearbook on Human Rights
<i>IYBIL</i>	Italian Yearbook of International Law
<i>JCMS</i>	Journal of Common Market Studies
<i>JEPP</i>	Journal of European Public Policy
<i>JHA</i>	Justice and Home Affairs
<i>JIA</i>	Journal of International Affairs
<i>JIEL</i>	Journal of International Economic Law
<i>JWT / JWTL</i>	Journal of World Trade / Journal of World Trade Law
<i>LIEI</i>	Legal Issues of European / Economic Integration
<i>LQR</i>	Law Quarterly Review
<i>LS</i>	Legal Studies
<i>MJIL / MYBILS</i>	Michigan Journal of International Law / Michigan Yearbook of International Legal Studies
<i>MLR</i>	Modern Law Review
<i>NGO</i>	Non-governmental organisation
<i>NILQ</i>	Northern Ireland Legal Quarterly
<i>Netherlands ILR</i>	Netherlands International Law Review
<i>NQHR</i>	Netherlands Quarterly of Human Rights
<i>Nordic JIL</i>	Nordic Journal of International Law
<i>NWJILB</i>	North-Western Journal of International Law and Business
<i>NYBIL</i>	Netherlands Yearbook of International Law
<i>NYUJILP</i>	New York University Journal of International Law and Politics
<i>ODI</i>	Overseas Development Institute
<i>ODI Review</i>	Overseas Development Institute Review
<i>OECD</i>	Organisation of Economic Co-operation and Development
<i>OJLS</i>	Oxford Journal of Legal Studies
<i>PCIJ</i>	Permanent Court of International Justice
<i>PJJC</i>	Police and Judicial Co-operation in Criminal Matters
<i>PL</i>	Public Law

<i>RBDI</i>	Revue Belge de Droit International
<i>RDI</i>	Revue de Droit International
<i>RHDI</i>	Revue Hellénique de Droit International
<i>RMC/RMCUE</i>	Revue du Marché commun et de l'Union européenne
<i>RRM</i>	Rapid Response Mechanism
<i>SEA</i>	Single European Act
<i>Stanford JIL</i>	Stanford Journal of International Law
<i>Syracuse JILC</i>	Syracuse Journal of International Law and Commerce
<i>Texas ILJ</i>	Texas International Law Journal
<i>Tel-Aviv ULR</i>	Tel – Aviv University Law Review
<i>Tulane LR</i>	Tulane Law Review
<i>TEU</i>	Treaty on European Union
<i>UKTS</i>	United Kingdom Treaty Series
<i>UNC</i>	Charter of the United Nations
<i>UNCAT</i>	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984
<i>UNTS</i>	United Nations Treaty Series
<i>Vanderbilt JTL</i>	Vanderbilt Journal of Transnational Law
<i>VCLT</i>	Vienna Convention on the Law of Treaties, 1969
<i>VCLTSIO</i>	Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, 1986
<i>Virginia JIL</i>	Virginia Journal of International Law
<i>WLR</i>	Weekly Law Reports
<i>YEL</i>	Yearbook of European Law

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Protocol to the Convention Relating to the Status of Refugees, 1967, 660 *UNTS* 267.

1969 Vienna Convention on the Law of Treaties, 1969, 1155 *UNTS* 331.

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Convention d'association entre la Communauté économique européenne et les Etats africains et malgache associés à cette Communauté. (Yaoundé II). OJ 1970 L 282/2.

1973 Minimum Age Convention, 1973, ILO No. C 138, 1015 *UNTS* 14862.

International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, 1015 *UNTS* 243.

1976 ACP-EEC Convention of Lomé (Lomé I). OJ 1976 L 25/2.

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1980 Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand - Member countries of the Association of South-East Asian Nations. OJ 1980 L 144/1.

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1981 African Charter on Human and People's Rights, 1981, 1520 *UNTS No.* 26, 363.

1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, 1984, 1464 *UNTS* 85.

Third ACP-EEC Convention of Lomé, (Lomé III). OJ 1986 L 86/3.

1986 Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, 1986, UN Doc. A/Conf. 129/15 (1986).

Agreement for Commercial, Economic and Development Cooperation Between the EEC and the Islamic Republic of Pakistan. OJ 1986 L 108/1.

1988 Additional Protocol to the European Social Charter, 1988, *ETS* No. 128.

1989 Convention on the Rights of the Child, 1989, 1577 *UNTS* 3.

Fourth ACP-EEC Convention of Lomé. OJ 1991 L 229/3.

1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, 1990, General Assembly Resolution 45/158, 18/12/1990.

1994 Framework Agreement Between the European Community and the Indian Republic on Cooperation and Development. OJ 1994 L 223/230.

1995 Agreement Amending the Fourth ACP-EC Convention of Lomé. OJ 1998 L 156/3.

Euro-Mediterranean Agreement Establishing an Agreement Between the European Communities and their Member States, of the One Part, and the State of Israel of the Other Part. OJ 2000 L 147/2.

1996 Revised European Social Charter, 1996, *ETS* No. 163.

Memorandum of Understanding Between the EC and the Islamic Republic of Pakistan on Arrangements in the Area of Market Access for Textile Products. OJ 1996 L 153/48.

1997 Euro-Mediterranean Interim Association Agreement on Trade and Cooperation Governing Formal Relations Between the European Community and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip. OJ 1997 L 187/3.

1999 Worst Forms of Child Labour Convention, 1999, ILO No. C182.

2000 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the Other Part. OJ 2000 L 317/3.

2001 Memorandum of Understanding Between the European Community and the Islamic Republic of Pakistan on Transitional Arrangements in the Field of Market Access for Textile and Clothing Products, (2001) OJ L 345/81.

Chapter One

Introduction.

Violations of the legal principles of the sovereign equality of all States and non-interference in the internal affairs of another are not uncommon where the geopolitical or other interests of States are at stake. In their foreign policies States have historically, in the main, sought directly to protect only their own interests. More recently, however, certain States have increasingly attempted to influence the normative framework which regulates the relationship between the State and its citizens in a third country.¹

During the last thirty years various administrations have formally declared that in their foreign policy formulation towards certain third countries, acting either individually or collectively, they will take account of human rights and democracy, among other ethical values. The EU's current constitutive treaties expressly refer, for example, to the objectives of promoting and protecting human rights and democracy in third States. The Council, Presidency, the European Parliament, various Commissioners and the Commission have all on numerous occasions declared their desire to achieve those objectives and the methodology to be used in their pursuance.

Foreign policies with ethical dimensions to them have often been theoretically analysed by International Relations scholars. This work is of interest and value but ethical foreign policies also involve many legal questions. Law is therefore, as important an analytical tool, as International Relations, of such policies. This thesis is an attempt to analyse the European Union's efforts to this end in legal terms and to understand how and on what basis action, if any, is taken and how effective it has been or is likely to be. This study will focus on the Union's relations with a number of, primarily developing, States. As a legal analysis of the EU's ethical foreign policies and practice, this thesis does not attempt to engage itself in the International

¹ Although the US has selectively promoted democracy in third States since the 19th Century. See Light, M., "Exporting Democracy" in Smith, K., and Light, M.(eds.), *Ethics and Foreign Policy*, (2001) p.75.

Relations debates, although it does refer to them where necessary. It is concerned with a number of different legal questions.

Chapter Two assesses the Union's "ethical foreign policy" from a Public International Law perspective. It firstly investigates which international legal rules, if any, oblige or allow the Union, Community and/or the Member States to promote certain values in third States or in certain circumstances take action if they are being violated. It further examines the legal constraints on taking such action and whether it may be seen as intervention in the internal affairs of a non-Member State.

Chapter Three examines Union policy and practice from a Union/Community law perspective. Foreign policy powers are likely, in a nation State, to be among the powers exclusively reserved for the central or federal government or an inherent part of the royal or executive prerogative. With a system based on the principle of conferred powers, however, it must be positively established to what extent the Union has competence to act externally, with regard to promoting and protecting certain values and interests, and the methods by which it can do so. The aim of Chapter Three is to determine the scope of competence, the legitimacy of acting under available powers and the extent to which they have been exercised in practice. First, it examines the instruments available to the Union and Community in the pursuance of foreign policy objectives. The main part of the chapter is concerned with Community competence and practice. In particular, it analyses how the Community has attempted to use all of its external competences, among others, in development cooperation, trade and humanitarian aid to pursue its objectives.

The next three substantive chapters analyse practice. The litmus test for such policies lies in their application. Policy statements and legal obligations are one thing, implementation quite another. Although a number of general surveys now exist of conditionality and its use in practice,² the aim in Chapters Four and Five is to look at

² In particular, Fierro, E., *The EU's Approach to Human Rights Conditionality in Practice*, (2002), Bulterman, M., *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* (2001) and Tomaševski, K., *Responding to Human Rights Violations 1946-1999*, (2000).

the multitude of instruments and policies that the EU has used in its relations with particular countries. This allows analysis of the circumstances which are taken into account when acting and also how priorities are identified and furthered in the relationship that exists with those States. It also allows the opportunity to analyse the importance attached to ethical values and their relationship with other priorities and objectives. Chapter Four examines relations with Myanmar, Nigeria and Pakistan. Chapter Five looks at relations with the Palestinian Authority and Israel in the overall context of the Middle East Peace Process (MEPP). Chapter Six examines the Union's policy of humanitarian and emergency aid.

Nigeria, Pakistan and Myanmar have been chosen in Chapter Four as the Union has a different legal relationship with each of them. There are, however, similarities between some of the domestic problems in each of these countries, in particular, with democracy. Nigeria, as an ACP State, has been chosen as it allows for an evaluation of the Lomé/Cotonou institutions and procedures where "essential elements" of those Agreements have been breached. Although there are a number of examples of those Agreements being suspended, it was possible to study only one such State within the scope of the chapter. Pakistan has been selected as a developing country which is covered by the scope of one of the Community's major development cooperation programmes, the Regulation on Financial and Technical Assistance to, and Economic Cooperation with, the Developing Countries in Asia and Latin America (the ALA Regulation).³ It has a close trading relationship with the Union and its Member States and has concluded bilateral treaties with the Community. Two military coups and the subsequent suspension and limited reintroduction of the democratic process have occurred during the existence of its formal relations with the Community. Myanmar has been selected as another developing State, this time within the ASEAN group of States, but one which has had all assistance, with the exception of humanitarian aid, suspended by the Community. The current military government has annulled previous democratic elections and is one of the more repressive regimes currently in power. Myanmar has also been selected as it is one of the few examples where it is possible to assess the full scope of the Community and Union's spectrum of measures

³ Council Regulation No. 443/92, Regulation on Financial and Technical Assistance to, and Economic Cooperation with, the Developing Countries in Asia and Latin America, OJ L 52, 27/2/1992 p.1.

against a State, taken in the absence of a sanctions regime imposed by the United Nations. Where the UN takes such action, the implementation of measures through the CFSP and Community legal order is primarily intended to enable the Member States to comply with their obligations under the UN Charter. Myanmar, however, is an example of action taken by the EU in the absence of measures being adopted in other international fora.

Chapter Five, as noted above, describes the role of the Union in the overall context of the MEPP and more specifically its relations with the Palestinian Authority. It is not possible, however, to discuss this issue without also examining relations with Israel. Although the 1995 Agreement between the Community and Israel is not a classic development cooperation based one (the Community has no definitions of “developing State” determining which type of trade instrument it utilises), it does contain the now standard “essential elements” clause. Israel’s problems with its Arab populations both within its internationally recognised boundaries and in the Occupied Territories are well documented. Union relations with Israel and the Palestinian Authority also, however, provide an ideal case-study to examine the relationship between the CFSP and the Community pillar and other fora such as the Barcelona Process, to assess the promotion of Union objectives. Despite the fact that the Agreement with Israel is a mixed one and does not use Article 181 EC as a legal base, it still allows an analysis of the human rights and ethical values dialogue in the relationship. It is also of significance, as the coming into force of the Treaty of Nice obliges the Community, for the first time, to pursue the objectives of democracy and human rights with all third States, not simply developing ones.⁴ The EC does have a “classic” development Agreement with the Palestinian Authority, so comparing differences of treatment between Israel and the Palestinian Administered Territories also allows consideration of how the EU’s status as a major international donor in relation to the latter enables it to influence policy there.

Having attempted to justify the selection of the case-studies in Chapters Four and Five, it is equally important to explain why some other States, also worthy of discussion, have been excluded. In the context of the ACP, as mentioned above,

⁴ New Article 181a EC. On this issue see Fierro, *The EU’s Approach*, *supra* note 2, p.285.

many States could have been discussed. Rwanda, Haiti, Sierra Leone, Uganda, Fiji, Niger, Cote d'Ivoire, Congo, Togo and Zimbabwe to name just a few. Nigeria does, however, offer the opportunity to look at recent practice and also consider the circumstances in which all punitive measures have been withdrawn and full relations resumed, something most of the other potential ACP case-studies did not offer.

Myanmar is to some extent unique as it is one of the few States with which the Union has suspended almost all relations. It is, however, a part of ASEAN, whose Member States have bilateral treaty relations with the Community. It thus poses unique policy and strategic problems as to the approach to be adopted. Pakistan is also in many cases unique. It possesses one of the most volatile political situations of any of the States covered by the ALA Regulation. It has major constitutional and legal problems as well as widespread problems with human rights. Military coups, its role in the “war on terror” and the resumption of full cooperation with a military regime are distinguishing features. Chile, Brazil, Columbia, Bangladesh, Sri Lanka, China and India, among others, would have been equally valid case-studies.

In Chapter Five, any of the Maghreb and Mashreq countries could have made suitable case-studies, as they are also part of the MEDA programme and the Barcelona Process. Similarly, relations with Iran, Saudi Arabia and the other oil-rich Middle Eastern States would have offered valid studies for analysis. A central focus of the Union’s relationship with many Middle Eastern States, however, is the “Palestinian issue” and thus it was the logical choice to examine the relationship between the Union and the Palestinian Authority. Furthermore, as noted above, the case-study with Israel allows the opportunity to investigate the presence of a “human rights dialogue”, where the Community does not have a development cooperation based competence and other geopolitical considerations play a role in that dialogue, in particular, the MEPP.

The most obvious category of States that have been excluded from the case-studies are the Central and Eastern European States as well as the Balkans. As the majority of these countries are to be future members of the Union or have a very close relationship with the Union, they have by and large been subjected to different legal and political criteria by the Union and its Member States compared to other third

States. For the purposes of the Organisation of Economic Cooperation and Development (OECD), World Bank and the United Nations Development Programme (UNDP) many of these countries are considered to be “economies in transition”, as opposed to developing countries, although they have in financial terms been the largest recipients of Community aid since the early 1990s. The Union and the Member States included human rights guarantees as a condition for the recognition of the statehood of many of the new States which emerged from the Soviet Union and Yugoslavia, following the end of the Cold War. These conditions went beyond the traditional criteria for statehood. Since then the Copenhagen criteria have established the basic requirements for all prospective members.⁵ The thesis as a whole primarily addresses the relationship between the Union and developing countries and thus it was not felt necessary to discuss relations with these States separately. This also explains the absence of specific discussion of relations with a number of other important third States, such as the United States, Russia, Japan and the rest of the western developed world, including Canada and Australia.

The final substantive chapter, Chapter Six, looks at the issue of humanitarian aid and the practices of the European Community Humanitarian Office (ECHO). A study of humanitarian aid is important for a number of reasons. In the first instance, the Union considers that the humanitarian aid it distributes is clear evidence of its commitment to human rights and human dignity and ethical values in third countries. Furthermore, the theory of humanitarianism to which the EU now subscribes allows no influences, other than need, to dictate its actions and funding programmes. Humanitarian aid is, in this context, the ultimate test of the equal application of the principles and policies which are the subject of this thesis.

Chapter Seven attempts to draw some conclusions as to the efficacy of the policies and instruments used and the approaches adopted in practice. It proposes that the Union recasts the manner in which it seeks to protect and promote the ethical values to which it claims to be committed.

⁵ See Chapter Three.

Chapter Two

Pursuing Ethical Values in Foreign Relations: Policy and Legal Issues.

1. Introduction.

Foreign policies with an ethical dimension to them, or more conveniently but less accurately “ethical foreign policies”, are closely tied up with ideology and the desire to project a particular identity to the wider world.¹ The decision to promote such policies also stems from a desire, or at least acquiescence, from the domestic constituency to engage in such practices. It has been estimated, for example, that 81% of the EU’s population feels that it should promote human rights abroad.² Article I-3(4) of the Draft Constitution, which defines the objectives of the Union in its relations with the wider world, provides that it shall promote and protect values such as human rights, peace and security. Spokespersons for the EU have made clear on numerous occasions its position on the role of human rights and other ethical values in external relations. For example, Javier Solana, the EU High Representative for the CFSP, at the 58th Session of the UN Commission on Human Rights stated:

..the European Union is determined fully to assume international responsibilities on account of our size, our wealth, our history and our geography. Our Union is set to play a prominent international role in the century to come. Human rights will remain at the heart of

¹ For example, Jose Pereira, during the Portuguese Presidency of the Council at a conference entitled “The EU and the Central Role of Human Rights and Democratic Principles in Relations With Third Countries” stated “[E]ncouraging respect for human rights and fundamental freedoms is at the centre of the relations between the EU and third countries...it is what we are about”. Available, <http://www.hrd-euromaster.venis.it/othactiv/index.htm>. Also see: Robin Cook, who as Foreign Secretary of the UK, in a speech entitled, “Human Rights into a New Century” on 17/7/1997 stated “...human rights are at the heart of our foreign policy..”; ICJ, *Human Rights in United States and United Kingdom Foreign Policy: A Colloquium*, (1978); and Dutch Ministry of Foreign Affairs, *Human Rights and Foreign Policy*, (1980) 11 NYBIL, 193.

² Gras, J., *The European Union and Human Rights Monitoring*, (2000) p.1.

that role because human rights are at the core of European integration. ...Ours is a Union of values.³

In a similar vein the Council's Annual Human Rights Report has stated:

Human rights...are the foundations of freedom, justice and peace in the world.....[T]he Union's headway towards integration is paralleled in the field of human rights. In a world where human rights....continue to be violated daily, the Union's commitment to human rights is continuously being translated into action.⁴

These statements illustrate, in part, the rationale upon which the EU wishes to legitimise its practices in this sphere. The decision to engage in such practices, however, has both policy and legal implications. This chapter will deal first with some of the policy issues and then with some of the legal considerations, which arise under international law, from pursuing and implementing such a policy.

2. Ethical Values and Foreign Policy: Choices and Implications.

Ethical foreign policies require a State to take into account and be sensitive to the interests of individuals in third States. It may sometimes require acting in a manner which is detrimental to the interests of one's own citizens. There is no overriding moral consensus requiring that such an approach be adopted. Consequently, as Light and Smith note, there is nothing wrong in not doing so.⁵ The decision by a State or a group of States to promote and protect ethical values in third States is replete with policy implications. The aim of this section is not to discuss all of them comprehensively but to highlight and identify certain issues which will be referred to in later parts of the thesis, which examine practice, to provide a yardstick against which to measure Union actions.

³ Address in Geneva on 19/3/2002.

⁴ Council of the European Union, *European Union Annual Report on Human Rights 1999*, p.1.

⁵ Smith, K., and Light, M., "Introduction" in Smith, K., and Light, M. (eds.), *Ethics and Foreign Policy*, (2001) p.3.

It is apparent that the decision to pursue an ethical foreign policy is an attempt to give further effect to values, which can be considered to be liberal ones, in a global political order in which Realism is currently the prevailing ideology.⁶ A common theme throughout the Realist tradition of International Relations is an emphasis upon the power and interest equilibrium and the protection of State security and interests.⁷ Thus for Morgenthau, for example, principles are subordinate to politics and the ultimate skill for any leader is to adapt to changing political configurations to protect the survival of the State.⁸ It is not contentious, however, to say that values such as human rights are now an entrenched feature of international relations. The issue is how to reconcile the interests of the State and the promotion of such values where they appear to be incompatible? Some States, such as the Member States of the EU, may wish to stand for something other than simply interest and power in their international relations. Choosing to do so, however, is not straightforward. There are difficult choices to be made concerning priorities and objectives in international relations and the relative weight to be attached to them, as well as the methods used to further those identified aims.

To take an obvious example, the EU has since the Lisbon European Council sought to work towards “sustainable economic growth with more and better jobs and greater social cohesion”.⁹ At the same time manufacturing industries have suffered significantly in Europe during the transition to knowledge and services based economies. A question which must be posed, therefore, is: does a foreign policy’s ethical dimension prohibit sales of armaments to a repressive regime, where this may be crucial for the economic survival of that part of manufacturing industry? Even if

⁶ See, Forsythe, D., *Human Rights in International Relations*, (2000) and Donnelly, J., *Realism and International Relations*, (2000). For discussion of the different types of Realisms, see Smith, M., *Realist Thought From Weber to Kissinger*, (1998) and Haslam, J., *No Virtue Like Necessity: Realist Thought in International Relations Since Machiavelli*, (2002).

⁷ See Donnelly, *Realism*, *supra* note 6 *passim*. Realists are often referred to as Statists due to their emphasis on the pre-eminence of the State.

⁸ Morgenthau, H., *Politics Among Nations*, (1992) *passim*.

⁹ Presidency Conclusions, 24/3/2000, para. 5.

the policy is formulated so as to prohibit arms sales to repressive recipients, will the answer be the same if the regime is a crucial ally for security purposes?

Most Realists would consider that even attempting to formulate such a policy is naïve, as it is ultimately futile. Vincent, for example, has argued that “[t]here is an inescapable tension between human rights and foreign policy”.¹⁰ Henry Kissinger, in the context of US policy, has stated:

I believe it is dangerous for us to make the domestic policy of countries around the world a direct objective of...foreign policy....The protection of basic human rights is a very sensitive aspect of the domestic jurisdiction of....governments.¹¹

National interest and security are considered the ultimate objectives of foreign policy and all others will be compromised if they are endangered. The Realist approach also insists that the morality one expects in relations between the State and its citizens, need not play a role in relations between States as there is no single shared universal morality.¹² States, according to this approach, formulate their policies in moral language only when it suits them and to cloak their other interests.¹³ Most Realist studies on ethical foreign policies, however, tend to be dismissive without detailed examination of practice.¹⁴

Despite the cynicism of ethical foreign policies among Realists, some of them do not entirely reject a role for ethical objectives and morality in foreign policy formulation. Such values are simply subordinate to other essentials. Kissinger, for example, as a leading proponent of that school of thought, notes:

..America should give preference to democratic governments over repressive ones and be prepared to pay some price for its moral convictions.....there is an area of discretion which

¹⁰ Vincent, R., *Human Rights and International Relations*, (1986) p.129.

¹¹ Cited by Baehr, P., *The Role of Human Rights in Foreign Policy*, (1996) p.85.

¹² See Haslam, *No Virtue*, *supra* note 6, p.250.

¹³ Hollis, M., and Smith, S., *Explaining and Understanding International Relations*, (1990) p.27.

¹⁴ See, for example, Kissinger, H., *Diplomacy*, (1994) and *Towards a Diplomacy for the Twenty-First Century*, (2000) and the works in *supra* note 6.

should be exercised in favour of governments....promoting democratic values and human rights... The difficulty arises in determining the precise price to be paid and its relationship to other essential American priorities...¹⁵

The role ethics will play in the creation of a new legal and political order will still be marginal. Other schools of thought, however, consider that the role such values play in foreign policy formulation should be much more central. Those who advocate this approach do so for different reasons. Some adopt a philosophical approach, based on natural law, utilitarianism or religious convictions.¹⁶ Those who subscribe to the Solidarist school of thought, for example, tend to argue that a foreign policy which places the defence of human rights at the centre of its ethical code will make an important contribution to both protecting national interests and also strengthening the pillars of an international order.¹⁷

The Union's approach to this issue is not dissimilar to the Solidarist perspective. It seems to involve an attempt to reconcile national security and other essential interests with the creation of a stable international order in which its values are reflected. From a long-term perspective, it is possible to argue that the interests of a polity's citizens can be best protected and promoted through a change in international thinking and in the behaviour of other States. The promotion of ethical values in third States therefore benefits the citizens of all States. As Commissioner Patten noted, "human rights make moral, political and economic sense.....countries which respect human rights make good neighbours and trading partners".¹⁸ Foreign policies with an ethical dimension to them must, if they are to be sustainable, serve the long-term interests of the promoter. A long-term perspective requires implementation in the short-term, however, and a careful balance must be struck between them.

¹⁵ Kissinger, *Diplomacy*, *supra* note 14, p.811.

¹⁶ For a sample of views see: Forsythe, *Human Rights*, *supra* note 6 and *Human Rights and World Politics*, (1983); Baehr, *Human Rights in Foreign Policy*, *supra* note 11; Smith and Light, *Ethics and Foreign Policy*, *supra* note 5; Donnelly, *Realism*, *supra* note 6; Dunne, T., and Wheeler, N.(eds.), *Human Rights in Global Politics*, (1996); and Hill, D., and Beddard, R.(eds.), *Human Rights and Foreign Policy-Principles and Practice*, (1989).

¹⁷ See, for example, Wheeler, N., *Saving Strangers*, (2000).

¹⁸ Speech by Commissioner Patten, 1/12/1999, available at <http://europa.eu.int/comm/dgla/human-rights/intro>.

For an ethical foreign policy to be meaningful, it must be clearly formulated and some order of priorities of the values and interests being pursued needs to be established. Furthermore, there must be some identification of how those objectives are to be achieved. By and large positive measures, for example preferential trade agreements as a reward for approved and encouraged reforms, are not where the conceptual problems tend to lie. The formulation of such mechanisms and standards are not, on the whole, problematic. It is with regard to punitive, condemnatory or negative action that policy considerations and dilemmas become most apparent. The failure to systemise the evaluation process where punitive measures may be taken can lead to *ad hoc* decision making. This runs a greater risk of inconsistency and incoherence with other policies and activities. In such circumstances, criticism of human rights and a lack of democratic instruments, for example, can be used strategically. They become another ideological weapon by which to demonise a regime without any cost. Some International Relations scholars argue that foreign policy decisions are usually made by utilising “the rational model”.¹⁹ According to this model, decision makers look for the “cost/benefit analysis” of any action and this is done by clarifying the goals in a situation; identifying their relative importance; identifying the alternative methods to achieving the goals; investigating the consequences and probable and possible outcomes of those alternatives; and then choosing the action that produces the best outcome in the situation.²⁰ Publicly identifying in advance and stating the priorities and weight to be attached to State objectives, in the above model, runs the risk of an administration being held a hostage to fortune. It limits flexibility and the ability to respond to changing international events and circumstances. Even where priorities are identified in political speeches, it is often difficult to determine the extent to which it is rhetoric and that to which it contains concrete legal undertakings.

The pursuit of an ethical foreign policy also requires the utilisation of appropriate instruments. In the implementation of such a policy, there is discretion in deciding which instruments to use. The effectiveness and impact of differing instruments

¹⁹ See, for example, Goldstein, J., *International Relations*, (1999, 3rd edn.) p.150.

²⁰ *Ibid.*

require careful consideration. The Union and Community have various instruments at their disposal by which to promote and protect ethical values in third States. These are discussed in the next chapter.

3. Legal Considerations and the Policy of Promoting and Protecting Ethical Values in Third States.

The decision to promote ethical values in relations with third States raises numerous legal questions. It is clear that there are legal limits to the permissibility of such a policy and the manner in which it can be pursued. The Union and Member States cannot unilaterally act in any manner they so wish, without due regard to their international legal obligations. The principles of the sovereign equality of States and non-interference in the internal affairs of another State are central to determining the prima facie legality or otherwise, under international law, of a decision to promote and protect ethical values in third States. It may also be the case that the Member States, and possibly the Community and/or Union, are with regard to some values, legally obliged to promote and protect them in third States. This section deals with these issues. The discussion initially analyses the relationship between the Union and Community and international law. It then discusses more generally the legal limits, imposed by international law, upon an ethical foreign policy. The final section of the chapter examines the content of those values under international law which, according to their constitutive treaties, the Community and Union are obliged to promote in third States.

3.1. International Legal Obligations and the Member States, Community and Union.

Before defining the content of any relevant international legal obligations, it must first of all briefly be determined in what way the Member States, Community and Union are recognised as being bound by international law. With regard to the Member States the issue is not subject to any difficulties. With regard to the Community and Union the issue is more complex. Two issues need to be examined.

First, the extent to which they possess international legal personality. Secondly, the approach of Community/Union law to international law. The discussion on the latter point deals primarily with customary international law, as it is this body of law which is most relevant to the analysis which follows in later parts of the chapter.²¹

3.1.1. International Legal Personality and the Community/Union.

In international law, personality is the basic proposition that an entity, whether it is a State, intergovernmental organisation or person, has in a specific context some legal capacity. Personality is relative. All legally recognised persons do not have identical powers and rights. Only States possess the totality of rights and duties.²² Article 281 EC states that the Community “shall have legal personality”. The conferral of international legal personality in Article 281 EC may be contrasted with the conferral of capacity in domestic law by Article 282 EC. Article 281 EC does not impose an obligation upon those States which are not a party to the Treaty, and for many years the Soviet Union and its allies declined to accept the personality of the EC. Article 310 EC confers express power to conclude treaties with third States and organisations. Numerous provisions, such as Articles 133 and 181 EC in the fields of the common commercial policy and development cooperation respectively, confer competence to conclude agreements in a specific area with third States. If these provisions are read in conjunction and by looking at practice,²³ it is clear that the EC has international legal personality.

²¹ This is because the Community/Union cannot, as a non-State entity, currently be a party to, for example, international human rights treaties. The situation will be different with regard to the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, *ETS No. 5*, once Protocol No. 14 (adopted 13/5/2004) is in force. For discussion of the impact of those treaties to which it is a party in the Community legal order see the references in the Bibliography.

²² See Advisory Opinion, *Reparations for Injuries Suffered in the Service of the United Nations*, (1949) *ICJ Reports*, 174, 179.

²³ The Community is now a party to literally hundreds of treaties.

With regard to the Union the issue is far less clear-cut.²⁴ As is well known, it was expressly decided not to include references to the Union's legal personality in the TEU, primarily due to the intransigence of the UK.²⁵ A lack of express conferment of personality does not, however, preclude it. This is especially the case if reference is made to the aims and objectives of the entity and personality is deemed necessary to fulfil those objectives.²⁶ Academic commentary on the legal personality of the Union has, by and large, argued that full international legal personality may be implied from the treaty-making capacity of the EU, but without addressing the implication of this conclusion.²⁷ Articles 24 and 38 TEU confer the ability to conclude agreements with third States. Many authors who consider the Union to have personality do so because they consider it a prerequisite for it to enter into an agreement. Yet this is not the case.²⁸ Even after the Nice amendments to Article 24 TEU and in the light of subsequent practice,²⁹ it is still unclear if in these provisions it is the Member States

²⁴ See, among others: Klabbers, J., "Presumptive Personality: The European Union in International Law" in Koskeniemi, M.(ed.), *International Law Aspects of the European Union*, (1997) p.231; Paasivirta, E., "The European Union: From an Aggregate of States to a Legal Person?" (1997) 2 *Hofstra Law and Policy Symposium*, 37; Neuwahl, N., "Legal Personality of the European Union—International and Institutional Aspects" in Kronenberger, V.(ed.), *The European Union and the International Legal Order*, (2001) p.3 and *ibid.*, "A Partner With a Troubled Personality: EU Treaty Making in Matters of CFSP and JHA After Amsterdam" (1998) 3 *EFARev.*, 177; Wessel, R., "The International Legal Status of the European Union" (1997) 2 *EFARev.*, 109 and Eeckhout, P., *External Relations of the European Union: Legal and Constitutional Foundations*,(2004) p.154.

²⁵ See Eaton, M., "Common Foreign and Security Policy" in O'Keeffe, D., and Twomey, P.(eds.), *Legal Issues of the Maastricht Treaty*, (1994) p.215.

²⁶ See the *Reparations* case, *supra* note 22, 179.

²⁷ See the work cited in *supra* note 24. For a contrary view see, among others, Bulterman, M., *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?*(2001) p.53 and Denza, E., *The Intergovernmental Pillars of the European Union*, (2002) p.173.

²⁸ See further Higgins, R., "The Legal Consequences for Member States of the Non-Fulfilment by International Organisations of their Obligations Toward Third Parties" (1995) 66 *AIDI*, 249, 254 and the Reports of the International Law Association Committee on the Accountability of International Organisations: (2000) *Report of the 69th ILA Conference*, p.875 and (2002) *Report of the 70th ILA Conference*, p.772.

²⁹ See for example, Council Decision 2001/352, Concerning the Conclusion of the Agreement Between the European Union and the Federal Republic of Yugoslavia on the Activities of the European Union Monitoring Mission, OJ L 125, 5/5/2001 p.1.

acting together but using the Council as a negotiating instrument, or if it is the Council acting for the Union.³⁰ The safer assumption is that the Union does not yet have legal personality. In the absence of personality it is the Member States, and not the Union, which are jointly responsible for any unfulfilled obligations entered into or any acts which violate international law, which are carried out in its name. Personality determines where responsibility lies, not whether it exists or not.³¹ The confusion with Union personality and responsibility will for the most part be resolved by the Draft Constitution, if it comes into force. The Final Report of Working Group III on Legal Personality of the European Convention³² came out strongly in favour of the Union having its own explicit single legal personality having absorbed the separate legal personalities of the various Communities. This view is reflected in Article I-6 of the Draft Constitution.

3.1.2. The Relationship Between International Law and the Community Legal Order.

From an international law perspective, it is clear that the Community is bound in its activities to respect custom and the peremptory norms of international law in its relations with third States. The International Court of Justice (ICJ), in assessing the Agreement of 25 March 1951 between the World Health Organisation (WHO) and Egypt, held that international organisations are subjects of international law and are bound by general rules of international law, under their constitutions and other

³⁰ See Declaration No.4 to the Amsterdam Treaty on Article 24 TEU. For a contrary view see Eeckhout, *External Relations*, *supra* note 24, p.158 and the work cited therein.

³¹ See Conway, G., "Breaches of EC Law and the International Responsibility of Member States" (2002) 13 *EJIL*, 679 and more generally, Hirsch, M., *The Responsibility of International Organisations Towards Third Parties: Some Basic Principles*, (1995) and Wellens, K., *Remedies Against International Organisations*, (2002). The real problem is with mixed agreements, entered into by the Community and Member States. For discussion see further the Bibliography for references.

³² CONV 306/02 WG III 16.

international agreements to which they are parties.³³ The Community is a party to neither the 1969 Vienna Convention on the Law of Treaties, as it is not a State, nor the 1986 Vienna Convention on the Law of Treaties Between States and International Organisations, to which it can become a party.³⁴ Nevertheless, any treaty relationships the Community enters into with third States or organisations are regulated by the provisions of the Conventions to the extent that they reflect custom. Furthermore, Article 103 of the UN Charter, an organisation of which all Member States of the Union are also a party, obliges all States to give priority to their obligations under the Charter, as opposed to those entered into under other treaties. States cannot evade their obligations under the Charter by delegating powers to other organisations they establish.

While the above may be obvious, the pertinent question is what is the approach of Community law to these issues? The ECJ considers the Community to be a legal order *sui generis*.³⁵ As de Witte notes, the ECJ has never stated “in so many words that EC law is entirely outside the scope of public international law but some of its dicta seem to point in that direction.”³⁶ Article 307 EC does recognise that the legal obligations of the Member States, entered into prior to becoming members of the Community, should be respected vis-à-vis third parties. This is opposed to relations between States which are members of the EC, where Community law supersedes it, in the areas it regulates.

The position of international law within the EC legal order can be seen to be analogous to the relationship between international law and the national law of a

³³ Advisory Opinion, *Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt*, (1980) *ICJ Reports*, 73, 89. Also see Advisory Opinion, *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, (1999) *ICJ Reports*, 62, para.66.

³⁴ Vienna Convention on the Law of Treaties, 1969, 1155 *UNTS* 331 and the Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, 1986, UN Doc.A/Conf. 129/15 (1986).

³⁵ Case 26/62, *NV Algemene Transport-en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

³⁶ De Witte, B., “Rules of Change in International Law: How Special is the EC?” (1994) 25 *NYIL*, 299, 300.

State. States can be monist or dualist - both are permissible; international law is concerned not with the method but the end result.³⁷ On the occasions the ECJ has looked at the role of custom and its impact in the Community legal order, it has tended to be in the context of the ability of individuals to challenge Community acts on the basis that they conflict with customary international law.³⁸ In *Racke*, Advocate General Jacobs explored the relationship between custom and the legal systems of the Member States but came to an ambivalent conclusion.³⁹ This was of importance in the context of custom binding the Community's actions as general principles of Community law resulting from the constitutional traditions common to the Member States. The ECJ has also displayed uncertainty as to the rights custom provides individuals and the circumstances in which it can be invoked by them under Community law. It did, however, state in *Racke* that:

It should be noted in that respect that, as is demonstrated by the Court's judgment in *Poulsen and Diva Navigation...*, the *European Community must respect international law in the exercise of its powers*. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country...⁴⁰

The exact impact of custom, and the significance of international law more generally, in the Community legal order will depend on the circumstances in which it is being invoked. Lenearts and De Smijter argue, however, that the views of the ECJ and generally understood interpretations of international law do not always coincide.⁴¹ Taking a restrictive view, the Court's dicta in *Racke* above can be read to mean that an individual would not be able to challenge a treaty which conflicted with customary international law through the judicial review procedures of the Community, solely on

³⁷ See Denza, E., "The Relationship Between International and National Law" in Evans, M.(ed.), *International Law*, (2003) p.415, 419.

³⁸ Case C-286/90, *Poulsen and Diva Navigation* [1992] ECR I-6019, Case T-115/94 *Opel Austria* [1997] ECR II-39 and Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz* [1998] ECR I-3655.

³⁹ See para. 89 of his Opinion.

⁴⁰ *Racke*, para. 45. Emphasis added. Also see para. 46 *et seq.*

⁴¹ Lenearts, K., and De Smijter, E., "The European Union as an Actor Under International Law" (1999/2000) 19 *YEL*, 95, 122.

that basis.⁴² In practical terms, however, notwithstanding the criticism of Lenearts and De Smijter, the ECJ does in its jurisprudence take account of the international legal obligations which regulate its activities. The dicta from *Racke*, cited above, should be read more broadly as a general recognition of the binding nature of customary international law upon the Community in all its activities. The reference to the adoption of a regulation, as an exercise of its powers, is simply one example of when regard must be had to custom. Where treaty relations are under consideration before the ECJ, for example, reference to the terms of the two Vienna Conventions is common place and the Court always perceives them to bind the Community on the basis that they represent customary international law.⁴³ The Community was created by States – which do not have the power to establish any entity outside the rules of the international legal order. Even if the Community is said to be a legal order *sui generis*, there is little doubt that it is bound in its activities to comply with the general rules of international law and the ECJ recognises this.

3.2. Legal Limits to Ethical Foreign Policies Under International Law.

The principles of the sovereign equality of States and non-interference in the internal affairs of another State are central in determining the prima facie legality or otherwise, under international law, of the Union's ethical foreign policy. This section is primarily concerned with the legality of the nature of the policy *per se*, rather than the manner in which the Union's policy is implemented in practice. The latter issue will be developed in the next chapter, although some general comments are made in the following sections.

⁴² The point here is that no matter what the status of the norm violated, unless the individual can rely on another rule of Community law, it cannot be challenged.

⁴³ For example, the ECJ referred to the 1986 VCLTSIO in *C-159/91 Levy* [1993] ECR I-4287, para.19 and to the 1969 VCLT in *Opinion 2/00, Cartagena Protocol on Biosafety* [2001] ECR I-9713, para.24.

3.2.1. State Sovereignty and the Principle of Non-Interference.

When the Union promotes the values it considers important in third States, it must be careful to ensure that it simply exerts its influence in requesting them to adhere to certain standards and does not intervene in their internal affairs. In many senses, this is the crux of the issue which this section deals with. It is concerned with what Falk has referred to, in a narrower context, as the reconciliation between sovereignty and human rights.⁴⁴ There are two different but related issues of concern. First, the extent to which international law limits the sovereignty of a State vis-à-vis the nature and actual relationship in existence between it and those within its jurisdiction. Secondly, the extent to which international law allows, or at least does not forbid, third States acting in an attempt to influence that relationship. The principles of State sovereignty and the equality of all States prima facie preclude external coercion upon a State to adhere to certain values. The internal regulation of relations between a State and its citizens is generally speaking within the *domaine réservé* of that State. The complexity of the relationship which exists between sovereignty, non-intervention in internal affairs and values, such as human rights, is reflected in Articles 1, 2, 55 and 56 of the UN Charter, in particular, Article 2, on the one hand, and, on the other, Articles 55 and 56.⁴⁵ The relevance and importance of Article 2(7) of the Charter and the principle it encapsulates cannot be overestimated.⁴⁶ It is difficult to find any resolution adopted in any of the United Nations organs or bodies

⁴⁴ See Falk, R., *Human Rights Horizons: The Pursuit of Justice in a Globalising World*, (2000) Ch.4.

⁴⁵ Article 2(7) UNC is concerned with the UN intervening in the internal affairs of its members and not with relations between them. In the light of Article 2(1) UNC it does not legitimise intervention by others. For detailed discussion, see: Simma, B., *et al.*, *The Charter of the United Nations*, (1994) p.139; Preuss, L., "Article 2, Paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction" (1949) 74 *RDC*, 553; Trindade, A., "The Domestic Jurisdiction of States in the Practice of the United Nations and Regional Organisations" (1976) 25 *ICLQ*, 715; Ermacora, F., "Human Rights and Domestic Jurisdiction" (1968) 124 *RDC*, 371; Henkin, L., *The Age Of Rights*, (1990) Ch.4; Waldock, H., "General Course on Public International Law"(1962) 106 *RDC*, 5, 173; and Jennings, R., and Watts, A.(eds.), *Oppenheim's International Law*, (1992, 9th edn.) p.427.

⁴⁶ The principle is one of customary international law, notwithstanding Article 2(7) UNC. See *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, (1986) *ICJ Reports*, 14, paras.174 and 202. Hereinafter the *Nicaragua* case.

which, when dealing with, for example, international cooperation and assistance between States in the fields of human rights and democracy, does not refer to Article 2(7) UNC. The Commission on Human Rights⁴⁷ and the General Assembly,⁴⁸ for example, annually adopt resolutions concerned with the promotion and protection of human rights and democracy, which require cooperation between States. These resolutions consistently reiterate that when States cooperate with or assist one another, they should respect the provisions of the Charter. Either the principle of non-interference or Article 2(7) of the Charter is almost always referred to.

It is possible to argue that international society is now undergoing a paradigmatic shift from the era of geopolitics to one of geogovernance, where the broader interests of social justice, such as the protection of human rights, take priority over the doctrine of non-intervention.⁴⁹ According to this approach, the human rights treaties which have been negotiated under the auspices of the United Nations and subsequent State practice have changed the nature and scope of that which is defined as within the “domestic affairs” of a State. As Reisman has argued, “no serious scholar still supports the contention that internal human rights are ‘essentially within the domestic jurisdiction of any State’ and hence insulated from international law”.⁵⁰ Similarly, McGoldrick has argued that the once central issue of domestic jurisdiction is now

⁴⁷ For example, see the following resolutions: “Promotion of a Democratic and Equitable International Order” - CHR Resolutions 2003/63, 2002/72, 2001/72 and 1999/68; “Enhancement of International Cooperation in the Field of Human Rights” - CHR Resolutions 2002/86, 2001/67 and 2000/70; “The Role of Good Governance in the Promotion of Human Rights” - CHR Resolution 2003/65; and “Further Measures to Promote and Consolidate Democracy” - CHR Resolution 2002/46.

⁴⁸ For example, see the following resolutions: “Enhancement of International Cooperation in the Field of Human Rights” - A/RES/57/224 and A/RES/55/109; “Promotion of a Democratic and Equitable International Order” - A/RES/57/213, A/RES/56/151 and A/RES/55/107; “Strengthening the Rule of Law” - A/RES/57/221; and “Promoting and Consolidating Democracy” - A/RES/55/96.

⁴⁹ See Chinkin, C., “Human Rights and the Politics of Representation: Is There a Role for International Law?” in Byers, M.(ed.), *The Role of Law in International Politics: Essays in International Relations and International Law*, (2000) p.131.

⁵⁰ Reisman, M., “Sovereignty and Human Rights in Contemporary International Law” (1990) 84 *AJIL*, 866, 869.

largely peripheral.⁵¹ Conversely it can be argued, however, that such treaties are only elaborating upon, and not transforming, the nature of the relationship between human rights and that which is within the “domestic affairs” of a State.⁵² There is no need, however, to perceive the relationship between human rights and other values such as democracy, on the one hand, and on the other sovereignty, as a zero-sum game as is often contended.⁵³ Neither is it necessary to define sovereignty to encapsulate responsibility for a population.⁵⁴ The soundest way to examine the relationship between sovereignty and values such as human rights is to question what amounts to interference and the extent to which such matters are actually within the internal affairs of a State. If ethical values are not within the internal affairs of a State or if the “interventions” of a third State or organisation do not amount to interference then State sovereignty is not an impediment to an ethical foreign policy.⁵⁵

The views of the Union and its Member States on where the boundaries lie between what is and is not within the internal affairs of a State and what amounts to interference in such situations have undergone a fundamental shift. During the negotiation of Lomé I, for example, the ACP States and Commission resisted the inclusion of references to human rights precisely because it was felt that it would

⁵¹ See McGoldrick, D., Approaches to the Assertion of International Jurisdiction: The Human Rights Committee” in Capps, P., Evans, M., and Konstadinidis, S.(eds.), *Asserting Jurisdiction: International and European Legal Perspectives*, (2003) p.199, 200 and *ibid.*, “Human Rights and Non-Intervention” in Lowe, V., and Warbrick, C.(eds.), *The United Nations and the Principles of International Law: Essays in Memory of Michael Akehurst*, (1994) p.85.

⁵² Byers, M., *Custom, Power and the Power of Rules*, (1999) p.43.

⁵³ See Kamminga, M., *Inter-State Accountability for Violations of Human Rights*, (1992) p.1; Henkin, L., “International Law: Politics, Values and Functions” (1989) 216 *RDC*, 9, Brownlie, I., *Principles of International Law*, (2003, 6th edn.) p.294 and McGoldrick, “Human Rights and Non-Intervention” *supra* note 51, p.85.

⁵⁴ See Reisman, “Sovereignty and Human Rights” *supra* note 50; Falk, R., “Sovereignty and Human Dignity: The Search for Reconciliation” in Deng, F., and Lyons, T.(eds.), *African Reckoning: A Quest for Good Governance*,(1998) p.14; Bennoune, K.,“ ‘Sovereignty Vs. Suffering’?: Re-Examining Sovereignty and Human Rights Through the Lens of Iraq” (2002) 13 *EJIL*, 241; and *Report of the International Commission on Intervention and State Sovereignty*, (2001).

⁵⁵ This is recognised in most of the works cited in the previous two notes, it is just that other approaches are also adopted.

interfere in the internal affairs of the States in question.⁵⁶ The 1986 Declaration on Human Rights of the 12 Member States, however, states quite clearly that, "...the protection of human rights is the legitimate and continuous duty of the world community and of nations individually. Expressions of concern at violations of such rights cannot be considered interference in the domestic affairs of a State."⁵⁷ More recently in a statement at the 56th Session of the Commission on Human Rights, the Presidency stated:

...human rights...are...about universality. No country should be free to invoke sovereignty or interference in internal affairs to prevent people under its jurisdiction from fully enjoying their human rights. It is the duty of the international community to call upon those States.....to cease those practices and bring the perpetrators to justice.⁵⁸

The approach the Union has adopted is that it is perfectly legitimate for it to comment upon the protection or violation of any rights in any State. An examination of Union practice, especially the issuing of declarations and démarches, illustrates that this is indeed its practice and view.⁵⁹ It is worth questioning, however, to what extent the approach of the Union is in accordance with international law. In the *Nationality Decrees* cases the PCIJ stated:

...within the domestic jurisdiction seems....to contemplate certain matters which...are not in principle matters regulated by international law.The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations.⁶⁰

In the later *Lotus* case⁶¹ the approach adopted by the PCIJ was essentially that States are free to engage in any act they wish, as it emanates from their own will, so long as

⁵⁶ See King, T., "Human Rights in the Development Policy of the EC: Towards a European World Order?" (1997) 27 *NYIL*, 51, 54.

⁵⁷ "Declaration on Human Rights" 21/7/1986, (1986) 19 *Bull EC* 7/8, para.2.4.4. Emphasis added.

⁵⁸ Statement by Mr J. Gama, on behalf of the Portuguese Presidency, 21/3/2000. Available at http://europa.eu.int/comm/external_relations/human_rights/doc/uncom56.pdf.

⁵⁹ See Chapter Three.

⁶⁰ Advisory Opinion, *Nationality Decrees Issued in Tunis and Morocco*, (1923) Series B, No.4, 1, 24.

⁶¹ *France v. Turkey*, PCIJ, (1927) Series A, No.10, 1.

another rule of international law does not prohibit it. This position has been repeated on numerous occasions.⁶² Furthermore, in the *Reparations* case, it was stated that a State is an entity which “possesses the totality of international rights and duties recognised by international law”.⁶³ In each case the fundamental limit of “domestic jurisdiction” is the extent to which international law, at that time, prohibits the activity in question or requires States to act in a particular manner.

In the *Nicaragua* case, the ICJ had to determine the legality of US acts which included assisting the *contras* in Nicaragua and laying mines in Nicaraguan territorial waters. The ICJ drew heavily upon the definitions of non-intervention which had been formulated in two General Assembly Declarations - On the Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970⁶⁴ and On the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty 1965.⁶⁵ With regard to non-intervention, in general it noted:

..in view of the generally accepted formulations (i.e., the two declarations), the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely.⁶⁶

Citing examples, the Court noted that “choice of political, economic, social and cultural system and the formulation of foreign policy” were all matters within the domestic jurisdiction of a State.⁶⁷ Subsequent General Assembly declarations have also dealt with non-intervention in internal affairs⁶⁸ but essentially none of them

⁶² See Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, (1996) *ICJ Reports*, 226 and the *Nicaragua* case, *supra* note 46.

⁶³ *Reparations* case, *supra* note 22, 180.

⁶⁴ GA Resolution 2625 (XXV) 24/10/1970. See the *Nicaragua* case, *supra* note 22, para.191.

⁶⁵ GA Resolution 2131 (XX) 21/12/1965. See the *Nicaragua* case, *supra* note 22, para.203.

⁶⁶ *Ibid.*, para. 205.

⁶⁷ *Ibid.*

⁶⁸ Most importantly, the Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, A/RES/36/103.

actually touch upon the fundamental issue of generally what is and is not within the “domestic affairs” of a State. The reason for this is clear; it is not fixed but dependant upon the development of international law.

This same fluid approach was also adopted by the Institut De Droit International (IDI) in its 1954 declaration “La détermination du domaine réservé et ses effets”.⁶⁹ The Institut’s 1989 declaration on “The Protection of Human Rights and the Principles of Non-Intervention in Internal Affairs of States,”⁷⁰ however, indicates where the boundaries lie between domestic jurisdiction and international regulation and the permissibility of measures which may be taken to persuade third States to uphold and protect human rights. Article 1 of the Declaration considers the protection of human rights to be an obligation *erga omnes*. Having attained such a status, they are no longer considered matters which are essentially within the domestic jurisdiction of a State. Articles 2 and 3 of the Declaration deal with the legality of action by third States in response to the violation of human rights by another State. Article 3 contends that diplomatic representations, as well as purely verbal expressions of concern or disapproval, regarding any violations of any human rights are lawful in all circumstances. Article 2 considers that retorsion, reprisals and other countermeasures are legitimate responses to the violation of human rights in a third State, provided such measures are permitted under international law and do not involve the use of force. The Declaration considers that “such measures cannot be considered an unlawful interference in the internal affairs of that State”. Article 2 also draws a distinction between non-derogable and derogable rights. In the case of the former, violations do not have to be gross or systematic to justify third State action, whereas in the case of latter, the implication is that individual violations will not be enough.⁷¹

Although the Declaration is not legally binding, it does raise a number of issues. In the first case it is not concerned with ethical values beyond human rights and thus

⁶⁹ Session d’Aix-en-Provence 1954. Article 1 states, “le domaine réservé est celui des activités étatiques où la compétence de l’Etat n’est pas liée par le droit international. L’étendue de ce domaine dépend du droit international et varie suivant son développement”.

⁷⁰ Session of Santiago de Compostela.

⁷¹ See Article 2(3).

only considers “interference” by third States permissible when human rights are being violated. Unless issues, such as the rule of law, democracy and good governance directly impact upon the protection of such rights, then they are within the domestic jurisdiction of a State. Nor does the Declaration deal with the positive aspect of promoting ethical values (which is addressed *infra*), but simply with action by third States in response to the violation of human rights. It considers that responses are legitimate, under international law, notwithstanding the existence of procedures under various international human rights treaties to deal with their violation. General self-help or horizontal mechanisms for the enforcement of international law, in this case human rights, have supposedly remained intact. Furthermore, the Declaration does not attempt to define the term “human rights”, all of which are considered to be obligations *erga omnes*, although it does draw a distinction in terms of the appropriate action in response to violations of different rights. As these issues are vital in determining the legality of an ethical foreign policy, under international law, they will be examined in turn.

3.2.1.(a). Human Rights and Obligations *Erga Omnes*.

There are certain international legal norms in whose violation all States have a legal interest. These are the obligations *erga omnes*, as identified by the ICJ in its dictum in the *Barcelona Traction* case.⁷² The Court stated:

..an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State.... By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*... Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial

⁷² See *Belgium v. Spain (Barcelona Traction, Light and Power Company, Limited)*, Second Phase, (1970) *ICJ Reports*, 3.

discrimination.⁷³

The Court only gave an illustrative list of such obligations. Section 702, *Third Restatement of the Foreign Relations Law of the United States* in this context considers that any State “violates international law if, as a matter of State policy, it practices, encourages, or condones” certain rights. In addition to those rights listed by the ICJ in the *Barcelona Traction* case, Section 702 makes specific reference to murder or disappearances; torture other cruel, inhuman, or degrading treatment or punishment; prolonged arbitrary detention; and a “consistent pattern of gross violations of internationally recognised human rights”.⁷⁴ The Human Rights Committee (HRC), established by the International Covenant on Civil and Political Rights 1966,⁷⁵ has also contributed to this debate. In General Comment 24 it stated that all States party to the Covenant are prohibited from entering reservations to key provisions, i.e., those which are considered to be peremptory norms.⁷⁶ The list of rights includes: slavery; torture and other forms of inhuman treatment; executing pregnant women; presuming a person guilty until they prove their innocence; arbitrarily arresting and detaining persons; and permitting the advocacy of national,

⁷³ *Ibid.*, paras. 33-34. The status of genocide as an obligation *erga omnes* has subsequently been confirmed, *inter alia*, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, (1996) *ICJ Reports*, 595, para.31.

⁷⁴ S.702 *Restatement (Third) of Foreign Relations Law*, (1987). S.702(m) considers that “any State is liable under customary law for a consistent pattern of violation of any such right as State policy.” With regard to the rights listed, so long as the violations are State policy, responsibility is invoked. The scale is not important. With regard to the other norms referred to in Section 702 (privacy; arbitrary arrest and detention; denial of fair trial; grossly disproportionate punishment; freedom of conscience and religion; and invidious racial or religious discrimination) only gross violations invoke responsibility. Also see further Comment O on Section 702, which states that “[v]iolations of the rules stated in this section are violations of obligations to all other States.”

⁷⁵ 999 *UNTS* 171. All of the Member States of the Union are a party to the Covenant.

⁷⁶ Peremptory norms of international law or principles *jus cogens* and obligations *erga omnes* are not synonymous, although in substantive terms there is a significant overlap between them. See further, Ragazzi, M., *The Concept of Obligations Erga Omnes*, (1997) p.43, Crawford, J., *The International Law Commission's Articles on State Responsibility*, (2002) p.244 and Gaja, G., “Obligations *Erga Omnes*, International Crimes and *Jus Cogens*: A Tentative Analysis of Three Related Concepts” in Weiler, J., Spinedi, M., and Cassese A. (eds.), *International Crimes of States: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, (1989) p.151.

racial or religious hatred.⁷⁷ The General Comment is, strictly speaking, only of relevance to those States which are a party to the Covenant.

Both General Comment 24 and the *Third Restatement* take a very expansive approach to those rights which, when violated, all States have an interest in. Beyond those norms referred to by the ICJ in the *Barcelona Traction* case, there is disagreement over which others can be considered to be obligations *erga omnes*.⁷⁸ At the very least, however, self-determination,⁷⁹ certain obligations under international humanitarian law⁸⁰ and torture⁸¹ are now also universally accepted as having achieved that status. The list does not extend to all human rights as the IDI's 1989 declaration implies.

3.2.1.(b). Human Rights Obligations, the Limits of Domestic Jurisdiction and the Legality of Horizontal Enforcement.

There is little doubt that those treaties which primarily protect human rights are considered to be somewhat different in nature from other international agreements.⁸² The ICJ in its Advisory Opinion on *Reservations to the Genocide Convention* stated that in such Conventions “[c]ontracting States do not have interests of their own; they

⁷⁷ “Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols” UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) para. 8.

⁷⁸ See further Ragazzi, *Obligations*, *supra* note 76, p.132.

⁷⁹ See: *Portugal v. Australia* (East Timor Case) (1995) *ICJ Reports*, p.90, para.29 and Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9/7/2004, para. 155.

⁸⁰ See Advisory Opinion, *Nuclear Weapons*, *supra* note 62, para. 79 and *Legal Consequences of the Wall*, *supra* note 79, paras. 157-159.

⁸¹ See, for example, *R. v. Bow Street Metropolitan Magistrate, ex part Pinochet Ugarte (No.3)* [1999] 2 W.L.R. 827, 841, *Filartiga v. Pena-Irala*, (1980) 630 F.2d 876 and *Al Adsani v. United Kingdom*, (2002) 34 *EHRR* 11, para.151.

⁸² See, for example, Craven, M., “Legal Differentiation and the Concept of the Human Rights Treaty in International Law” (2000) 11 *EJIL*, 489 and Higgins, R., “Introduction” in Gardner, J.(ed.), *Human Rights as General Norms and a State's Right to Opt Out*, (1997) p.vx. Although see the responses of the UK, USA and France to General Comment 24 of the Human Rights Committee.

merely have, one and all, a common interest, namely the accomplishment of those high purposes which are the *raison d'être* of the Convention.”⁸³ In the *Barcelona Traction* case, although dealing with a somewhat different issue, the Court’s sentiment is much the same, as is the approach of the HRC in General Comment 24. In this sense it can be argued that all States which are party to a human rights treaty, have an interest in compliance with it, even though they are not being directly affected by violations of its provisions in a third State. There are, however, two considerations which need to be addressed. First, is the State which is the target of disapproval violating a legal obligation? Secondly, if there is a legal obligation, where does it stem from?

A distinction must be drawn between legal obligations stemming from custom and those stemming from treaties. With regard to treaties which protect human rights, utilising the approach discussed above, i.e., that of the ICJ in the *Genocide* opinion among others, it can be argued that all States which are party to any such treaty have an interest in ensuring its provisions are being complied with by others and beyond this a right to act to protect that interest. Issues such as valid reservations will be a consideration in determining the extent of that right. Notwithstanding the existence of reservations, the ratification of a treaty entails the State’s consent to international regulation in such matters. The jurisprudence of international tribunals, such as the European Court of Human Rights, has clearly held that once a State becomes a party to such a treaty, those matters regulated by it are no longer within the exclusive preserve of the State’s discretion. In the *Belgian Linguistics* case,⁸⁴ for example, in response to Belgium’s argument that its policy on education was within its domestic jurisdiction, notwithstanding its obligations under the Convention system, the Court noted:

the Convention and the Protocol, which relate to matters normally falling within the domestic legal order of the Contracting States, are international instruments whose main purpose is to lay

⁸³ Advisory Opinion, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, (1951) *ICJ Reports*, 15, 23. Article 60(5) VCLT also recognises this.

⁸⁴ Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64 *Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium*, Judgment on Preliminary Objections.

down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction...⁸⁵

It does not automatically follow, however, that because a State has ratified an international treaty protecting such rights that other States have a right to comment or take other action in response to its violations of that treaty. This is especially the case as almost all such conventions have their own specific enforcement mechanisms.⁸⁶ The issue, therefore, is to what extent are methods of enforcement, other than those provided for in the treaties themselves, legitimate? The answer depends on the treaty in question - they take different approaches. The Covenant on Civil and Political Rights and the European Convention are exceptional in that they are the only major international human rights treaties that specifically refer to this issue. The Covenant, in Article 44, states that the “provisions for the implementation of the present Covenant...shall not prevent the State Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.” The Convention, however, takes the opposite approach. Article 55 requires that parties to it shall “except by special agreement,...not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.”⁸⁷ All other international human rights treaties, whether regional or universal, are either silent on this issue⁸⁸ or do not exclusively reserve the resolution of any disputes to the competent named

⁸⁵ *Ibid*, p.19.

⁸⁶ There are notable exceptions, such as: Convention Relating to the Status of Refugees, 1951, 606 *UNTS* 267; Convention on the Prevention and Punishment of the Crime of Genocide, 1948, 78 *UNTS* 277; and Slavery Convention, 1926, 60 *LNTS* 253, as amended by the Protocol to the 1926 Slavery Convention, 1953, 212 *UNTS* 17.

⁸⁷ See further on both provisions Novak, M., *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (1993) p.617.

⁸⁸ See: International Covenant on Economic, Social and Cultural Rights, 1966, 993 *UNTS* 3; Convention on the Rights of the Child, 1989, 1577 *UNTS* 3; American Convention on Human Rights, 1969, Pact of San Jose, Costa Rica, (B-32) ; and African Charter on Human and People’s Rights, 1981 (1982) 21 *ILM* 58.

bodies.⁸⁹ As both the Covenant and Convention refer only to dispute settlement procedures contained in treaties, it can be concluded that no human rights treaty actually prohibits the use of methods, other than those provided for, to encourage or persuade States party to them to comply with their obligations.⁹⁰ The adoption of resolutions on cooperation and assistance in human rights in the United Nations, as discussed above, is consistent with this understanding. A State bound by certain international obligations in the field of human rights is thus entitled to require another State, bound by those same obligations, to perform them.⁹¹ The procedures provided for by a treaty coexist alongside those traditional mechanisms for ensuring compliance, in international law, which exist between States.⁹² Taking action against a State for failing to comply with its legal obligations requires no injury in the traditional sense.⁹³

It is only the Member States of the Union which are parties to human rights conventions, rather than the Community or Union. Thus, where *all* of the Member States are party to a treaty, they have a collective interest, as do all other parties to it, to ensure compliance with those legal obligations they have all accepted. The issue of reservations by the Member States of the Union will be a consideration. If, in their

⁸⁹ See: Article 22, International Convention on the Elimination of all Forms of Racial Discrimination, 1966, 660 *UNTS* 195; Article 29, Convention on the Elimination of all Forms of Discrimination Against Women, 1979, 1249 *UNTS* 13; Article 30, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1464 *UNTS* 85; Article 92, International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families, 1990, General Assembly Resolution 45/158, 18/12/1990; Article 3, Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, 1998.

⁹⁰ For a concurring view, see Henkin, *Age of Rights*, *supra* note 45, p.59. Cassese, A., *International Law*, (2001) p. 235 and Kamminga, *Inter-State Accountability*, *supra* note 53, p.189 consider that the European Convention does not allow this. The distinction is that European Court has the exclusive right to settle disputes, but not over other methods of ensuring compliance with Convention rights.

⁹¹ See Henkin, L., "Human Rights and State 'Sovereignty'" (1996) 25 *Ga.J.Int'l & Comp.L.*, 31, 43.

⁹² S.703 of the *Third Restatement*, however, considers that the specific treaty-based machinery "supplements" traditional remedies.

⁹³ See further Schachter, O., "International Law Implications of US Human Rights Policies" (1978/9) 24 *N.Y.L.Sch.L.R.*, 63.

capacity as States parties to a treaty, they choose to speak or act through the Union's institutions, that is their choice.

With regard to human rights obligations which derive from custom, the issue of the legality of horizontal enforcement is more straightforward.⁹⁴ The practice of Charter-based bodies and procedures, such as ECOSOC Resolutions 1235⁹⁵ and 1503⁹⁶ and the work of the Special Rapporteurs, illustrates clearly that States can legitimately seek to ensure that others comply with their human rights obligations. Unilateral action is not necessarily problematic either, as each State has an interest in compliance with those obligations, whether they are directly affected or not. Thus measures which seek to ensure compliance with such norms are, subject to compliance with other international rules, perfectly legitimate. With regard to the content of such norms, it is difficult to contend that they extend beyond those which are recognised as obligations *erga omnes*. By definition all States are bound by them and have a right to act when they are breached. The fact that States are selective in when they choose to act, does not invalidate their legal right to do so,⁹⁷ although it may detract from their credibility when they do act.

3.2.1.(c). The Violation of International Norms by Third States and Community and Member State Obligations.

The Member States and Community also have an obligation (as opposed to a right) to respond, in certain circumstances, when third States violate certain norms. Although the International Law Commission's Articles on State Responsibility (ILCASR) do

⁹⁴ See Frowein, J., "Reactions by Not Directly Affected States to Breaches of Public International Law" (1994) 248 (IV) *RDC*, 349 and Simma, B., "From Bilateralism to Community Interest in International Law" (1994) 250 (VI) *RDC*, 221. For more general discussion see Damrosch, L., "Enforcing International Law Through Non-Forcible Measures" (1997) 269 *RDC*, 19 and Elagab, O., *The Legality of Non-Forcible Countermeasures in International Law*, (1989).

⁹⁵ ECOSOC Resolution 1235 (XLII), 42 U.N. ESCOR Supp. (No. 1) 17, U.N. Doc. E/4393 (1967).

⁹⁶ ECOSOC Resolution 1503 (XLVIII), 48 U.N. ESCOR (No. 1A) 8, U.N. Doc. E/4832/Add.1 (1970).

⁹⁷ Schachter, O., "International Law Implications" *supra* note 93, 79 argues that a legal right to act does not impose an obligation to do so in every case.

not apply to international organisations, many of the provisions are a reflection of custom.⁹⁸ The principle in Article 16 ILCASR, which prohibits aid or assistance in the commission of an “internationally wrongful act”, therefore, also applies to any other entity which has legal personality and has the capacity to act in that regard.⁹⁹ Article 16 establishes a relatively high threshold before a State or other entity is considered to be aiding or assisting in the commission of an internationally wrongful act by another.¹⁰⁰ The definition of an “internationally wrongful act” in Article 2 is, however, broad enough to encompass violations of any legal obligation by a State.¹⁰¹ If entities with legal personality are considered to be aiding or assisting a third State in the violation, for example, of its human rights obligations, then they are internationally responsible for their actions and obliged to stop doing so.¹⁰² Due to the manner in which the relevant articles of the ILCASR are drafted, aiding or assisting, for example, an isolated incident of torture will be enough to invoke responsibility.¹⁰³ Accordingly, the Member States and Community must cease any activities which aid or assist in the commission of such acts. The question of whether the Community and its Member States are obliged to act, where they are not aiding or assisting in the commission of an internationally wrongful act, is somewhat different.

Chapter III of Part Two of the ILCASR contains Articles 40 and 41, which deal with breaches of peremptory norms of international law¹⁰⁴ and the consequent

⁹⁸ See Articles 55 and 57. The ILC has now included the topic “Responsibility of International Organisations” in its programme of work. See, ILC, *Report on the Work of its 54th Session*, GAOR, 57/10, p.228.

⁹⁹ The ICJ in Advisory Opinion, *Legal Consequences of the Wall*, *supra* note 79, para.159 refers to a number of principles which can be found in the ILCASR, including Article 16, but does not expressly mention them.

¹⁰⁰ For discussion of the conditions see Crawford, *State Responsibility*, *supra* note 76, p.148.

¹⁰¹ Article 2 states that “[t]here is an internationally wrongful act of a State when conduct of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.”

¹⁰² See Article 30 ILCASR.

¹⁰³ Also see Article 40(2) ILCASR, which deals with aiding and assisting violations of peremptory norms.

¹⁰⁴ Article 26 ILCASR also refers to peremptory norms. It is concerned, however, with the circumstances precluding the wrongfulness of an internationally wrongful act.

responsibility of States. Article 40 applies to the “international responsibility (of a State) entailed by a *serious breach*...of an obligation arising under a peremptory norm of...international law.”¹⁰⁵ Article 41 details the obligations of other States in response to serious violations of peremptory norms by another. States must cooperate to bring to an end through lawful means the violation and not recognise as lawful a situation created by a serious breach within the meaning of Article 40.¹⁰⁶ The general nature of a State’s obligations in such circumstances is relatively clear, even if the actual content of the obligation may not be.¹⁰⁷ Whether these obligations also extend to the Community is more complex.

The commentary on Article 40 of the ILC Articles refers back to Article 53 of the 1969 Vienna Convention on the Law of Treaties.¹⁰⁸ This provision considers a peremptory norm of general international law to be one recognised “by the international community of States as a whole”. Palchetti implies that this excludes the Community acting in such circumstances.¹⁰⁹ It is questionable on policy grounds, however, whether the “international community of States” should be read so restrictively, as to exclude international organisations in the obligations they may owe, to ensure that such norms are not violated. States may still have the monopoly in recognising such principles¹¹⁰ but that is not to say that the entities they create cannot act in that regard. Article 41 of the ILC Articles provides a possible solution.

¹⁰⁵ Emphasis added.

¹⁰⁶ This principle was also used by the ICJ in Advisory Opinion, *Legal Consequences of the Wall*, *supra* note 79, para.159, but without referring to the ILCASR.

¹⁰⁷ See further *infra* and more generally Klein, P., “Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law” (2002) 13 *EJIL*, 1241.

¹⁰⁸ Crawford, *State Responsibility*, *supra* note 76, p.245.

¹⁰⁹ Palchetti, P. “Reactions By The European Union to Breaches of *Erga Omnes* Obligations” in Cannizzaro, E.(ed.), *The European Union as an Actor in International Relations*,(2002) p.219, 221. Klabbers, J., “Comment on Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*” (1999) 36 *CMLRev.*, 179 considers that *Racke* presented the ECJ with the opportunity to make pronouncements on the Community’s duties vis-à-vis obligations *erga omnes*, as opposed to peremptory norms, but chose not to take it.

¹¹⁰ Simma, “From Bilateralism” *supra* note 94, 243 has referred to this as “the foxes guarding the chickens”.

Article 41(1), as noted above, obliges States to cooperate together to bring to an end, through lawful means, serious breaches of peremptory norms.¹¹¹ The provision does not prescribe the action to be taken and it is clear that where the Member States have transferred competence to the Community, then under Community law, action must be taken by it. How that action is taken or through which forum is not relevant for the purposes of State responsibility. The obligation upon States is to act. Whether an obligation exists on the Community independently of the Member States is unclear. There is no reason, in principle, why it should not where the Member States have transferred their competence to it. Palchetti argues in this regard that the Community acts on behalf of the Member States and is not obliged to act independently of them.¹¹² Yet the bestowment and recognition of legal personality arguably means that, within its competence, the Community is obliged to act even if that obligation is ultimately owed by the Member States. If the action required is outside the scope of Community competence and the Member States choose to act through the CFSP or independently, that is their prerogative. In practical terms, in such circumstances, whether an obligation is owed by the Community, Member States or by both makes little difference. Action ultimately by a State is being taken in response to the systematic breach of peremptory norms and that is what is legally required. There is nothing to stop the EU Member States acting through whichever forum their other legal obligations require. In this limited respect, therefore, there is an obligation, as opposed to right, upon the Community to respond to violations of such norms. Similarly, the Member States may wish to utilise Union instruments through which to act. That is within their discretion.

On the basis of the preceding discussions, the following conclusions can be drawn. Those norms which are recognised as obligations *erga omnes* are no longer within a State's domestic jurisdiction. This is also the case with regard to those obligations a State has accepted by becoming party to a human rights treaty. With regard to

¹¹¹ Jørgensen, N., *The Responsibility of States for International Crimes*, (2000) p.215 argues, however, that the role of third States in such circumstances is limited to assisting and enforcing any decisions made by a determining body (probably the Security Council) as to whether such obligations have been violated or not.

¹¹² Palchetti, "Reactions by the Union" *supra* note 109, p.228.

obligations *erga omnes* all States have an interest in their compliance and a right to act when they are violated by a third State. Where all of the Union's Member States are party to a human rights treaty, they have a legitimate interest in ensuring that other States comply with their obligations under it. They also have a right to act if the treaty is violated by a third State, so long as they all have also accepted the obligation in question. All other issues are within the domestic jurisdiction of a State. The Community and its Member States, as is the case with all other States, must not aid or assist in the commission of any internationally wrongful acts by another State. Furthermore, where there are serious breaches of peremptory norms of international law, the Community and its Member States must cooperate together with others to bring to an end, through lawful means, such violations. Regardless of whether there is a right to act or an obligation, the responses must be lawful. The next section deals, in part, with this issue.

3.2.2. Legal Limits on the Implementation of Policy.

Ethical foreign policies are both positive and negative in nature and the values which they seek to promote and protect extend beyond the relatively narrow ambit of certain human rights. Thus, as regards positive measures, programmes are often funded by donors to help raise awareness of particular rights and issues, where an identified problem is seen to exist. The Union, for example, has consistently funded seminars in third States which attempt to ensure that journalists are aware of the international rules protecting freedom of expression.¹¹³ Furthermore, the Union routinely provides food aid for distribution.¹¹⁴ Positive rewards for compliance with certain norms, such as through the Generalised System of Preferences (GSP) scheme as implemented by the Community, are in principle perfectly lawful under international law. In most cases, positive measures cannot function without the consent of the third State. Such policies are, however, legally limited to encouraging and persuading other States to comply with those standards without intervening, in the sense of acting without or beyond the consent granted, in the internal affairs of the recipient State. Thus the

¹¹³ See the Council's *Annual Report on Human Rights* for examples of such activities.

¹¹⁴ See the discussion *infra*.

Community can provide assistance and any other help requested or agreed upon with the consent of all parties involved. Positive measures tend to pose few legal problems.

Legal problems do exist when States, or in our case the Community and its Member States, in objecting to the policies and practices of a third State, take punitive action, such as withdrawing preferential trade arrangements. Such acts may be part of the objecting donor's prerogative but they are not completely unregulated by international law. In a 1994 Communication the Commission stated that in response to human rights violations in a third State the EU may issue confidential or public démarches; change the content of cooperation programmes or the channels used; defer signature or the decisions needed to implement a cooperation Agreement; reduce cultural, scientific or technical cooperation; defer the holding of joint committee meetings; suspend all bilateral contact; postpone new projects; refuse to act on new initiatives; impose trade embargoes; or suspend all cooperation.¹¹⁵ A number of such actions, which straddle retorsion and reprisals, have legal consequences. The legal issues involved will depend, among other things, on the exact factual circumstances, the legal provisions regulating relations between the parties and the nature of the violation. A more detailed analysis of the legal limits of the instruments used by the Union is undertaken in the next chapter. We are here concerned more generally with the legal limits of implementing an ethical foreign policy.

In the first instance States, through some means or other, must be aware of a situation in a third State of which they disapprove. Chris Patten has noted that human rights promotion by the Union is a pre-emptive measure as there is no "*droit de regard*" on the part of foreign governments.¹¹⁶ Simma and Alston have argued, however, that such a right has evolved and is also broadly accepted.¹¹⁷ This view is almost certainly the correct one. All States observe and gather information, through various

¹¹⁵ COM (1994) 42, p.11.

¹¹⁶ Special Seminar With NGOS, 14/7/2003. Speech by Commissioner Patten, DN: Speech 03/364.

¹¹⁷ Simma, B., and Alston, P., "The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles" (1992) 27 *AYBIL*, 82, 98.

means, on compliance by others with legal obligations in which they have an interest. In the case of human rights, that would entail violations of all human rights protected by a treaty to which both States are a party or those protected by custom. Despite Patten's comment, this does not pose a legal problem. Supervising a third State's compliance with its legal obligations is not prohibited so long as it does not amount to intervention in its internal affairs.

Intervention has traditionally been defined in the literature as "dictatorial interference".¹¹⁸ Accordingly any interference that is not dictatorial does not amount to intervention. The IDI's 1989 Resolution and the Union, as noted above, now consider that purely verbal expressions of concern are lawful in all situations. Such expressions of concern, whether or not the issue is considered to be a part of the State's domestic jurisdiction, are legitimate according to this approach, because they do not satisfy the threshold to amount to intervention. As the Reporter's Notes to the *Third Restatement* state, "virtually every State has criticised some other for its human rights practices, both directly and by statement or vote in international bodies."¹¹⁹ The approach to intervention adopted by the ICJ in the *Nicaragua* case supports this. The Court relied heavily upon the 1965 and 1970 General Assembly Declarations, discussed above, both of which adopt a similar formula. The 1970 Declaration considers that:

No State or group of States has the right to intervene, directly or indirectly, *for any reason*, whatever, in the international or external affairs of another State. Consequently ...*all...forms of interference.....*are in violation of international law. No State may use or encourage the use of economic, political or any other type of measure to *coerce* another State in order to obtain from it subordination of the exercise of its sovereign rights and to secure from it advantages of any kind.¹²⁰

¹¹⁸ This definition probably originates from Lauterpacht, H., "The International Protection of Human Rights" (1947) 62 *RDC*, 1, 19. On its background and usage see Preuss, "Article 2, Paragraph 7" *supra* note 45, 605. It is still widely used in the literature, see *Oppenheim, supra* note 45, p.430, Henkin, *Age of Rights, supra* note 45, p.55 and Damrosch, L. *et al.*, *International Law: Cases and Materials*, (4th edn., 2001) p.951.

¹¹⁹ *Third Restatement, supra* note 74, Reporter's Notes (9).

¹²⁰ Emphasis added.

The Court stated:

....As regards the content of non-intervention...the principle forbids all States or groups of States to intervene directly or indirectly in internal or external affairs of other States. A prohibited intervention must accordingly be one bearing on matters in which each State is permitted...to decide freely.Intervention is wrongful when it *uses methods of coercion* in regard to such choices, which must remain free ones.¹²¹

On the basis of the *Nicaragua* case it is clear that the Union, whether it is dealing with a legally binding obligation or not, may publicly unilaterally criticise any situation in a third State of which it disapproves. The issues of domestic jurisdiction or sovereignty are not an impediment, as verbal expressions of concern are not coercive and thus do not amount to intervention. This is further supported by the Court in the *Nicaragua* case, which also considered that action on the economic plane against Nicaragua by the US, namely the cessation of economic aid, the reduction of sugar quotas and trade embargos, despite their economic consequences did not amount to intervention.¹²² In this case it does not amount to intervention in the affairs of a third State, if a donor changes its trade policies, as a response to behaviour it disapproves of, because it is within its discretion to afford those facilities to a third State. Foreign policy formulation is a part of the State's prerogative.¹²³ Section 703 of the *Third Restatement* goes further, however, in considering that "a State does not violate international law when it shapes its trade, aid or other national policies to influence a State to abide by recognised human rights standards". Such acts have traditionally been considered to be retorsion and thus legal.¹²⁴ It can be questioned, however, whether they are always legal. When donating aid, it is possible for States to undertake unilateral obligations which are legally binding and thus they may be estopped from rescinding from them.¹²⁵ In the alternative suspension of a

¹²¹ *Nicaragua* case, *supra* note 46, para.205.

¹²² *Ibid.*, para.245.

¹²³ *Ibid.*, para.205.

¹²⁴ See Damrosch, L., "Politics Across Borders: Non-intervention and Non-forcible Influence Over Domestic Affairs" (1989) 83 *AJIL*, 1, 54, Cassese, *International Law*, *supra* note 90, p.244, Crawford, *State Responsibility*, *supra* note 76, p.281.

¹²⁵ For the general principle see the *Nuclear Tests Case, (Australia and New Zealand v. France)* (1974) *ICJ Reports*, 253, para 43 *et seq.*

development cooperation treaty with a third State, in the absence of an “essential elements” clause, will only be a lawful response if one of the situations identified in Articles 54-64 of the Vienna Convention on the Law of Treaties exists. This is the case even if the donor is, of its own volition, granting to a third State preferential access to its markets. Furthermore, Article 60(5) VCLT is relevant, if the treaty in question is poverty-orientated, and individuals are perceived to be the identified beneficiaries. Suspension or termination not only of a treaty but also other bilateral aid, can also potentially lead to the legal responsibility, of the former donor, for violations of economic, social and cultural rights in the target State.¹²⁶

In the absence of treaty relations, States often resort to countermeasures, including sanctions, retorsion and non-forcible reprisals, in an attempt to convince/coerce another State to act in a manner which is deemed appropriate. While this area of law is not well-regulated, it is not entirely without rules. Again such measures should not amount to coercion.¹²⁷ The debate as to where the boundaries lie between economic coercion, for example, and lawful responses to the violation of human rights is annually played out in the General Assembly and Commission on Human Rights.¹²⁸ Such measures can be considered to be coercion if the target State is not violating a legally binding obligation or the issue is within the scope of its discretion. In the *Nicaragua* case, the ICJ considered that choices as to “political, economic, social and cultural system, and the formulation of foreign policy” are entirely within the discretion of the State. Thus the implementation of broad ranging sanctions to

¹²⁶ See General Comment 8 of the Committee of Economic Social and Cultural Rights (CESCR), E/C.12/1997/8, para.11.

¹²⁷ If they are simply symbolic that poses no problem, although if they are punitive in nature the considerations are the same as for those which are coercive. See Craven, M., “Humanitarianism and the Quest for Smarter Sanctions” (2002) 13 *EJIL*, 43, 47. Also see Abi-Saab, G., “The Concept of Sanction in International Law” in Gowlland-Debbas, V.(ed.), *United Nations Sanctions and International Law*,(2001) p.29, 32.

¹²⁸ See the various Resolutions adopted by the General Assembly and Commission on Human Rights entitled “Human Rights and Unilateral Coercive Measures” and “Unilateral Economic Measures as a Means of Political and Economic Coercion Against Developing Countries”. A/Res/57/222, A/RES/56/148, A/RES/55/110, A/RES/54/172, A/RES/53/141, A/RES/52/120, CHR Resolution 2002/22, CHR Resolution 2001/26 and A/RES/56/179, A/RES/54/200, A/RES/52/181 respectively.

express disapproval of a non-democratic or corrupt regime, for example, may amount to coercion.

If the issue is not within the domestic jurisdiction of a State, for example it is engaging in violations of obligations *erga omnes*, then although an objecting State has a right to respond, any countermeasures taken must still be proportionate.¹²⁹ Article 48(1) ILCASR notes, in this context, that a State may invoke the responsibility of a wrongdoing State if the *obligation breached* is “owed to a group of States, including that State, and is established for the protection of a collective interest of the group.” Commenting on Article 54 ILCASR, which permits “lawful measures” by States other than those who are injured, Crawford considers that currently international law “on countermeasures taken in the general or collective interest is uncertain.At present there appears to be no clearly recognised entitlement of States...to take countermeasures in the collective interest.”¹³⁰ That fact that there is no “clearly recognised entitlement” to act does not mean that States cannot do so; they simply must ensure that in doing so they respect other principles of international law. Article 54 ILCASR very pointedly uses the language of “lawful measures”. Simma and Alston have argued that where there are gross and persistent abuses of obligations *erga omnes*, countermeasures *are* lawful in the absence of treaty relations.¹³¹ The use of “lawful measures” in Article 54 ILCASR implies that, notwithstanding the seriousness of any such breach, countermeasures will not always be lawful; it depends on *their* nature. In the case of values which have not attained that normative status and may not even be legally binding upon the target State, there

¹²⁹ See Article 51 ILCASR and *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary/Slovakia) (1997) *ICJ Reports*, p.3, para.87 “in the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question”. Reprisals must also be proportionate. The classic authority is *Portugal v. Germany* (the *Naulilaa Case*), (1928) 2 R.I.A.A. 1012, 1026. See further Cannizzaro, E., “The Role of Proportionality in the Law of International Countermeasures” (2001) 12 *EJIL*, 889.

¹³⁰ Crawford, *State Responsibility*, *supra* note 76, p.305.

¹³¹ Simma and Alston, “Sources” *supra* note 117, 98.

are significant constraints on the responses which are legitimately available to third States.¹³²

3.3. Legal Obligations to Promote Ethical Values in the Treaty Framework.

The objective in this section is to determine which values the Community and Union are legally obliged to promote and protect and the content of those values in international law. Reference is made only to the constitutive treaties. The secondary legislation that has been adopted, practice and the treaties entered into with third States and organisations which aim, in part, to give effect to these obligations are discussed in Chapter Three.

The starting point for this discussion is Title XX of the EC Treaty which contains Articles 177-181, dealing with development cooperation. Article 177(1) refers to the fact that the Community *shall* foster the campaign “against poverty in the developing countries” and in Article 177(2) that this 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.” Furthermore, Article 177(3)EC obliges the Community and its Member States to comply with “the commitments and take account of the objectives they have approved in the context of the United Nations and other competent organisations.” Article 177(3) does not, however, contain a general obligation vis-à-vis all commitments undertaken in the UN but solely those relating to development cooperation. Article 177 is further supplemented by the TEU.

There is reference in the preamble of the TEU to the Union’s attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms as well as the social rights contained in the European Social Charter 1961

¹³² For more general discussion see White, N., and Abass, A., “Countermeasures and Sanctions” in Evans, M. (ed.), *International Law*, (2003) p. 505 and Gowlland-Debbas, *United Nations Sanctions*, *supra* note 127.

and the 1989 Community Charter on Fundamental Social Rights of Workers. However, it is not specified whether this attachment is limited to the “internal sphere” of the Union or also applies to the Union’s external relations. Beyond this the relationship between human rights and democracy, among other principles, in external relations and the objectives of the Common Provisions is weak. Article 11 of the TEU, which established the CFSP, specifically states that the Union shall “develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms,” but this is not a free-standing obligation for the Union but one of the objectives of the CFSP. Richardson has argued that this provision is evidence of the EU’s commitment to safeguarding the values of the Union in conformity with the Charter of the United Nations. He states it is evidence of a “...foreign policy clearly based on principles and not on *realpolitik*.”¹³³

Article 2 TEU, which establishes the Union’s objectives as a whole, only implicitly refers to such questions with, for example, the creation of Union citizenship. The link between these objectives and the promotion of human rights in external relations is not apparent. Article 6 TEU does, however, give a hint on issues of cultural relativity. Article 6, which reaffirms that the Union is founded on principles of liberty, democracy, respect for human rights and the rule of law, states in its second paragraph that:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ...and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The listed sources of fundamental rights upon which the Union is said to be founded all advocate a “European standard” of human rights protection. Implicitly this means that this is the standard which the Union as a whole should promote both in the CFSP and in the Community’s development cooperation policies. This seems to be the case

¹³³ Richardson, J., “The European Union in the World-A Community of Values” (2002) 26 *Fordham ILJ*, 12. For a contrary view, see Duquette, E., “Human Rights in the European Union: Internal Versus External Objectives” (2001) 34 *Cornell Int’l. L.J.*, 363, 378, who argues that the Union acts on the basis of power, not morality.

even though “European standards” may not be applicable or relevant to third States, which are either committed to other international treaties or consider that they have a different set of cultural values.¹³⁴ There is thus a desire to impose or at least achieve “our standards” elsewhere, due to an inherent belief in the superiority of those values,¹³⁵ without necessarily realising or seriously considering that they may not be appropriate or applicable outside of a particular social and historical context. The principles advocated by the EU are far from universal. While human rights are not a Western idea, there is significant force in the argument that the current and specific philosophy on which the current universal regime is based is Western in essence. As Mutua notes:

..that Africa merely needs a liberal democratic, rule of law State to be freed from despotism is mistaken. The transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa.....The supremacy of the jurisprudence of individual rights.....is not a natural...or universal phenomena, applicable to all societies, without regard to time and place.¹³⁶

Yet in a recent Communication, the Commission noted that its actions in the field of external relations will be guided by compliance with the rights and principles contained in the EU Charter of Fundamental Rights, as opposed to the European Convention on Human Rights to which the TEU refers, as this will promote coherence between internal and external approaches.¹³⁷

Beyond these references, there is nothing else in the constitutive treaties, as they currently exist, which creates an obligation to eradicate poverty or promote human rights and the rule of law in third States. Nor is there any articulation of what is meant by these principles or why it is they have been identified as global goals to be pursued. In the Draft Constitution, Chapter I of Title V (the Union’s External Action) again refers to these principles, as well as expressly for the first time: preserving

¹³⁴ In practice, however, the approach is sometimes subtly different. See further Chapter Four.

¹³⁵ See Robin Cook, *supra* note 1 for very express reference to this idea.

¹³⁶ Mutua, M., “The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties” (1995) 35 *Virginia JIL*, 339, 341.

¹³⁷ COM(2001)252, p.3.

peace and preventing conflicts; preserving and improving the quality of the environment; assisting populations confronting man-made and natural disasters; and promoting an international system based upon multilateral cooperation and good global governance.¹³⁸ There is no discussion in the treaties as they currently stand, or in the Draft Constitution, of the weight to be attached to these principles in relation to other policies or their content.

The legal obligations imposed by the Treaties vis-à-vis the promotion of ethical values are, as one would expect, extremely flexible. They do not expressly articulate, for example, that there is a general obligation upon the Community to take account of poverty reduction policies vis-à-vis the Common Commercial Policy, this only exists with regard to development cooperation. Article 3 of the TEU, however, in imposing an obligation on the institutions to ensure consistency and continuity of all activities, should prevent the Community, for example, in the WTO from adopting a position which would undermine its own development programmes in developing States.

3.3.1. The Obligation to Promote and Protect Human Rights in Third States.

In the context of the CFSP, the Union is obliged to contribute to the global development and consolidation of respect for human rights and fundamental freedoms. Much of the Union's external activities in the context of the promotion of human rights and other ethical values takes place in the more specific context of development cooperation and the relationship between development, human rights, democracy and the rule of law. This is dealt with in the following sections. It is initially worth addressing, however, to what extent the Member States of the Union are generally obliged to protect and promote human rights in third States by their human rights treaty obligations. This is as opposed to the protection of norms in

¹³⁸ This is further supplemented by Article III-213 on development co-operation which is not substantively very different from the current provisions and Article III-218 on humanitarian aid, which is a recognition of the *de facto* situation.

which they have an interest and the limits of responding to breaches of such norms, which were discussed above.

3.3.1.(a) The Member States and Treaty Obligations to Promote and Protect Human Rights in Third States.

The issue we are concerned with here is the “territorial applicability” of human rights treaties and whether those treaties generally oblige States to protect and promote such rights outside of their jurisdiction.¹³⁹ Notwithstanding the fact that a number of treaties contain similar language, there is no overall consistency in relation to this issue. The two 1966 Covenants, for example, take differing approaches. The Covenant on Economic, Social and Cultural Rights makes no specific reference to its jurisdictional application.¹⁴⁰ Article 2 of the Covenant on Civil and Political Rights, on the other hand, obliges each State to “undertake to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”. Most other treaties do not expressly limit their applicability to the territory of a State and require that effect be given by the Contracting State to the rights protected to “all within their jurisdiction”, although that term is understandably never defined.¹⁴¹

By looking at the practice of the tribunals established to interpret these treaties and the background to some of them, it is clear that there was (and is) no general intention

¹³⁹ More specific obligations are discussed *infra*.

¹⁴⁰ This is also the case in CEDAW, although the Optional Protocol of 1999 in Article 2 refers to the communications submitted by “..individuals, under the jurisdiction of a State Party..”. Similarly, the African Charter does not have such a clause.

¹⁴¹ The following relevant treaties take this approach: Article 6, CERD; Article 2, CRC; and Article 1, ECHR. The approach of the European Social Charter, 1961, *ETS No.35*, is different. Article 34 of the 1961 Charter applies to “metropolitan territory” although a State can extend it to non-metropolitan territories under Article 34(2). Article 10(1) of the 1988 Additional Protocol, *ETS No. 128* and Article L (1) of the Revised European Social Charter, *ETS No. 163* are substantively identical. For discussion on the scope of “jurisdiction” in general see Capps, Evans and Konstadinidis, *Asserting Jurisdiction*, *supra* note 51.

to impose an obligation upon States to protect human rights in third States. For example, examination of the drafting history of Article 2 of the ICCPR makes it clear that the term “jurisdiction” was added to ensure that States would be responsible for the acts of their agents outside of the State’s geographical territory. As Nowak notes, however, the discussions on these issues reveal that the intention of the final wording was to avoid obligating State parties to protect persons under their jurisdictional authority but *outside* their sovereign territory.¹⁴² Despite generally taking a very expansive approach to asserting its jurisdiction,¹⁴³ in the light of the *travaux préparatoires* the Human Rights Committee has not obliged any State parties to protect Covenant rights outside of their jurisdiction, where their agents are not involved.

The Strasbourg organs of the European Convention of Human Rights have on a number of occasions determined the applicability of the Convention outside of the physical territory of the Contracting States and their respective responsibilities. In the *Cyprus v. Turkey* cases of 1975, for example, it was held that a Contracting State may be responsible for the acts of its authorised agents outside of its territory.¹⁴⁴ The Court has subsequently further defined the “extra-territorial” application of the Convention on numerous occasions,¹⁴⁵ most recently and for our purposes importantly in *Banković*.¹⁴⁶ It is clear from the Court’s jurisprudence that it does not oblige State parties to protect or promote Convention rights outside of their jurisdiction. As is the case with the Covenant, a State may, however, be responsible for the acts of its agents outside of its territory.¹⁴⁷ As far as is known, on no occasion,

¹⁴² Novak, *U.N. Covenant*, *supra* note 87, p.41. Also see Advisory Opinion, *Legal Consequences of the Wall*, *supra* note 79, paras. 109-111.

¹⁴³ For more general discussion see McGoldrick, “Approaches to the Assertion of International Jurisdiction” *supra* note 51.

¹⁴⁴ Applications 6780/74 and 6950/75 (First and Second Applications) *Cyprus v. Turkey* (1976) 4 *EHRR* 482.

¹⁴⁵ See for example, *Soering v. UK*, Series A., 161, (1989) 11 *EHRR* 439, *Loizidou v. Turkey* (1996) 23 *EHRR* 513 and *Loizidou v. Turkey* (Preliminary Objections) (1995) 20 *EHRR* 99.

¹⁴⁶ Application No.52207/99 *Banković and Others v. Belgium and 16 Other States*, Decision of 12/12/2001.

¹⁴⁷ See, in particular, *Banković*, paras. 57-73.

under any of the major human rights treaties to which the Union Member States are a party, has a tribunal considered that State parties generally have an obligation to promote and protect human rights in third States. This does not mean, however, that obligations vis-à-vis third States do not exist with regard to specific issues, particularly in the context of development.

3.3.1(b) Development Cooperation, Human Rights and the Legal Obligations of Third States.

The relationship between development and human rights is a complex and multi-faceted one.¹⁴⁸ The right to development has been recognised on a number of occasions in declaratory documents, but always with a substantial dissenting or abstaining minority.¹⁴⁹ Arguments for the recognition of such a right are partly based on the principle, articulated in the UN Charter, that all States have an obligation to work together in an attempt to achieve global welfare.¹⁵⁰ Furthermore, Article 28 of the Universal Declaration of Human Rights recognises the right of everyone to a “social and international order in which the rights and freedoms set forth in this Declaration can be fully realised” although reference to this provision is notable by its absence from the international discourse.¹⁵¹ In the same vein the two 1966 Covenants

¹⁴⁸ See, among many others, Kumado, K., “An Analysis of the Policy of Linking Development Aid to the Implementation of Human Rights Standards” (1993) 50 *The Review-The ICJ*, 23, Madsen, H., “Development Assistance and Human Rights Concerns” (1994) 61/62 *Nordic JIL*, 129, O’Manique, J., “Development, Human Rights and Law” (1992) 14 *HRQ*, 383 and “Human Rights and Development” (1992) 14 *HRQ*, 78, Donnelly, J., “Human Rights, Democracy and Development” (1999) 21 *HRQ*, 608 and Paul, J., “The Human Right to Development: Its Meaning and Importance” in Slinn, P.(ed.), *Third World Legal Studies*, (1992) p17 and references in the Bibliography.

¹⁴⁹ The Commission on Human Rights expressly recognised the human right to development in 1977 see, U.N.Doc.E/CN.4/SR.1389, p.1392. More important is the 1986 Declaration on the Right to Development, GA Resolution 41/128, GAOR, 41st Session Supp.53, p186. For references to the literature on development and international law in general see the Bibliography.

¹⁵⁰ In particular, Articles 1, 55 and 56 of the Charter. See further Franck, T., *Fairness in International Law and Institutions*,(1995) Chs. 13 and 14.

¹⁵¹ The Charter of Economic Rights and Duties of States, GA.Res. 3281(xxix), UNGAOR, 29th Sess., Supp. No. 31 (1974) 50 is an exception.

refer to the idea that the human rights recognised in those documents can only be achieved “if conditions are created where everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights”.¹⁵² These declarations and provisions do not in themselves impose legal obligations upon States to assist others. The 1986 Declaration on Development has caused the relationship between human rights and development to become increasingly intertwined. The Rio Declaration of 1992,¹⁵³ as well as the reports of the Independent Expert on the Right to Development, appointed by the Commission on Human Rights, consider that the relationship between human rights and development has now gained universal acceptance.¹⁵⁴ What is in all probability legally recognised, is “..the right to development...as a universal and inalienable right and an integral part of fundamental human rights.”¹⁵⁵ What its exact content is and the obligations it imposes upon all States, however, is more difficult to determine. Development can be seen as a process, which aims to eliminate poverty and also allows other rights to be protected.¹⁵⁶ It also has other dimensions and implications and there are a number of conceptual aspects to the issue, which are of relevance to the discussion. First, why in the development discourse has poverty been so specifically highlighted, not only at the international level but also by the Union? Second, what is the actual role and place of human rights in the development process? Third, are there possible obligations not to hinder the development of others? Finally, do legal obligations to provide some form of assistance exist?

The trend towards identifying poverty as a primary objective of development cooperation policies began with the World Bank’s 1990 *World Development Report*. This signalled recognition of the importance of a focus on the poor, to ensure that

¹⁵² See the Preambles to the 1966 Covenants.

¹⁵³ (1992) 31 *ILM*, 874.

¹⁵⁴ “Report of the Independent Expert on Development” 11/09/2000, E/CN.4/2000/WG.18/CRP.1, para.5. See further Sengupta, A., “On the Theory and Practice of the Right to Development” (2002) 24 *HRQ*, 837.

¹⁵⁵ See the Vienna Declaration and Programme of Action 1993, A/CONF.157/23, reprinted (1993) 32 *ILM* 1667 para. 10. For a contrary view see Broding, G., “The World Bank and Human Rights: Mission Impossible?” Carr Centre for Human Rights Policy, Working Paper T-01-05 p.13.

¹⁵⁶ Sengupta, “Theory and Practice” *supra* note 154, 848.

they were not excluded from the benefits of development. The OECD now considers that the commitment of *all* development agencies to poverty reduction is “most tangibly reflected by their across the board support for the international development targets.”¹⁵⁷ This was established in the context of several UN Conferences and Summits.¹⁵⁸ Poverty is not perceived to be a high priority simply for the sake of relieving suffering. The *Human Development Report 2000*,¹⁵⁹ for example, argues that human rights are not a reward of development but they are critical to achieving it. One in five of the global population lives on less than one US\$ a day.¹⁶⁰ It is for this reason argued that poverty eradication is not only a development goal but *the* central challenge for human rights in the 21st Century.¹⁶¹ Those living in extreme poverty are clearly, in practice, not benefiting from many of the rights which States have committed themselves to protecting and promoting. It is now considered that poverty can only be eradicated as part of the development process. The collateral respect for certain human rights this entails, as part of the more general relationship between development and human rights, is obvious.

The role of human rights in the development process is relevant in two different respects. First, there is the relationship between human rights and the recognition of a right to development and what this entails. Second, there is the relationship between the protection of human rights and the economic development of the State in question. It has been argued that the right to development centres primarily upon the individual.¹⁶² It has, in the alternative, also been argued that the right to development is actually nothing other than the recognition, that in the development process, the State should take account of and protect the already existing rights of those

¹⁵⁷ DAC, *Shaping the 21st Century: Scoping Study, Donor Poverty Reduction and Practices*, (1996) p.vii.

¹⁵⁸ In particular, the World Summit for Social Development in Copenhagen in 1995.

¹⁵⁹ *Human Development Report 2000*, (2000).

¹⁶⁰ This is a widely accepted statistic which is regularly cited in World Bank and OECD reports.

¹⁶¹ *Human Development Report 2000*, p.8.

¹⁶² Article 2, 1986 Declaration.

individuals who are affected by its development policies.¹⁶³ It is certainly without doubt that a large number of “development” projects cause and create legally prohibited harms to some categories of project-affected persons.¹⁶⁴ The argument that the development process is focused upon the individual now seems to be the more widely accepted formulation and is the approach which the Community has adopted in its policies.¹⁶⁵ There is no reason, though, why the right to development does not also encompass the differing approaches mentioned above. They are not necessarily incompatible; it is a question of where the emphasis lies. The individual, not the State, is seen as the main beneficiary of the development process and is its focus. This requires that in the development process his or her legally protected or defined rights are not violated. It can also mean that as the State develops economically and politically, individual rights are increasingly realised, promoted and protected.

What these principles entail for the Community and its Member States is that when providing assistance and, in particular, funding for specific projects, these should not have an adverse impact upon the legally recognised rights of individuals in that State. It is difficult to think of a situation likely to arise in practice, however, in which the Community and or Member States could be held responsible for the role they have played in development projects they have funded, if any recognised rights have been violated as a part of that process. The recipient State, in conjunction with whom such projects are initiated and usually completed, is responsible and accountable before national and or international mechanisms, to which it is a party, for any possible breaches of its obligations.

The question, however, is to what extent does an obligation to assist, in this context exist? In 1969 the Development Assistance Committee (DAC) of the OECD agreed a target for developed countries to donate 0.7 % of their gross national product for

¹⁶³ See, Stewart, F., “Basic Needs Strategies, Human Rights and the Right to Development” (1989) 11 *HRQ*, 347, Nayar, M., “Human Rights and Economic Development; the Legal Foundations” (1980) 2 *Universal Human Rights*, 55 and Shihata, I., “Democracy and Development” (1997) 46 *ICLQ*, 635.

¹⁶⁴ Paul, J., “The Human Right to Development: Its Meaning and Importance” (1992) *Third World Legal Studies*, 17, 20.

¹⁶⁵ See, for example, Article 9 of the Cotonou Convention and discussion in Chapter Three.

overseas development assistance. This commitment has been reaffirmed on a number of occasions since.¹⁶⁶ The provision of assistance to States, in this context, was described by Addo, writing in 1990, as nothing more than soft law.¹⁶⁷ Subsequently the Vienna Declaration of 1993 has noted that "...States should cooperate with each other in ensuring development and eliminating obstacles to development," as have other documents which have been adopted at major international conferences.¹⁶⁸ Such commitments and statements cannot and do not, however, amount to unilateral statements in the sense required for the formation of a legally binding obligation to provide assistance.¹⁶⁹ Most, if not all, developed States provide some assistance. They do not, however, consider that are obliged to do so, unless they have entered into a specific treaty agreement to do so. The recognition and acceptance by consensus at Vienna in 1993 of the right to development as "a universal and inalienable right and an integral part of fundamental human rights" does not mean that States feel legally obliged to provide a certain amount of development assistance. The requisite *opinio juris* and practice for the purposes of custom is absent.¹⁷⁰

A legal obligation, which has now arguably been accepted in the development process, is that a State or group of States should not hinder the development of others. This is because development is perceived to be the best manner in which human rights and democracy can be protected.¹⁷¹ Articles 55 and 56 of the Charter read in conjunction with the Vienna Declaration and the 1986 Declaration on the Right to Development impose obligations upon States to cooperate and take action to work

¹⁶⁶ Most importantly the Millennium Declaration of the General Assembly, A/RES/55/2. See further Chapter Three.

¹⁶⁷ Addo, M., "Some Issues in European Community Aid Policy and Human Rights" (1988) *LIEI*, 55, 62

¹⁶⁸ See para.10 of the Vienna Declaration. Also see the Declarations of the Cairo World Population and Development Summit, 1994, the Copenhagen World Summit for Social Development, 1995 and the Beijing Fourth World Conference on Women, 1995.

¹⁶⁹ See the *Nuclear Tests Case*, *supra* note 125, para.45.

¹⁷⁰ The lack of a legal obligation is recognised most importantly by Sengupta in his capacity as the Independent Expert on the Right to Development. With the exception of the Scandinavian States, no developed countries have donated 0.7% of their GNP.

¹⁷¹ See further *infra*.

towards development for all States.¹⁷² What the potentially “obstructive States” must not do, however, is unclear. It is difficult to define a core obligation that the principle entails. A developing State would not be able to hold a group of developed States responsible for not removing trade barriers for example, if it considers its development is being hindered, unless there is a breach of a specific treaty obligation. There is a well established practice for developing States to be treated in a different or preferential manner in certain international treaties.¹⁷³ The obligation not to hinder or to provide assistance in practical terms, however, means little outside of such a treaty.

The content of the obligations discussed above and the responsibilities and duties of States are both unquantified. More precise legal obligations, however, do exist upon developed States. These are in the context of providing assistance in certain circumstances to developing States.

3.3.1(c) Development Cooperation, Humanitarian Assistance and the Obligation to Assist.

In a more limited context, it is arguable that developed States are under a legal obligation to provide humanitarian aid, in certain circumstances, to third States. With regard to human rights, States are obliged, as noted above, to protect the rights only of those under their jurisdiction. Humanitarian assistance is concerned with providing assistance to those in another jurisdiction. Here the State, if it still exists, is unable or unwilling to provide its population with protection from a situation which threatens their very existence. There is thus an overwhelming necessity for other States, agencies or organisations to act to alleviate the suffering of those affected.

Humanitarian assistance is usually considered to be a component of development assistance. There is in practice a continuum between the two. The provision of

¹⁷² See para. 10 of the Vienna Declaration.

¹⁷³ See Slinn, P., “The Implementation of International Obligations Towards Developing Countries: Equality or Preferential Treatment?” in Butler, W.(ed.), *Control Over Compliance With International Law*, (1991) p.165.

emergency relief can be substantially reduced if development projects, as understood in the strict sense, establish an infrastructure which lessens the long-term dependency on emergency aid in the eventuality of a disaster. Conversely humanitarian assistance can be concerned with the rehabilitation of affected populations, as well as alleviating immediate danger, and thus merge into development cooperation. It is also usually only in the developing world that a natural or man-made disaster will put a population in a situation where the State does not have the resources to alleviate their suffering. It is the overwhelming necessity to assist in the alleviation of that suffering that compels others to take action to assist the affected State in its efforts, if there are any. The two can be conceptually and legally distinguished, although the boundaries between them are sometimes unclear. Humanitarian assistance is seen to be subject to a different set of principles. Development cooperation is an inherently long-term and political activity. Humanitarian assistance is an altruistic and short-term one, the defining principles of which are urgency, neutrality and impartiality. Assistance is to be provided on the basis of need and nothing else. In the suspension of development cooperation, for whatever reason, an exception is always made for humanitarian assistance.

Although distinguishable from development cooperation, there is still a relationship between international human rights and humanitarian assistance. They are related in the sense that a humanitarian emergency, natural or man-made, will interfere with the enjoyment of rights such as those to health, food and shelter. While a lack of development can also interfere with such rights, the threat posed in a humanitarian situation is more urgent than would normally be the case in the context of economic, social and cultural rights.¹⁷⁴

Numerous declarations and resolutions currently exist which urge States to contribute and assist those in desperate and urgent need but they do not currently impose a

¹⁷⁴ The Committee on Economic Social and Cultural Rights, has in General Comment 3, 12/12/90 CESCR noted at para.1 that the Covenant does impose immediate obligations but also allows for progressive realisation acknowledging the constraints due to limits of available resources.

legally binding obligation to do so.¹⁷⁵ The Millennium Declaration of the United Nations General Assembly, for example, recognises that each State has a separate as well as collective responsibility to uphold the principles of human dignity, equality and equity at the global level.¹⁷⁶ It does not, however, encompass a specific obligation to assist. Similar commitments have also been made in the Rome Declaration on World Food Security 1996¹⁷⁷ and the World Food Summit Plan of Action.¹⁷⁸ The earlier General Assembly Resolution 45/102¹⁷⁹ encouraged the international community to contribute substantially and regularly to international humanitarian activities and stressed the importance of further developing international cooperation in the humanitarian field to better facilitate understanding, mutual respect, confidence and tolerance among the planet's countries and peoples. Again no legally binding obligation to assist exists. In two resolutions, however, the General Assembly does seem to recognise a very limited right to assistance. This is where there is a starving population involved, although the resolutions do not elaborate upon whom the duty is placed.¹⁸⁰

This is not to state, however, that there is no rights discourse in the humanitarian assistance field. General Assembly Resolution 43/131 on Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations, considers that a right exists for those providing assistance to demand access to victims of natural disasters and other emergency situations, although the nature of the obligation on those hindering access is not elaborated upon.¹⁸¹ If such a right were accepted, the question of whether the consent of the State in question would be required still needs to be

¹⁷⁵ For a contrary view see Laurent, P., "Humanitarian Assistance is a Right" in Pirotte, C., Husson, B. and Grunewald, F.(eds.), *Responding to Emergencies and Fostering Development*, (1999) p.122.

¹⁷⁶ Para. 2, Millennium Declaration.

¹⁷⁷ Adopted under the auspices of the UN Food and Agricultural Organisation, <http://www.fao.org/docrep/003/w3613e/w3613e00.htm>.

¹⁷⁸ Objective 7.4 of the Plan of Action, <http://www.fao.org/docrep/003/w3613e/w3613e00.htm>.

¹⁷⁹ Promotion of International Cooperation in the Humanitarian Field, A/RES/45/102.

¹⁸⁰ "Humanitarian Assistance to Victims of Natural Disasters and Similar Emergency Situations" A/RES/45/100 and "Strengthening of the Co-ordination of Humanitarian Emergency Assistance of the United Nations" A/RES/46/182.

¹⁸¹ General Assembly Resolution, A/RES/43/131.

resolved. The position reflected in treaties concerned with this area of law would certainly answer this in the affirmative.¹⁸² Generally, however, consent can be implied. There are relatively few examples of States making clear that they do not wish for outside assistance.¹⁸³

Article 11 of the ICESCR can be said, however, to contain legal undertakings which may be relevant in imposing an obligation upon the Member States of the Union to provide assistance in the context of the right to adequate food and the right to be free from hunger. Article 2 of the ICESCR which establishes the general nature of a State's obligations under the Covenant seems to imply, when read in conjunction with Article 11, that in times of crisis, for example famine, a State is obliged to seek international assistance.¹⁸⁴ The exact nature and extent of the legal obligation this imposes on Contracting States is not easy to ascertain. General Comment 3 of the Committee on Economic, Social and Cultural Rights (CESCR), in referring to Articles 55 and 56 of the UN Charter, recognises that the obligation to assist is "particularly incumbent upon those States in a position to assist others in this regard."¹⁸⁵ Shelton, in particular, has argued that general principles of law and human rights treaties impose a duty on States to provide famine assistance.¹⁸⁶ The *Limburg Principles*,¹⁸⁷ however, note that international cooperation and assistance

¹⁸² The Four Geneva Conventions of 1949 as well as the 1977 Protocols all require the consent of the State be granted. In the *Nicaragua* case, *supra* note 46, paras.242-243, the ICJ held that there was no doubt that the provision of strictly humanitarian aid cannot amount to unlawful intervention or be contrary to international law, so long as such aid was without discrimination of any sort. Whether this position is an evolution of the Protocols and Conventions is unclear.

¹⁸³ For example, North Korea in the past.

¹⁸⁴ See Alston, P., "International Law and the Human Right to Food" in Alston, P., and Tomaševski, T.(eds.), *The Right to Food*, (1984) p.9, 43. This is very much in line with para.26 of the *Limburg Principles*, UN Doc. E/CN.4/1987/17. Also see Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development*, (1998) p.144 and Eide, A., "The Right to an Adequate Standard of Living Including the Right to Food" in Eide, A., Krause, C., and Rosas, A., *Economic, Social and Cultural Rights: A Textbook*, (2001) p.133.

¹⁸⁵ General Comment 3 of the CESCR, para. 14.

¹⁸⁶ Shelton, D., "The Duty to Assist Famine Victims," (1984-5) 70 *Iowa Law Review*, 1279. This view is now substantiated by para.38, General Comment 12 on Article 11, ICESCR, E/C.12/1995/5 CESCR.

¹⁸⁷ The *Limburg Principles* are not legally binding, although they are highly persuasive

must be based on the sovereign equality of States,¹⁸⁸ and Article 11 ICESCR refers to the fact that the realisation of rights and international cooperation should be based upon “free consent.” The CESCR in its General Comment 12 on Article 11, on the other hand, notes that State parties should take steps to protect the right to food in other countries, and to provide the *necessary* aid when required.¹⁸⁹ States must also ensure an equitable distribution of world food supplies in relation to need.¹⁹⁰ Alston has argued that these obligations can be interpreted to mean that States have a duty to avoid international policies which deprive other States of their means of subsistence or which promote an inequitable distribution of food supplies. It also implies a duty to mitigate national policies which promote inequality and to ensure that international trade works towards an equitable distribution of food.¹⁹¹ It can further be argued that States have a joint and individual responsibility to cooperate in providing disaster and humanitarian assistance in times of emergency, including to refugees, although each State is only obliged to contribute to this task in accordance with its ability.¹⁹² States in need are entitled to ask for assistance; developed States, however, are not individually obliged to make up the short-fall but must attempt to meet the assessed need, to the extent they can.

Many of these obligations have now been expressly recognised by the Committee on Economic, Social and Cultural Rights in a *sui generis* statement.¹⁹³ The Committee considers that those in a position to provide “international assistance and cooperation, especially economic and technical” to enable developing countries to fulfil their core obligations (under the Covenant) must do so. Such core obligations give rise to national responsibilities for all States party to the Covenant, and international responsibilities for developed States, as well as others that are “in a position to

¹⁸⁸ *Ibid.*, para. 33.

¹⁸⁹ General Comment 12, para. 36.

¹⁹⁰ Article 11(2)(b), ICESCR.

¹⁹¹ See Alston, “Human Right to Food” *supra* note 184, p.9.

¹⁹² *Limburg Principles*, para.38.

¹⁹³ CESCR, *Substantive Issues Arising in the Implementation of the ICESCR: Poverty and the ICESCR*, UN Doc E/C.12/2001/10, (2002) 9 *IHRR* 889. It is not a General Comment and there are no other statements similar to it.

assist”.¹⁹⁴ Core obligations are considered by the Committee to have a crucial role to play in international development policies. As it notes, “it is particularly incumbent upon those who can assist, to help developing countries to respect this international minimum threshold.[I]f an international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State parties.”¹⁹⁵

Although the exact legal significance of this statement is uncertain, it is in many senses an express consolidation and elaboration of the Covenant’s provisions and the Committee’s earlier General Comments. The Member States of the Union, therefore, as State parties to the Covenant, individually have a legal obligation to provide assistance under it to developing States and are obliged to work together and with others to avoid policies which lead to an inequitable global distribution of food. The fact that they may coordinate their action in response to such obligations through ECHO or the Commission is perfectly compatible with their obligations under the ICESCR. Despite the existence of these obligations, it is clear that while the Commission and ECHO consistently refer to the human rights nature of their work with regard to humanitarian aid, there is no reference to these legal obligations.¹⁹⁶ With regard to development, the right to food and humanitarian assistance, the Covenant is the clearest relevant set of legal obligations requiring the Member States of the Union to provide assistance to third States. The content of these obligations is not particularly clear.

3.3.2. The Obligation to Promote and Protect Democracy and the Rule of Law in Third States.

3.3.2 (a) Democracy.

¹⁹⁴ *Ibid.*, para. 16.

¹⁹⁵ *Ibid.*, para. 17.

¹⁹⁶ See Chapter Six.

The development and consolidation of democracy and the rule of law are objectives shared by both the CFSP and the Community's development cooperation policy. As far as its own Member States are concerned, the Union has, since the Copenhagen Declaration on Democracy of 1978, insisted that "respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Community."¹⁹⁷ In more recent years, significant amounts of capital and energy have been invested by the Union in ensuring the existence of liberal democratic States on its eastern and southern borders. If one accepts Slaughter's¹⁹⁸ argument that liberal democracies (compared to non-liberal ones): do not tend to engage in armed conflicts with one another; obey their international obligations; enforce agreements; are respected; and take the unpredictability factor out of international development projects and investment by multinationals, then the logic of such an approach is apparent.¹⁹⁹ A similar argument has also been forwarded by King who argues that the Union is convinced that liberal democracies will prove to be the most peaceful neighbours.²⁰⁰ As the Union and its Member States have contributed the most assistance to these States²⁰¹ and accounted for the vast bulk of trade, they had little choice but to accept conditions on the recognition of their statehood, which clearly added criteria which were then not broadly or generally accepted as prerequisites for statehood in customary international law.²⁰²

¹⁹⁷ (1978) 3 *Bull EEC* 5. The position for new prospective Member States is laid down in the Copenhagen Criteria, of the Copenhagen European Council of June 1993, (1993) 6 *Bull EC* 1.13. See further Novak, M., "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in, the EU" in Alston, P., Bustelo, M., and Heenan, J.(eds.), *The EU and Human Rights*, (1999) p.687 and Verhoeven, A., "How Democratic Need European Union Members Be? Some Thoughts After Amsterdam" (1998) 23 *ELRev.*, 217.

¹⁹⁸ Slaughter, A., "International Law in a World of Liberal States" (1995) 6 *EJIL*, 503.

¹⁹⁹ Crawford, J. "Democracy and the Body of International Law" (1993) 44 *BYBIL*, 113, note 1, comments, that while this may be broadly true for war it is not the case for covert action. See Marks, S., "International Law, Democracy and the End of History" in Fox, G., and Roth, B. (eds.), *Democratic Governance and International Law*, (2000) p.532 for an excellent critique of Slaughter.

²⁰⁰ King, T., "The European Community and Human Rights in Eastern Europe" (1996) *LIEI*, 93.

²⁰¹ See further Chapter Three.

²⁰² The traditional criteria for statehood do not include democratic institutions or respect for human rights or minority groups. See Warbrick, C., "Recognition of States-Part 2" (1993) 43 *ICLQ*, 433 and

As Tomaševski notes, whereas States have traditionally engaged in relations with one another on the basis of their ability to satisfy the criteria of statehood, some States are now increasingly passing judgment on whether they consider a particular regime to be legitimate or not.²⁰³ Whether a right to democratic governance currently exists or not and what its contents are, is controversial.²⁰⁴ Academic commentary can be found in support of rereading Article 2(4) of the UN Charter, in certain circumstances, to allow the unilateral use of force to restore democracy.²⁰⁵ Yet as Crawford notes, the invasions in Panama and Nicaragua were routinely condemned in the UN and OAS²⁰⁶ and as the ICJ noted in the *Nicaragua* case, there is no right for one State “to intervene”, in the affairs of another, simply because it has chosen a particular ideology or political system.²⁰⁷ Intervention and the use of force to restore democracy are only permissible where they are authorised by the Security Council, as in the case of Haiti.²⁰⁸

Discussion of the role and status of democracy in international law can be approached from whether such a right now exists and what its contents are or how international law should develop and respond to democracy as a norm? Claims for a right to democratic entitlement require that international rules judge the legitimacy of regimes

Denza, *Intergovernmental Pillars*, *supra* note 27, p.49 on how the Community and the Member States, in terms of competence, ensured “an immaculate fudge” by not distinguishing who proposed the new criteria.

²⁰³ Tomaševski, K., *Development Aid and Human Rights Revisited*, (1993) p.123. Also see Murphy, S., “Democratic Legitimacy and the Recognition of States and Governments” (1999) 48 *ICLQ*, 545.

²⁰⁴ The seminal article is Franck, T., “The Emerging Right to Democratic Governance” (1992) 86 *AJIL*, p.46. Fox and Roth, *Democratic Governance*, *supra* note 199, contains an excellent collection of essays, many of which are critical of Frank’s argument.

²⁰⁵ See for differing views, D’Amato, A., “The Invasion of Panama Was a Lawful Response to Tyranny” (1990) 84 *AJIL*, 37, Reisman, “Sovereignty and Human Rights” *supra* note 50 and Byers, M., and Chesterman, S., “You the People: Pro Democratic Intervention in International Law” in Fox and Roth, *Democratic Governance*, *supra* note 199, p.259.

²⁰⁶ Crawford, J., “Democracy and the Body of International Law” in Fox and Roth, *Democratic Governance*, *supra* note 199, p.106.

²⁰⁷ *Nicaragua* case, *supra* note 46, paras.102-110 and 265.

²⁰⁸ Security Council Resolution 940 of 1994.

and that democracy is essential in domestic law.²⁰⁹ Relations between those States which are most keen on the promulgation of a right to democratic governance and non-democratic regimes, however, are far from consistent.²¹⁰ The Union Member States, for example, have friendly relations with, among others, Saudi Arabia, Dubai, Kuwait, Bahrain, Singapore, China and Musharaff's regime in Pakistan; illustrating that democracy, or the lack of it, is sometimes an ideological weapon in inter-State relations. For many States, democracy or its absence in other States plays little or no real role in determining relations between them, as it is perceived as being part and parcel of a State's internal affairs. The inconsistent practice of some States does not, however, necessarily undermine the evolution of a norm at the international level. For example, the UN Commission on Human Rights in 1999 adopted a "Resolution on the Promotion of Democracy" by 51 votes to 0 which reaffirmed that democracy is important for the protection of other rights, although it made no reference to a "right to democratic governance" itself.²¹¹

The traditional view in international law has clearly been that it has no business with domestic constitutional issues and the formation of government. Fox and Roth note, however, that since the events of 1989-1991, international law has begun to address the issue.²¹² There clearly has been a major shift in practice, for example, self-determination now plays a more significant role in questions of recognition than was the case in the past.²¹³ Not only have international tribunals dealing with human rights issues begun to stress the importance of democracy for the protection of human rights²¹⁴ but international declarations have continually affirmed that "democracy

²⁰⁹ Marks, "International Law" *supra* note 199, p.546.

²¹⁰ For EU practice see Chapter 4 and more generally Youngs, R., *The European Union and the Promotion of Democracy*, (2001).

²¹¹ CHR 1999/57, "The Promotion of the Right to Democracy". For discussion see Fox, G. and Roth, B., "Introduction" in Fox and Roth, *Democratic Governance*, *supra* note 199, p.1, 3.

²¹² *Ibid.*, p.1.

²¹³ See further Crawford, J., "Democracy in International Law-A Reprise" in Fox and Roth, *Democratic Governance*, *supra* note 199, p.114.

²¹⁴ See for example the Human Rights Committee's General Comment 25, 12/07/96 and also the decision of the European Court of Human Rights in *United Communist Party of Turkey v. Turkey*, (1998) 26 EHRR 121, para.45.

fosters the full realisation of all human rights and vice versa”.²¹⁵ The Commission on Human Rights, for example, has urged the:

“continuation and expansion of activities carried out by the United Nations system, other intergovernmental and non-governmental organisations and Member States to promote and consolidate democracy within the framework of international cooperation and build a democratic political culture through the observance of human rights, mobilisation of civil society and other appropriate measures in support of democratic governance.”²¹⁶

The General Assembly has also adopted a number of different resolutions concerning democracy and electoral assistance. One of the first of these resolutions is entitled “Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in their Electoral Process” which declares very clearly that:

“any...attempt, directly or indirectly, to interfere in the free development of national electoral processes, in particular in the developing countries, violates the spirit and letter of the principles enshrined in the Charter and in the Declaration on the Principles of International Law Concerning Friendly Relations and Corporation Amongst States in Accordance with the Charter of the United Nations”.²¹⁷

Another resolution entitled “Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratisation” commends the assistance that has been provided to States and requests that further post-election assistance be provided to requesting States in order to sustain the electoral process.²¹⁸ The basic sentiment of the resolutions is that States or international organisations may provide assistance for the electoral process, if they are so requested, but must not interfere in the development of that process, in particular, in developing countries.

Democracy can be seen as being compatible with respecting all five types of rights: economic, social, cultural, civil and political. The implementation of democratic

²¹⁵ CHR 1999/57.

²¹⁶ *Ibid.*, para.4.

²¹⁷ A/RES/52/119.

²¹⁸ A/RES/52/129.

institutions is in itself also an exercise of various rights. The holding of fair elections, for example, is seen to contribute to the fulfilment of the right to political participation as found in Article 25 of the ICCPR.²¹⁹ While democracy may be conducive to the protection of human rights it is not essential or indeed sufficient. Questions concerning the arbitrary exercise of power or even majority rule, in particular, where political parties are defined along ethnic or religious lines, would still need to be addressed. In majoritarian democracies, for example, discrimination may be rife.²²⁰ The existence of democratic institutions and the protection of human rights are not necessarily synonymous.

The EC Treaty and the CFSP, as stated above, also set as a policy objective the promotion and consolidation of democracy in dealings with all States. The perceived importance of the role of democracy in the development context is, however, more advanced than its evolution as a general normative value. Various international organisations, such as the UN and European Union, have emphasised the importance of democracy not only as a condition for the respect for human rights, as discussed above, but also because it is conducive to the development of the State in question as opposed to a right *per se*.²²¹ The European Commission has noted on numerous occasions that “developing States can only develop and reduce poverty where functioning democracies and accountable governments are in power.”²²² The OECD has also placed a great deal of stress on the fact that democracy and good governance are central to the achievements of the development goals of the 21st century.²²³ A lack of democracy is thus seen to be fatal to the development process. Conflicts between ethnic groups, for example, arguably often break out due to a lack of

²¹⁹ Article 3 of the First Protocol to the ECHR and Article 13 of the African Charter are narrower in scope.

²²⁰ Israel is a classic example of this. See for example, the Concluding Observations of CERD CERD/C/52/Misc.29 and further Chapter Five.

²²¹ Although see the regular resolutions adopted by the Commission on Human Rights which seem to emphasise all aspects of democracy, for example CHR 2002/46 “Further Measures to Promote and Consolidate Democracy”.

²²² COM (2001)252, p.4.

²²³ See OECD, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance*, (1997).

democratic representation within domestic institutions. Thus if States and organisations are to assist others in the development process, it is on the basis that democratic institutions exist and the mechanisms are in place to ensure that grievances of such a nature can be redressed. Clark, for example, has argued that what has happened in Eastern Europe and in Latin America is the realisation that human rights and democracy are not luxuries, nor are they the result of being developed or wealthy, but conditions which make wealth develop.²²⁴

It can be appreciated that liberal democracies may prefer to deal with other democratic States, as opposed to totalitarian ones.²²⁵ However, the basis for the connection between democracy and development, and this is limited only to the Community's development cooperation policy, is the argument that democracy assists the development process and thus benefits the population. The perception seems to be that human rights will be respected and this will also lead, over a period of time, to wealth creation within the State itself. Democratic States are also seen as being less prone to civil strife and are less likely to slide into civil conflict.²²⁶ While this approach may have an intrinsic appeal, it is questionable whether it is correct. A number of Asian States, such as Malaysia, Singapore and China have developed rapidly without the presence of democratic institutions but due to the implementation of sound economic policies. Political credibility, as opposed to democratically held elections, is certainly a factor in how a State develops. Multinational corporations are far more likely to invest, as economic studies show, in countries which implement sound fiscal policies and where institutions have credibility as opposed to those which are democratic and lack such credibility or where corruption at all levels is rife. As investment from multinational corporations outweighs development assistance by a ratio of approximately five to one, it is these factors which are far more important for the economic development of the State than democracy itself.²²⁷

²²⁴ Clark, J., "Human Rights and Democratic Development" in Mahoney, K., and Mahoney, P. (eds.), *Human Rights in the Twenty First Century*, (1993) p.683.

²²⁵ It is always worth noting the distinction between totalitarian and authoritarian States.

²²⁶ See Chapter Three.

²²⁷ See, for example, Borner, S., Bunetti, A., and Weder, B., *Political Credibility and Economic Development*, (1995) p.62.

As noted above, democratic States may ideologically prefer to cooperate with other democracies but in practice they have no hesitation in dealing with non-democratic regimes, or seeing election results set aside, when they perceive it to be in their interests. Events in Algeria are a classic example of this. In the context of the thesis, Denza has noted that the Union lacks any international legal basis for imposing democracy on non-Member States.²²⁸ States may assist each other in the development and consolidation of democracy but it is essential that this must not amount to interference within their internal affairs. Democracy as a right *per se* is not yet established in international law at most it is *lex ferenda*. Democracy as a right, as protected in multilateral treaties, is only a procedural one. For it to be substantively effective it must be accompanied by the rule of law. Without it, procedural democracy in real terms means little to the average person. It is probably for this reason that both the EC and EU treaties refer to the consolidation and development of both democracy and the rule of law.

3.3.2 (b) The Rule of Law.

As with democracy, the rule of law is seen as being of most importance, in its promotion, in developing States. The *World Development Report* as published annually by the World Bank, for example, has consistently recognised and affirmed that establishing the rule of law is one of the five “fundamental tasks” which governments must perform in the pursuit of development.²²⁹ The reports emphasise a number of functions which governments must fulfil in order to support the rule of law: providing a set of rules which are known in advance and which are actually implemented as opposed to simply existing on the statute book; the equal and consistent application of those legal rules; a judicial system which is reasonably effective and impartial in the resolving of disputes between parties; and a clear process by which rules and procedures are amended to avoid abuse.²³⁰ Many of these

²²⁸ Denza, *Intergovernmental Pillars*, *supra* note 27, p.89.

²²⁹ World Bank, *World Development Report*, (1997) p.4. Also see Kennedy, D., “Laws and Developments” in Hatchard, J., and Perry-Kessaris, A., *Law and Development*, (2003) p.17.

²³⁰ For the link between poor laws and law enforcement see Sherwood, R., Shephard, G., and Marcos de Sousa, C., “Judicial Systems and Economic Performance” Special Issue (1994) 34 *Quarterly*

criteria also overlap with the concept of “good governance” which is a “fundamental element” of the Cotonou Agreement.²³¹ Good governance is perceived to include support for the rule of law by providing: assistance to improve and reinforce the legal, judicial and enforcement systems; strengthening public sector management; controlling corruption; reducing excessive military expenditure; and promoting and defending human rights by adherence to internationally agreed principles.²³² The OECD, like the World Bank, now places a great deal of stress on the fact that democracy, good governance and the rule of law are central to the achievements of the development goals of the 21st Century.²³³ Invoking and ensuring respect for the rule of law as well as implementing policies concerned with good governance, are undeniably among the most difficult aspects of reform which any State can undertake. As noted above, it is a widely held belief in development circles that the rule of law will help to eradicate corruption and this is of benefit to the development process.²³⁴ It is controversial, however, how beneficial, in development terms, it actually is to eradicate corruption.²³⁵

The essential question we are concerned with, however, is the extent to which international legal rights or obligations exist, requiring States to not only respect the rule of law but also to promote it.²³⁶ The rule of law is essential to the protection of other rights. Furthermore, as noted above, democracy in the procedural sense is only meaningful if it is accompanied by the rule of law. If it is part and parcel of

Review of Economics and Finance, 101. A lack of effective institutions can also hamper economic development see, De Soto, H., *The Other Path*, (1989) and *The Mystery of Capital*, (2000).

²³¹ In the context of developing countries see further, Faundez, J.(ed.), *Good Government and Law: Legal and Institutional Reform in Developing Countries*, (1997).

²³² See Ginther, K., Denters, E., and de Waart, P.(eds.), *Sustainable Development and Good Governance*, (1995) p.20 for more on the notion of good governance in the context of development cooperation. The list here is based upon regularly cited features of good governance derived from the reports in, *supra notes* 223 and 229.

²³³ See OECD, *Report of the Working Group*, *supra note*, 223.

²³⁴ See Kennedy, “Laws as Development” *supra note* 229, p.23

²³⁵ *Ibid.*

²³⁶ Article 8, ACHR; Article 7, Banjul Charter; Article 6, ECHR; and Article 14, ICCPR, to the extent that they cover the rule of law, do not impose obligations for the promotion of the concept in third States.

democracy, then the rule of law should be seen as a component of it. If it is seen as separate but probably related to democracy, it is difficult to see States being obliged to comply with the rule of law outside of the treaty obligations they have undertaken. There is certainly no general legal obligation for it to be promoted in third States.

4. Conclusions.

The promotion of certain ethical values in foreign policy requires serious consideration of numerous issues if it to be pursued in a meaningful manner. It requires the balancing of different, at times competing, interests. The promoters of such values are in a stronger moral position if they themselves comply with the standards they espouse for others. In a recent Commission Communication, for example, it was argued that the European Union's moral and political authority to engage in such practices stemmed from the fact that "the EU and all its Member States are democracies espousing the same policies both internally and externally".²³⁷ Ethical policies are a part of "enlightened self-interest" and worth pursuing but without consistency and uniform application have little credibility in third States.

In terms of legal obligations, it is clear that international law does give rights and impose obligations upon States, and in some instances the organisations they have established, to act in certain limited circumstances. There are also legal limits as to how those values should be promoted in third States. Most of the law in this field, however, is uncertain or controversial. It is difficult to determine, in specific cases what is required or prohibited. The law is, however, evolving so as to limit the "protection" provided by the principle of "domestic jurisdiction" and strengthen the possibilities of international support for the enforcement of certain norms. International society is undergoing a paradigmatic shift, where interests such as human rights and democracy will further limit State sovereignty, but it has almost certainly not yet reached its destination.

²³⁷ COM (2001)252.

Chapter Three

Ethical Values and the International Relations of the Union and Community: Competence and Practice.

1. Introduction.

This chapter aims to assess the competence of the Community and Union to promote human rights, democracy and other ethical values in third States.¹ As systems based upon the conferral of powers, the Community and Union are only competent to act where powers have been transferred to them.² The first part of the chapter examines the relationship between the Union and Community and the instruments through which they pursue their foreign policy objectives. The remainder of the chapter adopts a thematic approach to competence and examines how it has been used in practice. The discussion is focused on those aspects of practice which are most relevant to relations between the Union and developing States.

¹ The discussion does not deal with the relationship between the Community/Union and international organisations.

² Articles 5 EC and TEU. This principle can be found in Article I-9, I-11, I-12 and I-13 of the Draft Constitution (DC). As Macleod, I., Hendry, I., and Hyett, S., *The External Relations of the European Communities*, (1996) p.38 state, the legally correct question is actually "...whether one of the objectives of the Treaties would be attained by the measures proposed, and whether adoption of such measures would be consistent with the procedures envisaged in the Treaty, in conformity with any conditions imposed by the Treaties...and with other principles of Community law."

2. The Relationship Between the Union and Community and the Instruments Available for Implementing an Ethical Foreign Policy.

2.1. The Relationship Between the Component Parts of the Union.³

Article 1 TEU states that the Union is founded on the European Communities. The Union is built upon the foundations laid by the Communities but it is not confined to them. Whether the structure of the Union is considered to be a Greek temple, a cathedral or a layered organisation,⁴ it is clear that there is a significant overlap between the objectives of the Communities in relation to third States and those of the CFSP; which are defined in broader and less precise terms. In public international law, in such circumstances, the more specialised body should carry out its functions and not cede its powers to the more general institution of which it is a part.⁵ The CFSP's objective of international cooperation, for example, can encompass or at least encroach upon the development cooperation competence of the Community.⁶ Neither

³ See more generally, among others, Denza, E., *The Intergovernmental Pillars of the European Union*, (2002), Isaac, G., "Le 'Pilier' Communautaire de l'union Europe, Un 'Pilier' Pas Comme Les Autres" (2001) 37 *CDE*, 45, Baratta, R., "Overlaps Between European Community Competence and European Union Foreign Policy Activity" in Cannizzaro, E.(ed.), *The European Union as an Actor in International Relations*, (2002) p.51 and Cremona, M., "The Common Foreign and Security Policy of the European Union and the External Relations Powers of the European Community" in O'Keefe, D., and Twomey, P.(eds.), *Legal Issues of the Maastricht Treaty*, (1994) p.247.

⁴ See, among others, de Witte, B., "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?" in Heukels, T., Blokker N., and Brus, M.(eds.), *The European Union After Amsterdam*, (1998) p.51, von Bogdandy, A., and Nettesheim, M., "Ex Pluribus Unum: Fusion of the European Communities into the European Union" (1996) 2 *ELJ*, 267, Wessel, R., "The Constitutional Relationship Between the European Union and the European Community: Consequences for the Relationship with the Member States" *Jean Monnet Working Paper 9/03*, Schroeder, W., "European Union and European Communities" *Jean Monnet Working Paper 9/03* and Curtin, D., and Dekker, I., "The EU as a "Layered" International Organisation: Institutional Unity in Disguise" in Craig, P., and de Búrca, G.(eds.), *The Evolution of EU Law*, (1999) p.84.

⁵ See, for example, Advisory Opinion, *Legality of the Threat or Use of Nuclear Weapons*, (1996) *ICJ Reports*, 226, para.29.

⁶ Article 11 TEU.

the TEU nor EC Treaty, however, provides much clear guidance on the nature of the relationship between the Union's constituent parts, although the TEU does require consistency between their activities.⁷

Article 2 TEU requires the Union to assert its identity on the international scene, in particular, through the CFSP. Article 11 TEU furthermore states that the CFSP, "will cover all aspects of foreign and security policy". If Community competence is to remain intact, as Article 47 TEU states, then the differing character and nature of cooperation requires that the powers being exercised under the different legal orders should be defined as such. Where the Community is exercising its development cooperation competence this needs to be distinguished from action taken under the CFSP more generally. All external competences are not exclusively within the scope of the latter, even though the Council when acting under the second pillar and defining policies with regard to a particular country has on occasion defined all areas of foreign policy.⁸ It is not necessary to take the approach forwarded by Wessel, however, who considers that any indistinctiveness in cases of overlap should be resolved to the benefit of the Community.⁹ It is simply the case that a distinction should be maintained which is based upon the purpose and function of the legal base to determine its scope. Competence under the CFSP is different in nature from that under the Community. The different instruments, for example, reflect the different scope and objectives of the acts. The manner in which some actions are financed in practice, however, does add to the fusion between the CFSP and the external relations of the Community. Foreign policy while remaining largely intergovernmental in nature is increasingly being financed through the first pillar.¹⁰ This still does not justify a failure to distinguish between the sources of competence.

Some of the difficulty in defining the relationship between the CFSP and Community results from the failure of the Intergovernmental Conferences to provide the ECJ with jurisdiction over decisions taken by the European Council/Council where they do not

⁷ Article 3 TEU.

⁸ See *infra*.

⁹ Wessel, R., *The European Union's Foreign and Security Policy: A Legal Institutional Perspective*, (1999) p.14.

¹⁰ Election monitoring is a typical example, see *infra*.

utilise Community procedures.¹¹ The ECJ has, however, ensured that Community procedures and institutions are not circumvented. In the *Airport Transit Visas* case¹² the Court held that it did have jurisdiction to determine the scope of a measure adopted under what were then the Justice and Home Affairs (JHA) provisions of the TEU. This was not because it had jurisdiction over such acts but so that it could determine whether a provision of the EC Treaty should have formed the legal basis instead.¹³ Although Articles 230 and 234 EC grant the Court jurisdiction only over acts adopted under the EC Treaty,¹⁴ the Court may state that a Community legal base should have been used, which is a *de facto* declaration of illegality. It is only in instances in which the Community has exclusive competence that the Council must not encroach upon its powers. If the Member States enjoy shared competence, the choice is theirs as to how they exercise it. In the context of development cooperation and humanitarian aid, for example, it is perfectly possible for both the Community and the Member States, unilaterally or through the CFSP, to exercise their competence.¹⁵

What the Court did not address in the *Airport Transit Visas* case, however, was the question of whether the boundaries between the pillars are movable and the role that subsidiarity could play in that determination? Denmark essentially raised this argument in its submissions to the Court. The Advocate General dealt with it but

¹¹ For discussion of the approach adopted by the DC and some of the problems associated with it see, House of Lords European Union Committee, *The Future Role of the European Court of Justice*, 6th Report, (2004) p.30.

¹² Case C-170/96, *Commission of the European Communities v. Council of the European Union* [1998] ECR I-2763.

¹³ See paras.[16]-[17].

¹⁴ For confirmation of this see, Case C-167/94, *Criminal Proceedings Against Juan Carlos Grau Gomis and Others*, [1995] ECR I-1023, para. 6.

¹⁵ See Cases C-181/1991 and 248/1991, *European Parliament v. Council of the European Communities and Commission of the European Communities*, [1993] ECR I-3685 (the *Bangladesh* case) and Case C-316/1991, *European Parliament v. Council of the European Union*, [1994] ECR I-625 (the *EDF* case). Eeckhout, P., *External Relations of the European Union: Legal and Constitutional Foundations*, (2004) p.151, however, argues that the CFSP should only cover those aspects of foreign policy in which the Community does not have competence.

dismissed the issue without providing clear reasoning.¹⁶ The Court and the Advocate General probably did not feel that this matter was central to the case before them. There is in principle no reason, however, why some of the non-exclusive powers currently exercised by the Community cannot, at some stage, also be exercised by the Member States under the CFSP.

The *Airport Transit Visas* case confirms that the Court may determine if acts adopted by the Council outside of the Community Treaty should have been based on EC powers and polices the boundaries of its jurisdiction. The Court has ensured that the Member States do not circumvent the Community by resorting to other aspects of the Union. A great temptation for the Member States to rely on the CFSP, instead of on the Community, is the fact that they will have more control over any action taken. The conclusion that can be drawn is that the relationship between the CFSP and Community cannot be precisely described even though the Union has been in existence for over a decade.

2.2. Union and Community Instruments Relevant to the Pursuit of Ethical Values in Third Countries.

2.2.1. Union Instruments.

2.2.1.(a). Common Strategies.

The aim of common strategies is to enhance the coherence of the Union's international action. Such measures should be adopted by the European Council where the Member States have important interests in common.¹⁷ Common strategies do not have to develop a new approach to a particular country or region but may build upon pre-existing arrangements and coherently present in one document the

¹⁶ See para.[9] of his Opinion.

¹⁷ Article 13 TEU.

objectives, interests and priorities of the Union and Member States.¹⁸ Common strategies are decided upon unanimously by the European Council and though they are usually implemented by joint actions and common positions, they may require action to be taken under any of the pillars or by the Member States. As Dehousse notes, however, even if a common strategy is adopted, this does not guarantee a smooth process of implementation. Member States may contest that proposed joint actions and common positions do not fall within the framework of the common strategy or that they relate to another topic.¹⁹ The Court does not have jurisdiction to settle such disputes. The common strategies adopted by the Cologne European Council on Russia,²⁰ the Helsinki European Council on the Ukraine²¹ and the Feira European Council on the Mediterranean²² all illustrate that the promotion of human rights, fundamental freedoms, the rule of law and democracy will form part of the Union's strategy towards those countries or regions.²³ The common strategies commit the Union to respect the separation of powers between the CFSP and Community.²⁴ They do nothing, however, to help demarcate that separation of powers. One of the problems with these strategies is that there is some doubt as to the exact nature of the legal obligations they impose.²⁵ In practice, however, common strategies contain few, if any, precise commitments; which are rather found in the joint actions and common positions adopted to implement such strategies.

¹⁸ See, for example, para. 4, 2000/458/CFSP, Common Strategy of the European Council of 19 June 2000 on the Mediterranean Region, OJ L 183, 22/6/2000 p.5.

¹⁹ Dehousse, F., "After Amsterdam: A Report on the Common Foreign and Security Policy of the European Union" (1998) 9 *EJIL*, 525.

²⁰ 1999/414/CFSP, Common Strategy of the European Union of 4 June 1999 on Russia, OJ L 157, 24/6/1999 p.1.

²¹ 1999/887/CFSP, European Council Common Strategy of 11 December 1999 on Ukraine, OJ L 331, 23/12/1999 p.1.

²² *Supra* note 18.

²³ Mediterranean Common Strategy, para. 14; Ukrainian Common Strategy, para. 10; and Russian Common Strategy, para. 1.

²⁴ Para. 24 of the Mediterranean Common Strategy, for example, states: "[t]his Common Strategy shall be implemented by the EU institutions and bodies, each acting within the powers attributed to them by the Treaties, and in accordance with the applicable procedures under those Treaties."

²⁵ For discussion see Pagani, F., "A New Gear in the CFSP Machinery: Integration of the Petersburg Tasks in the Treaty on European Union" (1998) 9 *EJIL*, 737 and Denza, *Intergovernmental Pillars*, *supra* note 3, p.140.

2.2.1.(b). Common Positions and Joint Actions.

According to Article 12 TEU, common positions and joint actions are the only instruments that can be adopted under the CFSP to give effect to common strategies. In practice, the Council has also occasionally adopted “decisions” as referred to in Article 13(3) TEU. Joint actions, common positions and decisions can also be used independently of a common strategy to introduce, implement or amend policy vis-à-vis a third country, a group of countries or region. All such measures impose a legal obligation upon the Member States to comply with them.²⁶ Articles 14 and 15 TEU, which provide for the adoption of joint actions and common positions respectively, do not provide for any hierarchy between them. The Treaty adopted at Maastricht did not explain when one should be used in preference to the other. Article 14 TEU now states that, “[j]oint actions shall address specific situations where operational action by the Union is deemed to be required.” Common positions are the more general measure which define, “the approach of the Union to a particular matter of geographical or thematic nature.”²⁷ The choice as to whether a joint action or common position should be adopted is, generally speaking, within the discretion of the Council and it has not always followed the guidelines in Articles 14 and 15 TEU.²⁸ Common positions, for example, have routinely been used to reduce economic and financial relations with third countries or, for example, to impose arms embargos.²⁹ They have also, on occasion, been partly used as an instrument by which to condemn a third State.³⁰

²⁶ See, in particular, Articles 14(3) and 15 TEU.

²⁷ Article 15 TEU.

²⁸ See Denza, *Intergovernmental Pillars*, *supra* note 3, p.151.

²⁹ For examples, see the regularly updated list issued by the Council entitled “Liste des mesures négatives appliquées par l’union a l’égard de pays tiers”.

³⁰ See, for example, 95/515/CFSP, Common Position on Nigeria, OJ L 298, 11/12/1995 p.1 which is very notable in this respect.

Joint actions have, on the whole, been more specific in their content and concentrated on operational issues.³¹ On numerous occasions, as noted above, however, the Council has also used decisions - usually to implement, amend or give further effect to the detail of a common position or a joint action already adopted.³² The Council, after the Amsterdam amendments, also has a specific power under Article 18(5) TEU to appoint a Special Representative with a mandate in relation to particular policy issues. This provision reflects pre-existing practice. Such representatives have usually been appointed by joint actions but have, on occasion, had their mandate terminated by decisions.³³ The work of the Special Representatives is primarily of a diplomatic nature.³⁴

A potential problem in preparing legally binding measures to implement the CFSP is finding common ground between the Member States. The need for negotiation and compromise between the Member States may also slow the decision-making process down. In terms of an ethical foreign policy, what is especially problematic is the fact that the Member States have differing approaches to the promotion and protection of ethical values in third States. The strategic, security, material and economic interests, historical allegiances and animosities as well as the priorities of the Member States differ. Finding an approach which is acceptable to all and as effective as possible in the circumstances will rarely be straightforward.

Joint actions, common positions and decisions, however, also have their advantages. An agreed position and policy by 25 States is potentially far more effective than unilateral measures by a solitary one. Heavyweight foreign policy players, such as France, Germany and the UK often have substantial influence in their relations with

³¹ See Eeckhout, *External Relations*, *supra* note 15, p.401 for examples.

³² See, for example, Council Decision 1999/75/CFSP, OJ L 23, 30/1/1999 p.5 and more generally Denza, *Intergovernmental Pillars*, *supra* note 3, p.151.

³³ The seven current Special Representatives have all been appointed by Joint Actions. Ten former Special Representatives were also appointed by Joint Actions except Panagiotis Roumeliotis, who was appointed by Council Decision 1999/361/CFSP, OJ L 141, 4/6/1999 p.1. The mandate of Felipe González was extended by Council Decision 1999/75/CFSP, OJ L 23, 30/1/1999 p.5 although it was terminated by a Joint Action, 1999/665/CFSP OJ L 264, 12/10/1999 p.2.

³⁴ See the discussion in Chapter Five.

third States and the value of collective action by them, along with others, in persuading States to amend their behaviour is substantial. A joint approach is also useful if such action is unpopular in the third country or region targeted, as the burden of any retaliatory action will be shared by all of the Union's Member States.

2.2.1.(c). Diplomatic and Other Non-Legally Binding Measures.

In some cases legally binding measures are either not appropriate or cannot be adopted. For these reasons the Union also uses classic instruments of diplomacy, such as declarations, statements and démarches. Démarches are usually carried out by the Presidency or by the Troika. Although it is difficult to ascertain exactly how many démarches are delivered annually, their frequency indicates that they are considered to be an invaluable tool. Approximately 100 démarches were delivered in 1986.³⁵ The number is now substantially higher.³⁶ Démarches take a number of forms. They can be either: completely confidential; confidential in part; initially confidential in part or full and then later published; or published in full when the démarche is made. The advantage of confidential démarches is that a particular case or situation can be discussed at the appropriate level with the State in question, with no public loss of face. Confidential démarches are made if there is a danger that publicity will damage or harm the interests of a particular individual. Public démarches concerned with an individual are very sensitive and relatively rare, usually only being issued in instances involving high profile individuals.³⁷ Démarches which are concerned with a particular situation tend to be public, as there is usually no direct individual interest and often public interest in the Union taking action. States rarely, if ever, respond to démarches dealing with human rights issued by the Union. In

³⁵ See OJ C 86, 2/11/1986 p. 137.

³⁶ The *1998 Annual Report of the CFSP*, (1999) npg, refers to 138 being made. In the 2002 Report, no number is given but each démarche which is not completely confidential is listed, there are approximately 200, *2002 Annual Report of the CFSP*, (2003) p.78.

³⁷ For example, the initiation of proceedings by Malaysia against UN Special Rapporteur Cumaraswamy, led to named démarches being delivered by the Union, démarche of 11/8/1999 cited in *1998 Annual Report of the CFSP*, npg.

terms of their content, démarches mostly deal with civil and political rights issues and there is only occasionally reference to the legal obligations a State may have breached.³⁸

The Presidency on behalf of the Union and the European Council also routinely issues declarations and statements, either unilaterally or in multilateral fora, on notable events in many third States.³⁹ Declarations and statements are usually used to condemn certain practices and situations or to commend developments. The wording of statements and declarations is a product of compromise and negotiation. As a consequence of the unanimity rule, declarations and statements require formulation of a form of wording acceptable to all of the Member States. In multilateral fora, whether declarations or statements can be issued is often determined by the agreed agenda. In the annual sessions of the United Nations Commission on Human Rights, where only a relatively brief opportunity exists, the EU is now compiling an annual volume of its views on the human rights situation in third States to supplement its oral statements.⁴⁰ Whereas the Presidency or Council may be tempered by diplomatic constraints, in particular, when criticising third States, the European Parliament which adopts many resolutions on third States, tends to be much more forthright in its criticism.

The implementation of an ethical foreign policy requires that issues such as human rights, the rule of law and democracy are introduced into the political dialogue that exists with third States. Political dialogue takes place in a number of different fora. An Agreement between the Community and a third State usually establishes an

³⁸ Kamminga, M., *Inter-State Accountability for Violations of Human Rights*, (1992) p.29 argues that as far as démarches on human rights are concerned little reference is made to law, as the obligations in question are usually uncertain and thus it is more credible to refer to morality. With regard to démarches on other issues, reference to the law is much more common.

³⁹ Statements and declarations differentiate between who is issuing them. In 2002, a total of 204 declarations and statements were issued, see *2002 Annual Report of the CFSP*, (2003) p.77.

⁴⁰ This can be found at http://europa.eu.int/comm/external_relations/human_rights/doc/uncom58.pdf for 2002. The Union and its Member States also regularly make statements in the relevant Committees of the General Assembly and other bodies, such as ECOSOC, concerning human rights and the political situation in third States.

institutional framework for such discussion.⁴¹ This is especially the case if it contains an “essential elements” clause, which gives legitimacy and focus to such discourse.⁴² Dialogue also takes place between the Union and third States in the absence of formal treaty relations or outside any institutional framework. Although they are not entitled to perform the full range of diplomatic functions, the Communities have established over 140 Commission delegations in third States.⁴³ It is also common practice for the majority of third States to send ambassadors to the Union and establish diplomatic missions in Brussels.⁴⁴ Diplomatic relations between the Union and third States are well established in practice and can be used to commence a political dialogue on, among other things, ethical values. The Council can also appoint Special Representatives to be a part of such dialogues.⁴⁵ The fora can be multilateral or bilateral in nature.⁴⁶ An example of the former is the Union’s participation in the Middle East Peace Process as a member of the *Quartet*.⁴⁷ The Union’s political dialogue with Iran and China is bilateral in nature. The EU has no contractual relations with Iran. Further to the Commission’s Communication of 2001,⁴⁸ relations between the parties have improved and a trade and cooperation Agreement may be concluded at some stage in the future. The political dialogue, an integral part of this improvement in relations, has concentrated on: terrorism; nuclear proliferation; reform of the political process including progress towards democracy; and protection of human rights.⁴⁹ The dialogue with China, on the other hand, was initiated in 1996,

⁴¹ See further the discussions in Chapters Four and Five on political dialogue in practice.

⁴² See, *infra*.

⁴³ Article 20 TEU does not confer any competence in this regard. See the External Services Directory at http://europa.eu.int/comm/external_relations/repdel/index_rep_en.cfm and further Denza, *Intergovernmental Pillars*, *supra* note 3, p.164 and Macleod, Hendry and Hyett, *External Relations*, *supra* note 2, p.208.

⁴⁴ *Ibid.*

⁴⁵ Article 18(5) TEU.

⁴⁶ With mixed Agreements, one side will be composed of the Community and its Member States.

⁴⁷ See further Chapter Five.

⁴⁸ COM (2001) 071.

⁴⁹ The conclusions of the General Affairs and External Relations Council on Iran, since the adoption of the 2001 Communication have consistently referred to these issues, although it is difficult to know what emphasis has been placed upon them in the actual political dialogue. See

in the absence of existing or envisaged treaty relations establishing an institutional framework for discussion of human rights.⁵⁰ It forms part of a more general strategy towards closer relations.⁵¹

Until the end of 2001, however, there were no guidelines as to when ethical issues should be raised in political dialogue or in which fora.⁵² The Council addressed this by adopting the EU Guidelines on Human Rights Dialogue in December 2001,⁵³ seeking to integrate human rights and democracy into all aspects of relations with a third country. The Guidelines state that a specific human rights dialogue can be initiated for any issue of concern.⁵⁴ Torture and the death penalty, however, are a part of all dialogues and have their own separate guidelines.⁵⁵ The general obligation to initiate a human rights dialogue in the 2001 Guidelines is extremely vague and based upon political expediency, rather than consistency. Any human rights dialogue must define the practical aims to be achieved as well as the added value to be gained. A “degree of pragmatism and flexibility” is an inherent part of the process.⁵⁶ While the assessment and any decision to initiate such a dialogue requires the agreement of the Council Working Party on Human Rights (COHOM), the final decision to initiate it lies with the Council of Ministers.⁵⁷ The objectives to be pursued and the issues to be covered will vary from one dialogue to the next and will be defined on a case by case

http://www.europa.eu.int/comm/external_relations/iran/intro/gac.htm#iran130502 for extracts of the Council debates and Conclusions.

⁵⁰ Agreement on Trade and Economic Cooperation between the European Economic Community and the People’s Republic of China, OJ L 250, 19/9/1985 p.1. This Agreement was complemented in 1994 and 2002 by an exchange of letters, establishing a broad EU-China political dialogue. See further, Fierro, E., *The EU’s Approach to Human Rights Conditionality in Practice*, (2003) p.191.

⁵¹ See COMs (1995)279, (1998)191, (2001)265 and (2003)533.

⁵² Although right-specific dialogues did exist on the death penalty. See *infra*.

⁵³ EU Guidelines on Human Rights Dialogue, issued by the Council, 13/12/2001.

⁵⁴ *Ibid.*, para. 3.

⁵⁵ Guidelines to EU Policy Towards Third Countries on the Death Penalty, 3/6/1998; Guidelines to EU Policy Towards Third Countries on Torture and Other Inhuman or Degrading Treatment, 9/4/2001; and Declaration by the Presidency on Behalf of the EU on the Implementation of the Guidelines on Efforts to Prevent and Eradicate Torture, 11/12/2002.

⁵⁶ Guidelines on Human Rights, para. 3.

⁵⁷ *Ibid.*, para. 6. COHOM must work with geographical working parties, CODEV and the Committee on Measures for the Development and Consolidation of Democracy and the Rule of Law.

basis.⁵⁸ This built in flexibility is to be expected, to accommodate the different basis and nature of relationships with third countries. It is noticeable though that on the numerous occasions on which the Union has committed itself to consistency and coherence of action between institutions and policies, it has never explained how to achieve it between all third States.⁵⁹

The guidelines on torture and the death penalty mentioned in the previous paragraph are noteworthy because of their differing approach to legal obligations and competence. The torture guidelines expressly state that they only apply to the CFSP.⁶⁰ Yet, it is difficult to see why they cannot be part of the Community dimension as well. There is no obvious reason why the death penalty can be raised within Community competence but not torture. This is, in particular, the case as the prohibition on torture is an obligation *erga omnes*. The torture guidelines refer to numerous legal obligations which already bind the Member States⁶¹ whereas the death penalty guidelines refer to the fact that they are aiming to work “towards the progressive development of human rights”.⁶² In both instances, however, the notions of flexibility and pragmatism are built in.

2.2.2. Community Instruments.

The Community also has at its disposal a number of instruments to promote and protect ethical values in third States. In terms of external relations, one of the most important powers at its disposal is the ability to negotiate new Agreements or become a party to existing ones with States or international organisations. Article 281 EC

⁵⁸ *Ibid.*, paras. 4-5.

⁵⁹ See COM 2000 (212) for one example, from many.

⁶⁰ Guidelines on Torture, para.1. The others do not differentiate between the Community or CFSP dimension.

⁶¹ The Commission in 2002 also proposed a Regulation Concerning Trade in Certain Equipment and Products Which Can be Used for Capital Punishment, Torture or Other Cruel, Inhuman and Degrading Treatment. See COM (2002) 770. It has not yet been adopted.

⁶² *Ibid.*

expressly confers legal personality upon the Community.⁶³ The Community is now a party to a wide variety of Agreements with third States and organisations. Their scope and whether or not they are mixed in nature, is determined by the Community's competence. Any Community Agreement must be based upon both the relevant paragraphs of Article 300 EC, which sets out the procedural steps to be followed, and those Treaty articles which confer substantive competence to act. Numerous Treaty provisions, such as Articles 133, 149, 151, 174, 181, 181a, 308 and 310 EC provide that competence. The Community is a party to treaties which can be broadly classified as Association, Cooperation and Sectoral Agreements.⁶⁴ The Community can also adopt unilateral measures which assist in its pursuance of foreign policy objectives and have legal consequences for third States and/or their nationals. The two 1999 Human Rights Regulations,⁶⁵ and those which aim to provide financial assistance to third States⁶⁶ are examples.

These powers enable the Community to pursue its political objectives in different ways. Agreements and regulations provide a legal basis for a broad scope of Community activities, ranging from assisting a third State with infrastructure projects to funding the promotion of certain values, such as democracy or freedom of expression. The Community can, in the context of a regulation, change the content of

⁶³ Article 184 of the EURATOM Treaty and Article 6 of the now expired ECSC Treaty are in identical terms.

⁶⁴ See further the thematic discussion *infra*.

⁶⁵ Council Regulation No. 975/1999, Laying Down the Requirements for the Implementation of Development Cooperation Operations Which 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, OJ L 120, 8/5/1999, p.1 and Council Regulation No. 976/1999, Laying Down the Requirements for the Implementation of Community Operations, Other Than Those of Development Cooperation, Which Within the Framework of Community Cooperation Policy, 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 Third Countries, OJ L 120, 8/5/1999 p.8. COM (2003)250 proposes amendments to both Regulations. It has not yet been adopted.

⁶⁶ For example, Council Regulation No. 443/92, Financial and Technical Assistance To And Economic Cooperation With The Developing Countries in Asia and Latin America, OJ L 52, 27/2/1992 p.1. (The ALA Regulation).

cooperation programmes or the channels used; reduce cultural, scientific or technical cooperation; refuse to act on new initiatives or postpone new projects. In the case of an Agreement which has been negotiated, it can defer signature or its implementation⁶⁷ and, in the case of one already in force, defer holding joint committee meetings. It is further open to the Community to suspend all cooperation, suspend all bilateral contact or impose trade embargoes against a third State.⁶⁸

The utility of the instruments at the disposal of the Community/Union will depend upon the scope of the measures which are actually adopted. This is ultimately limited by the competence actually enjoyed and the political will to adopt such measures. It is to this issue the discussion now turns.

3. The Exercise of Competence and the Pursuit of Ethical Foreign Policy Objectives.

3.1. Development Cooperation.

3.1.1. Introduction.

The Community's main commitment in international development terms has always been to the group of countries now known as the ACP States.⁶⁹ The relationship between these countries, the Community and its Member States is currently regulated by the Cotonou Convention.⁷⁰ This Convention like the earlier ones⁷¹ is mixed in

⁶⁷ Agreements have been delayed over human rights concerns with Russia (1995), Croatia (1995), Algeria (1998) and Pakistan (1999). See OJ C 280 E, 21/11/2003 p.63.

⁶⁸ See COM (1994) 42, p.11 and the discussion in Chapter Two.

⁶⁹ Originally known as the Associated African States and Madagascar.

⁷⁰ Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States, of the Other Part, OJ L 317, 15/12/2000 p.3.

⁷¹ Yaoundé I and II, Convention d'association entre la Communauté économique européenne et les Etats africains et malgache associés à cette Communauté, OJ L 93, 11/06/1964 p.1431 and OJ L 282, 28/12/1970 p.2 respectively; and the four Lomé Conventions, ACP-EEC Convention of Lomé, OJ L 25, 30/1/1976, p.2, Second ACP-EEC Convention, OJ L 347, 22/12/1980 p.1, Third ACP-EEC

nature.⁷² In the vast majority of the Community's other Agreements with developing countries the Member States are not also a party. The Community's development cooperation policy originally had a limited focus and was concentrated on the then colonies of the Member States - the first of them soon to be given independence. It now has a global reach and substantively addresses issues, such as armed conflict,⁷³ sustainable development,⁷⁴ climate change,⁷⁵ debt relief,⁷⁶ tourism,⁷⁷ poverty reduction⁷⁸ and migration.⁷⁹

The relationship between the violation of human rights and development assistance has been extensively discussed since the first Lomé Convention and the situation in Uganda under Idi Amin.⁸⁰ The provisions and mechanisms which have been inserted into the subsequent Lomé/Cotonou Conventions,⁸¹ to deal with such eventualities, however, are still unclear as to whether it is the Member States, the Community or both who are exercising their competence in such matters. The Agreement amending the Fourth Lomé Convention, for example, ensured that a commitment to human rights became an "essential element" of the Convention⁸² and that its provisions could

Convention, OJ L 86, 31/3/1986 p.3, Fourth ACP-EEC Convention, OJ L 229, 17/8/1991 p.3 and the Agreement Amending the Fourth ACP-EEC Convention OJ L 156, 29/5/1998 p.3. For the legal literature on the Conventions see references in the Bibliography.

⁷² See Article 1 of the respective Conventions.

⁷³ See SEC (96) 332, the Common Position adopted by the Development Ministers, 2/6/1997 and COM (1999) 240. See further Smith, K., *European Union Foreign Policy in a Changing World*, (2003) p.145.

⁷⁴ COM (1999)499.

⁷⁵ Commission Working Paper C (99)3532, 3/11/1999 and Development Ministers' Conclusions, 11/11/1999.

⁷⁶ COM (1999) 518.

⁷⁷ COM (1998) 563.

⁷⁸ COM (2000)212.

⁷⁹ See the Conclusions of the Development Ministers, 28/5/1996.

⁸⁰ See the statement issued by the Council on 21/6/1977 with regard to Uganda, (1977) 6 *Bull EEC* 77.

⁸¹ For the voluminous literature on this issue see further the Bibliography but, in particular, Arts, K., *Integrating Human Rights into Development Cooperation: The Case of the Lomé Conventions*, (1999) p.167 and Bulterman, M., *Human Rights in the Treaty Relations of the European Community*, (2001) p.151.

⁸² Article 5.

be suspended if fundamental and systematic abuses of those values occurred. The amended Article 366a of the Convention provided a clear legal base for the suspension or termination of the Agreement, if either party considered that the other had failed to fulfil an obligation to respect the “essential elements” referred to in Article 5.⁸³ In Council Decision 1999/214/EC, which adopted a procedure in case of violations of Article 366a by an ACP State, the question of competence between the Member States and the Community vis-à-vis such violations was unresolved.⁸⁴ This is still the case under Articles 9 and 96 of the Cotonou Convention, as Decision 1999/214 continues to apply.⁸⁵ The failure to clarify where competence lies in this respect⁸⁶ is not reflected in the Community’s development cooperation Agreements to which the Member States are not also a party. Before discussing the competence granted by the development cooperation provisions of the EC Treaty, which provide one of the legal bases for such Agreements, it is necessary to discuss the November 1991 Resolution of the Council and the Member States Meeting Within the Council on Human Rights, Democracy and Development.⁸⁷ This Resolution is a watershed in the Community’s perception of the relationship between development cooperation and ethical values and objectives.

⁸³ Article 366a is further elaborated upon in Annex LXXXIII to the Fourth Lomé Convention.

⁸⁴ Council Decision 1999/214/EC, on the Procedure for Implementing Article 366a of the Fourth ACP-EC Convention, OJ L 75, 20/3/1999, p. 32.

⁸⁵ The Community does now have competence under Article 300 (2)/(3) EC to speed up the suspension of Agreements, although it is not clear to what extent this would apply to the Cotonou Convention due to its mixed nature.

⁸⁶ The final paragraph of the preamble to Council Decision 1999/214/EC states: “Whereas in fields covered by the Convention and falling within the competence of Member States, the representatives of the governments of the Member States meeting within the Council may authorise in parallel the Council, if need be, also to cover these fields in adopting decisions pursuant to Articles 1 and 2 of this decision”.

⁸⁷ Reprinted (1991) 11 *Bull EEC* 122. The Resolution developed an earlier Communication, SEC (1991)61.

3.1.2. The 1991 Resolution of the Development Council and the Member States.

In a resolution adopted by the General Affairs Council (GAC) of 29 June 1991, it was stated that respect for human rights, the rule of law and the existence of political institutions which are effective, accountable and enjoy democratic legitimacy are the basis for equitable development.⁸⁸ The later Development Council Resolution of November 1991 had as one of its primary objectives the improvement of the cohesion and consistency of initiatives taken both by the Community and by its Member States in the promotion of human rights and democracy in relations with developing countries. It very clearly recognised the central place of the individual in the development process which should be designed to promote economic and social rights as well as civil and political liberties through representative democracy. A high priority was also given to a positive approach that stimulates respect for human rights and encourages democracy. Examples of such positive measures included assistance in the holding of elections, promoting the role of non-governmental organisations and ensuring equal opportunities for all.⁸⁹ While priority would be given to such measures, negative measures would also be used, in appropriate circumstances, taking account of the gravity of the breach and guided by objective and equitable criteria. The most important aspects of the relationship between the Community and other States, however, would be the Community's emphasis on: sensible economic and social policies; democratic decision-making; adequate governmental transparency and financial accountability; the creation of a market friendly environment for development; measures to combat corruption; and respect for the rule of law, human rights, freedom of the press and expression in third States.⁹⁰ The Council also attached a great deal of importance to the question of military spending in developing countries. It was considered that since donor countries were engaged in a process whereby *their* military spending was being reduced, it would be difficult to justify if recipients of aid did not adopt the same policy.⁹¹

⁸⁸ Resolution of the Luxembourg European Council (1991) 6 *Bull EEC* 14.

⁸⁹ Resolution on Human Rights, Democracy and Development, *supra* note 87, para.4.

⁹⁰ *Ibid.*, para.5.

⁹¹ *Ibid.*, para.9.

This final aspect of the Resolution has not been elaborated upon by the Commission in the various Communications it has since adopted. Otherwise, the Resolution has acted as a catalyst for the integration of its various different aspects into the Community's relations with the ACP States and other developing countries, as well as the Central and Eastern European States.

The 1991 Resolution signified a major shift in approach for the Community's development cooperation policy and the promotion of ethical values. Prior to the coming into force of the TEU, which expressly makes reference to these issues for the first time in the Treaties, the Resolution firmly placed human rights and other ethical values on the Community's agenda in its relations with third States. Although the Resolution is a joint one and thus does not clarify the issue of competence, it implies that the Community can take action in the fields addressed by the Resolution either solely or jointly with the Member States.

The Resolution's addition of new objectives and conditions to the Community's development cooperation policy is in line with the general policy being pursued by all donors, in the last ten to fifteen years. The number of development success stories is relatively few and far between, so donors seek to condition their schemes, in an attempt to make them more effective. Although recipient States have an interest in the number of objectives expanding, as it provides them with alternative sources of funding for projects, most conditions have been added at the insistence of donors, including the Community.⁹² At the same time nothing seems to be removed from the list of objectives and criteria and there is no identification of the relationship between them.⁹³

The majority of recipient States have little or no real choice in the imposition of conditionality. But conditionality is often pursued by donors without assessing its effectiveness and the burdens it imposes upon recipient States. A number of

⁹² See Arts, *Integrating Human Rights*, *supra* note 81, p.167.

⁹³ Pollit, C. and O'Neil, H., *An Evaluation of the Process of Evaluation of EC External Aid Programmes*, (1999) p.17.

programmes funded by different bodies all requiring the satisfaction of various conditions can create a huge administrative burden for a developing State. For example, in one year alone there were 405 projects in Mozambique's health sector which had differing reporting requirements for various donors.⁹⁴ In the Community context therefore, coordination between it and the Member States becomes exceptionally important as a way to reduce that burden. There is usually little systematic relationship between conditionality and policy changes, unless conditionality supports reforming groups and there is some domestic will to reform in general.⁹⁵ The adjustments required to satisfy conditionality criteria can be very difficult to implement. Yet, the relationship between the implementation of policies stipulated by the Community and the continued flow of funding to help with reform is weak.⁹⁶ States therefore may lose the incentive to implement reform policies as not only are the promised benefits not being realised but they cannot be afforded either.

Where the Community takes or threatens to take negative measures under the 1991 Resolution, it is worth questioning which standards are being applied in the determination of "equitable and objective factors". The Resolution says the Community will avoid penalising the population for governmental actions. Thus it may have to adjust activity with a view to ensuring that development aid benefits more directly the poorest sections of the population. The adjustment of such programmes may not always be possible with the new focus in mind, and the relationship with other foreign policy objectives will also be relevant.

3.1.3. Competence Under Articles 177-181 EC.

⁹⁴ World Bank, *World Development Report*, (2000) p.193.

⁹⁵ See, Alberto, A., and Dollar, D., "Who Gives Foreign Aid to Whom and Why" *NBER Working Paper 6612* cited in *World Development Report*, *supra* note 94, p.193.

⁹⁶ See further, Court of Auditors, *Special Report 12/2000, The Management by the Commission of the European Union on Support for the Development of Human Rights and Democracy in Third Countries*, OJ C 230, 10/08/2000 p.1.

Article 177 EC establishes the general objectives to be pursued by the Community in development cooperation but does not clarify the relationship between them. Article 177 EC aims to make Community policy consistent with Member States policies and expressly states that Community competence will be complementary to that of the Member States. Some of the uncertainties inherent in that provision were addressed by the Court in *Portugal v. Council*.⁹⁷ Here Portugal sought the annulment of Council Decision 94/587/EC concerning the conclusion of the Cooperation Agreement on Partnership and Development between the EC and India.⁹⁸ The decision was based upon Articles 133, 181 and 300 EC.⁹⁹ The Agreement dealt with a variety of issues, such as energy, intellectual property, tourism and drug abuse.¹⁰⁰ Article 1(1) of the Agreement provided that, “[r]espect for human rights and democratic principles is the basis for the cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement.” “Essential elements” clauses are now standard practice of the Community.¹⁰¹ Article 1(2) of the Agreement with India provided its principal objective; to enhance and develop through dialogue and partnership cooperation between the parties in order to achieve a closer and upgraded relationship.

Portugal challenged the Agreement, in particular, arguing that the legal bases used did not confer on the Community the necessary powers to include the “essential elements” clause or the provisions on tourism and energy. On the “essential elements” clause, Portugal argued that Article 308 EC should have been included. This Article provided the Community with an appropriate legal basis for such commitments prior to the TEU. In addition, Portugal argued that while observance of

⁹⁷ Case C-268/94, *Portuguese Republic v. Council of the European Union*, [1996] ECR I-6177.

⁹⁸ 94/578/EC, OJ L 223, 27/08/1994 p. 23.

⁹⁹ At the time, the Articles were 113, 130y, 228(2) and 228(3) EC. For our purposes, the Amsterdam and Nice amendments have not changed the substantive scope of the provisions in question.

¹⁰⁰ Articles 7, 10, 13 and 19 of the Agreement.

¹⁰¹ The policy was formally adopted in the November 1991 Development Council Resolution at para.10 and further developed in COM (1995)216. For discussion of the policy in general see Cremona, M., “Human Rights and Democracy Clauses in the EC’s Trade Agreements” in Emiliou, N., and O’Keeffe, D. (eds.), *The European Union and World Trade Law-After the GATT Uruguay Round*, (1996) p.62 and Reidel, E. and Will, M., “Human Rights Clauses in External Agreements of the EC” in Alston, P., Bustelo, M., and Heenan, J.(eds.), *The EU and Human Rights*, (1999) p.723.

human rights may be mandatory in the Community legal order, this did not provide a competence to act in that sphere in either internal or external matters.¹⁰² Article 177(2) EC was considered merely to define a general objective and not to confer a competence to include such provisions in an Agreement.

The Court held that while Article 308 EC had been used prior to the coming into force of the TEU, as the basis for such measures, it could only be used in the absence of more specific provisions granting that power. As Article 177 EC declared that, “Community policy ...shall contribute to the general objective of developing and consolidating the rule of law ...respecting human rights and fundamental freedoms” the decision should have referred to Article 308 EC only if the terms of the Agreement extended beyond the competence granted by that provision.¹⁰³ It further stated:

“The mere fact that Article 1(1) of the Agreement provides that respect for human rights and democratic principles ‘constitutes an essential element’ of the Agreement does not justify the conclusion that the provision goes beyond the objective stated in Article 130u(2) of the Treaty. The very wording of the latter provision demonstrates the importance to be attached to respect for human rights and democratic principles, so that, *amongst other things, development cooperation policy must be adapted to the requirement of respect for those rights and principles.*”¹⁰⁴

This paragraph of the Court’s judgment can be read in two different ways. The first is that in its formulation, the Community’s development policy must take account of other conditions and objectives, such as human rights and democracy. There is no hierarchy between the different objectives and principles, development policy must simply take account of other relevant principles. The alternative reading, which is supported by paragraph 26 of the judgment, is that development policy is subordinate to the objective of protecting human rights and democratic principles and must be conditioned towards that aim.¹⁰⁵ The Court did not elaborate on whether Article 177

¹⁰² *Portugal v. Council*, paras.1-16.

¹⁰³ *Ibid.*, paras. 17-23.

¹⁰⁴ *Ibid.*, para. 24. Emphasis added.

¹⁰⁵ Para. 26 states, “[w]ith regard, more particularly, to the argument of the Portuguese Government that the characterisation of respect for human rights as an essential element in cooperation presupposes

EC could lawfully form the basis of an Agreement in which the protection of human rights was a specific field of cooperation? It would seem, however, that the legal base was valid precisely because, in the Agreement with India, the observance of human rights and democratic principles were not specific fields of cooperation. If human rights were included as a field of cooperation this would possibly go beyond the relationship between human rights and development cooperation established by the Court. This view is further supported by paragraph 39 of the Court's judgment where, referring to *Opinion 1/78*,¹⁰⁶ the Court declared that clauses dealing with specific matters should not impose such extensive obligations that they *de facto* constitute distinct objectives. While this approach is consistent with the Court's earlier case law on this issue and also, in this context, a literal reading of Article 177(2) EC, the relationship developed between development policy and human rights in paragraphs 24-26 of the judgment goes beyond it.

It was Advocate General La Pergola, not the Court, however, who addressed one of the most important matters raised by the case. The inclusion of an "essential elements" clause is necessary if the Community wishes to invoke violation of its terms to legitimately suspend or terminate, under international law, an Agreement between itself and a third State.¹⁰⁷ Articles 60-62 of the Vienna Convention on the Law of Treaties, 1969, codified the customary law on the suspension or termination of a treaty, as a consequence of its provisions being breached.¹⁰⁸ The requirement in

specific means of action, it must first be stated that to adapt cooperation policy to respect for human rights necessarily entails establishing a certain connection between those matters whereby one of them is made subordinate to the other."

¹⁰⁶ *Opinion 1/78*, [1979] ECR 741.

¹⁰⁷ *Portugal v. Council*, para. 28 of his Opinion. The "essential elements" clause in the Agreement with India is different in nature from the clause in Cotonou Agreement. There is no one "essential elements" clause as the content tends to differ depending upon the third State(s) with whom the Community is concluding the Agreement. For analysis of the different clauses see Bulterman, *Treaty Relations*, *supra* note 81, p.167 and Fierro, *Human Rights Conditionality*, *supra* note 50, p.213. While the content of the clauses may differ, in bilateral treaties at least, the suspension mechanisms usually do not.

¹⁰⁸ Vienna Convention on the Law of Treaties, 1969, 1155 UNTS 331. For an early confirmation of the status of these principles as customary rules see the ICJ in Advisory Opinion, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, (1971) *ICJ Reports*, p.16, para.87.

Article 60(3)(b) of the Vienna Convention for the suspension of an Agreement is that a provision which is, “essential to the accomplishment of the object and purpose of the treaty”, must have been breached. A narrow reading of Article 60 of the Vienna Convention could mean that the “essential elements” clause cannot form the basis for suspension or termination of the Agreement. This is precisely because cooperation in human rights is not provided for. The basic objective of the Agreement, set out in Article 1(2), is to enhance and develop the relationship between the parties. The Court’s reading of the relationship between the “essential elements” clause and Article 1(2) of the Agreement in the *Portugal* case is that human rights and democracy are the foremost objectives with the broader notion of development subservient to them, although this is far from clear in the Agreement itself. Protecting or promoting human rights is not an objective in Article 16, which deals expressly only with development cooperation. The observance of human rights and democratic principles by both the Community and India, however, is the basic condition for its continuing application.

The *travaux préparatoires* of the 1969 Convention suggest, however, that Article 60 has a broader application. Paragraph 9 of the International Law Commission’s 1966 commentary on Article 60(3) states:

“...The Commission ... was unanimous that the right to terminate or suspend must be limited to cases where the breach is of a serious character. It preferred the term “material” to “fundamental” to express the kind of breach... “fundamental” might be understood as meaning that only the violation of the provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary nature.”¹⁰⁹

The inclusion of provisions defining human rights and democratic principles as “essential elements” should therefore allow suspension or termination in accordance with Article 60 of the Convention.¹¹⁰ Although the application of Article 60 must be

¹⁰⁹ (1966) *YBILC*, II (Part Two) p.255 cited by Rosenne, S., *Breach of Treaty*, (1985) p.21.

¹¹⁰ See COM(1995)216, p.8, for example, of a confident assertion that suspension or termination would be legally permissible under Article 60, Vienna Convention.

determined by the facts of the case itself, the *travaux préparatoires* and terms of the provision make it clear that the breach must be a serious or “material” one. The suspension or termination of such an Agreement would only be lawful therefore, in response to new and systematic breaches of human rights or the dismantling of democratic institutions. Furthermore, an “essential elements” clause cannot be invoked by the Community for human rights violations which were ongoing at the time an Agreement was concluded and where the Community was aware of them.¹¹¹ The clause is designed to ensure that human rights do not seriously deteriorate within those States, not to improve them. That must be achieved through other mechanisms.

There is also a further possible limitation to an “essential elements” clause. Article 60(5) of the Vienna Convention prohibits the suspension of “provisions relating to the protection of the human person contained in treaties of a humanitarian character”. This is arguably drafted broadly enough to refer to any treaty which creates rights intended to protect the individual, whether or not it is primarily humanitarian, so long as it has a substantial humanitarian element to it.¹¹² Bulterman has argued that the principle in Article 60(5) is not applicable in the context of Community Agreements as the “essential elements” clause serves no purpose, if the values it aims to protect are violated.¹¹³ She further argues that such provisions are ancillary in nature and thus not central to the objective of the treaty.¹¹⁴ The extent to which this is correct, for all the Agreements to which the Community is a party and which have such a clause, must be questioned. In the *Portugal* case the Court held that development cooperation should work towards the protection of certain values, such as, human rights and democracy. The discussion below stresses that poverty reduction and its eradication, which should focus on the individual, is now the central and primary aim of the Community’s development cooperation policy.¹¹⁵ Due to the conceptual approach the Community has adopted towards the relationship between human rights and democracy, on the one hand, and poverty reduction and development

¹¹¹ See Article 45, Vienna Convention.

¹¹² See, for example, Aust, A., *Modern Treaty Law and Practice*, (2000) p.238 who argues that Article 60(5) applies to a treaty which creates “rights intended to protect individuals”.

¹¹³ Bulterman, *Treaty Relations*, *supra* note 81, p.223.

¹¹⁴ *Ibid.*

¹¹⁵ See COM (2000)212, p.5.

cooperation, on the other, the relevance of Article 60(5) of the Vienna Convention cannot be dismissed. Whether it precludes relying on an “essential elements” clause must be determined in the light of the actual content of an Agreement with a third State and the programmes the Community has initiated under it.

The suspension or termination by the Community of an Agreement for violation of an “essential elements” clause by a third State has moreover no bearing upon the legal obligations owed under international law, by that State. The ILC’s Articles on State Responsibility and the Vienna Convention on Treaties create two distinct legal regimes.¹¹⁶ The Community is thus still free to use other methods, as discussed in Chapter Two, to pursue its objectives in its relations with the State in question.

After the *Portugal* case it is clear that the development cooperation provisions of the EC Treaty grant the Community competence to include “essential elements” clauses in its development cooperation Agreements. This will now also be the case on the basis of Article 181a in relations with all third States. The Court in the *Portugal* case did not, however, address the issue of subsidiarity. Article 177(1) EC makes clear that the Community’s competence in this area is complementary to the policies pursued by the Member States - it is not superior to Member State competence nor inferior. As new policies develop the coming into existence of common rules in the *AETR* sense cannot be ruled out and thus the eventual pre-emption of Member State competence is a possibility.¹¹⁷ Advocate General Jacobs in the *EDF*¹¹⁸ case and the Court in the *Bangladesh*¹¹⁹ case have highlighted, however, that until such rules develop (if they develop) Member States retain their competence to engage in development cooperation activities both outside the Community system as well as in

¹¹⁶ See Article 56 ILCASR and Article 43 VCLT and further the discussion in the *Third Report on State Responsibility*, A/CN.4/507/Add.3 para.324.

¹¹⁷ Declaration 10 attached to the TEU illustrates that the possibility of common rules, in the *AETR* sense, was envisaged in development cooperation.

¹¹⁸ Case C-316/1991, *European Parliament v. Council of the European Union*, [1994] ECR I-625, para. 42-47 of his Opinion.

¹¹⁹ Cases C-181/1991 and 248/1991, *European Parliament v. Council and Commission of the European Communities*, [1993] ECR I-3685, para. 16.

cooperation with it.¹²⁰ Even though it is a non-exclusive competence, subsidiarity is unlikely to be a major obstacle in its exercise. The underlying approach of the Court in the *Portugal, EDF* and *Bangladesh* cases almost certainly means that the Member States are not going to be deprived of their competence to act.

3.1.3.(a) Poverty Reduction and Development Cooperation.

One express objective of Article 177(1) EC is the “campaign against poverty in developing countries”. Poverty reduction is now the overriding focus of Community development cooperation policy¹²¹ as well as that of all major development agencies.¹²² The Community has affirmed its commitment to help reduce the number of persons living in absolute poverty by one half by 2015 and for developed States to donate 0.7 percent of their gross national product for overseas development assistance.¹²³ The Commission has also issued a number of Communications dealing with debt relief for the most highly indebted countries.¹²⁴ An effectively implemented poverty reduction policy is without doubt the most important contribution the Community can make to promoting human rights and other ethical values in its relations with third States.

Defining poverty or how to tackle it is not straightforward. OECD guidelines emphasise that its causes differ and thus each State needs to be looked at

¹²⁰ See COMs (1995)160 and (1999)218 on this issue.

¹²¹ See COM(2000) 212, p.5. This Communication has been approved by the Development Council, Press Release, Number 8571/00.

¹²² See World Bank, *Building Poverty Reduction Strategies in Developing Countries*, (1999) and in the context of the OECD, J. Wolfensohn, J., *A Proposal for a Comprehensive Development Framework*, (1999) and Chapter Two.

¹²³ See, for examples: the Monterrey Consensus adopted by the International Conference on Financing for Development, March 2002; the Conclusions of the Barcelona European Council 15-16/3/2002 at para. 13 where Member States agree to aim for 0.39% of GNP by 2006 with a long-term commitment to 0.7%; COM(2000) 212, p.5 and the Preamble to the Cotonou Agreement.

¹²⁴ COM(1996)153. Also see Council Decision 94/453/EC, 6/7/98 on Exceptional Assistance for Heavily Indebted ACP Countries and *infra*.

individually.¹²⁵ It has also been argued that to be successful each development project needs to emphasise not only poverty but also participation and partnership.¹²⁶ Poverty reduction is deemed to require ownership of the development process by those most in need and an increased focus on the social dimension of growth and development.¹²⁷ According to the Community, to achieve their objectives poverty reduction policies must exist in a context in which democracy, good governance, human rights and the rule of law are respected. These are all cross-cutting principles - to be integrated into the implementation of development policies which support economic growth and focus on poverty reduction.¹²⁸

The Community's approach to poverty reduction suffers from a number of problems. One of the most notable is the definition of poverty. An early Communication on this issue, from 1993, only really noted that poverty and its causes were multi-dimensional.¹²⁹ A later Communication (from 2000) suggests that the deprivation of basic capabilities and a lack of access to education, health, natural resources and political participation, as well as a lack of income, are all relevant.¹³⁰ Yet poverty can be defined in a number of other ways including consumption, level of assets, lack of dignity or autonomy, social exclusion, equality in terms of gender and race, political freedom and security and deprivation of a long and healthy life.¹³¹ The 2000 Communication, however, in no way elaborates upon the relevance of factors other than income in its definition. It does stress though that an integrated approach to institutional support and capacity building is required.¹³² In the past this has been one of the criticisms of the Community's policies. Audits of such policies had highlighted that if the Community focused greater attention upon institutions and

¹²⁵ DAC, *Guidelines on Poverty Reduction*, (2001) p.10.

¹²⁶ Pollit and O'Neil, *Evaluation*, *supra* note 93, p.21.

¹²⁷ DAC, *Guidelines*, *supra* note 125, p.10.

¹²⁸ COM(2000) 212, p.27.

¹²⁹ COM (1993) 518.

¹³⁰ COM (2000)212, p.16.

¹³¹ These approaches to poverty are an amalgamation of differing factors utilised in UNDP, *Human Development Report 2000* (2000) p.17 and DAC, *Shaping the 21st Century, Scoping Study, Donor Poverty Reduction and Practices*, (1996) p.12.

¹³² COM(2000)212, p. 16.

policies within the ACP States, then its impact on poverty reduction would be significantly greater.¹³³ The political responsibility of governments for macro-economic reforms, gender issues, social policies such as health, food security education and training, and the sustainable management of natural resources are also of the utmost importance.

The Community has identified three ways in which a poverty focus can be implemented.¹³⁴ First, by concentrating on the least developed countries. Secondly by implementing a more poverty focussed cooperation program with those middle income countries where more than twenty percent of the population live on or under US\$ 1 per day. Thirdly by improving the focus on poverty reduction in cooperation programmes with all other developing countries.¹³⁵ There are a number of theoretical and practical problems with this approach.

One of the methods by which the Community has attempted to implement its poverty reduction strategies has been through the identification of “poor groups”. Yet the identification and targeting of the poor by donors often adopts a “broad-brush approach” and treats target groups as homogeneous socio-economic groups.¹³⁶ Studies have shown that the Community has often adopted this “one approach fits all” perspective.¹³⁷ It is also the case that, in the past, not all Directorate Generals in the

¹³³ See *ACP Synthesis Report*, (1999) p.13. Also see Court of Auditors, *Special Report 8/2003, Concerning the Execution of Infrastructure Work Financed by the EDF, Together With Commission Replies*, OJ C 181, 31/7/2003 p.1, para.35 which notes that the EDF can make a significant and relevant contribution to national infrastructure development strategies but all too often the end results, costs and time were very different from the initial terms of the contract.

¹³⁴ COM(2000) 212, p.20.

¹³⁵ *Ibid.*

¹³⁶ See *DAC Guidelines*, *supra* note 125, p.xiii.

¹³⁷ See Loquai, C. Hove, K., and Bossuyt, J., “The European Community’s Approach Towards Poverty Reduction in Developing Countries” *ODI Working Paper* 111, p.78. Also see Carlsson, J., Chibbammullilo, P., Orjueal, C., and Saasa, O., “Poverty and European Aid in Zambia” *ODI Working Paper* 138. The Court of Auditors, *Special Report 10/2003, Effectiveness of the Commission’s Management of Development Assistance to India in Targeting the Poor and Ensuring Sustainable Benefits*, OJ C 211, 5/9/2003 p.21 paras.11-37, notes that the Community had been reasonably

Commission received training in poverty reduction. In the Development Directorate which deals with the ACP States, for example, there is a general set of guidelines on poverty reduction. But there was no emphasis on poverty reduction in DG IB which dealt with the Asian and Latin American countries as well as the MEDA countries and is now part of the External Relations DG.¹³⁸ Even though the Community has now introduced Poverty Reduction Strategy Papers (PRSP) as part of its approach, a study by Oxfam has argued that, where they actually exist, they are only implemented in 1 out of 6 States.¹³⁹ An emphasis on poverty reduction has also had the consequence of all aspects of development cooperation being portrayed as being poverty oriented, even when a programme has little apparent connection with it.¹⁴⁰

The Community's emphasis on poverty is not focussed on the dignity of the individual and their autonomy but is seen as a means to ensure the general integration of developing countries into the world economy. It is for this reason that economic growth and trade are seen as being important. It is argued that a focus on such an approach will not only help to reduce poverty levels but will also ensure developed countries integrate into the global economy.¹⁴¹ For the Community this means that the objective is to create a sustainable economic development process, which can then benefit the poor through a trickle-down process. This perspective, however, may conflict with its approach to the more general relationship between development and human rights, which is based on a grass-roots approach.¹⁴² Of crucial importance therefore, is that the overall balance of policy towards a State takes account of the aims and objectives identified in development policy. Yet, this is not the case, especially when the Community's poverty reduction and development cooperation policies compete with its more general foreign policy objectives. For example, in recent policy papers there is a discernable shift in emphasis from poverty reduction towards other political objectives, especially the fight against international

successful in targeting and identifying poor groups although systematic attention to these issues throughout the project would have improved its results.

¹³⁸ DAC, *Shaping the 21st Century*, *supra* note 121, p.xviii.

¹³⁹ Oxfam, *Rigged Rules and Double Standards*, (2002) p.5.

¹⁴⁰ See, for example, COM (2002) 116.

¹⁴¹ COM(2000) 212, p.20.

¹⁴² See Chapter Two and *infra*.

terrorism.¹⁴³ As the *World Development Report* for 2003 notes, effective policies aimed at eradicating poverty should, in any case, contribute to a safer world.¹⁴⁴

The tension between development cooperation and general foreign policy objectives has also been apparent in the relationship between the General Affairs and Development Councils. The situation in Liberia in 2000 is a good example. The Development Council was trying to adjust programmes to ensure that those in power would not benefit from Community aid. It found, however, that the General Affairs Council took action to suspend all aid to that country in pursuit of its more general foreign policy objectives, although the aid suspended was directly earmarked for poverty reduction programmes.¹⁴⁵ The danger of short-term priorities consistently prevailing over long-term objectives is now particularly acute following the absorption of the Development Council into the General Affairs Council. Although a single Council can balance competing objectives, the General Affairs Council has stated that development priorities should be integrated into more general foreign policy ones.¹⁴⁶ It has further approved Javier Solana's strategy paper, "A Secure Europe in a Better World"¹⁴⁷ which envisages external assistance supporting a future security strategy."¹⁴⁸ The pre-eminence of general foreign policy objectives may relegate poverty reduction to an ancillary status. The Commission, in particular, has argued very strongly that development objectives should not be subordinated to foreign policy ones, especially action under the CFSP.¹⁴⁹

¹⁴³ See, in particular, COM 2003/299/4 (the new Communication on relations with ASEAN States), COM (2002) 340 (the proposal for the new ALA Regulation, especially Article 2(d)). Also see Article 15, Agreement Establishing an Association between the European Community and its Member States, of the one part, and the Republic of Chile, of the Other Part, OJ L 352, 30/12/2002 p.3.

¹⁴⁴ World Bank, *World Development Report 2003*, (2003) p.1.

¹⁴⁵ Cited by Mr. Rowe and Clare Short in Minutes of Evidence to the House of Commons Select Committee on International Development, *Ninth Report: The Effectiveness of EC Development Aid*, (2001) question 43.

¹⁴⁶ General Affairs Council of 18/19/02, Doc. 6266/02.

¹⁴⁷ Solana, J., *A Secure Europe in a Better World—European Security Strategy*, Brussels, 12/12/2003.

¹⁴⁸ See further, House of Lords European Union Committee, *Twelfth Report: EU Development Aid in Transition*, (2004) p.28.

¹⁴⁹ See COM(1996) 70, p.20

As noted above, poverty should be defined by reference to more than just income. The Community has given priority to income in its definition, yet the allocation of EC aid to developing countries is not focused on the most deprived in terms of income. It has been described by the International Development Select Committee of the House of Commons as giving “more to the better off and less to the poor.”¹⁵⁰ The *World Development Report 1999* highlighted that if abject poverty is defined as those living on US\$ 1 per day, five percent of the population of Eastern Europe and Central Asia live in abject poverty. The corresponding figures for South Asia and sub-Saharan Africa are 42.3 per cent and 48.5 per cent respectively. If the level of abject poverty is drawn at US\$ 2 per day the figures for Asia and Africa rise by fifty percent.¹⁵¹ There is no such corresponding increase for Eastern Europe and Central Asia. The Community’s allocation of aid commitments would have to undergo a fundamental shift if poverty reduction were indeed to become a central objective. Between 1990 and 2000 the top ten recipients of EC development assistance were: Yugoslavia, Morocco, Bosnia and Herzegovina, the former Yugoslavia, Egypt, Tunisia, South Africa, Turkey, Albania and Macedonia.¹⁵² None of these are classified as low-income countries by the Development Assistance Committee (DAC) of the OECD. Between 1980 and 1998 of the (then) ACP States, only Ethiopia ranked among the top beneficiaries of EC aid. That list was again dominated by the former Yugoslavia, Poland, the Russian Federation and other central and eastern European States.¹⁵³ The fact that over half of the world’s poor, who are in Asia, remain outside the scope of the Development DG and receive minimal assistance to relieve poverty is clearly contrary to the Community’s proclaimed objectives.¹⁵⁴ The justification for the allocation of aid to middle income countries is that poverty is also present in these

¹⁵⁰ Select Committee, *Ninth Report*, *supra* note 145, para.4.

¹⁵¹ World Bank, *World Development Report 1999*, (1999) p.25.

¹⁵² Select Committee, *Ninth Report*, *supra* note 145, para. 19.

¹⁵³ For a long-term breakdown see, Cox, A., and Chapman, J., *The European Community External Cooperation Programmes: Policies, Management and Distribution*, (1999) p.129. Poland alone has received more aid than all of Asia together. See *Ninth Report*, *supra* note 145, para.24.

¹⁵⁴ Even where such projects are, relatively speaking, well designed in Asia, their impact has been described by the Court of Auditors as “modest at best”. Court of Auditors, *Special Report 12/2000, The Management by the Commission of the European Union on Support for the Development of Human Rights and Democracy in Third Countries*, OJ C 230, 10/08/2000 p.1.

States.¹⁵⁵ This is somewhat disingenuous as it underplays the strategic and political importance of most of the countries benefiting. It cannot be denied that aid targeted towards middle income countries which promote growth and have sound economic policies and institutions, can be extremely effective. It is, however, still difficult to defend the Community's actions in the light of its proclaimed priorities and objectives.

It is also difficult to defend the approach taken by the Community towards the relationship between poverty reduction and trade. Trade is perceived by the Community to be crucial in assisting the integration of developing countries into the world economy. The Community has on numerous occasions adopted policy papers to help developing countries to benefit from trade.¹⁵⁶ As an instrument to alleviate poverty, trade has far greater potential than aid.¹⁵⁷ World Bank figures show that developing countries earn \$322 per capita through exports as opposed to \$10 from aid.¹⁵⁸ Even a modest increase in exports can far outweigh the impact of all aid initiatives, although donors such as the Community will have little or no control over its distribution. Trade is the most powerful instrument available to alleviate global poverty. As opposed to other initiatives and instruments, however, it can also directly affect the commercial and economic interests of donor States. The Doha Development Agenda (DDA) as part of the WTO Ministerial Conference, alongside the commitments undertaken in Johannesburg at the World Summit for Sustainable Development (WSSD) and Monterrey in the International Conference on Financing for Development (ICFD) now form the basis for initiatives and action to be taken by

¹⁵⁵ Select Committee, *Ninth Report*, *supra* note 145, para. 19.

¹⁵⁶ See COM (2002) 82 and 513. Also see the 2003 Commission Report, *Making Trade Work for Development: Putting Theory Into Practice*, (no further reference given) available at http://europa.eu.int/comm/europeaid/reports/making_trade_work_2003_en.pdf.

¹⁵⁷ See OECD, *The Development Dimension of Trade*, (2002) and *Strengthening Trade Capacity for Development* (2002).

¹⁵⁸ World Bank, *World Development Indicators*, (2001). Also see Oxfam, *Rigged Rules*, *supra* note 139.

the Community in this regard.¹⁵⁹ The approach adopted by the Community towards developing countries is, however, protectionist and detrimental to their interests.¹⁶⁰ An economic analysis of the Community's position in the WTO has stated:

“..contrary to official declarations, analysis demonstrates that the EU is not a staunch defender of developing countries in the WTO ... [m]ost of the African Group actually has a large negative correlation with EU positions ...[t]he relatively protectionist policies... are in opposition to the declared interest of most developing countries...although....the EU believe themselves to be more friendly to the developing countries than the rest of the world. ...They.... are isolated in strong opposition to the developing countries in the WTO.”¹⁶¹

The Community considers the Everything But Arms (EBA) initiative¹⁶² to be its major contribution to alleviating poverty through trade. The Commission has argued that it has fully opened its internal market to all products, except weapons, from the 49 least developed countries.¹⁶³ Yet tariffs on sensitive goods such as bananas, sugar and rice are only gradually being removed.¹⁶⁴ The Commission has argued that the GSP and EBA are part of its attempt to “ensure that the concerns of developing countries are at the heart of the discussions under the DDA.”¹⁶⁵ Most of the extreme poor in the developing world, however, work in agriculture and labour intensive

¹⁵⁹ The Seville European Council, 21-22/6/2002 at para. 40 of its conclusions confirmed the commitment to Doha and Monterrey, as a means to sustainable development. Also see COM (2002) 513 and COM (2004) 150 which proposes how to “translate the Monterrey Consensus into practice”.

¹⁶⁰ See for example, Bjørnskov, C., and Lind, K., “Where Do Developing Countries Go After Doha? An Analysis of WTO Positions and Potential Alliances” (2002) 36 *JWT*, 543; Oxfam, *Rigged Rules*, *supra* note 139 and the rebuttal, European Commission, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty-Comments From the Commission*, issued 17/4/02; and Global Issues, Free Trade and Globalisation-The WTO Meeting in Doha, Qatar, at <http://www.globalissues.org/traderelated/freetrade/doha.asp>.

¹⁶¹ Bjørnskov and Lind, “*Developing Countries*” *supra* note 160, 547 and 560-562.

¹⁶² Council Regulation No. 416/2001, OJ L 60, 1/3/2001, p.43.

¹⁶³ European Commission, *Rigged Rules*, *supra* note 160.

¹⁶⁴ See Regulation No. 1401/2002 Laying Down Detailed Rules of the Opening and Administration of the Tariff Quotas for Rice, Originating in the Least Developed Countries, OJ L 203, 1/8/2002 p.42 and Regulation No. 1381/2002 Laying Down Detailed Rules of the Opening and Administration of the Tariff Quotas for Raw Sugar Cane, Originating in the Least Developed Countries, OJ L 200, 30/7/2002, p.14.

¹⁶⁵ European Commission, *Rigged Rules*, *supra* note 160, p.1.

industries where the EU's tariffs are possibly the highest in the developed world. Oxfam in an analysis of trade rules showed that the tariffs applied to such goods by the Community are double that of the US and can be significantly higher than that of almost all other States.¹⁶⁶ Other audits paint a slightly different picture.¹⁶⁷

Notwithstanding these differences of view, the level of protection from competition given to EU producers is unlikely dramatically to change. While reform of the CAP is complex, politically contentious and beyond the scope of this discussion, Hans Schmidt the Danish Environmental Minister, at the WSSD considered reductions in EU agricultural subsidies (to its producers) so as to benefit developing countries, to be "unrealistic".¹⁶⁸ The agricultural subsidies awarded to farmers by States in the developed world are still about six times greater than the development assistance they grant.¹⁶⁹

The EBA will only be of benefit to the least developed countries (LDCs), if they have the capacity to respond to the further opening up of European markets and if there is a demand for products for which they can meet the supply. In many cases, non-sensitive goods are already subject to duty-free access. The danger though is not to Community producers but to producers in States not classified as LDCs. The EBA benefits producers in the LDCs at the expense of those elsewhere, who are only entitled to take advantage of the general GSP scheme. Where the goods they export to the EU are in competition with those exported by the LDCs, those producers and their economies will suffer. This will particularly be the case with sugar.¹⁷⁰

¹⁶⁶ Oxfam, *Rigged Rules*, *supra* note 139, p.99.

¹⁶⁷ See European Commission, *Rigged Rules*, *supra* note 160 and Gallezot, J., *Real Access to the EU's Agricultural Market*, (2003) - http://trade-info.cec.eu.int/doclib/docs/2003/july/tradoc_113490 and the literature cited therein.

¹⁶⁸ Speech to the WSSD on 7/10/02 - <http://www.iisd.ca/wssd/portal.html>. See further the statements issued by the OECD and Oxfam on the CAP reforms, both of which were very critical. OECD, *Agricultural Policies in OECD Countries: A Positive Reform Agenda*, COM/AGR/TD/WP(2002)19/FINAL and Oxfam, Press Release, 27/6/2003.

¹⁶⁹ World Bank, *World Bank Development Report*, (2003) p.12.

¹⁷⁰ See the studies available at <http://www.acpsugar.org/> and Stevens, C., and Kennan, J., *The Impact of the EU's Everything But Arms Proposal: A Report to Oxfam*, (2001). Brazil and Thailand (neither

The inability of the Community practically to prioritise poverty reduction and concentrate its efforts where they are most needed can also be seen with regard to the policy of debt relief for highly indebted countries. By the end of 2000, 22 countries had been identified as being eligible for debt relief by the Community.¹⁷¹ Yet almost all of the money earmarked for this purpose is simply being transferred from elsewhere. In the 1999 Communication on this issue,¹⁷² it is clear that there is to be a simple reallocation of funds already budgeted.¹⁷³ A later Communication discussed the allocation of €1 billion for the same purpose¹⁷⁴ - almost all already budgeted for development projects and now being reallocated.

There are other aspects, however, of poverty reduction policies and development cooperation generally where the Community is trying to improve its record. Of particular importance is the attempt to eradicate the practice of tied aid. Action Aid considers that in some EU States 90% of aid projects are tied to home companies.¹⁷⁵ It has been estimated that over 66% of all grants awarded to African countries are recycled back to EU States.¹⁷⁶ The OECD and a number of aid agencies have long been campaigning to bring it to an end.¹⁷⁷ The Commission is attempting to tackle this,¹⁷⁸ but aid donations are sometimes only agreeable to donor States on the basis that they also assist the home economy. Denmark, for example, in 2003 cancelled a

of whom is a LDC) have both submitted challenges to the EC's tariff regime on sugar under the WTO dispute resolution mechanism. See WT/DS266/21 and WT/DS283/2.

¹⁷¹ Communication of 26/10/1999 (no number given) on Community Participation in the Debt Relief Initiative for Highly Indebted Poor Countries (HIPC).

¹⁷² See Council Decision, 6/7/1998, On a Debt Relief Debt Relief Initiative for Highly Indebted Poor Countries, annexed to the Commission Communication, 26/10/1999.

¹⁷³ 82% was from the EDF and the rest from the Community budget, see p.7 of the Communication and the annexes for the sources of funding.

¹⁷⁴ COM (2001)210.

¹⁷⁵ Cited by Action Aid on its webpage at <http://www.actionaid.org>, accessed 10/7/2003.

¹⁷⁶ See the Annex to Select Committee, *Ninth Report*, *supra* note 145.

¹⁷⁷ See DAC, *Recommendations on Untying ODA to the LDC*, (2001) and Action Aid's campaign at <http://www.actionaid.org>.

¹⁷⁸ See COM (2002) 639.

€45 million aid package to Bangladesh as non-Danish contractors were to be used.¹⁷⁹ The Commission and Council have now identified the untying of aid to least developed countries as one of eight priorities in the context of the Monterrey Consensus.¹⁸⁰

Effective poverty reduction requires a refocusing of approach and the Member States must sacrifice some of their own interests. Despite its rhetoric with regard to poverty reduction the Community has been much more active in protecting and promoting ethical values through other mechanisms, such as funding projects. This has been easier for the Community as it does not require it fundamentally to reassess its relationships with all third States.

3.1.3.(b). Funding the Pursuance of Ethical Values and Practice.

3.1.3.(b)(i). The General Legal Basis for Funding Projects Pursuing Ethical Values.

EC development aid is primarily funded through a number of different sources; the EDF in the case of the Lomé/Cotonou Conventions and Category 4 of the Budget for external action in general.¹⁸¹ Despite the rhetorical priority the Community has given to measures concerning issues such as human rights and democracy, as opposed to aid in the strict sense, it should be noted that in actual terms such allocations amount

¹⁷⁹ *Supra* note 175.

¹⁸⁰ “The Monterrey Consensus and the European Union” MEMO/04/05 of 11/03/04. Nine of the existing 15 Member States had already legislated to untie their aid. The problem has become more acute after expansion.

¹⁸¹ Although the general budget is also used in ACP States. For general analysis of external aid budgets see: Cox and Chapman, *External Cooperation Programmes*, *supra* note 153; Chang, H., Fell, A., and Laird, M., *A Comparison of Management Systems for Development Cooperation in OECD/DAC Members*, (1999); Staff Working Document D (2001)32947, *Report on the Implementation of the European Commission External Assistance*; Select Committee, *Ninth Report*, *supra* note 145; and House of Lords Committee, *Twelfth Report*, *supra* note 148. The discussion does not extend to the work of the European Investment Bank.

to no more than a few percent of the external relations budget lines.¹⁸² This expenditure is dwarfed by other categories of assistance, such as, Programme Aid, Food Aid, Humanitarian Assistance and Project Aid.¹⁸³

The European Parliament originally instigated an initiative to move all budget lines relating to the promotion of human rights and democratic principles together into a single chapter of the budget called the “European Initiative in Support of Democracy and the Protection of Human Rights”.¹⁸⁴ This is the budget heading which funds many projects whose express aims include the promotion of democracy, the rule of law and human rights.¹⁸⁵ Despite the consolidation of many budget lines the expansion of budget lines concerned with aspects of human rights and democracy has continued. A reason for this is the introduction of *ad hoc* budget lines by the Parliament, where it considers the general allocation to be deficient. The Commission has also stressed the need for the various financial instruments used to promote ethical values to be flexible, so as to ensure compatibility with their specific objectives and to guarantee the availability of financial resources at a minimum of notice.¹⁸⁶

Community expenditure, however, is only legitimate if it has both a budgetary appropriation and is also authorised by the adoption of a basic act which provides the appropriate legal base. The ECJ’s decision in *United Kingdom v. European Commission* (Payments to Combat Social Exclusion),¹⁸⁷ which reaffirmed this, led to one hundred budget headings, equating to one percent of the Union's budget for 1998,

¹⁸² Approximately €100 million has been allocated per year since 2001. Cox and Chapman, *External Cooperation Programmes*, *supra* note 153, p.xviii of the 1997 version of their report give a figure of two percent of the external relations budget.

¹⁸³ *Ibid.*, p.28.

¹⁸⁴ Resolution on a European Democracy Initiative [1992] OJ C 150, 15/6/1992 p.281. Now referred to as the EIDHR.

¹⁸⁵ B7-70, until 1995 it was B7-52.

¹⁸⁶ See COM(1995)567 section 2(b) Financial Resources. Court of Auditors, *Special Report 12/2000*, *supra* note 154, para.75 urged the Commission to simplify the number of budget heads to allow evaluation of them, which in its response the Commission refused to do.

¹⁸⁷ Case C-106/96, *United Kingdom v. European Commission* (Payments to Combat Social Exclusion) [1998] 2 CMLR, 981.

being suspended for non-compliance.¹⁸⁸ As the Financial Report for 1998 notes, a number of different budget heads concerned with the promotion of democracy, the rule of law and human rights had to be suspended. The earmarked funds were eventually released under the terms of an *ad hoc* agreement between the institutions.¹⁸⁹

In the light of the *Social Funds Case* it is clear that many projects promoting ethical values were not lawful where there was significant expenditure without an appropriate legal base. Some projects, however, were based on an appropriate unilateral instrument. Article 6 of the ALA Regulation,¹⁹⁰ for example, specifically refers to the fact that financial and technical assistance is to be extended, in particular, with regard to the spread of democracy and human rights.¹⁹¹

The fact that the Commission and the other institutions understood beforehand the weakness of the legal basis for some of the human rights and democracy based projects can be ascertained from a 1997 Communication. This proposed a “human rights regulation” to provide the various different headings for such projects with a clear legal basis,¹⁹² but the Council rejected the proposal.¹⁹³ The decision of the Court, however, in the *Social Funds Case* made it necessary to ensure the legality of such funding.

The original proposal for a “human rights regulation” was based exclusively on Article 179 EC. This was clearly inadequate for countries with which the

¹⁸⁸ *European Communities Financial Report 1998*, (1999) p.53.

¹⁸⁹ *Ibid.*, p.54.

¹⁹⁰ Council Regulation 443/92, *supra* note 60.

¹⁹¹ See, for example, the report issued by the Commission on the implementation of the Regulation which was published as COM (1998) 40.

¹⁹² COM (1997) 357.

¹⁹³ Although the Opinion of the Legal Service of the Council’s was confidential, Weiler, J., and Fries, S., “A Human Rights Policy for the European Community and Union: The Question of Competences” in Alston, *The EU and Human Rights*, *supra* note 101, p.147, claim it was widely leaked in the press and led to an agreement where the Council would turn a blind eye to the Commission’s practices, if the Commission expunged any official reference to a Community human rights policy relating to any activity in and by the Member States.

Community has relations outside of the development cooperation context. It was for this reason that the proposed regulation was then split into two, with one regulation relying upon Article 179 EC and the other Article 308 EC. In substantive terms the proposals were identical.¹⁹⁴

Article 308 EC, however, unlike Articles 177-179 EC makes no reference to human rights or other principles such as democracy. The practice of the Community prior to the TEU was to use Article 308 EC to fund all such projects, and the specific competence was derived from Article 2 EC. Now that Article 179 EC provides a more specific legal base it must be used with regard to developing countries. Article 308 EC would only continue to be needed for other States. Although the Court did not address this issue directly in the *Portugal* case, this approach was upheld in rejecting Portugal's arguments on Article 308 EC in the Agreement with India. A similar conclusion can be drawn from *Opinion 2/94*.¹⁹⁵ There the Court did not, as such, reject the use of Article 308 EC as a provision granting competence to the Community to undertake or pursue human rights objectives in its external relations. It only rejected the use of Article 308 EC when it amounted to a *de facto* circumvention of the procedure for treaty amendment.¹⁹⁶ Its use for measures pursuing such objectives in third States, in the absence constitutional implications, was not questioned. As the Court noted in *Opinion 2/94*, Article 308 EC,

“is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to *attaining one of the objectives laid down by the Treaty*.”¹⁹⁷

¹⁹⁴ The Commission also presented an earlier amended proposal for the regulation in COM(1999)13. The following discussion however, is based upon the re-examined proposals for the regulations in COMs (1999) 206 and (1999) 207.

¹⁹⁵ *Opinion 2/94*, [1996] ECR I-1759.

¹⁹⁶ See further Gaga, G., “Opinion 2/94” (1996) 33 *CMLRev.*, 973, Mathieu, S., “L’adhésion de la communauté à la CEDH” (1998) 414 *RMUE*, 31 and Cremona, M., “The EU and the External Dimension of Human Rights Policy” in Konstadinidis, S. (ed.), *A People’s Europe: Tuning a Concept into Content*, (1999) p.155.

¹⁹⁷ *Opinion 2/94*, para. 29. Emphasis added. Also see *Opinion 2/92*, [1995] ECR I-521, para.36.

Article 308 EC must respect limits in its text and scope as defined by the Court. The use of Article 308 EC to pursue ethical values in non-developing third States is not without problems, however, even though it has been extensively used for that purpose. Article 181a EC, after the Nice amendments, grants external competence for Agreements but not for other instruments which must still rely upon Article 308 EC.

The Court had the opportunity in *Opinion 2/94* to declare whether the protection of human rights was one of the Community's general objectives, a question of disagreement among the Member States.¹⁹⁸ It avoided addressing it. Before the Court five Member States argued that the protection of human rights was not a Community objective and neither the Community nor Union had specific powers in the field. They relied upon the fact that it was not mentioned in either Articles 2 or 3 of the EC Treaty. It is clear, however that the "activities" listed in Article 3 of the Treaty are not exhaustive. Article 2 EC sets out the Community's tasks with Article 3 stipulating the activities of the Community which "shall include" but are not limited to the list in that provision. The task of "raising....the standard of living and quality of life" as found in Article 2 can be seen as having a human rights objective. Furthermore, the preamble of the Universal Declaration of Human Rights says that the protection of human rights leads to the promotion of social progress and "better standards of life". The means may be different but the objectives are ultimately much the same. A number of commentators attach importance to the fact that the Court did not declare that the Community does not have a human rights objective.¹⁹⁹ Others have argued that the protection of human rights is a transverse objective.²⁰⁰

¹⁹⁸ Austria, Belgium, Denmark, Finland, Germany, Greece, Italy, Sweden, the Commission and the European Parliament all considered the protection of human rights to be Community objective. France, Portugal, Spain, Ireland and the United Kingdom all opposed the idea.

¹⁹⁹ Alston, P., and Weiler, J., "An Ever Closer Union in Need of a Human Rights Policy: The EU and Human Rights" in Alston, *The EU and Human Rights*, *supra* note 101, p.3, 24 and Arnall, A., in *The Human Rights Opinion of the European Court of Justice and Its Constitutional Implications*, (1996) p.7.

²⁰⁰ Brandtner, B., and Rosas, A., "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 *EJIL*, 468, 472 and the Commission in

The objectives in the Community Treaty are expressly supplemented, by the Common Provisions of the TEU which apply to all aspects of the Union. Article 6(1) TEU which affirms that the Union is founded on the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law²⁰¹ is relevant here. Article 6(4) TEU further provides that the “Union shall provide itself with the means necessary to attain its objectives and carry through its policies.” Article 6(4) TEU also makes an appearance in the Protocol on the Application of the Principles of Subsidiarity and Proportionality which was attached to the Community Treaty at Amsterdam. Paragraph 2 of the Protocol specifically notes that reference should be had to Article 6(4) TEU in the application of the principles of subsidiarity and proportionality. This reinforces the argument that those objectives of the Union which are found in the Common Provisions can be pursued through the Community pillar. If the provisions in both the TEU and the EC Treaty are considered in conjunction, then Article 308 EC within the confines of the scope of the EC Treaty can provide a basis to achieve those objectives. Any measures taken on the basis of Article 308 EC, however, still have to satisfy the link with the functioning of the common market and be necessary.

In the past these criteria have been ignored if the political will exists for measures to be adopted.²⁰² Although *Opinion 2/94* was in a different context, before the Court no Member State challenged Community competence to accede to the Convention on the basis that it was not connected to the functioning of the common market. Dashwood considers that the Court did not address the issue as there obviously is no such link.²⁰³ An alternative view is that there seems to have been a general acceptance that there

Opinion 2/94, supra note 195, p.1773. A number of Member States in their submissions considered the protection of human rights to be a horizontal principle as opposed to an objective.

²⁰¹ A use of language which draws heavily not only from the Court’s own jurisprudence but also the Preamble to the UDHR.

²⁰² For detailed historical analysis on the use of Article 308 EC see Weiler, J., “The Transformation of Europe” (1991) 100 *YLJ*, 2403 and for a more recent perspective Schütze, R., “Organized Change Towards an ‘Ever Closer Union’: Article 308 EC and the Limits to the Community’s Legislative Competence” (2003) 22 *YEL*, 79.

²⁰³ Dashwood, A., in *Human Rights Opinion, supra* note 199, p.24.

was such a link and the Court did not address it for that reason. In the case of the proposed regulation on funding for human rights projects in non-developing third States, Article 308 EC was used because there was eventual political agreement between the Member States to use it and the need for a link with the functioning of the common market and being necessary, in the sense the provision refers, to were set to one side. The proposed measures were adopted as Council Regulations 975 and 976 of 1999.²⁰⁴

In terms of substantive competence there are problems, however, with regard to Regulation 976/1999 on funding for human rights projects in non-developing third States, which uses Article 308 EC as its legal base. In the preamble to both the regulations the principle of the indivisibility of rights, as proclaimed in the Vienna Declaration, is seen as a principle that “underpins the international system for the protection of human rights” and therefore “constitutes the very foundation of European integration”. Regulation 976/1999 also provides a basis to fund projects aimed at giving effect to many other related principles and concepts. This is questionable as far as non-developing States are concerned. Article 6 of the TEU refers to the respect of “fundamental rights, as guaranteed by the European Convention...on Human Rights... and as they result from the constitutional traditions common to the Member States, as general principles of Community law”. This is significantly narrower than the ambit encompassed by the regulation. Article 11 TEU does refer more generally to the development and consolidation of “democracy and the rule of law, and respect for human rights and fundamental freedoms” but is limited to the CFSP and is not one of the Common Provisions. Regulation 975/1999 which uses Article 179 EC as a legal base is less susceptible to criticism on this basis.

Neither of the regulations, however, defines what is meant by terms such as “human rights” nor do they provide an exhaustive list of those operations for which the Community shall provide technical and financial aid.²⁰⁵ Particular emphasis has also

²⁰⁴ *Supra* note 65.

²⁰⁵ This lack of clarity is a common feature of all Community documents which address issues, such as, human rights although in COM(1998)146 in the context of the Community’s relationship with the

been placed in the regulations on measures to support and promote human rights and democracy by preventing conflict between States. This approach gives practical implementation to the Communication on Conflict Prevention in ACP States.²⁰⁶ In the context of the regulations it is not geographically limited and is therefore applicable to all States which enjoy a relationship with the Community.

The express protection of Member State competence in the Treaty under the development cooperation provisions and the need for unanimity under Article 308 EC seems to be the reason why such an expansive approach towards Community competence is evolving. It would be inconceivable, for example, for the Court to have taken the approach it did with regard to the relationship between human rights and development cooperation in the *Portugal* case, if the realistic possibility existed of the Community's actions pre-empting the Member States' competence. The *Social Funds* case, although not concerned with development cooperation as such, implicitly reaches the same conclusion. The fact that Regulations 975 and 976 of 1999 on the basis of Articles 179 and 308 EC successfully passed through all stages, while granting an exceptionally broad ambit for action, shows that they are very unlikely to hinder the ability of the individual Member States to fund similar or indeed different projects.

3.1.3.(b)(ii) Funding and Promoting Democracy.

In its activities in promoting and protecting certain values in its relations with third States, the Union has placed very considerable emphasis on the promotion of democracy. A link is seen to exist between development, human rights and democracy. Human rights are necessary for the full development of the individual, whereas democracy is a necessary condition for the exercise of those rights.²⁰⁷ This

ACP States the Commission does provide examples and some broad definitions of other concepts, such as the rule of law, democratic principles and good governance.

²⁰⁶ COM(1999)240. This aims to ensure that Community funds are not used for belligerent purposes as well as establishing procedures for punitive measures.

²⁰⁷ See, for example, COM (1995)567 and Chapter Two.

approach is expressed in the 1991 Resolution on Human Rights, Democracy and Development.²⁰⁸ It is similar to that in the 1986 Declaration on the Right to Development which recognises man as the main beneficiary of the right to development, as opposed to the text of the EC Treaty which is more concerned with the integration of developing economies into the world economy.²⁰⁹ The earlier Luxembourg European Council Resolution on Human Rights had stated that respect for human rights and democracy was part of the economic development process and without it economic growth would not occur.²¹⁰ The concept of development has thus metamorphosed from one concerned with the economic development of States as stated in Article 177 EC, to one that primarily promotes human rights and democracy.

The Court of Auditors has argued, however, that the Community's purpose in combining democracy, development and human rights, was to promote them as a political good which would improve the lives of citizens by bringing more freedom, political representation and accountability.²¹¹ In this respect combining the concepts is an essential part of the process of furthering sustainable social and economic development. It should create economic wealth which will eventually benefit all.²¹²

Supporting democracy in third States can take a number of different forms. One of the Union's primary practical contributions to democracy, following the 1991 Resolution, is through the sponsoring and observation of elections in developing or transitional countries. Election observance as an activity is relatively cheap, it is only for a limited period of time and requires only a small number of observers. The holding of elections and their monitoring is also likely to obtain some media

²⁰⁸ *Supra* note 87, para.3.

²⁰⁹ Declaration on the Right to Development GA Resolution 41/128, GAOR, 41st Session Supp. 53, p186.

²¹⁰ *Supra* note 88.

²¹¹ Court of Auditors, *Special Report 12/2000*, *supra* note 154, p.3.

²¹² See further King, T., "Human Rights in the Development Policy of the European Community: Towards a European World Order?" (1997) *NYBIL*, 51, 61-76 and Simma, B., Aschenbrenner, J., and Schultze, C., Human Rights Consideration in Development Cooperation Activities of the EC" in Alston, *The EU and Human Rights*, *supra* note 101, p.571.

coverage. Election observance therefore, provides an opportunity to display to the international community a commitment to democracy and reform.²¹³

The Union has extensively developed its involvement in the observation of multi-party parliamentary elections from the early 1990s. Since then it has observed and assisted in numerous elections, including those held in Russia, South Africa, Palestine, Bosnia, Indonesia, Nigeria, Cambodia, Pakistan, Zimbabwe and Togo.²¹⁴ The competence for such involvement is dependent upon the geographical region in question. The basis for the expenditure incurred has been unsystematic and dependent on whether the Community has engaged in election assistance or the Union engaged in election observance under the second pillar.²¹⁵ Competence for the Community is derived from Articles 179, 308 or 310 EC, depending upon the region in question. In the context of the ACP States the Lomé/Cotonou Conventions have provided the legal basis. With regard to other countries the specific basis for election assistance has sometimes been the partnership or cooperation Agreement with the country in question or the regulation, for example the ALA Regulation,²¹⁶ governing relations between the Community and country in which elections were taking place. The Community's support for the election process is also funded from the electoral processes budget heads.²¹⁷

Electoral assistance as a form of aid has been considered to be within the Community pillar, whereas election observance has been funded either through the first or second pillar or both.²¹⁸ The primary reason for this approach is to ensure adequacy of funding. The Communication on election observance noted that whereas second

²¹³ Although paradoxically the Member States and European Parliament have criticised the Union's lack of visibility in monitoring elections, see COM(2000)191, p.9.

²¹⁴ COM(2000)191 see Annex 1. In the period between 1992 and 1994, for example, the Community provided such assistance to 41 countries. See COM(1995)567.

²¹⁵ Articles 6(1) and Article 11 TEU. Although it is all referred to as Union activity. See for example, with regard to South Africa where Decision 93/678/CFSP, OJ L 316, 17/12/1993 p.45 established the principle for the EU's support in the election process but where the funding came from Community Budget-Line B7-5070.

²¹⁶ Article 5, ALA Regulation, *supra* note 60.

²¹⁷ COM(2000)191, p.11.

²¹⁸ See *ibid.*, for examples of where this has happened.

pillar joint actions have been used to observe elections, funds have never been sufficient to cover all of the expenses of EU involvement and have therefore, been combined with complementary Community action.²¹⁹ A specific budget line does exist, in Chapter B7-70 covering “Support for the Democratic Transition and the Supervision of the Electoral Processes”, which clearly encompasses observation. The strategy now is for all observation and assistance to be based upon the competence granted by paragraph (f) of Articles 2.2 and 3.2 of Regulations 975/99 and 976/99 respectively.²²⁰ This still does not clarify the source of funding for such initiatives.

While supporting the electoral process displays the Community’s commitment to reform and democratic rule, it is not the end of its involvement. In transitional countries, in particular, democratic institutions need to be consolidated and supported. A democratically elected government may dismantle institutions or remove obstacles which limit its exercise of power.²²¹ For this reason the Community has also undertaken measures to support pluralism, good governance and the rule of law.

3.1.3.(b)(iii) Good Governance, the Rule of Law and Civil Society.

In its 1991 Resolution on Human Rights and Democracy the Council stressed the importance of good governance and the rule of law. While recognising that sovereign States have the right to institute their own administrative structures and establish their own constitutional arrangements, the Council stressed that equitable development could only be achieved effectively and sustainably if a number of general principles were followed. Those are: sensible economic and social policies; adequate government transparency and financial accountability; creation of a market friendly environment; democratic decision-making; measures to combat corruption; as well as respect for the rule of law, human rights and freedom of the press and expression. The Community and the Member States considered that these principles would be central in both existing and new relationships with other States.

²¹⁹ *Ibid*, p.14.

²²⁰ *Ibid*, p.11.

²²¹ For discussion in the context of Pakistan, see, Maluka, Z., *The Myth of Constitutionalism*, (1996).

The rule of law and good governance are now considered to be areas of common interest, fundamental to the dialogue between the parties and central to the achievement of development goals.²²² The OECD and World Bank adopt a similar approach.²²³ The Community has recently provided some guidance as to what it means by the rule of law and good governance. While there is substantial overlap with the approaches adopted by the World Bank and OECD, they are not identical.²²⁴ For the Community, the rule of law entails: effective implementation of legal rules; the separation of powers; institutional arrangements for participation in decision-making at all levels; political and institutional pluralism and transparency; and the integrity of institutions. Furthermore, the legislature and an independent judiciary must respect and give effect to human rights and fundamental freedoms and there must be equality before the law.²²⁵ With regard to good governance: equity and the primacy of the law in the management and allocation of resources; the institutional capacity to manage resources effectively in the interests of economic and social development; accountability and measures aimed at preventing and combating corruption; and public participation in the decision-making process, are all seen as vital.²²⁶ In its most recent Communication on this issue, the Commission stated, “governance refers to the rules, processes, and behaviour by which interests are articulated, resources are managed, and power is exercised”.²²⁷

Both principles, in particular good governance, are defined in a fluid manner and it is questionable to what extent the definitions provided are meaningful. The advantage in stressing good governance and the rule of law in relations with third States is that

²²² COM (1998) 146, p.2 and COM (2003) 615, p.3.

²²³ See OECD, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance*, (1997) *passim* and World Bank, *World Development Report* (1997) p.4. See further, Faundez, J.(ed.), *Good Government and Law: Legal and Institutional Reform in Developing Countries*, (1997) and Ginther, K., Denters, E., and de Waart, P. (eds.), *Sustainable Development and Good Governance*, (1995) p.20 for more on good governance in this context.

²²⁴ In part, because there are no internationally agreed definitions. See COM(2003)615, p.3.

²²⁵ COM(1998)146, p.6.

²²⁶ *Ibid* and Article 9(3) Cotonou Convention.

²²⁷ COM(2003)615, p.3.

they are more pragmatic than and not as culturally loaded as human rights.²²⁸ Both concepts must be introduced or improved by States which are recipients of Community aid. What is apparent, however, is that the Community is demanding very high standards from third States, especially developing countries. For example, for the rule of law as defined to be implemented in a society where in the past it has not been respected requires a fundamental redistribution of power – which is exceptionally difficult to achieve or impose. Good governance is also difficult to achieve and, in practice, projects dealing with public procurement and tackling corruption seem to attract the most funding from the Community.²²⁹

Although the Community, along with the World Bank and OECD, argues that these concepts are indispensable to development, it is not clear to what extent it considers the appropriateness of their application. In April 2000 the Commission on Human Rights of the United Nations adopted a resolution entitled “The Role of Good Governance in the Promotion of Human Rights”²³⁰ where it noted that good governance necessarily varies according to the particular circumstances and needs of different States. The Resolution further notes that the responsibility for determining and implementing such practices, based on transparency and accountability and which aim to create and maintain an environment conducive to the protection and promotion of human rights, rests with the State concerned. It is difficult to know, however, how the Community applies these concepts in its relations with third States? Togo and Cote d’Ivoire, for example, have had aid suspended or delayed over accusations of corruption but this seems to have been more to do with the misappropriation of donor funds than shortcomings in good governance in general.²³¹ The real concern lies not in the unwillingness or inability of third States to adopt and implement appropriate policies but in the scope of the Community’s ambition. The Community’s initiative to promote its objectives through funding is not only ambitious but also stretches the Community’s budget lines over a vast geographic

²²⁸ *Ibid.*

²²⁹ House of Lords Committee, *Twelfth Report*, *supra* note 148, p.67.

²³⁰ E/CN.4/RES/2000/64, 2/4/2000.

²³¹ See House of Lords Committee, *Twelfth Report*, *supra* note 148, p.74.

region and a vast area of reforms; so that it is not able to give effective support to a reform process that it may have instigated.

Since the adoption of the 1991 Resolution, the Commission reports on it²³² illustrate the great diversity of Community assisted projects concerned with good governance and the rule of law. For example, in 1994 alone the Community funded projects which included the development of institutions and representative organisations, the transparency of public administration, legal assistance in the drafting of constitutions and legislation, the reinforcement of the judicial system including the administration of justice, police and prison reform, and support for an independent or pluralistic and responsible media.²³³

The striking breadth of the measures which the Community has funded, mainly in the absence of strategic plans,²³⁴ has obviously contributed to the fact that the Community's project portfolio has been spread far too thinly over different areas, resulting in the dilution of their impact. The Court of Auditors, for example, has noted that the Commission in funding projects has rarely addressed their continuity. Valuable and worthy projects which have not been able to attract funding other than from the Commission, have stopped functioning when Community funding has dried up.²³⁵ The lack of a strategic plan, which includes continuity of Community funding, has ensured that the Community has had a limited impact when it could have achieved significantly more.

The funds committed by the Community would have had a far greater impact if they were part of a coherent overall strategy which assessed needs and aimed to address particular issues identified as needing support within the context of policy towards a third State. Such an approach would not only focus the Community's effort but would also lead to more tangible benefits for the citizens and the State in question.

²³² COMs(1994)42, (1995)191, (1996)672, (2000)726 and the more recent *EIDHR Compendiums*.

²³³ This list is not exhaustive and derived from Annex 3 to COM(1995)191. In every other year the scope has been equally broad.

²³⁴ Although Country Strategy Papers are being introduced by the Development and External Relations DGs.

²³⁵ Court of Auditors, *Special Report 12/2000*, *supra* note 154, paras.33 and 47.

While this may be laborious and difficult to undertake, it would provide real benefits. It is true, however, that such efforts can usually only tinker with the edges. This is especially true in Asian and Latin American States, where the ratio between populations and funding is most stark.

3.2. Humanitarian Aid and Food Aid.

3.2.1. Community Competence in Humanitarian Aid

The Community has, like most other donors, considered humanitarian aid within the development cooperation context. The Union Treaties still do not establish a humanitarian aid policy. Historically, practice was conducted on an *ad hoc* basis using a variety of legal bases. The Yaoundé/Lomé Conventions, for example, contained provisions which allowed the Community and the Member States to provide emergency assistance to ACP States, funded out of the EDF, the general budget or both. In non-ACP States the Community either relied upon a provision in a framework regulation or, where there was none, funds were allocated on the basis afforded by the general budget procedure.²³⁶ Prior to the TEU, Article 308 EC was used for such action with the addition of Article 37 EC where food aid was involved.

The European Community Humanitarian Office (ECHO) was eventually set up in 1992, partly in response to the humanitarian crises resulting from the conflict in the Balkans and Persian Gulf in the early 1990s. The aspiration for the Union to become an international actor arose when the end of the Cold War left a power vacuum.²³⁷ Humanitarian aid was perceived to be one means towards that end. The creation of ECHO streamlined the procedural aspects of the Community's activities in this field. It brought within its scope activities carried out by several services within the Commission structure, such as humanitarian aid, emergency food aid and prevention

²³⁶ See, for example, *Annual Report on Humanitarian Aid 1993*, p.10.

²³⁷ Holland, M., *The European Union and the Third World*, (2002) p.100.

and disaster preparation activities. It did nothing though to clarify the scope of the Community's competence in this field.²³⁸

Eventually a 1995 Communication,²³⁹ which became the 1996 Council Regulation on Humanitarian Aid,²⁴⁰ attempted to establish objectives and to set out the general criteria for the humanitarian aid provided by the Community. It also addressed the issue of competence and the scope of activity. The legal base for the regulation is Article 179 EC, but it has been used for a global humanitarian aid policy. The logic behind splitting the proposal for the regulation on human rights and democracy into two, as explained above, was because development cooperation provisions can only lawfully extend to developing countries. Article 308 EC had to be used for non-developing countries. The Humanitarian Aid Regulation, however, is careful not to limit its application to developing countries. Article 1 states:

“[t]he Community's humanitarian aid shall comprise assistance.....to help people in third countries, particularly the most vulnerable among them, and as a priority those in developing countries, victims of natural disasters, man-made crises....or exceptional situations or circumstances.”

Assistance can thus be provided to any third country. It is not clear that assistance to those in developing countries must be due to a humanitarian incident – it must simply aim to alleviate suffering of the most vulnerable in such countries. A distinction between developing and non-developing countries can be seen to lie within the regulation. Assistance can be provided to a developing country, regardless of an emergency, to alleviate suffering but to non-developing countries only if an emergency situation of some sort exists. In practice, however, it does not seem that this distinction is in any way observed. The Commission considers that Article 179

²³⁸ Mandate from the Commission to ECHO, 6/11/1991. Also see, *Annual Report on Humanitarian Aid 1993*, (1994) p.2 where ECHO's *raison d'être* is explained and Court of Auditors, *Special Report 2/1997, Concerning Humanitarian Aid From the European Union Between 1992 and 1995*, OJ C 143, 12/05/1997, p.1 which deals with the background to the administrative shake-up.

²³⁹ COM(1995)201.

²⁴⁰ Regulation No. 1257/96, Concerning Humanitarian Aid, OJ L 163, 2/07/1996 p.1.

EC is a perfectly adequate legal base for the Community's activities.²⁴¹ Its approach was approved by the Development Council and it seems unlikely that the Humanitarian Aid Regulation will be amended with a view to splitting it on the lines of the 1999 Human Rights Regulations.²⁴²

The objectives and general principles of humanitarian aid in the regulation are broad in nature and provide the Community with competence beyond what can be strictly considered to be of a humanitarian nature. The principle objectives in the regulation are: to save and preserve life during emergencies and their immediate aftermath; to provide the necessary assistance and relief to people affected by longer lasting crises; and to take steps to carry out short term rehabilitation and reconstruction work with a view to facilitating the arrival of aid.²⁴³ The regulation also grants powers for operations to prepare for or prevent disasters or comparable emergencies.²⁴⁴ This aspect of its work now accounts for approximately eighty percent of ECHO's expenditure.²⁴⁵ With regard to its preparatory work, the Community's humanitarian activities merge into development cooperation.

The demarcation between development, rehabilitation and humanitarian aid has been further muddied by two more regulations – the 1997 Regulation on Operations to Aid Uprooted People in Asian and Latin American Developing Countries and the 1996 Regulation on Rehabilitation and Reconstruction of Operations in Developing Countries.²⁴⁶ The latter stems directly from the 1996 Communication entitled “Linking Relief Rehabilitation and Development” (LRRD).²⁴⁷ The practice of linking

²⁴¹ See COM(1999)468.

²⁴² Development Council Conclusions, 18/5/2000, Press Release Number 8571/00.

²⁴³ Article 2, Regulation 1257/96.

²⁴⁴ Article 1, Regulation 1257/96.

²⁴⁵ See the Annual Reports for a breakdown of figures.

²⁴⁶ Council Regulation No. 443/1997, On Operations to Aid Uprooted People in Asian and Latin American Developing Countries OJ L 68, 8/03/1997 p.1 and Council Regulation No. 2258/96, On Rehabilitation and Reconstruction Operations In Developing Countries, OJ L 306, 28/11/1996, p.1.

²⁴⁷ COM(1996)153.

such aid was widespread prior to the 1996 (LRRD) Regulation coming into force.²⁴⁸ This regulation, which is based upon Article 179 EC, provides the Community with an express competence to fund projects which overlap with both emergency humanitarian assistance as well as infrastructure projects, which would normally come within the ambit of development cooperation. Projects designed to help re-establish a working economy and the institutional capacity, needed to restore social and political stability, can all be funded.²⁴⁹ The distinction between the scope of the 1996 (LRRD) Regulation and that concerned with humanitarian aid is that the former is clearly limited to developing countries.

Operations under the LRRD Regulation are seen as forming part of a continuum between humanitarian action and development aid. These operations must, in particular, permit refugees and other internally displaced persons to return home and must assist the entire population to resume normal civilian life.²⁵⁰ These operations are not to be implemented by ECHO, however, but by the Commission.²⁵¹ The adoption of these different measures has led to a situation where some forms of rehabilitation assistance to non-developing countries are based upon the Humanitarian Aid Regulation and implemented by ECHO, but the Commission (through EuropeAid)²⁵² is responsible for the implementation of rehabilitation aid in developing countries. ECHO, however, has a far clearer idea of where such funding is most needed.

The distinction between humanitarian and rehabilitation aid is further muddied by the aforementioned Regulation on Operations to Aid Uprooted People in Asian and Latin

²⁴⁸ See, for example, Articles 255 and 257 Lomé IV. Also see COM (1993) 204 and Court of Auditors, *Special Report 4/2000, On Rehabilitation Action for ACP Countries as an Instrument to Prepare for Normal Development Aid*, OJ C 113, 19/4/2000 p.1, 3.

²⁴⁹ See Article 1.

²⁵⁰ Article 1, Council Regulation 2258/96. See further *infra*.

²⁵¹ See Article 7, Council Regulation 2258/96.

²⁵² EuropeAid was established in 2001 with the aim of creating a single department to coordinate non-humanitarian aid destined for all third countries. Some aid agencies still have reservations about its effectiveness. See *KnowEurope* 9/2/02 "Jury Still Out as Aid Agency Steps Up Spending Reforms". The House of Lords Committee, *Twelfth Report, supra* note 148, p.8 however, considers that it has helped to improve the quality and delivery of European Aid.

American Developing Countries. This is distinct from assistance under Article 1 of the LRRD Regulation which also covers such persons. The purpose of a separate regulation is to provide support and assistance for uprooted persons which is not covered by the Humanitarian or LRRD Regulation and is thus distinguishable from them both. Whereas rehabilitation under the LRRD Regulation would provide for assistance to such persons it does not lawfully permit the extent of funding provided by the Uprooted Persons Regulation. Article 1 of the Humanitarian Aid Regulation can, however, extend to such assistance.²⁵³ The Community's competence and activities are becoming less demarcated between its different component parts. From a practical perspective this has a number of benefits as it still allows the Commission and ECHO flexibility to implement and fund projects in accordance with their assessment of priorities and needs on the ground.

3.2.2. Community Competence in Food Aid.

The Common Agricultural Policy (CAP) has meant that a policy on food aid has been in existence since July 1968 when the Community joined the Food Aid Convention (FAC) of the International Wheat Agreement and the European Food Aid programme was established.²⁵⁴ European Food Aid programmes started as a means of using surplus agricultural commodities for the purposes of economic development and emergency relief in developing countries.²⁵⁵ Such programmes have evolved over time to accommodate changing international circumstances, as well as the Community's evolving competence and approach. It is, for example, only twenty years since a Communication on such assistance stated that one of the reasons for the Community providing food aid was to help pull *it* out of recession.²⁵⁶

²⁵³ Although it does have a separate budget head and thus a protected source of funds.

²⁵⁴ Food Aid Convention of 1967, OJ L 305, 19/12/1968 p.1.

²⁵⁵ See OJ C 170, 28/7/1975 p.28 where the Commission provides a summary of all Community food programmes between 1969 and 1975. More recent surveys of Community food aid programmes can be found in the ECHO, *Annual Report on Humanitarian Aid*.

²⁵⁶ See COM (1982)640.

The inherently differing objectives of agricultural and development policy ensured that while dual legal bases were being used, the Community's actions with regard to food shortages were driven less by concern for the alleviation of hunger than by the objectives of Article 33 EC.²⁵⁷ It is for this reason, among others, that Snyder described food aid as "one of the most visible, most frequently praised, yet also most vociferously criticised facets" of the relationship between the developed and developing world.²⁵⁸ Cathie maintains, however, that the Community has never argued the case for food as a form of aid on the grounds of the interests of its own producers.²⁵⁹ This is highly questionable. The legal basis for the Community to become party to the Food Aid Conventions and for the early regulations concerned with food aid matters was Articles 42 and 43 of the EC Treaty.²⁶⁰ Where the Community's agricultural competence was relied on, it is difficult to argue that development cooperation was the primary aim. Article 235 EC (now 308 EC) would have allowed for a development based approach, if the political will had existed. It did not.²⁶¹

With Regulation 3331/82, a discernible shift from previous practice can be detected. This regulation followed shortly after the November 1981 Resolution of the Council on Aid to Agricultural Products and Food Aid, which stated that the Community had a responsibility to ensure that the aid it supplied was used effectively to relieve hunger and improve the self-reliance of the targeted countries.²⁶² The regulation

²⁵⁷ See further Macalister-Smith, P., "The EEC and International Humanitarian Assistance" (1981) *LIEI* 89, 98.

²⁵⁸ Snyder, F., "The European Community's New Food Aid Legislation: Towards a New Development Policy?" in Snyder, F., and Slinn, P.(eds.), *International Law of Development: Comparative Perspectives*, (1987) p.271.

²⁵⁹ Cathie, J., *European Food Aid Policy*, (1997) p.6.

²⁶⁰ See, for example, Regulation No. 2721/72, OJ L 291, 28/12/1972 p.28 and Regulation No. 2727/1975, OJ L 281, 1/11/1975 p.1. Regulations strictly concerned with food aid used the then Articles 42 and 43 EC. Other measures concerned with cereals and food which may have been used as aid also relied upon the now Articles 133 and 300 EC.

²⁶¹ See further COM (1974)300 as an early example of the Commission's approach to questions of food policy and aid.

²⁶² Reproduced in, *Compilation of Texts Adopted by the Council January 1981-December 1988*, (1989) p.13.

used the same double legal base and did not take the full step towards humanitarian objectives. As Snyder notes, the use of the two bases meant it was a mixture of “ideology, strategy, technology and surpluses.”²⁶³

The Community’s policy vis-à-vis food aid is now based on the development cooperation provisions of the Community Treaty.²⁶⁴ The 1996 Regulation on Food Aid Policy and Management shows how the Community’s approach has evolved.²⁶⁵ It highlights the objectives of Community food aid policy, which are no longer solely or even largely driven by the welfare of the Community’s own agricultural producers. The basic aim is to provide food aid in situations in which food insecurity exists, whatever its basic cause, and to increase food security in developing countries.²⁶⁶ The Community’s broadly defined competence to act is not limited to emergency situations although such emergencies are also covered by the objective. The Community can respond in different ways to promote food security, in particular, it can act to raise the nutritional level of the recipient population or promote the availability of foodstuffs to the public.²⁶⁷

The Community also has powers to act with longer term solutions in mind – for example, to act to support the efforts of recipient countries to improve their own food production and thus reduce their dependence on food aid.²⁶⁸ This involves financial support for domestic structural reform as opposed to the more short-term measures, noted above, which would primarily involve sending food aid. The Community may

²⁶³ Snyder, “The European Community’s Food Aid Legislation” *supra* note 258, p.281 quoting R. Talbot, “The European Community’s Food Aid Programme: An Integration of Ideology, Strategy, Technology and Surpluses” *Food Aid* (November 1979) p. 269. Also see Snyder, F., “European Community Law and Third World Food Entitlements” (1989) 32 *GYIL*, 87 and more generally McMahon, J., “International Agricultural Trade Reform and Developing Countries: The Case of the European Community” (1998) 47 *ICLQ*, 632.

²⁶⁴ See in particular the preamble to Regulation No. 1292/96, On Food Aid Policy and Food Aid Management and Special Operation in Support of Food Security, OJ L 166, 5/07/1996 p.1, which is the current framework regulation on food aid policy.

²⁶⁵ COM (1995)283 provides further background to the Food Aid Regulation.

²⁶⁶ Article 1(1), Regulation 1292/96.

²⁶⁷ Article 1(3), Regulation 1292/96.

²⁶⁸ *Ibid.*, fifth, sixth and seventh indents.

also assist developing States develop their agricultural sectors.²⁶⁹ This again involves more than humanitarian or emergency aid. The Community, in particular in post-emergency situations, can back up the recipient country's policies on poverty reduction, nutrition and rehabilitation. Agricultural development, however, has to fit within the overall context of the Community's development policy and this raises the importance of the coherence between the Community's differing sectoral competences described above.

The Community's extensive general competence in development cooperation covers almost all conceivable situations concerning food security and aid. But it can only achieve its objectives if adequate resources are committed. In financial terms the amount of European food aid distributed is impressive. In 1998 it accounted for approximately eight percent of the Community's external budget.²⁷⁰ It is questionable, however, to what extent the Community assists any State in achieving food security. The Community's practice in the past has been to globally distribute its food aid. With the exception of the smallest of States, in terms of population, the Community does not satisfy the food requirements of any recipient State. It would in any case, be undesirable for the Community to create a dependency between itself and a State or group of States in this regard. In distributing food aid the Community is obliged to take account of the per capita income of its recipients and the balance of payments situation of the recipient country.²⁷¹ Consequently there is a lack of assistance to those living in extreme poverty in middle income countries.

The Community's competence in terms of food aid, as with development cooperation, does not, in practice, encroach upon the competence of the Member States to act in parallel. It now reflects the reorientation of food aid from the purpose of disposal of the Community's surplus agricultural produce to that of the Community's development cooperation policy.

²⁶⁹ Article 1(4), Regulation 1292/96.

²⁷⁰ Cox and Chapman, *External Cooperation Programmes*, *supra* note 153, p.35.

²⁷¹ Article 2(2), Regulation 1292/96.

3.3. Competence in Trade and the Pursuit of Ethical Values.

3.3.1. Introduction.

The final area of substantive competence to be discussed is that of trade. International trade is considered in the context of development cooperation provisions to be a tool by which developing States can be brought into the global economy. Trade is also crucial, as discussed above, to the Community's efforts to help eradicate and reduce poverty in third States. The demarcation between competence in trade and development cooperation is, however, at times very unclear. The Community's role in trade is also relevant to the pursuit of ethical values in third States in other ways. Some of these are tangentially related, others more directly so. The globalisation of trade, in which the Community has played a substantial role, has arguably resulted in an increase in the rule of law in international economic relations.²⁷² As a commitment to the rule of law is considered imperative for economic development, as well as the establishment of democracy and protection of human rights, trade has in this way contributed to the Community's development cooperation objectives.

Trade with and possibly assistance from the Union and its Member States are among the most important considerations for third States when they seek to establish or consolidate links. The pursuit of ethical values in third States and a trade based relationship are, however, not always compatible. Trade relies on economic efficiency which can interfere with the enjoyment of certain human rights, for example, minimum labour standards.²⁷³ The enforcement of minimum labour standards is, however, sometimes perceived to be driven by protectionism.²⁷⁴ There

²⁷² See Garcia, F., "The Global Market and Human Rights: Trading Away the Human Rights Principle" (1999) 25 *Brook J. Int'l L.*, 51, 53 and De Waart, P., "Quality of Life at the Mercy of WTO Panels: GATT's Article XX: An Empty Shell?" in De Waart, P., and Weiss, F. (eds.), *International Economic Law With a Human Face*, (1998) p.109.

²⁷³ See more generally, Compa, L., and Diamond, S. (eds.), *Human Rights, Labour Rights and International Trade*, (1996).

²⁷⁴ See Alston, P., "International Trade as an Instrument of Positive Human Rights Policy" (1982) 4 *HRQ*, 155.

is a difficult balance to be struck. Linking trade to a respect for ethical values does provide an enforcement mechanism to those States who are in a position to offer concessions or other trade related benefits. Within the Community context the relationship between ethical values in third States, primarily human rights, and trade arises directly in a number of different contexts. First, there is a relationship between the protection of certain rights in third States and the granting or withdrawing of benefits under the Generalised System of Preferences (GSP). Secondly, there is the imposition of restrictive measures against a third State for the violation of ethical values. Thirdly, restrictive measures can be imposed on the export, from the Community to third States, of goods which may be used for purposes of which it does not approve. Each of these will be discussed in turn.

3.3.2. The GSP Scheme.

In the Community context, the GSP and the removal of all tariffs for the least developed countries (LDCs) under the Everything But Arms Initiative (EBA)²⁷⁵ increasingly blur the distinction between trade and development cooperation. An expansive approach to both development and trade makes the demarcation between the two increasingly difficult. But it is important as the Community's competence in trade in external relations is exclusive in nature, while in development cooperation it is not.

The Community first established a GSP in 1971 with the regulations which formed the scheme either based on Articles 235 (now 308) or 113 (now 133) EC.²⁷⁶ The scheme was updated in the 1980s by Regulations 3599/85²⁷⁷ and 3600/85,²⁷⁸ in which there was no reference to a legal base. These measures were subsequently challenged

²⁷⁵ Council Regulation No. 416/2001, OJ L 60, 1/3/2001 p.43.

²⁷⁶ Règlement 1314/1971 du Conseil, du 21/06/1971, établissant, pour certains produits des chapitres 1 à 24 du tarif douanier commun, un système de préférences généralisées en faveur des pays en voie de développement, OJ L 142, 28/06/1971 p.85, Règlement 1313/1971 du Conseil, du 21/06/1971, portant ouverture de préférences tarifaires pour certains produits textiles et des chaussures, originaires de pays en voie de développement, OJ L 142 , 28/06/1971 p. 76.

²⁷⁷ OJ L 352, 30/12/1985 p.1.

²⁷⁸ OJ L 352, 30/12/1985 p.107.

by the Commission to determine whether Article 113 (now 133) EC could extend to incorporating development cooperation aims or whether reference to Article 235 EC (now 308 EC) was required. Both Advocate General Lenz and the Court held that Article 113 EC could be used for development based measures. The rationale was that the link between development and trade was progressively stronger and it was therefore legitimate for development aims to play a role in international trade relations.²⁷⁹ As the Court relying upon *Opinion 1/78*²⁸⁰ stated:

“...the existence of a link with development...does not cause a measure to be excluded from the sphere of the common commercial policy.... it would no longer be possible to carry on any worthwhile common commercial policy if the Community were not in a position to avail itself also of means of action going beyond instruments intended to have an effect only on the traditional aspects of external trade..”²⁸¹

The link is now well established in Community law. The Community has competence to include development objectives in trade measures and these should be based upon Article 133 EC.²⁸² In the context of the current GSP scheme²⁸³ there are two principal dimensions to the relationship with ethical values. These are the withdrawal of the preference for the violation of minimum standards and the awarding of greater benefits for compliance with specified international instruments.

3.3.2.(a). The GSP Scheme, Labour Standards and the Withdrawal of Benefits.

²⁷⁹ Case 45/86, *Commission v. Council*, [1987] ECR 1493, paras 17-18.

²⁸⁰ *Opinion 1/78*, [1979] ECR 2871.

²⁸¹ Case 45/86, *Commission v. Council*, para. 20.

²⁸² See, for example, Regulation No. 2820/1998, OJ L 357, 30/12/1998 p. 1 and Council Regulation No. 602/98, OJ L 80, 18/3/1998 p.1.

²⁸³ Council Regulation No. 2501/2001, Applying a Scheme of Generalised Tariff Preferences for the Period 1 January 2002 to 31 December 2004, OJ L 346, 31/12/2001, p.1 as subsequently amended by Council Regulation No. 2211/2003, Amending Regulation No. 2501/2001 Applying a Scheme of Generalised Tariff Preferences for the Period 1 January 2002 to 31 December 2004 and Extending it to 31 December 2005, OJ L 332, 19/12/2003 p.1.

The link between labour standards and trade is not new.²⁸⁴ Article XX(e) GATT 1947, for example, allows the banning of goods made by prison labour, although the provision has never been invoked by the Community.²⁸⁵ The Commission first made the link between trade and labour standards in a 1978 Communication, but this highlighted some of the pitfalls.²⁸⁶ The standards were derived from an amalgamation of a number of ILO Conventions, to which most of the Community's Member States were not party.²⁸⁷ Accusations of protectionism in such circumstances are justifiable. Furthermore, in the past the language used by the Commission did nothing to clarify which standards were to be used, as "international labour standards" and "fair labour standards" were used interchangeably to mean the same thing.²⁸⁸ The Community now uses the term "core labour standards"²⁸⁹ in line with the approach adopted by the OECD²⁹⁰ as well as the ILO itself, which considers eight of its conventions, which protect certain civil rights, to be "core conventions".²⁹¹ In Article 50 of the Cotonou Convention, for example, the parties now "reaffirm their commitment to the internationally recognised core labour standards, as defined by the relevant International Labour Organisation (ILO) Conventions". A similar approach has been adopted in the dialogue between the EC

²⁸⁴ See, Compa and Diamond, *Human Rights, Labour Rights supra* note 273 Wet, E., "Labour Standards in the Globalised Economy: The Inclusion of a Social Clause in the General Agreement on Tariffs and Trade/World Trade Organisation" (1995) 17 *HRQ*, 443 and Waer, P., "Social Clauses in International Trade" (1996) 30 *JWT*, 25.

²⁸⁵ This is because it is almost impossible for customs authorities to determine the conditions under which goods are produced in third countries. See OJ C 251, 8/9/1994 p.10.

²⁸⁶ COM (1978) 492.

²⁸⁷ For discussion see, Alston, "International Trade" *supra* note 274.

²⁸⁸ See, for example, COM (1996) 402.

²⁸⁹ See COM (2001) 416.

²⁹⁰ OECD, *International Trade and Core Labour Standards*, (2000).

²⁹¹ These are: Convention No. 29, Forced Labour Convention, 1930, 39 *UNTS* 55; Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, 68 *UNTS* 17; Convention No. 98, Right to Organise and Collective Bargaining Convention, 1949, 96 *UNTS* 257; Convention No. 100, Equal Remuneration Convention, 1951, 165 *UNTS* 304; Convention No. 105, Abolition of Forced Labour Convention, 1957, 320 *UNTS* 291; Convention No. 111, Discrimination (Employment and Occupation) Convention, 1958 363 *UNTS* 31; Convention No. 138, Minimum Age Convention, 1973, 1015 *UNTS* No. 14862; and Convention No. 182, Worst Forms of Child Labour Convention, 1999, 2133 *UNTS* No. 37245.

and China regarding China's failure to sign up to the core ILO conventions.²⁹² By using ILO Conventions the Community is not only encouraging their ratification but also promoting universally accepted standards.

Under Article 26 of the GSP Regulation the Community can temporarily withdraw, in respect of all or certain products, the preferential tariffs enjoyed by a State in response to the violation of certain rights. First, if the activities prohibited in the 1926 Slavery Convention or ILO Convention Nos. 29 and 105 on forced labour are practised within its jurisdiction.²⁹³ Secondly, if serious and systematic violations of the rights protected under any of the other six ILO core conventions are occurring within its jurisdiction. The scheme has regard to effective enforcement of the law, not to the law in the State in question. Nor is it necessary that the goods produced under such conditions are exported to the Community. The approach now adopted by the Community towards the norms in question is preferable to that adopted under the previous scheme where the rights in some core ILO conventions were considered to be worthy of protection and others were not.²⁹⁴

Any Member State, natural or legal person can bring to the attention of the Commission, violations of the requisite conventions in the territory of a State benefiting under the GSP.²⁹⁵ The investigative procedure initiated as a result of such a complaint allows the Commission to obtain information from a broad array of individuals and organisations.²⁹⁶ Once the Commission has concluded its

²⁹² See COM(1998)181, Section B1.

²⁹³ ILO Convention No. 29 provides a definition of forced labour and is supplemented by Convention No. 105. Article 1, Slavery Convention, 1926, 60 *LNTS* 253 as amended by the Protocol to Slavery Convention, 1953, 212 *UNTS* 17, provides the basic definition of slavery in international law.

²⁹⁴ See Article 9, Council Regulation No. 3281/1994, Applying a Four-Year Scheme of Generalised Tariff Preferences (1995 to 1998) in Respect of Certain Industrial Products Originating in Developing Countries, OJ L 348, 31/12/1994 p.1 and Council Regulation No. 1256/1996, Applying Multi-annual Schemes of Generalised Tariff Preferences (1996 to 1999) in Respect of Certain Agricultural Products Originating in Developing Countries, OJ L 160, 29/06/1996 p.1. The only reference was to the Slavery and the Forced Labour Conventions.

²⁹⁵ Article 28, Regulation 2501/2001.

²⁹⁶ *Ibid.*

investigations in accordance with Articles 28 to 31 of the regulation, if appropriate, the preferences can be suspended by the Council.²⁹⁷

The withdrawal of preferences under the GSP is not formally linked with other aspects of Community development cooperation.²⁹⁸ If a State is in breach of core ILO Conventions, it is also likely to be in breach of any “essential elements” clause of any development Agreement in force between it and the Community. While there is no formal link between suspension of the GSP scheme and other measures, for reasons of consistency it should follow that withdrawal of benefits under the GSP should lead to commensurate action with regard to other assistance.

To date, the Community has suspended preferences on one occasion - in 1997 with regard to Myanmar.²⁹⁹ The fact that the authorities in Myanmar did not assist or cooperate with the fact-finding mission sent by the Commission seems to have been as crucial to the determining of a breach as the practices themselves.³⁰⁰ A complaint has also been made about Pakistan but benefits were not withdrawn due to the commitment of the authorities to try and tackle the problems highlighted.³⁰¹ The Commission is at the time of writing investigating practices in Belarus.³⁰²

3.3.2.(b). The GSP Scheme, Labour Standards and the Incentive Scheme.

The GSP Regulation also establishes that additional preferences may be granted to States if they can provide evidence that they implement and give effect to domestic legislation incorporating “the substance of the standards laid down” in the eight core

²⁹⁷ *Ibid.*, Article 29(4).

²⁹⁸ For confirmation of the view that the removing of the GSP has no link with other measures see, the answer given by Mr Marin at OJ C 21, 22/1/1998 p.75.

²⁹⁹ Council Regulation No. 552/1997, OJ L 85, 27/03/1997 p.8 as subsequently amended and extended. The EBA specifically does not apply to Myanmar as a consequence of this measure.

³⁰⁰ See the Preamble of the Regulation and Chapter Four.

³⁰¹ See Chapter Four.

³⁰² See Commission Decision, 29/12/2003, Providing for the Initiation of an Investigation Pursuant to Article 27(2) of the Council Regulation No. 2501/2001 With Respect to the Violation of Freedom of Association in Belarus, OJ L 5, 9/1/2004 p.90.

ILO Conventions or they “are engaged in a clear and significant way” in applying them.³⁰³ If the applicant State can prove this to the Commission then, depending on the product in question, it can gain a greater reduction than that enjoyed under the GSP scheme, under the Common Customs Tariff.³⁰⁴ This incentive scheme was one of the innovative features of the revised GSP as formulated in the 1994 and 1996 regulations. The incentive scheme will, however, only be an inducement to developing States to adopt the relevant ILO Conventions if the reduction in tariffs is generous and the Community is a major importer of such goods from those States. Furthermore, the product in question must be a significant foreign currency earner.³⁰⁵ Where the State in question benefits from the EBA initiative, moreover, it will provide little incentive. The scheme is of utility therefore, only for countries not classified amongst the least developed. Prior to the amendments to the current scheme, the failure of any State to be awarded additional benefits had alerted the Commission to the fact that it was very difficult to comply with and provided little incentive for change.³⁰⁶ For this reason Article 14(2)(b) was added to the regulation, to allow States to benefit from the scheme if they were engaged in applying legislation to give effect to the core conventions in a “clear and significant way including all appropriate means envisaged in the...ILO Conventions taking the utmost account of the assessment of the ...ILO”. This effectively lowers the threshold. Shortly after the regulation was amended, Sri Lanka was successful in its application for additional benefits.³⁰⁷

The procedure is still fairly onerous. Few States are likely to amend their legislation solely due to the inducement described. Those States taking advantage of the scheme

³⁰³ Article 14(2), Regulation 2501/2001, amended by Article 4, Regulation 2211/2003, *supra* note 283. A similar scheme also exists for effective protection of the environment under Articles 21-24 and to Combat Drug Trafficking under Article 25. See further Chapter Four.

³⁰⁴ Article 8, Regulation 2501/2001.

³⁰⁵ COM (2001) 416, p.6 recognises that the special incentive scheme did not work well.

³⁰⁶ See COM (2003) 634, p.3.

³⁰⁷ Commission Regulation of 29 December 2003, Granting the Democratic Socialist Republic of Sri Lanka the Benefit of the Special Incentive Arrangements for the Protection of Labour Rights, OJ L 364, 31/12/2003 p.34. China has now applied for additional benefits with regard to the environment, Uzbekistan and Russia have applied with regard to labour rights.

are likely to have already adopted or are in the process of adopting domestic legislation giving effect to the core ILO Conventions. Furthermore, they must export enough of a non-sensitive product to make it a worthwhile exercise for them to satisfy the Commission that they are entitled to a reduction in tariffs.³⁰⁸ The Community, however, should not be criticised for this. If it did not apply stringent criteria the benefit would become meaningless. The amendments it has made and the successful Sri Lankan application suggest that the Community has now struck the right balance.

3.3.3. Restrictive Trade Measures.

A decision to interrupt or reduce economic relations between the Member States and a third State, for matters within the scope of its competence, must be given effect by the Community, notwithstanding the forum in which such action is agreed. Action outside of the Community would encroach on its exclusive competence, and the danger exists that, if such measures are enacted by individual Member States, distortions of competition may arise. It has long been practice to implement the commercial aspects of any such decision through the Community.³⁰⁹

The standard modern practice is for the Council to adopt a common position, which outlines the measures to be taken, and for it to be implemented by the requisite actors depending on the allocation of competence.³¹⁰ Some aspects need to be implemented by the Member States and the others by the constituent parts of the Union.³¹¹ The

³⁰⁸ Article 16, Regulation 2501/2001.

³⁰⁹ For discussion of early practice see, Kuyper P., "Sanctions against Rhodesia and the European Economic Community and the Implementation of General International Legal Rules" (1975) 12 *CMLRev.*, 231 and "Community Sanctions against Argentina: Lawfulness under Community and International Law" in O'Keeffe, D., and Schermers, H. (eds.), *Essays in European Law and Integration*, (1982) p.141.

³¹⁰ Although not all are very clear on this, see for example, Common Position 96/635/CFSP, OJ L 287, 8/11/1996 p. 1, concerning Myanmar. See more generally, Denza, *Intergovernmental Pillars*, *supra* note 3, p.296.

³¹¹ The visa restrictions for example, stipulated in the Common Position on Myanmar, *ibid.*, were outside of Community competence. Article 2, Council Regulation No. 1081/2000, Prohibiting the

Community now has express competence under Articles 60 and 301 EC to give effect to common positions or joint actions.

The decision on restrictive measures in the CFSP, which are then in part implemented by the Community, may be unilaterally adopted by the Council³¹² or may give effect to a resolution adopted by the Security Council acting under Chapter VII of the UN Charter.³¹³ This is binding on the Member States as UN members.³¹⁴ Such measures can be punitive in order to bring pressure to bear on a third State for its policies or acts.³¹⁵ They may also aim to ensure that the Member States, possibly again with others, do not provide a State or insurgents with some of the materials and instruments needed to engage in practices and policies they do not approve of. For example, the Community has adopted a regulation with regard to Indonesia, on the

Sale, Supply and Export to Burma/Myanmar of Equipment Which Might be Used for Internal Repression or Terrorism, and Freezing the Funds of Certain Persons Related to Important Governmental Functions in that Country, OJ L 122, 24/5/2000 p. 29, refers to the implementation of aspects of the Common Position which come within Community competence. It does not include the visa provisions of the Common Position.

³¹² For example, Common Position 96/635/CFSP.

³¹³ For example, Council Regulation No. 2111/1999, Prohibiting the Sale and Supply of Petroleum and Certain Petroleum Products to Certain Parts of the Federal Republic of Yugoslavia, OJ L 258, 5/10/1999 p.12 and Council Regulation No. 2151/1999, Imposing a Ban on Flights Between the Territories of the EC and the Federal Republic of Yugoslavia other than the Republic of Montenegro or the Province of Kosovo, OJ L 264, 12/10/1999 p.3, were both implemented to give effect to common positions (Common Position 1999/604/CFSP OJ L 236, 7/9/1999 p. 1 and Common Position 1999/273/CFSP OJ L 108, 27/4/1999 p.1.) which in turn were adopted to give effect to a series of Security Council Resolutions.

³¹⁴ Article 103 United Nations Charter and Article 307 EC. For more recent discussion on economic sanctions imposed by the UN and their implementation in the Community legal order see, among many others, Denza, *Intergovernmental Pillars*, *supra* note 3, p.111 and Bethlehem, D., "Regional Interface Between Security Council Decisions and Member States Implementation: The Example of the European Union" in Gowlland-Debbas, V.(ed.), *United Nations Sanctions and International Law*, (2001) p.291. Such action is perfectly compatible with the Member States obligations under Article 48(2) of the Charter.

³¹⁵ For example, those imposed against Nigeria - discussed in Chapter Four.

basis of a common position, which prohibits the sale of equipment which can be used for internal repression.³¹⁶

A Communication published in 2002 attempts to take this further. The Commission has proposed a regulation concerning trade in equipment and products which can be used for capital punishment, torture or other cruel, inhuman and degrading treatment.³¹⁷ Based upon Article 133 EC, the first part of the regime imposes a ban on exports to any third State, of products which have no practical use, other than for the purposes of torture, inhuman and degrading treatment or capital punishment.³¹⁸ The purpose of this is to prevent the violation of human rights and it is aimed at giving further effect to the aforementioned specific guidelines on torture and the death penalty. In a series of cases, the ECJ has held that the Common Commercial Policy can encompass regimes which have a foreign policy aspect.³¹⁹ This is the first attempt specifically to prohibit the export to all States of goods, which have no other use but to contribute to human rights violations. This is notwithstanding the fact that the imposition of capital punishment in a third State may be legitimate under both domestic and international law.

Regulation 1334/2000³²⁰ which establishes the current Community regime on dual-use goods further establishes the link between human rights and the export of such

³¹⁶ Council Regulation No. 2158/1999, Concerning a Ban on the Supply to Indonesia of Equipment Which Might Be Used In Internal Repression, OJ L 265, 13/10/1999 p. 1.

³¹⁷ COM (2002) 770.

³¹⁸ *Ibid.* Explanatory Memorandum, para.5.

³¹⁹ Case C-83/94, *Criminal Proceedings against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer*, [1995] ECR I-3231, paras.10-13. Also see, among others, Case C-70/94, *Fritz Werner Industrie-Ausrüstungen GmbH v. Germany* [1995] ECR I- 3189, Case C-367/89, *Aimé Richardt* [1991] ECR I-4621 and Case C-124/95, *R, ex parte Centro-Com Srl v. HM Treasury and the Bank of England* [1997] ECR I-81, especially Advocate General Jacobs' Opinion at para.27. The first three cases were in the context of dual-use goods.

³²⁰ Council Regulation No.1334/2000, Setting up a Community Regime for the Control of Exports of Dual-Use Items and Technology, OJ L 159, 30/06/2000 p.1 . It has been subsequently amended on a number of occasions, most recently by Council Regulation No. 149/2003, Amending and Updating Regulation No. 1334/2000, Setting up a Community Regime for the Control of Exports of Dual-Use Items and Technology, OJ L 30, 05/02/2003 p. 1.

goods. The original regime was implemented by Regulation 3381/94.³²¹ It was with respect to this regulation that the Court in the *Werner* and *Leifer* cases, confirmed that restrictions on the export of dual-use goods fell within the exclusive competence of the Community. Article 8 of Regulation 3381/94 referred to the Third Annex of Council Decision 94/942/CFSP. This set out the considerations the competent authorities should take into account when deciding whether or not to grant an export authorisation.³²² These included obligations under Security Council Resolutions, the non-proliferation of sensitive goods and an obscure reference to human rights in terms of the June 1991 Luxembourg European Council Resolution. This said that the export of conventional arms to States should take its human rights record and internal situation into account. Cross-pillar action was thus taken to regulate trade in dual-use goods.

In Regulation 1334/2000, which replaced that regime with a purely Community system, Article 5 allows a Member State to prohibit or impose an authorisation requirement on the export of goods, for public security reasons or due to human rights considerations. The Member State in so doing must inform the Commission of its reasoning. The State has discretion on the matter and if it decides that it does not wish to permit the export of such goods it may legitimately do so, so long as the restriction is proportionate to the risk to the protection of human rights in the State of destination.

Decision 94/942/CFSP has now been repealed,³²³ but Annex Three is still applicable.³²⁴ The general regime has also been supplemented by regulations which specifically prohibit the exportation of dual-use goods to a named third State because

³²¹ Council Regulation No. 3381/94, Setting up a Community Regime for the Control of Exports of Dual-Use Goods, OJ L 367, 31/12/1994 p. 1.

³²² OJ L 278, 30/10/1996 p.1.

³²³ 2000/402/CFSP, Council Decision Repealing Decision 94/942/CFSP on the Joint Action Concerning the Control of Exports of Dual-Use Goods, OJ L 159, 30/06/2000 p. 218.

³²⁴ Para. 5, Preamble, Regulation 1334/2000.

they may be used for the purposes of internal repression.³²⁵ All of these measures rely on human rights violations in the States in question, among the reasons behind their adoption.³²⁶

Such considerations are also relevant in the EU Code of Conduct on Arms Exports.³²⁷ Arms exports are outside the Community's competence but not outside the scope of the CFSP.³²⁸ In the Code of Conduct on Arms Exports, Criterion Two is based upon the respect for human rights in the country of final destination and declares that Member States will not issue export licences if there is a clear risk that the proposed export will be used for repressive measures. Respect for human rights is, however, only one of seven detailed criteria in addition to which the measure is not legally binding.³²⁹

4. Conclusions.

This chapter has shown that the Community and Union have a wide armoury of instruments and strategies at their disposal to pursue their ethical objectives in third States. Although the Community and Member States were slow to introduce such values into their relations with third States, the end of the Cold War and the lack of a rival political ideology and provider of ideologically tied funds strengthened their bargaining position. The changing global political climate coinciding with the adoption of the Maastricht Treaty enabled a more proactive approach to be adopted. Not only have policies which place an emphasis upon certain values been introduced

³²⁵ For example, concerning Indonesia, *supra* note 316, Burma *supra* note 311 and Council Regulation No. 310/2002, Concerning Certain Restrictive Measures in Respect of Zimbabwe, OJ L 50, 21/2/2002 p.4.

³²⁶ See, in particular, the preambles to the regulations.

³²⁷ Adopted 8/6/1998. See Denza, *Intergovernmental Pillars*, *supra* note 3, p.104.

³²⁸ Article 11(1) TEU.

³²⁹ An annual report is published on the national measures taken to give effect to the Code – see for example, OJ C 320, 31/12/2003, p.1. The reports indicate that some Member States regularly refuse to grant export licences. Amnesty International, *Undermining Global Security: The European Union's Arms Exports* (2004) however, has been very critical of the Code.

in relations with most third States, but there has also been a refocusing of approach. The transformation in the Community's competence and attitude has been significant. Food Aid, for example, has gone from being a policy concerned with equally promoting the interests of Community producers to one primarily, although not exclusively, cast in terms of alleviating hunger.

The Union has used the CFSP and cross-pillar action to implement the policies it wishes to pursue. Where the Community does not have competence, for example arms controls, the CFSP has been used instead. Where Community competence does exist its breadth is more than apparent. Projects funded under the two 1999 Human Rights Regulations (975 and 976 of 1999), for example, illustrate the scope of the Communities activities and ambition. The competence under Articles 177-181 EC is, however, expressly limited to development cooperation. The Community has also used its development cooperation powers to pursue a global humanitarian aid policy. Articles 308, 133 and 310 EC have also been used to pursue ethical values in relations with third States. The use of Article 133 EC, where the Community has exclusive competence, still does not substantially affect the competence of the Member States in their development cooperation policies. Shared competence, as is the case with development cooperation, can lead to the Member States being deprived of their powers. The *AETR* principle does not in practice apply in the case of development cooperation, however, because the Community is not establishing uniform rules. The Court and Member States have allowed a very broad approach to development cooperation because it is about coordinated action and providing funds. Community policies do not prohibit the Member States from pursuing any policies they so wish, so long as they are broadly complementary to and coordinated with Community action.

Development aid is most effective when it both supports economic growth and is focused on poverty reduction. The Community in line with all other major donors now considers poverty reduction to be the major objective of development policy. The obstacles all donors face are substantial, especially considering the institutional structures in recipient States with which they often have to contend. As the House of Lords Committee on the European Union noted, despite these problems, "[t]here is little doubt that EU aid is achieving better results than it has in the past, but is capable

of achieving even better results.”³³⁰ The Union certainly has the powers, instruments and economic influence to pursue an effective ethical foreign policy. The major consideration facing the Union and indeed any State in the pursuit of such a policy, however, is the balance to be struck, in practice, between their sometimes competing foreign policy objectives. The remainder of the thesis deals with this issue.

³³⁰ House of Lords Committee, *Twelfth Report*, *supra* note 148, p.8.

Chapter Four.

Ethical Values and Foreign Policy in Practice: Responses to the Denial of Democracy in Myanmar, Nigeria and Pakistan.

1. Introduction.

The next three chapters of the thesis deal with specific examples of the practice of the Union. In this chapter, relations with Myanmar, Pakistan and Nigeria are discussed. In all three democracy has been interrupted at one stage or another and all have well documented problems relevant to those ethical values the EU seeks to promote and protect in third States. The aim in this chapter is to assess how differing approaches and tactics as well as geopolitical considerations have influenced the scope and type of legal and diplomatic instruments selected by the Union to achieve its objectives.

2. Myanmar.

In 1980 the EC entered into a Cooperation Agreement¹ with the then Member States of the Association of South East Asian Nations (ASEAN).² The Community has subsequently extended relations with those States, with the exception of Myanmar, who have joined ASEAN after the Agreement came into force.³ The Community has refused to extend the Agreement to Myanmar due to the current situation there.

¹ Cooperation Agreement between the European Economic Community and Indonesia, Malaysia, the Philippines, Singapore and Thailand - Member Countries of the Association of South-East Asian Nations, OJ L 144, 10/6/1980 p.2.

² Singapore, Malaysia, Philippines, Indonesia and Thailand. Brunei joined in 1984, Vietnam in 1995, Laos and Myanmar in 1997 and Cambodia in 1999. ASEAN is not an international organisation, nor does it enjoy international legal personality.

³ This has been through either the adoption of a Protocol to the Agreement with the ASEAN States (for example, Brunei) or the adoption of both a separate bilateral Agreement and a Protocol (for example, Cambodia and Laos).

In the absence of a development based treaty relationship with Myanmar, if the Union wishes to promote and protect ethical values in that country, the primary techniques and instruments will be those of the CFSP as supplemented by various projects funded by the Community. Myanmar comes within the scope of the Asian and Latin American Regulation (ALA Regulation)⁴ and is thus eligible for projects to be funded under it, as well as under the European Initiative for Democracy and Human Rights (EIDHR).⁵ The ALA Regulation states, that in relations with Asian and Latin America countries, emphasis should be placed on strengthening the cooperation framework and on making an effective contribution, through institutional dialogue and economic and financial cooperation, to sustainable development, security, stability and democracy.⁶ The ALA Regulation stipulates that indicative multi-annual guidelines should apply to the main partner countries and accordingly in the Country Strategy Programmes (CSP) for these countries, the promotion of effective democracy and protection of human rights and fundamental freedoms have been identified as major objectives.⁷

Before discussing relations between the Union and Myanmar in detail, it is worth briefly discussing the situation there.⁸ A highly authoritarian regime has been in power since 1962, when an elected civilian government was overthrown. Since 1988 when the armed forces suppressed a massive pro-democracy movement, a junta composed of senior military officers have ruled by decree, without a Constitution or legislature. On 27 May 1990 the military permitted relatively free elections, by most accounts, for a parliament to which they announced they would

⁴ Council Regulation No.443/92, Regulation on Financial and Technical Assistance to, and Economic Cooperation with, the Developing Countries in Asia and Latin America, OJ L 52, 27/2/1992 p.1.

⁵ Council Regulation No.975/1999, OJ L 120, 8/5/1999 p.1 and Council Regulation No. 976/1999, OJ L 120, 8/5/1999 p.8.

⁶ Articles 4-6, Regulation 443/92.

⁷ A CSP does not exist for Myanmar. Also see COM (2003) 399/4 with regard specifically to ASEAN States.

⁸ This information is derived from the Reports of the UN Special Envoy and Special Rapporteur to Burma/Myanmar, especially, E/CN.4/2003/41, E/CN.4/2000/38, E/CN.4/1999/35, E/CN.4/1999/129, E/CN.4/1997/64, E/CN.4/1996/65, E/CN.4/1994/57 and E/CN.4/1993/37.

transfer powers. Voters overwhelmingly supported anti-government parties with the National League for Democracy (NLD) winning 80% of the parliamentary seats. Since the election, the military has systematically and brutally suppressed the democracy movement. The reports of the Special Rapporteur appointed by the Commission on Human Rights and the Special Envoy of the Secretary-General of the United Nations,⁹ as well as submissions made to US courts¹⁰ highlight and document gross and systematic human rights violations. In brief, and the list is not exhaustive: torture; extra-judicial killings; disappearances; arbitrary arrest and detention; denial of fair trials; excessive use of force and violations of humanitarian law; severe restrictions on the freedoms of expression, assembly and movement; persecution of ethnic groups; and the systematic and widespread use of slavery and slave-like practices are all well documented and widely verified. The State Peace and Development Council (SPDC)¹¹ has routinely refused to meet with representatives of the United Nations and has on numerous occasions denied the Special Rapporteur entry into the country, although some visits have been permitted since 1998. In 1998 the ILO in a report on Myanmar referred to the regime engaging in “clear flagrant violations of a peremptory norm of international law” (referring to slavery and slave-like practices) and “crimes against humanity”.¹² Furthermore, Myanmar was suspended from the ILO in 2000, due to its failure to ensure compliance with the ILO Forced Labour Convention, 1930.¹³ The SPDC, for its part, considers that it is the victim of propaganda and misinformation. According to it, those human rights obligations which are culturally applicable to

⁹ *Ibid.*

¹⁰ See *Doe v. Unocal*, 963 F. Supp. 880. US Dis. Ct.

¹¹ Previously the State Law and Order Restoration Council.

¹² Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the ILO to Examine the Observance by Myanmar of the Forced Labour Convention 1930 (No.29) Geneva, 2/7/1998, Part V, para. 538.

¹³ Convention No. 29, Forced Labour Convention, 1930, 39 *UNTS* 55. Report of the Governing Body of the ILO, 276th Session, November 1999. Of the ILO’s core conventions, Myanmar is also a party to Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, 68 *UNTS* 17.

the people of Myanmar are respected.¹⁴ Of the major UN human rights conventions, Myanmar is a party to those on the rights of women¹⁵ and children.¹⁶

In 1993, the last year for which data are available, trade between the EU and Myanmar amounted to ECU 28 million.¹⁷ Myanmar does not control any vital resources. It is of negligible importance, relatively speaking, in trade terms to the Union and it does not pose a security threat to it. Nor is it likely that a large influx of refugees from Myanmar will arrive at the Union's borders. Thus with little else at stake, there are few interests which can impede any decision of the Union and its Member States to take punitive action against it or, on the other hand, little tangible benefit to the Union in promoting ethical values in Myanmar.

The Union's relationship and dealings with Myanmar have been conducted on both a regional and a bilateral basis. The latter is dealt with in detail in Section 2.2 of this chapter. Although it is not possible within the scope of this chapter to discuss the regional dialogue between the Union and the ASEAN States in detail, the following section provides some context and background to that dialogue and discusses the approach to ethical values in it.

2.1. The Role of Ethical Values in Regional Dialogue Involving Myanmar and the Union.

The Union was slow to realise the growing importance of South-East Asia in global terms. It was not until the Essen European Council of 1994 that a New Asia Strategy (NAS) recognised that the existing relationship with the ASEAN States had undergone a fundamental shift and was increasingly one of equals. The relationship thus required a review of the presumptions upon which it had been based. One of the consequences of the NAS was the establishment of the Asia

¹⁴ See the SPDC's webpage <http://www.myanmar-information.net/truth/truth.html>.

¹⁵ Convention on the Elimination of all Forms of Discrimination Against Women, 1979, 1249 *UNTS* 13.

¹⁶ Convention on the Rights of the Child, 1989, 1577 *UNTS* 3.

¹⁷ See OJ C 91, 6/12/1995 p.53.

Europe Meetings (ASEM)¹⁸ which is intended to function outside formal regional structures. The political dialogue undertaken in ASEM is in addition to those arrangements, which have been established, with a more formal structure. These include the Asian Regional Forum (ARF),¹⁹ Post-Ministerial Conferences (PMC) and the ASEAN-EU Joint Cooperation Committee (JCC), which is based upon the 1980 Cooperation Agreement with ASEAN.²⁰ With the exception of the JCC, all fora come within the scope of the CFSP.

The Union and its Member States have, in accordance with the objectives of the CFSP and Community development cooperation provisions, introduced human rights, democracy and other ethical values to their regional dialogue with these Asian States. The Union has encountered differing amounts of resistance from them. Furthermore, the Union has vetoed the admission into the dialogue of certain States, due to their lack of democratic institutions and the human rights situation within them.²¹ This approach can in some respects disadvantage the Union, as the Asian States may respond by taking their business elsewhere. In the First ASEM meeting held in Bangkok in 1996, for example, the different priorities and perspectives of the participants was more than apparent. In paragraph five of the statement adopted at the conclusion of the meeting, the Asian States managed to ensure that the commitment to the dialogue, among the participating countries, was being conducted “on the basis of mutual respect, equality, promotion of

¹⁸ ASEM is composed of the ASEAN States, China, Japan, South Korea and the EU.

¹⁹ The ARF primarily provides a setting in which members can discuss regional security and political concerns. All ARF documents are available at: <http://www.dfat.gov.au/arf/index.html>.

²⁰ See further, Mahncke, D., “Relations Between Europe and South East Asia: The Security Dimension” (1997) 2 *EFARev.*, 291, van Dijk, P., “Meeting Asia and Latin America in a New Setting” and Kagami, M., “Europe and Asia: Too Faraway” both in van Dijk, P., and Faber, G.(eds.), *The External Economic Dimensions of the European Union*, (2000) p.292 and p.341 respectively and McMahon, J., “ASEAN and the Asia-Europe Meeting: Strengthening The European Union's Relationship with South East Asia?” (1998) 3 *EFARev.*, 233.

²¹ Myanmar, Laos and Cambodia. The Community has subsequently signed Agreements with the latter two States which contain an “essential elements” clause. See Cooperation Agreement Between the European Community and the Lao People’s Democratic Republic, OJ L 334, 5/12/1997 p.15 and Cooperation Agreement Between the European Community and the Kingdom of Cambodia, OJ L 269, 19/10/1999 p.18.

fundamental rights and, in accordance with the rules of international law and obligations and non-intervention, whether direct or indirect, in each other's internal affairs.”²² This form of wording was clearly a compromise between the parties. The Union wished to ensure that some commitment to human rights was agreed upon whereas the Asian States wanted to ensure that the impact of that commitment was, as far as possible, diminished. Unlike the approach of the Union, the position of many Asian States is that matters such as human rights and democracy are within a State's domestic jurisdiction and any criticism of them is an interference in its internal affairs. The wording was thus one both parties could live with, as they took it to mean completely different things. The description by a leading Commission official of some of the documents adopted in the Third ASEM summit in Seoul in 2000 as a “breakthrough vis-à-vis human rights”, simply highlights the limited ambitions and prospects that are now held out for such objectives being effectively addressed in this forum.²³ In the light of the attacks in Bali and Jakarta in recent years, the Union has now very clearly shifted its focus to cooperating on and dealing with terror in the region. This has now been recognised as one the key objectives of ASEM.²⁴ With regard to the question of participation in the ASEM, the Union has stood its ground on human rights and other such issues. Laos, Cambodia and Myanmar, have all become parties to ASEAN, albeit after the ASEM process had begun. The EU has therefore, exercised its veto, stating that it did not wish to negotiate or engage in dialogue with them due to their human rights records. It is only with regard to Myanmar that the Union still adopts this approach. It is, however, under increasing pressure to give way and to admit it to ASEM.

The Community, as noted above, also has a Cooperation Agreement with the Member States of ASEAN. The Union has continually, although quite selectively at times, plugged away at discussions on ethical values with the ASEAN States, even though the 2003 Commission Communication on relations with them indicates

²² See (1996) 3 *EU Bull*, Documents.

²³ Rieterer, M., “ASEM–The Third Summit in Seoul 2000: A Roadmap to Consolidate the Partnership Between Asia and Europe” (2001) 6 *EFARev.*, 1, 13.

²⁴ See the Chair's Statement at the 5th ASEM Foreign Ministers Meeting, 22-24/7/2003.

a distinct shift of focus from such matters.²⁵ The Union, on the one hand, considers that they have problems with such matters and, on the other, maintains a dialogue with them encouraging trade cooperation and the greater protection of intellectual property among a host of other issues. Mols' assertion that an EU-ASEAN human rights dialogue has been neglected because it, "would focus attention on a weak point in practically all ASEAN countries"²⁶ cannot, however, be sustained.

Major shortcomings in the approach of the Union to the ASEAN States on these matters do, however, exist. It has by and large treated them in a homogeneous manner. Yet, there is no shared Asian culture or a uniform view on the role of human rights and democracy.²⁷ Some of the ASEAN States are Islamic in nature, although this is expressed in very different ways, others are Buddhist or Confucian. Some, such as Singapore, promote a certain brand of nationalism and national identity over and above religion. The Union's primary concern, however, has been to obtain basic commitments to human rights and democracy from all ASEAN States. One of the grounds of opposition from some of the ASEAN States to such issues, as an agenda item in the dialogue with the Union, has been on the basis of what is perceived as the imposition of cultural values by the European States: values that some States consider are not relevant to them.²⁸ The Presidency, however, has been keen to stress that this is not the imposition of values by one part of the world on another but an affirmation of shared values. The framing of ethical values in this manner does not cut any ice with some of the ASEAN States. Trade and access to markets have been the issues they wish to discuss and while progress has been made on these fronts, the Union and its Member States have seen the commitment to human rights by all parties as essential for the dialogue to move

²⁵ See COM (2003) 399/4, p.10.

²⁶ Mols, J., "Cooperation With ASEAN: A Success Story" in Edwards, G., and Regelsberger, E.(eds.), *Europe's Global Links: The European Community and Inter-Regional Cooperation*, (1990) p.66.

²⁷ See more generally Bauer, J., and Bell, D.(eds.), *The East Asian Challenge for Human Rights*, (1999). The ratification of the major UN human rights conventions by these States and the nature of their reservations differ markedly.

²⁸ See especially the speeches of Yew and Mahathir of Singapore and Malaysia respectively.

forward.²⁹ The 2003 Commission Communication, however, very interestingly notes that the clearest shared value between the EU and ASEAN States is regional integration.³⁰ As noted above, the Communication also places far greater emphasis on the fight against terror. This does not necessarily mean the abandonment or subordination of a commitment to discussion on ethical matters. In the ASEAN-EU Foreign Ministers meeting in January 2003, for example, there was a reaffirmed commitment by all parties to respect for the equality of civilizations and to the shared values of human rights, including development and fundamental freedoms.³¹ The question now is what weight will be attached to such matters, when other foreign policy objectives have come into sharper focus?

The Union in pushing ethical values on to the agenda in its dialogue with the ASEAN States has adopted a pragmatic view. At the end of 2000 in a joint statement the two blocs stated quite clearly that it was economic dialogue and cooperation that was to be intensified. ASEAN-EU programmes in intellectual property had to be seen as a priority, along with questions of market access.³² Human rights, democracy and other fundamental freedoms were nowhere to be found. The Union has clearly adopted an approach of obtaining basic commitments to human rights and democracy, among others, from third States, whenever it is a party to dialogue with them. This fact is borne out by the other case-studies. The commitments obtained add nothing to the legal obligations States are under. All fora where such commitments have been made, no matter how weak they are present another opportunity for the Union to discuss them and utilise diplomatic pressure to that end. This is valuable in itself as it allows the Union to consistently emphasise the importance it attaches to such matters and that any shortcomings in this respect will be a legitimate subject of discussion.

²⁹ This has to some extent been achieved. See, Joint Declaration of the 10th Meeting of the Foreign Ministers of the ASEAN-EC, Manila, 29-30/10/1992. Reproduced as EFPB Doc., 92/409.

³⁰ COM (2003) 399/4, p.10.

³¹ Joint Co-Chairman's Statement of the 14th EU-ASEAN Ministerial Meeting, 27-28/1/2003, para.5.

³² Joint Statement of the ASEAN-EU Ministerial Meeting, October 2000, available at <http://www.deltha.cec.eu.int/newsroom/releases/2000/ASEAN>.

2.2. Bilateral Dealings With Myanmar.

The nature of the regime in Myanmar and its practices has, as noted above, resulted in the Union's refusal to accept that country as a party to inter-regional dialogue. Notwithstanding the general situation in Myanmar since 1961, and some very limited punitive measures that the Community adopted in 1993, the relationship between it and the Union only took a decisive turn for the worse when the Danish Consul in Yangon, James Leander Nichols, was arrested for the unauthorised use of fax machines and telephones and subsequently died in custody in 1996. Nichols was the honorary consul of Denmark but also represented Finland, Norway and Switzerland. In a declaration issued on 5 July 1996 the EU indicated that it was very concerned with the situation in Myanmar and that it expected a full and satisfactory explanation of the death from the authorities.³³ It also called for an investigation into the death by the UN Special Rapporteur. The death of a consular official provided impetus for action and led to a very swift response by Denmark, which pushed vociferously for the imposition of economic sanctions by the Union.³⁴ As a consequence of Nichols' death the Union decided to adopt a parallel approach towards Myanmar. Punitive measures would be adopted via the CFSP and Community, on the one hand, and, on the other, diplomatic measures would be utilised. These will be analysed in turn.

2.2.1. Diplomatic Measures and Myanmar.

Following the death of Nichols, the EU met with Myanmar's Minister of Foreign Affairs on three occasions.³⁵ It insisted that the SPDC must, without delay, respect human rights and release immediately and unconditionally all members of the National League for Democracy (NLD) and all other political prisoners. It also insisted that the ruling junta enter into meaningful dialogue with the pro-democracy

³³ See EFPB Doc., 96/221.

³⁴ See EFPB Doc., 96/312 and later OJ C 135, 14/5/1999 p.69.

³⁵ At the margins of the PMC in July 1996 and Troika meetings at the margins of the UN General Assembly in July and October 1996. The meetings were described as being "most unsatisfactory" and "a disappointment" by the EU. See EFPB Docs., 96/270, 96/312 and 97/163.

movement and all other national minorities to bring about reconciliation and democratic reform. It further insisted that Myanmar fully explain the death of Nichols.³⁶ The unrealistic nature of such demands is more than apparent but what the death of the Danish consul provided for the Union, was a focal point and reason for it to amalgamate all its objectives and press for them collectively.

In response to the lack of what it perceived as satisfactory answers, the EU subsequently asked the UN Special Rapporteur (who had already been denied entry to the country) and the Working Group on Arbitrary Detention and Imprisonment to visit the country, as well as urging the Commission on Human Rights to take action against Myanmar.³⁷ The Union's deteriorating diplomatic relationship with Myanmar, due to the death of the Danish consul, further came to a head when the other ASEAN States decided to accept Myanmar's application to join them. On 26 June 1997 the General Affairs Council (GAC) confirmed its attachment to the EU-ASEAN dialogue, in particular human rights, and expressed the hope that by joining ASEAN, Myanmar would also contribute to those values. EU-ASEAN dialogue was thus envisaged as an additional forum in which the Union could raise its grievances.³⁸ Due to the common position that had already been adopted by the Union, however, it was not possible at this stage to allow Myanmar to accede to the EC-ASEAN Cooperation Agreement or ASEM, unless such measures were repealed.³⁹ This approach caused substantial diplomatic problems in the relationship with the other ASEAN States as the Union also attempted to chastise them for admitting Myanmar.⁴⁰

ASEAN now had a Member State against whom the Union had already taken the punitive measures prescribed in a number of common positions. The accession of

³⁶ *Ibid.*

³⁷ *Ibid.* Myanmar was in fact already an annual topic of debate in the Commission on Human Rights.

³⁸ Reproduced as EFPB Doc., 97/151.

³⁹ See EFPB Docs., 98/171, 98/238, 98/276 and OJ C 134, 30/4/1998 p.20.

⁴⁰ See the statement on the Accession of Cambodia, Laos and Burma/Myanmar to ASEAN, reproduced as EFPB Doc., 97/083. Also see (1997) 1/2 *EU Bull* 1.3.115 on the 12th EU-ASEAN Ministerial Meeting.

Myanmar to ASEAN, however, opened the door for a more critical dialogue with Indonesia on the situation in East Timor, something the Portuguese had long been pressing for. This consequently pushed human rights further up the agenda of priorities. The tactic to be adopted with regard to Myanmar's accession to ASEAN caused problems though between EU Member States themselves. Germany advocated Myanmar's participation in the EU-ASEAN meeting in Berlin in March 1999, provided human rights were on the agenda. Denmark refused to take part in the meeting if Myanmar was a party to the discussion. Eventually a compromise position was agreed between ASEAN States and the EU and between the Union Member States as well. Myanmar was allowed to be present at the meeting, which eventually took place in May 1999 (a deal was negotiated in the meantime) but only as a silent observer. Due to the debate over the accession of Myanmar to ASEAN, EU-ASEAN Ministerial Meetings were not held for three years.⁴¹ The 13th ASEAN-EU Ministerial Meeting, held in Vientiane in December 2000, has now resolved the position. Laos, Cambodia and Myanmar all participated for the first time at the meeting as full members.⁴² As noted above, however, only Laos and Cambodia have become parties to the EC-ASEAN Cooperation Agreement of 1980. The Union has consistently argued that it is within its prerogative to decide whether to extend the Agreement to new ASEAN States and it will refuse to do so with regard to Myanmar, until a democratic government with a commitment to human rights is installed.

Until recently, however, the Community has not sought to negotiate a third-generation Agreement with the ASEAN States, contrary to its practice elsewhere.⁴³ A historic reason for this has been Portugal's refusal to consent to a Commission mandate to negotiate Agreements with these countries as a group, due to its animosity, over East Timor, with Indonesia.⁴⁴ Rather than agreeing to a mandate

⁴¹ See (2000) 12 *EU Bull* 1.6.78 and OJ C 297, 15/10/1999 p.153. Other meetings were, however, ongoing.

⁴² (2001) 1/2 *EU Bull* 1.6.112.

⁴³ COM (2003) 399/4. "Third-generation Agreements" not only contain "essential elements" clauses but also deal with cooperation in areas which "second-generation Agreements" did not.

⁴⁴ See COM (1996)314, p.8. Portugal is not named. Although see OJ C 325, 27/10/1997 p.16, para.17 where the European Parliament names Portugal in this regard.

with the ASEAN States, except Indonesia, which would have been politically very damaging to interests in the region, the Commission has attempted to make do with the 1980 Agreement.⁴⁵ East Timor is now no longer a problem in relations with the ASEAN States and consequently the new Communication on the relationship with them allows for the negotiation of Agreements with the ASEAN States individually.⁴⁶ As ASEAN does not have international legal personality this is necessary. This approach allows the Community to exclude Myanmar but it does run the risk of damaging its relations with the ASEAN States as a group.

The Union has on occasion also arranged *ad hoc* bilateral meetings with the military authorities on the fringes of the UN General Assembly. These meetings have been set up through a network of contacts at embassy level. Such meetings have not been conducive to re-establishing relations.⁴⁷ Persuading the other ASEAN States, who have much more influence in Myanmar than the Union, of the benefits of a democratic and free Myanmar may achieve better results. The ASEAN States are now beginning to disagree among themselves over how best to deal with Myanmar. At the ASEAN Summit in June 2003, for example, the other ASEAN States issued a very rare public rebuke to Myanmar over the treatment of Suu Kyi.⁴⁸ Malaysia suggested that Myanmar be expelled unless it reformed, whereas Thailand pressed for it to be given more time to allow it to reform.⁴⁹ The opportunity is now ripe for the Union to utilise its leverage and to press the other ASEAN States to use their political influence in Myanmar.

⁴⁵ The GAC on 24/3/1997 approved a package of measures which were seen as an alternative to a third-generation Agreement. Reproduced as EFPB Doc., 97/148.

⁴⁶ COM (2003)399/4. East Timor is, further to a decision of the ACP-EC Council of Ministers on 16/5/2003, now a member of the ACP group of States.

⁴⁷ I am grateful to Commission desk-officers for this insight.

⁴⁸ *International Herald Tribune*, "Japan Halts Aid to Burmese Over Democracy Leader's Detention" 26/6/2003, internet edition.

⁴⁹ *The Independent* "Burma Stays Silent on Suu Kyi's Fate as Dissidents Are Freed" 24/7/2003 p.10.

2.2.2. The Utilisation of Punitive Legal Instruments by the Union Against Myanmar.

Under EPC, the Community and its Member States had adopted declarations on the situation in Myanmar prior to the 1990 elections.⁵⁰ Démarches and statements, which became more vocal when it was apparent that there would not be a restoration to democracy, were also issued on the 1990 elections and their results.⁵¹ In mid-1991 the Community declared itself “appalled” at the failure to respect the wishes of the population.⁵² It is at this stage that the Community and its Member States began to consider downgrading development aid and possibly suspending all non-humanitarian aid to Myanmar.⁵³ The fact that the Community was already considering reducing aid to a country, due to the failure of a regime to hand over power to a democratically elected body prior to the 1991 June Resolution of the Luxembourg Council, is a clear indication that the Resolution was not only establishing guidelines for action but was also building upon existing practice. Gross and systematic violations of fundamental norms since 1962 had until then not prompted any other response from the Community. In the Luxembourg Declaration of 4 January 1991 on Myanmar, however, the Community and its Member States stated that in the aftermath of the election and the refusal of the military to cede power, the Community and Member States had a “legitimate concern for... civil and democratic rights” and a call to respect human rights cannot be dismissed as “interference in the domestic affairs of other States.”⁵⁴ As the discussion in Chapter Two highlights, this is a controversial statement. Nevertheless the situation in Myanmar presented one of the first opportunities for the Community and later Union to apply its new and more robust guidelines to the situation in a third State.

As a direct response to the annulled election, the Heads of Mission of the then twelve Member States issued statements on the detention of Aung San Suu Kyi in

⁵⁰ See, for example, EFPB Doc., 88/245.

⁵¹ See, for examples, EFPB Docs., 90/223, 90/296 and 92/463.

⁵² See EFPB Doc., 91/238.

⁵³ See EFPB Doc., 91/189.

⁵⁴ See EFPB Doc., 91/002.

November of 1991.⁵⁵ The Member States also agreed at this time to the withdrawal of all military attachés accredited to Myanmar by the Member States.⁵⁶ While there was some downgrading of military cooperation, the lucrative trade between Britain and France and Myanmar in armaments, many of which were used in internal repression, was not expressly and more comprehensively prohibited until a common position was implemented by Community measures in 2000.⁵⁷ Community development aid, however, continued to be supplied, even where projects were directly assisting the regime in power. It was not until the 39th session of the United Nations Development Programme (UNDP) meeting in May 1993 that leading donor countries, including Union Member States, decided to minimise support for the programme aid provided to the military regime in Myanmar, while attempting to maximise humanitarian benefits for ordinary citizens.⁵⁸ Although there are no official declarations to this effect, the Commission accordingly began to prioritise work with NGOs to assist the most vulnerable sectors of society.⁵⁹

The initial response of the Community, i.e., reducing its level of development assistance and refocusing its aim, were the only measures taken against Myanmar, despite several declarations, Presidency statements, and resolutions of the European Parliament on the various consequences of the activities of the regime in

⁵⁵ See EFPB Doc., 91/408.

⁵⁶ See EFPB Doc., 91/473.

⁵⁷ Council Regulation No.1081/2000, OJ L 122, 24/5/2000 p.29. This has been repealed by Council Regulation No. 798/2004, Renewing the Restrictive Measures in Respect of Burma/Myanmar and Repealing Regulation No.1081/2000, OJ L 125, 28/4/2004 p.4. Common Position 1996/635/CFSP (relating to Regulation 1081/2000) did not apply to contracts for such goods, which were already in force. See further *infra*. The 1998 Code of Conduct on Arms Exports, however, may have been used by some Member States to limit sales to Myanmar. Also relevant is Joint Action 1999/34/CFSP, OJ L 9, 15/1/1999 p.1 on the Union's contribution to combating the spread of small arms and light weapons.

⁵⁸ See EFPB Doc., 93/78.

⁵⁹ See, for example, OJ C 319, 18/10/1997 p.189 which reinforces the view that Community development aid to Myanmar changed focus after 1993. Also see the Presidency Statement, reproduced as EFPB Doc., 93/110.

Myanmar.⁶⁰ In 1996, the death of the Danish consul and the submission of a complaint from the International Confederation of Free Trade Unions (ICFTU) concerning the use of forced labour compelled the Union to take further punitive action on two fronts.

The death of the Danish consul in 1996, as noted above, led to Denmark pushing very strongly for the imposition of full economic sanctions against Myanmar. Aung San Suu Kyi, the leader of the pro-democracy movement in Myanmar, whom the Union continually asserts it is supporting and assisting, has at various stages urged the Union to implement such measures.⁶¹ Damrosch has argued that it is legally justifiable for third States to impose and maintain punitive measures against a regime where local leaders, who are being supported by the international community, call for them.⁶² As Chapter Two highlights, there are limits to the legality of such measures. The Union's rhetoric at times, however, certainly leads to the impression that it will implement the measures which have been called for by Suu Kyi.

Yet in order to protect the trading interests of their companies, both France and the UK have opposed the adoption of such measures. The lack of consensus on the imposition of punitive measures exists because companies such as ELF and Total are heavily involved in pipe-line projects in Myanmar. Indeed, the European Parliament has adopted resolutions on the complicity of Total in human rights abuses during the laying down of pipe-lines in Myanmar.⁶³ EU based multinational oil companies provide a third of all foreign investment in Myanmar.⁶⁴ While trade between the EU and Myanmar may not have been significant in relative terms, European investment is far from negligible. The Member States whose

⁶⁰ The number of resolutions and declarations adopted by the European Parliament on Myanmar is very substantial. See, for examples, OJ C 347, 18/11/1996 p.84 and OJ C 167, 1/6/1998 p.225.

⁶¹ See OJ C 200, 30/6/1997 p.174, para.3.

⁶² Damrosch, L., "Enforcing International Law Through Non-Forcible Measures" (1997) 269 *RDC*, 19, 149.

⁶³ OJ C 365, 4/12/1996 p.80.

⁶⁴ OJ C 313, 12/10/1998 p.181, para. G.

companies would be most affected have only been prepared to agree to relatively weak punitive measures.

In October 1996, after a good deal of negotiation, a common position was adopted which reaffirmed some of the measures, discussed above, which had been adopted after the annulled election of 1991.⁶⁵ This common position did not distinguish between the Community and CFSP aspects, although it should be noted that it did not actually require any action on behalf of the Community. The preamble to the 1996 common position provides clear clues as to the rationale behind it. The EU considered itself disappointed “at the result of the meetings in Jakarta and New York”, i.e., those diplomatic negotiations over the death of Nichols, which were discussed above. Only having highlighted this was the absence of progress towards democratisation and the continuing violation of human rights mentioned. What is equally interesting about the 1996 common position is the fact that it also calls upon Myanmar to act in certain ways, for example, freeing political prisoners and entering into meaningful dialogue with pro-democracy groups. The punitive measures introduced by the Union aimed to promote progress towards democratisation and securing the immediate and unconditional release of detained political prisoners.

The new measures introduced by the 1996 common position were limited to banning entry visas for certain senior members of the military regime and their families as well as the suspension of high-level bilateral governmental visits to Myanmar. The continuing “further deterioration in the political situation” in Myanmar has led to the original 1996 common position being consistently renewed and amended by the Council.⁶⁶ In practice, the common position has been subsequently amended in three significant ways. First, the Council has routinely extended the scope of the visa ban and the persons affected by it. Secondly, in the common position adopted in April 2000 it agreed to the funds being frozen of those

⁶⁵ Common Position 96/635/CFSP, OJ L 287, 8/11/1996 p.1.

⁶⁶ See, for example, the Preamble of Common Position 2003/297/CFSP, OJ L 106, 29/4/2003 p.36. This rationale is routinely cited in the common positions.

persons affected by the visa ban.⁶⁷ Finally, the common position of April 2000 also prohibited the sale, supply and export of equipment which might be used for internal repression or terrorism.⁶⁸

Despite being consistently amended the common positions against Myanmar are far from comprehensive. The provisions on the suspension of military aid, in the original 1996 common position, for example, did not apply to contracts already entered into, thus they continued to be honoured. The common positions have not forbidden investment or suspended non-military trade between the Union and Myanmar. This is not to say, however, that certain governments do not pressurise some of their companies to withdraw from Myanmar.⁶⁹ The freezing of the personal assets and funds of military officials, which are held in Union Member States, may make life financially trickier for them but whether it is all the Union can do is highly questionable. The freezing of funds concerns individual funds, however, rather than those of Burmese companies and institutions operating in the Union.⁷⁰ They may not be very difficult to circumvent. Where further punitive measures have been adopted upon renewal of the common position it is questionable what the practical effect on the regime in Myanmar has been? The regulation implemented to give effect to those parts of the April 2000 common position prohibiting the sale and supply of equipment which might be used for internal repression for example,⁷¹ resulted in Myanmar signing a trade deal with Russia which now allows it to import the equipment it requires from there.⁷²

⁶⁷ Article 1, Common Position 2000/346/CFSP, OJ L 122, 24/5/2000 p.1.

⁶⁸ *Ibid.*, as implemented by Council Regulation 1081/2000 as amended by Council Regulation 798/2004.

⁶⁹ The British government ironically, requested the voluntary withdrawal of British American Tobacco and welcomed it when in November 2003 it did so. See FCO Website Update 6/11/2003. "BAT Withdraws from Burma: FCO Minister Delighted".

⁷⁰ Article 6, Regulation 798/2004. Also see COM(2000)299 which is the Communication upon which Regulation 1081/2000 is based and COM(2004) 226 which is the Communication for Regulation 798/2004.

⁷¹ Council Regulation 1081/2000 as amended by Regulation 798/2004.

⁷² ICFTU Press Release, 23/7/2001.

The US, to some extent, has been prepared to take the steps against Myanmar which the Union has not. In July 2003 Congress adopted the Burmese Freedom and Democracy Act⁷³ which bans the import into the US of all goods produced in Myanmar.⁷⁴ Furthermore, this act obliges the US to oppose the adoption of any loans by International Financial Institutions to Myanmar.⁷⁵ In a number of other respects the act is very similar to the Union's common positions, requiring the freezing of assets and the imposition of a visa ban.

Where both US and EU legislation falls short, is from prohibiting investment by European and US companies in Myanmar. The freezing of assets held in the EU and US as well as an import ban in the US will only have a limited impact, while European and US investment which seeks to exploit Myanmar's abundant natural resources is permitted. It is in the laying of pipe-lines and exploiting other natural resources that NGOs routinely cite the worst violations by the military and those companies which invest in Myanmar. The campaigns currently mounted against Total and ELF, due to their alleged complicity in slave-like practices, are based on these allegations. A complete investment ban is the most effective measure that can be adopted. Due to a lack of Community competence in such matters, however, this has not been discussed in the Council, although it is a possibility under the CFSP.⁷⁶

The ICFTU complaint, referred to above, related to Myanmar benefiting from the GSP.⁷⁷ This eventually led, as discussed in Chapter Three, to a 1997 regulation suspending the GSP in respect of Myanmar. The blatant refusal of the authorities in Myanmar to cooperate with the Commission team, which was sent to investigate the allegations, played as much of a role in the withdrawal of benefits as the forced

⁷³ 117 Stat. 864.

⁷⁴ *Ibid.*, Section 3.

⁷⁵ *Ibid.*, Section 4.

⁷⁶ I am grateful to a Commission desk-officer for this insight. If any of the Member States have an Investment Protection and Promotion Agreement with Myanmar this will limit the possibilities for any joint action in this regard under the CFSP. The UK does not. See the answer by Mr Hain, Hansard HC, 600W, 22/3/2000. Article III-271(I) of the Draft Constitution on the Common Commercial Policy will change this when it comes into force.

⁷⁷ See OJ C 15, 20/1/1996 p1.

labour practices themselves. The authorities in Myanmar claimed that there was nothing to investigate and consequently denied the investigatory team entry to the country in November 1996. A number of MEPs, however, visited Myanmar on tourist visas and in an individual capacity to try and verify the existence of forced labour practices there.⁷⁸ The Commission also considered evidence from a wide range of bodies on the practices of the authorities in Myanmar.⁷⁹ With a small amount of trade, in relative terms, between the Union and Myanmar the practical impact of such a measure is not very great. It is admittedly more important now in the context of the Everything But Arms initiative and it does set an important precedent. If one considers the seriousness of Myanmar's legal violations, however, the practical consequences and impact of the measures implemented are still not particularly significant. The prohibition on forced labour and slavery like practices are obligations *erga omnes*, which entitle the Community and its Member States to act. The suspension of the GSP, even for violations of obligations *erga omnes* does not, however, automatically mean that all other development aid is cut-off; there is no mechanism to that effect.⁸⁰

The Council has offered to open discussions with Myanmar if it restores democracy and the situation there improves.⁸¹ In a GAC meeting in 1998, for example, it stated that the reconvening of Parliament, the adoption of a new democratic constitution and the holding of free and fair elections, would constitute such a move.⁸² The imprisoning of opposition activists has specifically been considered to be a move away from democracy.⁸³ With the exception of opening a dialogue with the opposition and the release of Aung San Suu Kyi, (who is routinely subsequently

⁷⁸ See EFPB Doc., 96/334.

⁷⁹ See OJ C 133, 28/4/1997 p.48, para.3.

⁸⁰ For confirmation see, OJ C 21, 22/1/1998 p.75.

⁸¹ GAC of 26/4/1999 (1999) 4 *EU Bull* 1.4.92.

⁸² GAC of 5/10/1998 (1998) 10 *EU Bull* 1.3.11.

⁸³ See (1998) 9 *EU Bull* 1.3.16. Also see Common Position 2003/461/CFSP.

rearrested whenever she is released) the authorities in Myanmar have shown little inclination to give effect to any of these measures.⁸⁴

Although the situation in Myanmar has continually deteriorated according to the Council,⁸⁵ it considers that the removal of the GSP and the various common positions are sufficient to have their desired effect,⁸⁶ even if all of the evidence is clearly to the contrary.⁸⁷ The death of James Nichols was the primary reason behind the first common position, as aggravated by the human rights situation, not the other way around. Since the original common position, however, the strengthening of the common position has been due to a perceived deterioration in the human rights situation in that country. The reports of NGOs do not seem to imply that the situation has worsened, merely that it has not improved significantly and that the regime is still in power.⁸⁸ The steps actually taken bear little resemblance to the Union's rhetoric. The Council in April 2003 considered that the best way forward is for it to implement carefully calibrated sanctions and to provide significant amounts of humanitarian aid.⁸⁹ The Union has become increasingly detailed in its demands but does not follow them up in any meaningful way.⁹⁰ Measures which would affect the general commercial interests of the Member States have not been adopted, despite systematic and gross breaches of the most fundamental of international norms.

2.2.3. The Promotion of Ethical Values in Myanmar.

⁸⁴ The Spanish Presidency welcomed this in a declaration on 8/5/2002 although it did not consider this alone to be sufficient for the removal of punitive measures. Suu Kyi's re-arrest led to the adoption of Common Position 2003/297/CFSP.

⁸⁵ See the Preambles to the common positions.

⁸⁶ See OJ C 187, 16/6/1998 p.38

⁸⁷ The further extension of punitive measures under Regulation 798/2004 contradicts the Council's view that the measures it had implemented were sufficient to have the desired effect.

⁸⁸ See Human Rights Watch, *World Report 2000* and Amnesty International, *World Report 2000*.

⁸⁹ GAEXREL Council Conclusions on Burma, 14/4/2003.

⁹⁰ See, for example, the Presidency Declaration of 21/2/2003.

Despite the scaling down of development assistance from the Community, it has continued to fund projects in Myanmar which are aimed at helping to alleviate the suffering of the most vulnerable sections of the population. The original 1996 common position excluded such measures from its scope and urged the focus of development assistance upon such projects and the provision of humanitarian aid.⁹¹ This approach has been maintained in the subsequent common positions. The establishing and running of such projects is in practice very difficult for the Community. Such projects must be undertaken in the context of decentralised cooperation through local civilian authorities and NGOs. Human Rights Watch and Amnesty International have both, for a number of years now in their annual reports, considered that non-governmental human rights organisations have not been permitted to function in that country. The number of and activities of other NGOs has also been severely curtailed by the authorities. In this context it is highly difficult for the Community or any other donor to make anything but the most marginal of contributions. It is difficult to know how projects which promote democracy, for example, are being implemented in the absence of organisations with the capacity to do so and indeed what difference, if any, they can make at either a local, regional or national level. The Community, however, still funds democracy related projects in Myanmar.⁹²

Of the other projects the Community has funded, most have been concerned with humanitarian aid. The policies of the authorities in Myanmar have caused an outpouring of refugees into Bangladesh and Thailand, very few of whom are repatriated.⁹³ Aid has also been provided to finance projects which assist uprooted people, thus improving the quality of life of vulnerable sections of the population in the State of Rakhine and the refugee populations therein,⁹⁴ where for example, the Commission has provided €1 million of funding to a project for vulnerable groups.⁹⁵ By and large the Community has used Budget-line B7-212, which assists

⁹¹ Article 5(ii) 96/635/CFSP.

⁹² See, for example, (2000) 9 *EU Bull* 1.2.12.

⁹³ See Crépin, P., *Evaluation of ECHO Actions in Favour of Burmese Refugees in Thailand-Final Report*, (2002).

⁹⁴ See, for example, (2000) 12 *EU Bull* 1.6.83.

⁹⁵ See (1998) 12 *EU Bull* 1.3.121.

with aid towards the self sufficiency of refugees, displaced persons and uprooted people for these projects. In the alternative, humanitarian aid budget lines have also been used to assist certain populations. Beyond this, however, it is difficult, if not impossible, for the Union to make any other contribution to improving the human rights situation in that country by working with NGOs. The Commission has adopted a pragmatic approach, however, towards a number of projects, where it has worked with the authorities in Myanmar. The 1993 UNDP decision agreed to minimise project aid to the government and to assist the most vulnerable sections of society. Where it is impossible for NGOs to function, the Commission must work with the regime to achieve a particular objective. Thus, for example, projects funded under the HIV/AIDS budget line, have been conducted in conjunction with the Health Ministry so that provision for aid can be made to those most in need.⁹⁶

The regime in Myanmar has shown itself to be insensitive to both positive and negative measures. The tactical approach now adopted by the Union towards Myanmar is almost entirely negative in nature. Dialogue is infrequent and *ad hoc* and only when it can be agreed upon. The common positions are prohibitive in nature and reduce all aspects of dialogue and downgrade the relationship between the parties. The death of the Danish consul, not the human rights situation, was the spur for more punitive measures to be adopted after the annulled election. The measures the Union can adopt in this context are still hostage to the interests of the individual Member States. In the circumstances therefore, it is difficult to see what else the Union can do.

3. Pakistan.

Pakistan has enjoyed formal bilateral relations with the Community since 1976, shortly after its former colonial ruler, the United Kingdom, itself acceded to the

⁹⁶ See OJ C 117, 16/4/1998 p.160.

Community in 1973.⁹⁷ Although the Lomé/Cotonou Conventions have now been extended to almost all other developing Commonwealth States, the sub-continent has been excluded from this trend. The sheer scale in terms of size and population is no doubt a major factor in this decision. Relations between the Union and Pakistan have recently blossomed, despite all but having broken down in 1999. The second-generation Agreement, which had been in force since 1986, had expired⁹⁸ and a third-generation Agreement had been negotiated and initialled in April 1998 but it was not signed due, among other reasons, to the coming to power of the military regime of General Musharaff in October 1999.⁹⁹ Events in New York and Washington in September 2001, however, initialled the complete rehabilitation of the military dictatorship and Pakistan was welcomed back into a warm embrace by the Union and US. One of the consequences of this was the signing of the initialled third-generation Agreement in November 2001. Before discussing the basis for relations between the Union and Pakistan, it is worth discussing the prevailing political situation in Pakistan.

Civilian rule in Pakistan, since independence in 1947, has routinely been interrupted by the military seizing power. The second-generation Agreement with the Community, for example, was concluded with the military regime of General Zia-ul-Haq. Pakistani governments of all persuasions have always considered that as Pakistan is a signatory to the UDHR, this is sufficient evidence of its commitment to the idea of human rights as understood in international law. Pakistan is also party to the Convention on the Rights of the Child,¹⁰⁰ the Women's Convention¹⁰¹ and the

⁹⁷ Commercial Cooperation Agreement Between the EEC and the Islamic Republic of Pakistan, OJ L 168, 28/6/1976 p.2. Diplomatic relations between the Community and Pakistan were first established in 1962.

⁹⁸ Agreement for Commercial, Economic and Development Cooperation Between the EEC and the Islamic Republic of Pakistan, OJ L 108, 25/4/1986 p.1. Under Article 10 the Agreement was valid for a period of 5 years, renewable for one year periods on the agreement of both parties.

⁹⁹ See, for example, the comments of Commissioner Patten at OJ C 350 E, 11/12/2001 p.137.

¹⁰⁰ *Supra* note 16.

¹⁰¹ *Supra* note 17.

Convention on the Elimination of Racial Discrimination.¹⁰² Furthermore, it is party to five of the ILO's core Conventions, including those which deal with bonded labour and slavery.¹⁰³ In terms of human rights issues, it is well documented that in Pakistan problems exist with regard to restrictions on the rights to association and expression; anti-terrorist legislation; abuse of the laws on blasphemy; minority rights; women's rights; religious persecution; the rule of law; child and bonded labour; slavery and slavery-like practices; and the systematic use of torture by security forces.¹⁰⁴

In terms of trade, the EU is Pakistan's largest trading partner. Over 30% of Pakistani exports, in particular, rice, textiles, leather and sporting goods are destined for the Union. Approximately 28% of Pakistan's imports are from EU countries. It is estimated that a third of the population of 140 million live in absolute poverty.¹⁰⁵ Furthermore, due to Pakistan's relatively low GNP per capita of \$470, which places it 160th of the 208 economies measured by the World Bank,¹⁰⁶ Pakistan has been a recipient of around €423 million between 1976 and 2001 and €225 million worth in

¹⁰² The International Convention on the Elimination of all Forms of Racial Discrimination, 1966, 660 *UNTS* 195. It has entered numerous "declarations", as opposed to reservations, to the UN treaties to which it is a party. Although see Article 2(d), Vienna Convention on the Law of Treaties, 1969, 1155 *UNTS* 331.

¹⁰³ Convention No. 29, *supra* note 13; Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, 68 *UNTS* 17; Convention No. 98, Right to Organise and Collective Bargaining Convention, 1949, 96 *UNTS* 257; Convention No. 105, Abolition of Forced Labour Convention, 1957, 320 *UNTS* 291 and Convention No. 111, Discrimination (Employment and Occupation) Convention, 1958, 363 *UNTS* 31.

¹⁰⁴ For extensive and detailed accounts of the human rights problems in Pakistan see references in the Bibliography. Especially noteworthy, however are: HRW, *Contemporary Forms of Slavery in Pakistan*, (1995); Amnesty International, *Women in Pakistan: Disadvantaged and Denied Their Rights* (1995); the report of the Special Rapporteur on Torture, E/CN.4/1997/Add.2; and the report of the Special Rapporteur on Intolerance and Discrimination Based on Religion or Belief, E/CN.4/1996/95/Add.1.

¹⁰⁵ World Bank, *World Development Indicators Database*, 2004.

¹⁰⁶ *Ibid.*

on-going development programmes. It has also received humanitarian aid from the Union, which is primarily aimed at the 3 million Afghani refugees in Pakistan.¹⁰⁷

3.1. The Legal and Political Structure of EU Dialogue with Pakistan.

The Union has maintained political dialogue with Pakistan on a number of levels, both regional and bilateral.¹⁰⁸ Dialogue exists with Pakistan through Union meetings with the South Asian Association for Regional Cooperation (SAARC)¹⁰⁹ as well as Troika meetings. The scheduling of these meetings is not, however, regular. SAARC has not functioned properly since 1998, due to Indian objections over the general situation in South-Asia - a euphemism for the Kashmir issue.¹¹⁰ The Troika has not been meeting Pakistan on an annual basis, as had been the intention of the parties, although since 2002 meetings have become more regular as have EU-Pakistan Political Directors Meetings. It is at these meetings, when they have been held, that the Union has raised its concerns over, among others, Pakistan's (now former) support for the Taliban, the Kashmir issue, nuclear testing, drugs, international terrorism and human rights. Other issues have also been raised in these meetings, in particular, the restoration of democracy. Furthermore, the 1986 Agreement between Pakistan and the Community established a Joint Cooperation Committee (JCC) which was supposedly to meet on an annual basis.¹¹¹ It did not do so, with the last meeting being in 1996. The third-generation Agreement between the parties, which was signed in November 2001 and approved

¹⁰⁷ I am grateful to the EU Delegation in Pakistan for these figures. Also see OJ C 147 E, 20/6/2002 p.34.

¹⁰⁸ Formal political dialogue with Pakistan was established following the Lisbon European Summit of June 1992.

¹⁰⁹ SAARC's main aims are economic and social development among its Member States. It was established in 1985.

¹¹⁰ Informal summits have been held on the fringe of the General Assembly. A SAARC meeting did take place in January 2004 and the current prospects for it being able to function more effectively in the future are good.

¹¹¹ Article 7(1)(d).

by the European Parliament on 22 April 2004,¹¹² also establishes a JCC which has not to date met.¹¹³ The Union's discussion with Pakistan on ethical values, in these different fora, has tended to concentrate upon a number of key issues. These are discussed in turn.

3.2. Democracy, Human Rights, the Union and Pakistan.

As discussed in Chapter Three, the Union has elevated democracy to a level at least equivalent to that of fundamental human rights, even though, as Chapter Two argues, there is no real legal basis in international law for it to do so. Removing or suspending democratic institutions, annulling of free elections, *coup d'etats* etc., are more tangible in terms of assessment for the suspension of Agreements, than violations of human rights and fundamental freedoms. In Pakistan, however, the situation has not been so straightforward for the Union.

3.2.1. Negotiating the Third-Generation Agreement.

A third-generation Agreement between the Community and Pakistan has, as noted above, now been concluded. This is the same Agreement that was initialled in April 1998 but not signed until November 2001. As also noted above, one of the reasons for this delay was the coming to power of General Musharaff in October 1999. The coup, which was bloodless, brought to power a regime which in many circles is considered to be more committed to economic and social reform and promoting human rights, tackling religious extremism and rooting out corruption, than the

¹¹² The delay was caused by a large number of MEPs being opposed to the Agreement entering into force. See, for example, (2003) 9(38) *European Voice*, "Pakistan's Human Rights Record Delays EU Accord" 13/11/2003 p.6. When the European Parliament approved the Association Agreement on 22/4/2004 it also adopted a separate resolution expressing concerns about numerous issues, such as human rights, nuclear proliferation and the role of the military in politics. See (2004) 4 *EU Bull* 1.2.10. As of 31 May 2004 the Agreement has not been published in the Official Journal, although see (2004) 4 *EU Bull* 1.6.104.

¹¹³ Article 16 establishes a JCC which is required to meet on at least an annual basis.

government it replaced.¹¹⁴ Due to the government's military nature and its coming to power in a coup, however, which the Supreme Court of Pakistan unsurprisingly validated on the basis of the doctrine of necessity,¹¹⁵ the Community initially refused to sign the Agreement. Having previously refused to acknowledge the validity of the Supreme Court judgment, the Union now uses it to support its normalisation of relations with Pakistan.¹¹⁶

The entire process of the negotiation of the Agreement was tied up with human rights and other ethical issues. The Union, via the Troika and the Commission, were not only concerned with inserting an "essential elements" clause in the Agreement but had also identified a number of human rights problems in Pakistan, in particular child labour, which needed to be addressed. These human rights concerns were integral to the entire negotiation of the Agreement. In 1996 the then Commissioner for Development, Manuel Marin, visited the then President and Prime Minister of Pakistan (Farooq Leghari and Benazir Bhutto respectively) and discussed the negotiation of the Agreement. Particular emphasis was placed by the Commission on the preparation of a campaign against child labour in Pakistan. The discussion also embraced drug exportation and support for international terrorism, both of which were related to Pakistan's then links with the Taliban regime in Afghanistan and to a lesser extent the situation in Kashmir.¹¹⁷

The actual Agreement, which is non-preferential and has no budget line associated with it, was initialled in April 1998.¹¹⁸ The discussion at that time primarily centred on strengthening economic and political ties between the parties. Although the Kashmir issue, the economic and social reforms undertaken by Pakistan and Community anti-dumping rules were also discussed, particular attention was once

¹¹⁴ Compare, for example, Amnesty International and Human Rights Watch Reports prior and subsequent to the coup. The Union also now recognises this, although it did not do so publicly before September 2001.

¹¹⁵ See *Zafar Ali Shah v. Pervez Musharaff*, (2000) 52 PLD 869. The Supreme Court has never failed to validate a government which has come to power via a military coup in Pakistan.

¹¹⁶ See *infra*.

¹¹⁷ (1998) 7/8 *EU Bull* 1.4.13.

¹¹⁸ (1998) 1 *EU Bull* 3.76.

again paid to the question of child labour. At this stage the Commission proposed ECU 71 million to support a programme already launched by the Pakistani government, in conjunction with an earlier Commission project, the ILO and UNICEF, which aimed to improve the education and health of children and eradicate the use of such labour.¹¹⁹

The successful negotiation of the Agreement itself had to overcome a substantial number of differences between the parties. Two rounds of negotiations in December 1996 and April 1997 had failed due to a lack of agreement on a number of issues, namely intellectual property rights, maritime transport, the social clause and the declaration on illegal immigrants. Informal talks held in 1998 eventually led to a compromise.¹²⁰ Differences of opinion are still apparent with regard to, for example, illegal immigrants.¹²¹ The agreed “essential elements” clause in the Agreement reaffirms the importance the Community and Pakistan attach to the principles of the Universal Declaration of Human Rights and “democratic principles.”¹²² The democratic process (whatever the distinction between it and democratic principles) and its continued existence are not essential elements. Respect for democratic principles, however, is.

One of the main objectives of the Agreement is to “support Pakistan’s efforts for comprehensive and sustainable development, including economic and social development policies which take account of the poor and disadvantaged sections of its population, particularly women in these sections, as well as sustainable management of natural resources.”¹²³ Women’s sectors are now accordingly receiving extra funding and have been highlighted as a priority area of funding, which is now conducted on an *ad hoc* basis under the ALA Regulation and EIDHR. As the legal basis for the Agreement is Articles 133, 228 and 179 EC, other issues can also be addressed. One of the most important provisions of the Agreement, as

¹¹⁹ On the earlier project see OJ C 305, 15/10/1996 p.122.

¹²⁰ See COM (1998) 357.

¹²¹ The joint declaration on the readmission of illegal immigrants is not considered to be a part of the Agreement and Pakistan also made a unilateral declaration on this point.

¹²² Article 1.

¹²³ Article 2(2).

far as the Community is concerned, is the provision concerning the protection of intellectual, industrial and commercial property rights, in conformity with international standards.¹²⁴ With regard to the promotion and protection of human rights Article 4, which outlines the basis for development cooperation, is the most important. Projects which promote and emphasise health education, human resource development specifically for women, population welfare, environment and rural development specifically targeted towards the poorer and disadvantaged sections of the population are to be given priority for funding.

While the provisions of the Agreement are not in any way unique, what is worth noting is that the Agreement would, in all likelihood, have been ratified in 1999 by both parties, if the military coup of October 1999 had not taken place. The Community had obtained the inclusion of an “essential elements” clause and the Pakistani government was prepared, as the Community insisted, to initiate programmes aimed at alleviating child labour. In terms of human rights commitments, the Commission was satisfied. This is not withstanding the fact that Nawaz Sharif, the democratically elected leader of Pakistan at the time, was during his period in office systematically dismantling the country’s democratic institutions.¹²⁵ His instigating of a constitutional crisis, due to his interference with the Supreme Court and compelling the Lahore High Court to dismiss the Chief Justice, was widely reported. Alterations to the Constitution and the make-up of the courts had ensured that there was no *de facto* method (in the absence of a coup) by which to call or force an election and thus remove Sharif from power.¹²⁶ Amnesty International, in a report on Pakistan at the time, noted a “very sharp downturn in the protection of human rights under the Sharif regime”, with NGOs “routinely being harassed and very high levels of corruption”.¹²⁷ The EU Presidency, however, ignoring the bigger picture limited itself at this time to issuing a statement expressing its concern at the problem of “honour killings” which the Sharif

¹²⁴ Article 3(4)(b).

¹²⁵ The EU Election Observer Group in the Pakistani election of 1997, which swept Sharif to power, considered that although malpractice existed, on the whole the election was fair. OJ C 373, 9/12/1997 p.19.

¹²⁶ See the Constitution (Fourteenth Amendment) Act, 1997.

¹²⁷ Amnesty International, *World Report 2000-Pakistan*.

government had refused to declare as murder.¹²⁸ The Community was prepared to negotiate with the Sharif government and apparently turn a blind eye to some of its activities, despite concerns from its delegation in Islamabad, so long as the Pakistani government was prepared to make a basic commitment to human rights and democratic principles.¹²⁹

The initialled Agreement was not signed for three years. The first delay on the part of the Community was due to the kidnapping of a prominent Pakistani journalist, Najam Sethi, who had been very critical of the government. Sethi was kidnapped by a group, who are widely suspected to have been acting on the instructions of Sharif. The constitutional crisis, referred to above, which further undermined the rule of law and separation of powers, barely raised an eyebrow in the Union.¹³⁰ The kidnapping of a journalist, however, provoked an international response which eventually led to his release.¹³¹ The resolution of this incident was followed by nuclear tests by both India and Pakistan, which are discussed below, and later in October 1999 by the military coup. The Community's original stance was that it would simply not countenance signature of the Agreement until a legitimate democratic government was installed.

From the perspective of ethical values, the entire episode of negotiating the Agreement was fraught with problems. The Community, as far as it was concerned, when dealing with the Sharif government, was negotiating with a regime legitimately in power. That is certainly true, but the danger signs were more than apparent that Sharif was engaging in and behind some very unsavoury practices. Extra-judicial killings, arbitrary arrests and detentions were widely being used against opposition politicians. The fact that Sharif had come to power via Community observed elections seemed to counter that. If ultimately the regime engaged in widespread and systematic breaches on a scale beyond those already

¹²⁸ Reproduced as EFPB Doc., 99/140.

¹²⁹ I am grateful to the delegation official who disclosed this.

¹³⁰ There are no Presidency statements or declarations on this issue.

¹³¹ The Presidency issued a Declaration on this matter, reproduced as EFPB Doc., 99/073. Sethi became part of a subsequent Amnesty International campaign.

occurring, then from the Community's perspective the "essential elements" clause which had been agreed upon could be invoked. The Pakistani nuclear tests of May 1998, however, ensured that they did not have to rely upon the clause.

3.2.1.(a) The Third-Generation Agreement and the Pakistani Nuclear Tests.

Further to Pakistan's six nuclear tests in response to India's five tests in May 1998, the Union unequivocally threatened to take negative action against Pakistan. Signature of the initialled Agreement was completely off the agenda. The Presidency issued a statement in May 1998 following the nuclear tests and again in June of that year.¹³² The Council also adopted a common position concerning the EU's contribution to the promotion of non-proliferation and confidence building in the South-Asia region.¹³³ The Presidency statement condemned the tests which it considered ran counter to the wishes of the 149 States which had signed the Comprehensive Test Ban Treaty (CTBT).¹³⁴ The Council felt that India undermined stability in the region and that Pakistan had made it worse. It was not in the common position, however, that the Union threatened to take negative measures but in the Presidency statements it issued. If such commitments had been undertaken in common positions this would oblige the Union to take further action in accordance with its terms. Presidency statements thus allowed condemnation and a threat to be issued without any legal obligation to pursue the matter further. The Presidency in its statement of 29 May 1998 assured India and Pakistan that it would take *all necessary measures*, if they did not ratify the CTBT without conditions. The statement condemned the nuclear tests as it was felt they posed a "grave threat to international peace and security" The Presidency asked the Commission to consider review of the GSP following India's tests and now asked it to open and extend this consideration to Pakistan as well. After India's tests the Presidency

¹³² 98/606/CFSP (1998) 5 *EU Bull* 1.3.17 and (1998) 6 *EU Bull* 1.4.19.

¹³³ OJ L 290, 29/10/1998 p.1. Also see the Conclusions of the Cardiff European Council, reproduced as EFPB Doc., 98/103.

¹³⁴ Comprehensive Nuclear Test Ban Treaty, 1996, GA Resolution A/RES/50/245. The treaty is not yet in force.

statement had condemned India but did not hint at suspending the Agreement with India. The Member States instead worked for a delay in consideration of loans to India from the World Bank.¹³⁵ As a consequence of the Indian tests, the Council had attempted to persuade Pakistan not to carry out tests by asking the Commission to expedite signature of the EC-Pakistan Agreement and to examine the scope for enhanced development and economic assistance. Other concerns over human rights, which had already delayed the signing of the Agreement with Pakistan, would be set aside in an attempt to persuade it not to test such weapons. It is difficult to see how subsequent nuclear tests by Pakistan would have breached the Agreement, which had been initialled, if it had already entered into force. Ratification of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)¹³⁶ and the CTBT was always considered by the Union to be an essential political prerequisite for the ratification of the Agreement with Pakistan. It had repeatedly been raised in Troika meetings and Commission officials were adamant that while it was not a legal requirement for Pakistan to ratify those treaties, politically it was very desirable, if not essential.¹³⁷ The timing for the Community was thus ideal, as it could further utilise the Agreement for the purposes of leverage.

There was certainly no attempt on the Community's behalf to suspend the Agreement with India, which was already in force, and in which the relevant provisions are very similar. Following Pakistan's tests, however, the Presidency withdrew the request to the Commission to expedite the Agreement with Pakistan and asked for an examination of the possible suspension of the GSP, as well as attempting to delay World Bank loans.¹³⁸ The GSP Regulation clearly does not envisage the withdrawal of benefits in the event of nuclear testing.¹³⁹ As a unilateral instrument, however, the Member States can lawfully withdraw the benefit of the GSP to a particular third State, if they so wish. The Commission did not re-open the GSP procedure as requested. The reason behind this is unclear. It

¹³⁵ (1998) 5 *EU Bull* 1.3.9.

¹³⁶ Treaty on the Non-Proliferation of Nuclear Weapons, 1968, 729, *UNTS* 10485.

¹³⁷ Interview, 15/4/2001 in Islamabad.

¹³⁸ (1998) 6 *EU Bull* 1.4.19.

¹³⁹ See Article 24, Council Regulation No. 2501/2001, OJ L 346, 31/12/2001 p.1.

may be that the Commission did not wish to set a precedent, whereby the Community withdraws the GSP to express displeasure with a third State, for acts not envisaged in the text of the regulation. In any case the effect of such a response upon the Pakistani government would have been marginal at best. With regard to the Member States delaying World Bank loans to Pakistan, the very real fear of Pakistan defaulting on its other loan commitments ensured that any delay was not lengthy and it was soon business as usual.¹⁴⁰

The reaction of the Union to the nuclear tests is interesting on a number of levels. At no stage did the Union consider Pakistan's legitimate security interests. Its much larger, powerful and indeed hostile neighbour India had already tested such weapons. Admittedly this was a case of India sabre-rattling with an eye to China, rather than to Pakistan, but it was provocative at the very least and Pakistan felt exceptionally threatened. The Union has recognised and indeed provided scope for exceptions from treaty obligations based on security interests in the Association Agreements concluded under the Barcelona Process.¹⁴¹ Yet, no such allowances were made with regard to either India or Pakistan. The Union's reactions and responses were far from consistent. The Union had no regard to Pakistan or India's legal obligations in this regard. Neither is a party to the CTBT or NPT. Furthermore France, for example, is not party to the NPT either and only became a party to the CTBT after it had carried out nuclear tests in 1995. It does seem rather rich therefore, for the Union to insist that both India and Pakistan ratify treaties to which all of its own Member States are not a party. It is also the case that ratification of those treaties was not a central issue in negotiations on the third generation Agreement with India but it was with Pakistan. On another level, however, the reaction does demonstrate some consistency. The Presidency was as harsh on India after its nuclear tests as it was on Pakistan, despite the fact that it has far more to lose in trade terms with the former than the latter. In the case of Pakistan, the Union was still in a position to withhold the benefits it was about to grant under the initialled Cooperation Agreement and did so. Ultimately the GSP

¹⁴⁰ In January 1999, the World Bank loaned Pakistan a further \$350 million to help improve public sector governance. World Bank News Releases, Pakistan, 21/1/1999.

¹⁴¹ See Chapter Five.

was not suspended and World Bank loans were not delayed with regard to either country. It should also not be overlooked that the Union was, for obvious reasons, unable to respond after France's nuclear tests. The Union's policy can be considered to be one of the containment of nuclear weapons *if* it is in a position to exert pressure.¹⁴²

3.2.2. Signature of the Third-Generation Agreement with Pakistan.

Events subsequent to those discussed above display the relativity of ethical policies as far as relations between the Union and Pakistan are concerned. Within two weeks of the attacks on New York and Washington in September 2001 an EU Troika was in Pakistan. The General Affairs Council, meeting on the 8th and 9th of October 2001, completely reformulated policy towards Pakistan, among other States.¹⁴³ The Council essentially wished to reaffirm its commitment to the "global coalition against terrorism" and considered global terror to pose a real challenge for it, as well as a threat to "our security and stability."¹⁴⁴ No other reason was considered necessary. The political decision was taken, regardless of all other considerations. Dialogue with Pakistan had to be "continued and developed" in particular, by signing the third-generation Agreement.¹⁴⁵ In the Special Council Meeting of 12 September 2001, it had already been identified that the attack on the US was not only an attack on it but also "against humanity itself and the values and freedoms we all share."¹⁴⁶ The justification for the change in policy towards Pakistan was solely to ensure that the "coalition against terror" was effective.

¹⁴² Nuclear non-proliferation has been central to relations with, for example, North Korea, Iran and Libya. Nothing has, however, ever been publicly said about Israel's possession of such weapons. Also see Council Joint Action 2004/495/CFSP, On Support for IAEA Activities Under its Nuclear Safety Programme and in the Framework of the EU Strategy Against Proliferation of Weapons of Mass Destruction, OJ L 182, 19/5/2004 p.46.

¹⁴³ The others are Iran and the Central Asian States. Relations with India were also identified as needing strengthening.

¹⁴⁴ GAC, Conclusions 8-9/10/2001, para. 1.

¹⁴⁵ *Ibid.*, para. 8.

¹⁴⁶ Declaration of the Special European Council, 12/9/2001.

In a Commission Communication of September 2001 concerning the GSP, for example, the justification given for including Pakistan among those States which benefit under the drugs incentive scheme, was to help “stabilise its economic and social structures and thus consolidate the institutions that uphold the rule of law.”¹⁴⁷ The argument is that by further engaging politically with Pakistan and providing additional development aid, the Community will help to stabilise the region and more specifically Pakistan and pave the way for democratic reforms to be effectively implemented. If this is the case, it is difficult to see why this did not occur to the Council and Commission prior to September 2001. After all, the conflict in Kargil had already taken place and led to exceptionally high tensions between Pakistan and India. If they wanted to restore international peace and stability to the region this would have been an appropriate step to take earlier.

The turnaround in relations with Pakistan is not, however, as stark as it may at first seem. The extent of the Community’s engagement and funding of projects in Pakistan during the period between the expiry of the second-generation Agreement and the signing of the third, also illustrates a difference of approach towards military dictatorships. In Myanmar the Community is, by and large, funding humanitarian work. In Pakistan it was still clearly working with the military government in development projects. In this sense, the Commission is in practice differentiating between military regimes, probably depending on the extent of their repressiveness. What they are not prepared to normally do now, however, is to sign a bilateral Agreement with a military government. What the Community objected to in the case of Pakistan, was not the government in power or its policies *per se*, but the manner in which it came to power. They simply did not wish to be seen to be dealing openly with a military regime. This would open a Pandora’s box as it would lead to exceptional difficulties in attempting to differentiate why it is concluding Agreements with one military regime and not another? The simpler approach was not to sign any Agreements with military regimes and in practice to cooperate with more moderate ones by implementing and funding programmes

¹⁴⁷ See COM (2001)0131, *Explanatory Memorandum*, p.2. The Communication was published on 25/9/2001

which are directed towards the most disadvantaged sectors of society. Thus in Pakistan €195 million was primarily being aimed at social sector development, such as primary education, eradicating child labour, reproductive health and drug rehabilitation. Other projects which included road and school building, development programmes concerned with the Social Action Programme aiming to improve the quality of elementary education, health, population and sanitation and water quality were also being funded.¹⁴⁸

Despite the still widespread violation of the values that the Union wishes to promote in Pakistan, many positive moves were made under the military regime both prior to and subsequent to the ratification of the third-generation Agreement. Extra-judicial executions have declined sharply since 2000, a National Commission on the Status of Women has been set up to protect women's rights and in April 2000 it was announced that honour crimes were to be tried as murder, something the Union and especially the European Parliament has long pushed for. Bonded labour remains a major problem, but as Commission officials admit, this has no short-term or immediate solutions and is more a case of structural and social reform.¹⁴⁹ What is most interesting is that independent NGOs have noted widespread reforms and a commitment to improve human rights by the military regime.¹⁵⁰ In some respects it is arguable that the Union prefers to openly deal with a democratically elected but despotic and corrupt government, as opposed to a non-democratically elected regime which has a commitment to societal and structural reform, which is similar in scope to the policies the Union wishes to promote.

The irony, however, is that General Musharaff, with his new found international legitimacy, is now engaged in the systematic dismantling of the separation of powers and amending the Constitution so that he cannot effectively be removed from power. The regime is making the most of its current immunity from US and

¹⁴⁸ This information was derived from the external relations web page of the Commission in June 2001.

¹⁴⁹ Interview, 15/4/2001 in Islamabad.

¹⁵⁰ Human Rights Watch, *Annual Report-Pakistan*, (2001).

Union criticism.¹⁵¹ This is more than apparent if one considers the elections held as part of the “roadmap to democracy” which the Union has endorsed. The elections held in October 2002 were welcomed by the Presidency and considered to be a “step in the gradual transition to full democracy” although it did note “some concerns about reports of manipulation”.¹⁵² The Union’s election observance mission (EUEOM) was much more critical. It is worthy of note that a Presidency statement was only issued after the Mission’s preliminary report and not after the final more comprehensive and critical report was published.¹⁵³ The judgment of the Supreme Court validating the coup of October 1999, which as mentioned above is now relied upon by the Union in part to legitimise relations, especially forbade the changing of the fundamental features of the Constitution. Musharaff has done so on numerous occasions to ensure that he maintains overall political control despite the swearing in of Zafarullah Khan Jamali as Prime Minister.¹⁵⁴ The EUEOM had serious misgivings about the Legal Framework Order 2002¹⁵⁵ and considered that it had “grave concerns about the process and that “at best Pakistan will be a ‘guided democracy’ far short of international standards.”¹⁵⁶ Serious concerns were also expressed by the Commonwealth Observer Group,¹⁵⁷ which stated that “..we have observed an incomplete democratic process. We look forward to the restoration of democracy in Pakistan.”¹⁵⁸ As a consequence Pakistan was not readmitted back to

¹⁵¹ The Council still issue routine statements on relations with India, for example, but has not been critical with regard to “internal matters”. The one exception is the Presidency Statement of 20/4/2004 on the conviction and sentencing to 23 years imprisonment of Javed Hashmi (an opposition politician) for treason and mutiny. The statement is worded in notably muted terms.

¹⁵² Presidency Declaration, 16/10/2002.

¹⁵³ Both reports are available at <http://www.eueom.org.pk>.

¹⁵⁴ Musharaff, for example, declared himself President in June 2001 contrary to the Supreme Court’s judgment and has subsequently pushed through the National Security Council Act, 2004, which indefinitely institutionalises the role of the military in civilian politics.

¹⁵⁵ The Order essentially manipulated the electoral process to ensure that overall political control was maintained by the military. The Order in Section 5(3) forbids any legal challenge to it.

¹⁵⁶ EUEOM, *Pakistan National and Provincial Assembly Election, 10 October 2002, Final Report*, p.17

¹⁵⁷ Commonwealth Observer Group, *Report of the Commonwealth Observer Group-Pakistan National and Provisional Assembly Elections*, (2000).

¹⁵⁸ *Ibid.*, p.47

the Commonwealth after the elections.¹⁵⁹ Yet, the EU Presidency subsequently welcomed the “transfer of power” to a civilian regime when Jamali was sworn in as Prime Minister.¹⁶⁰

This sequence of events displays the relativity of an ethical foreign policy. The primary purpose of any foreign policy is the defence of the physical and political character of the State.¹⁶¹ The exportation of values and the achievement of a stable world order will always be subservient to the physical protection of the State. As noted above, the Special Council meeting of 12 September 2001 noted that the allegiance against terror had to be as effective as possible. Due to the physical proximity of Pakistan to Afghanistan and the links between the Pakistani government and its former protégé the Taliban, Pakistani cooperation was imperative if effective action was to be taken against *Al-Qaida*. Notwithstanding their concerns, the Member States of the Union had to upgrade their relations with Pakistan and needed enticements to that end. This has consequently placed limitations upon the Union’s ability to act against it and is potentially of serious detriment to the situation in Pakistan. The Union has, in the past, actually had notable success in pursuing its ethical objectives in Pakistan through a combination of targeted condemnation, dialogue and further complementing this with the funding of appropriate projects. Results have not been achieved across the board but with regard to particular situations. The following discussion will look briefly at the problems of blasphemy and child labour, as examples of how the Union has

¹⁵⁹ See Concluding Statement of the Twentieth Meeting of the Commonwealth Ministerial Action Group (CMAG) on the Harare Declaration, 1/11/2002. The US State Department did not send its own observer mission. Also see Human Rights Watch, *Pakistan: Entire Election Process “Deeply Flawed”* 9/10/2002. The Commonwealth, with reservations, readmitted Pakistan in June 2004 under very strong pressure from Australia, the UK and externally the US. This was reward for its role in the “war on terror.” This was only made possible though due to the thaw in relations between India and Pakistan.

¹⁶⁰ Presse 366 P172/02 EU, also see EFPB Doc., 02/375. The military regime has been referred to, by the EU, as the “present interim government” see, *National Indicative Programme, 2003–2005*, p.7.

¹⁶¹ See Denza, E., *The Intergovernmental Pillars of the European Union*, (2002) p.85.

made a noteworthy contribution to the protection of some of the values it wishes to protect in Pakistan.

3.3. The Union's Successes in Promoting Ethical Values in Pakistan.

3.3.1. The Pakistani Law on Blasphemy and the Union.

The UN Special Rapporteur on Religious Intolerance has considered that the blasphemy laws in Pakistan are applied in a prejudicial manner so as to persecute minority religious groups, in particular, Christians and *Ahmadhis*.¹⁶² The European Parliament, Council and Troika have always expressed disquiet about this issue and the Union has responded to this situation, in a concerted way, on two occasions: first in 1995 and then subsequently in 1998. The Union's earlier intervention led to a marked improvement in the position of *Ahmadhis* in Pakistan, although not of the Christian minority. *Ahmadhis* are in a more vulnerable position, as compared to Christians, as they are considered by many to be heretics; something which has always been considered to be punishable by execution in orthodox Islam.¹⁶³ Early in 1995 the Union carried out a series of confidential *démarches* with the Pakistani authorities on the issue of religious persecution and, in particular, the law on blasphemy. They were assured at the highest level that adequate steps would be taken, if not to repeal the law, then at least to force through amendments and give clear instructions, at the administrative level, to prevent any misuse of the law. The issue was also debated openly, for example, during the meeting of the EU-Asia Directors Troika in late October 1995. The validity of the administrative approach to tackle the problem was clear, with many at the time suspected of committing such a crime, being acquitted. These steps were duly welcomed by a public declaration of the EU which undertook to continue monitoring the law's

¹⁶² See Report of the Special Rapporteur, *supra* note 104.

¹⁶³ For detailed discussion see, Eltayeb, M., *A Human Rights Approach to Combating Religious Persecution*, (2001) p.55.

application.¹⁶⁴ Although the persecution of *Ahmadhis* had not been eradicated by the time of the Union's 1998 interventions, the situation had improved.

Various resolutions of the European Parliament led in 1998 to the issue being reopened, this time with particular focus on the Christian minority in Pakistan. The Union Troika again carried out a *démarche* on the blasphemy laws to the Pakistani Minister of Law and expressed a "great deal of discomfort" over the presence of the death penalty for the crime.¹⁶⁵ The Commission also sent a delegation on a fact-finding mission to Faisalabad concerning the infamous cases of Ayub Masih and the self-immolation of the Archbishop of Faisalabad, John Joseph.¹⁶⁶ The Council did admit, however, that despite the issuing of several *démarches* on this issue, which had been raised systematically in the institutional political dialogue with the Pakistani authorities, little had been achieved despite assurances to the contrary by the government.¹⁶⁷

The later intervention did not substantially improve the situation for the Christian minority. The failure of the Pakistani authorities to suitably amend the blasphemy laws application with regard to the Christian minority, is not, however, due to the shortcomings of the Union's approach. Persecution of all religious minorities in Pakistan is a direct consequence of the increasing Islamisation of policies which has been pursued, for political reasons, since the 1970s by various governments.¹⁶⁸ What is important is that the Union was in a position of influence, which is why the commitment to reform was made by the Pakistani government. In one case reform did take place on a practical level, in another it did not. When the European

¹⁶⁴ See EFPB Docs., 93/135, 94/041, 94/340 and 96/033. The issue is still raised whenever the opportunity presents itself, see, for example, EP 2002/C93 E/69.

¹⁶⁵ OJ C 96, 8/4/1999 p. 86.

¹⁶⁶ Ayub Masih was falsely accused of blaspheming Islam (due to a dispute over land) and sentenced to death in 1996 by a court in Sahiwal, Punjab. He subsequently became a *cause célèbre* for the global campaign concerning the prejudicial application of Pakistan's blasphemy laws against its Christian minority. He was acquitted in 2002. Archbishop John Joseph set himself alight to gain national and international attention for the persecution of the Christian minority in Pakistan.

¹⁶⁷ See OJ C 13, 18/1/1999 p.136.

¹⁶⁸ See, among others, Eltayeb, *A Human Rights Approach*, *supra* note 163, p.55.

Parliament passed a resolution on the freedom of religion and human rights in Pakistan in June 1998¹⁶⁹ this was integrated into the discussion between the EC and the Pakistani government, as the initialled third-generation Agreement had not then been concluded. Dialogue and discussion led to an atmosphere which was conducive to a commitment to reform and the undertaking of measures, even though satisfactory reform was not eventually forthcoming. What is particularly worthy of note, is that the issue of blasphemy has no direct link with any other issue. It is a case of rights, which the Union considers to be fundamental, being violated. It has thus pursued discussion on that issue with little or no benefit to it and the Member States.

3.3.2. Child Labour in Pakistan and the Union.

The situation in Pakistan with regard to child labour, especially bonded child labour, is notoriously bad. Some estimates put the figure at 20 million bonded child labourers.¹⁷⁰ While the international community has been primarily concerned with those children working in the carpet, textile and football industries, the mistreatment and working conditions of those in mines and brick kilns is equally, if not significantly, worse.¹⁷¹ Adult bonded labour is equally widespread yet has received relatively little international attention. When the ICFTU complained to the Commission with regard to Myanmar, vis-à-vis the GSP, it simultaneously complained about Pakistan. The European Parliament in 1996 also passed a resolution on the application of the social clause in the GSP to Pakistan and Myanmar.¹⁷² This led to the opening of an investigation into practices in Pakistan. There was particular concern at the level of forced and bonded child labour, which it was considered breached ILO Conventions 29 and 105. The Economic and Social Committee (ESC) in its opinion on the Proposal for a Regulation Withdrawing the GSP From Burma¹⁷³ asked for the investigation on Pakistan to be reopened, as it

¹⁶⁹ Resolution B4-0614, 18/6/1998.

¹⁷⁰ See *Contemporary Forms of Slavery*, *supra* note 104.

¹⁷¹ *Ibid.*

¹⁷² OJ C 17, 22/1/1996 p.201.

¹⁷³ OJ C 133, 28/4/1997 p.47.

was not convinced that adequate measures had been taken.¹⁷⁴ While the European Parliament and ESC pushed for further measures, the Council, for the reasons discussed below, did not proceed with withdrawing the GSP. Such a step would have had important consequences for both the Union and Pakistan.

The Union is the largest importer of Pakistani textiles and arrangements exist to regulate this trade.¹⁷⁵ Furthermore, the Community must tread carefully if it wishes to suspend the GSP vis-à-vis Pakistan. Such practices, which are not State-policy as is the case in Myanmar, are also widespread outside of Pakistan. Furthermore, a ban on products produced by such labour would cause other social problems within Pakistan.¹⁷⁶ Withdrawing the GSP would also affect industries other than those which were being targeted. Dialogue and appropriately targeted projects which have in the past produced significant results are therefore the preferred option.

In a Troika meeting in October 1995, for example, the EU strongly expressed its concerns regarding child labour and the case of Iqbal Masih to the Pakistani authorities.¹⁷⁷ The threat of withdrawing the GSP was put off, however, as the Pakistani authorities undertook measures in response to earlier criticism. The Commission considered that this was, temporarily at least, enough. As with the blasphemy laws the situation was kept under review.¹⁷⁸ As an issue which has been specifically targeted by the Commission, the ILO and UNDP for funding, especially in assisting the enforcement of laws which prohibit such activities, the Community has achieved significant results. The problem has been far from eradicated, but

¹⁷⁴ *Ibid*, para. 12.

¹⁷⁵ Memorandum of Understanding Between the European Community and the Islamic Republic of Pakistan on Transitional Arrangements in the Field of Market Access for Textile and Clothing Products, OJ L 345, 29/12/2001 p.81.

¹⁷⁶ See OJ C 305, 15/10/1996 p.122 where the Commission acknowledges this.

¹⁷⁷ See EFPB Doc., 95/336 and OJ C151, 19/6/1996 p.276. Iqbal Masih was an ex-bonded child labourer who escaped and became an international spokesperson for the global campaign against child labour. He was assassinated, in 1995, aged 12 in Pakistan. He had been awarded the Reebok Human Rights Youth in Action Award, 1994 and was posthumously awarded (alongside Anne Frank) in 2000 the first World Children's Prize.

¹⁷⁸ See OJ C 21, 22/1/1998 p.148.

governments in Pakistan have undertaken steps and some reform due to cajoling by the Troika and others, and consistent and systematic discussion on the issue in institutional dialogue between Pakistan and the Union.¹⁷⁹

In the above examples a sparing use of condemnation, a substantial amount of dialogue and funding, where appropriate, have secured some improvement in the situation. Commission officials consider that in their discussions, Pakistani officials are frank and constructive in their approach. The Pakistanis are also considered to be receptive and indeed obliging, when either the Troika or the Commission have raised such issues with them. It is generally considered by the Commission, however, that while there is usually a will to undertake some reform, the requisite capacity to give effect to it does not always exist.¹⁸⁰ There is currently, however, little need for the Pakistanis to be receptive to the Union's demands if they do not want to. The Community while still funding valuable projects in Pakistan has, for the time being at least, lost a substantial amount of its political leverage in relations with it. This state of affairs will continue to exist while Pakistan is perceived to be a vital partner in the "war against terror".

4. Nigeria.

As an ACP State, Nigeria's relationship with the Union has primarily been through the Lomé/Cotonou Conventions. These are between the ACP States, on the one hand, and, on the other, the Community and Member States. Nigeria, one of the most populous and important African nations, has been subjected to the full range of Community and Union punitive measures. These have subsequently been revoked by the Union, as it was felt that enough reforms had taken place for them to be no longer appropriate. The following section will look briefly at the political and economic situation in Nigeria and provide some background to put the following

¹⁷⁹ For example, in May 2000, the military government announced the National Policy and Action Plan to Combat Child Labour to which the EU then contributed €990,000.

¹⁸⁰ I base this upon several interviews with desk-officers in Brussels and members of the mission in Islamabad.

analysis into context. This is followed by a discussion of the Lomé/Cotonou institutions and instruments and the action in that fora as a response to events in Nigeria. The discussion finally examines the punitive and positive action taken under the CFSP and Community pillars.

Since independence in 1960, Nigeria has enjoyed several periods of democracy although military rule has been more common.¹⁸¹ In June 1993 Presidential Elections, organised by a military government, were held and subsequently annulled. In November 1993, as a consequence of the ensuing turmoil and civil disturbances, the then Nigerian Defence Minister Sani Abacha assumed power. He dissolved all democratic political institutions and replaced elected governors with military officers. In late 1994 the military government established the Ogoni Civil Disturbances Special Tribunal. This was set up to try prominent Ogoni activists, including Ken Saro-Wiwa, for their alleged roles in the killings of four politicians in May 1994. In October 1995 the tribunal sentenced Saro-Wiwa and eight others to death and they were subsequently executed in November 1995. In 1995 the military government also alleged that 40 military officers and civilians, mostly journalists and human rights activists were engaged in a coup plot. A secret tribunal convicted most of the accused and several death sentences were handed down.

In June 1998 Abacha died and was replaced by General Abubakar who undertook a very different course of action from his predecessor. The Provisional Ruling Council, (PRC) commuted the death sentences of a number of political opponents and also released a substantial number of political prisoners. The government also took several steps towards restoring worker's rights, which had deteriorated seriously under previous military regimes. In August 1998 the National Electoral Commission (NEC) was ordered to conduct elections which were held in May 1999 and won by Chief Olusegun Obasanjo, who was sworn in as the democratically elected President of the Federal Republic of Nigeria. He was subsequently re-elected in 2003.¹⁸²

¹⁸¹ Nigeria was under military rule between 1966 and 1979 and between 1983 and 1999.

¹⁸² The account is derived in part from the Reports of the Special Rapporteurs on Nigeria, A/51538, E/CN.4/1997/62/Add.1 and E/CN.4/1997/62, Skogly, S., "Complexities in Human Rights Protection:

Nigeria currently has a per capita GNP of \$310, placing it 174th out of the 208 economies measured by the World Bank.¹⁸³ It is estimated that 70% of the population lives below the internationally recognised absolute poverty line of US\$ 1 per day.¹⁸⁴ In terms of human rights obligations, it is a party to the Covenant on Civil and Political Rights;¹⁸⁵ the Covenant on Economic, Social and Cultural Rights;¹⁸⁶ the Convention Against Torture;¹⁸⁷ the Children's Convention;¹⁸⁸ the Women's Convention;¹⁸⁹ five of the ILO's core Conventions;¹⁹⁰ and the African Charter.¹⁹¹ There have, in the last few years, been widespread breaches of human rights in Nigeria, as defined in its international legal obligations. The scale of the violations since late 1999, while serious, has been relatively minor compared to the situation prior to then. The general view is that the situation has improved significantly since the return to democratic government in 1999. The concluding comments of the Human Rights Committee,¹⁹² Committee on Economic, Social and Cultural Rights,¹⁹³ Committee on Women's Rights¹⁹⁴ and Committee on the Elimination of Racial Discrimination,¹⁹⁵ which relate to the period prior to 1998, paint a very different situation. Arbitrary arrest, summary execution and other extra judicial killings, torture, restrictions on the freedom of expression and association, widespread discrimination on the basis of ethnicity, race and gender, executive

Actors and Rights Involved in the Ogoni Conflict in Nigeria" (1997) 15 *NQHR*, 47 and Osaghae, E., *Crippled Giant, Nigeria Since Independence*, (1998).

¹⁸³ World Bank, *World Development Indicators Database*, 2004.

¹⁸⁴ *Ibid.*

¹⁸⁵ International Covenant on Civil and Political Rights, 1966, 999 *UNTS* 171.

¹⁸⁶ International Covenant on Economic, Social and Cultural Rights, 1966, 993 *UNTS* 3.

¹⁸⁷ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 *UNTS* 85.

¹⁸⁸ *Supra note* 16.

¹⁸⁹ *Supra note* 15.

¹⁹⁰ Convention No. 100, Equal Remuneration Convention, 1951, 165 *UNTS* 304 and ILO Convention Nos., 29, 87, 98 and 105, *supra note* 102.

¹⁹¹ African Charter on Human and Peoples' Rights, 1981, 1520 *UNTS No.* 26, 363.

¹⁹² Doc.CCPR/C/79/Add.64, CCPR/C/79/Add.65 and A/51/40 paras. 267-305.

¹⁹³ Doc.E/C.12/1/Add.23

¹⁹⁴ Doc.A/53/38/Rev.1 paras. 138-174. See subsequently, CEDAW/C/2004/I/CRP.3/Add.2.

control over the judiciary, as well as an ineffective and poorly functioning judiciary were among a host of problems identified as being widespread. The situation was such that a Special Rapporteur was appointed in 1995 by the Commission on Human Rights solely to deal with Nigeria and the reports of the Special Rapporteurs on extra-judicial, summary or arbitrary executions and independence of judges and lawyers confirm the extent of the problems that existed at the time.¹⁹⁶

Nigeria's largest export in terms of value to the EU is petroleum, a trade which since 1990 has been worth at least €2 billion per annum. In 2002 the trade was worth just under €4 billion. Petroleum products accounts for over 85% of the value of Nigerian exports to the Union. The importance of the EU to Nigeria as a trade partner can also be seen from the fact that the Union is the largest importer of, among other Nigerian exports, cocoa beans, wood, aluminium, leather and crustaceans for human consumption. The Union is thus vital to the sustainability and survival of the Nigerian industries involved. The Union between 1990 and 1998 annually exported over €2 billion worth of goods to Nigeria. Since 1998 the amount of trade has steadily increased. In 2000 and 2001 it was worth over €6 and in 2002 it was worth over €5 billion. The diversity of products exported to that country, however, means that the Nigerian market is unlikely to sustain or be crucial to any particular industries in the Union.¹⁹⁷

4.1. Dialogue Between Nigeria and the Union.

Although a number of other fora, such as summits between the European and African Unions¹⁹⁸ and Union relations with NEPAD¹⁹⁹ exist, the most important

¹⁹⁵ Doc.A/50/18, paras 598-636.

¹⁹⁶ See documents, A/51538, E/CN.4/1997/62/Add.1 and E/CN.4/1997/62.

¹⁹⁷ Statistics derived from <http://www.europa.eu.int/comm/development/stat/extrd99/import/ng.htm>, http://www.europa.eu.int/comm/development/body/country/country_statistics_en.cfm?CID=ng&lng=en&type=csp&status

¹⁹⁸ Summits have been held in 2000, 2003 and 2004. See further COM(2003)316.

¹⁹⁹ The New African Partnership for Development. See, for example, Presidency Statement, 25/9/2002.

fora for dialogue and discussion between the Union Member States and Nigeria are the institutions established by the successive Lomé/Cotonou Conventions. The institutional structure of the Lomé/Cotonou Conventions establishes a Council of Ministers (ACP-EC Council, formally known as the Lomé Council), a Committee of Ambassadors and a Joint Parliamentary Assembly (JPA).²⁰⁰ The ACP-EC Council consists of members of the Council and Commission of the EU, on the one hand, and, on the other, a representative of each of the ACP States. The ACP-EC Council's main functions are to conduct political dialogue, adopt policy guidelines and take the necessary decisions for the implementation of the provisions of the Treaty.²⁰¹ The Committee of Ambassadors is composed, on the one hand, of the permanent representative of each Member State to the EU and a Commission representative and, on the other, the Head of the Mission of each ACP State to the EU. The main function of the Committee is to assist the ACP-EC Council in the fulfilment of its tasks and carry out any mandate entrusted to it.²⁰² The JPA is composed of equal numbers of EU and ACP representatives. It is composed of members of the European Parliament, on the one hand, and, on the other, Members of Parliament or failing this, representatives designated by the parliament of each ACP State. The JPA is a consultative body which aims to promote democratic processes through dialogue and consultation. It can and does adopt resolutions and make recommendations to the ACP-EC Council with a view to achieving the objectives of the Agreement.²⁰³

As discussed in Chapter Three, Article 366a of Lomé IV (bis) established a consultation procedure, although it was not always used.²⁰⁴ It was not utilised in the case of Nigeria, as the Member States initially through EPC and later the Union's CFSP and Community, decided to implement unilateral punitive measures. The discussion will initially deal with the measures that were taken by the Lomé

²⁰⁰ Articles 15, 16 and 17, Cotonou Agreement and Articles 30, 31 and 32, Lomé IV (bis) respectively.

²⁰¹ Article 15 Cotonou.

²⁰² Article 16 Cotonou.

²⁰³ Article 17 Cotonou.

²⁰⁴ The equivalent is Article 96 Cotonou. The EU suspended all aid to Niger, for example, within 48 hours of a coup in 1996. See (1996) No. 157 *The Courier*, 7.

institutions before examining those adopted under EPC, the CFSP and the Community.

4.2. Action Under Lomé IV.

Lomé IV, which was signed at the end of 1989, was concluded for a period of ten years, with a Mid-Term Review due in 1994. Human rights and democracy were not essential elements of the Agreement (they became so in Lomé IV bis) but the formula in Article 5, Lomé IV leaves little doubt as to the importance of their role in the cooperation that had been established between the States party to it. Article 5, however, was not formulated so as to impose concrete obligations. Consequently, it was difficult to determine exactly when a State did not comply with the general obligations laid down in it.²⁰⁵

The Article 366a procedure was not yet available to respond to the annulling of the elections in Nigeria in 1993. Rather than denounce the Agreement with Nigeria, upon six months notice, which was provided for in Lomé IV,²⁰⁶ the Community and its Member States simply decided upon unilateral measures. The Member States did not engage in any dialogue and discussion, concerning the suspension of Nigeria, but reached their own judgment as to what Nigeria had done. Despite repeated requests by the ACP States for the establishment of a judicial body to determine material breaches of the Convention by either party, the Member States and Community have always resisted, preferring to maintain a unilateral power of assessment for themselves.²⁰⁷

It is arguable, however, that even if Article 366a had been in place, it would not have been used. Article 366a and the decision implemented to give effect to the procedure is permeated with compromise over questions of competence.²⁰⁸

²⁰⁵ Arts, K., *Integrating Human Rights into Development Cooperation: The Case of the Lomé Conventions*, (2000) p.197.

²⁰⁶ Article 367, Lomé IV. This was invoked in the case of Haiti.

²⁰⁷ See Holland, M., *The European Union and Third World*, (2002) p.123.

²⁰⁸ See Chapter Three.

Furthermore, it is difficult to consider that the annulling of the elections would have constituted a manifest breach of the essential elements of the Convention at the time. In the case of Nigeria it had already been negotiated and concluded with a military regime. The military's continued rule of the country did not amount to a fundamental change in circumstance as required by Article 62 of the Vienna Convention on the Law of Treaties, 1969. As Lomé IV had been concluded in 1989, the mid-term review obviously could not exclude States already party to it. Once changes to the Convention came into force, however, it was a different matter for subsequent events, especially as the Union's approach to non-democratic regimes had undergone a transformation in the intervening years.

Other measures were adopted by the Lomé institutions. The problem in discussing dialogue and action in the ACP institutions, however, is that little tends to enter the public domain other than the resolutions and minutes of the meetings of the JPA.²⁰⁹ It is thus difficult to know the content of the discussion on Nigeria in the then Lomé Council, although it is likely that confidential measures were adopted.²¹⁰ Anecdotal evidence suggests that the debates were heated and intense but few, if any, concrete measures were adopted.²¹¹ The records of the JPA, however, do reveal that there was substantial disagreement between EU representatives and those of the ACP States.

Since 1996 there has been a tendency to ensure that resolutions are adopted in the JPA by a procedure which is both secret and split (ACP and EU separately), in response apparently to increasingly critical individual country resolutions.²¹² This has resulted in it becoming more difficult to adopt critical country resolutions in the JPA, as it requires a separate majority among both the ACP and the EU members. Arts considers that a resolution critical of Nigeria was not adopted because of this

²⁰⁹ The minutes published in the *Official Journal* do not always provide any real information.

²¹⁰ Arts, *Integrating Human Rights*, *supra* note 205, p.254 notes, that measures on individual country situations are not common and usually in non-traceable documents or other confidential settings.

²¹¹ I am grateful to a Commission desk-officer for this information.

²¹² See S.H. "Joint Assembly in Lomé, October 27-30: A Harmonious Prelude" (1998) No.167 *The Courier*, 11, the minutes of the meeting at OJ C 96, 30/3/1998 p.1 and Arts, *Integrating Human Rights*, *supra* note 205, p.248.

procedure in the October 1997 JPA in Togo.²¹³ Conversely, however, a resolution was adopted in September 1996 in Luxembourg prior to the procedure being used and interestingly also in April 1998 at the JPA in Mauritius, where the ACP members voted in favour of condemning Nigeria by 24 votes to 23 with 3 abstentions. The EU members unanimously voted for the measure.²¹⁴

The resolutions adopted by the JPA are surprisingly condemnatory of the Nigerian authorities. Secret procedures have allowed representatives of States who would not normally publicly condemn Nigeria, to do so without repercussions. It is clear that the secret procedure, which was designed to stop condemnatory resolutions, did not achieve that objective, due to opposition to the activities of the Nigerian regime by other ACP States.²¹⁵ The resolution adopted in the Luxembourg ACP-EU Meeting of September 1996 is typical of the measures adopted by the JPA. The JPA had been unable to agree a resolution condemning Nigeria in 1995, as differences between the ACP and EU members had arisen and greater support seemed to be forthcoming for the view that this was tantamount to meddling with a State's internal affairs.²¹⁶ It is likely, however, that the failure to adopt such a measure was because the vote was not secret and the "internal affairs" argument was relied upon so as to not condemn a fellow ACP member. The other distinguishing factor, which may well have been decisive for some ACP States, was the execution of the Ogoni leaders. The importance of the 1996 resolution lies not in the fact that it insisted that the Nigerian regime respect human rights and restore democracy but in making numerous recommendations to the EU institutions. In particular, that international sanctions designed to isolate the Nigerian authorities economically, diplomatically and politically, if applied effectively could bring pressure to establish a democratic constitutional regime and put a halt to its human rights abuses.²¹⁷ It also called for a total ban on arms exports to Nigeria from the European Union, including exports relating to contracts signed before the then

²¹³ *Ibid.*, p.248, footnote 137.

²¹⁴ See OJ C 24, 2/9/1998 p.12.

²¹⁵ See, for example, Joint Assembly Resolution on Nigeria, OJ C 62, 27/2/1997 p.25.

²¹⁶ See OJ C 96, 1/4/1996 p.286.

²¹⁷ See the Preamble, para. 8.

embargo came into effect, which was aimed at the lacuna in the common positions which had then already been adopted.²¹⁸

The JPA Resolution further recognised the complicity of EU based multi-nationals in the human rights abuses and environmental degradation in Nigeria. Shell, in particular, has been highlighted by Greenpeace as being complicit in many atrocities.²¹⁹ No other resolution or measure adopted by the EU Member States, in any other fora, including the JPA,²²⁰ has addressed this issue. The Abacha regime may have been brutal and repressive but EU based companies were allegedly profiting handsomely from it. The practical results of the resolutions of the JPA, which are legally non-binding, however, are negligible. While in psychological terms they were important in the context of the discussion of human rights and democracy in the JPA, they did not have any real effect. In any case, the first adopted resolutions were after the execution of the Ogoni activists when common positions had already been adopted by the Council under the CFSP. It is to these the discussion turns.

4.3. Action Under the CFSP.

The annulling of the election of June 1993 led to the Presidency issuing a statement “deploring” the decision to annul the elections and suspend the National Executive Council (NEC).²²¹ In July 1993, a month after the elections, the Community and its Member States decided to suspend all military cooperation with Nigeria, as well as impose visa restrictions for the members of the military and security forces and suspend all visits by members of the military. Furthermore all further cooperation aid would be suspended, although allowances were made for projects which promoted human rights and democracy.²²² The initial action taken by the Community and Member States after the annulled election in Nigeria provoked a

²¹⁸ See *infra*.

²¹⁹ See the discussion paper on Shell’s policies at <http://www.greenpeace.org/~comms/ken/hell.html>.

²²⁰ See OJ C 308, 9/10/1997 p.37 and OJ C 62, 27/2/1997 p.59.

²²¹ Reproduced as EFPB Doc., 93/272.

²²² Presidency Statement on Nigeria, reproduced as EFPB Doc., 93/305.

stronger response than that which followed the annulled election in Myanmar two years earlier. The annulled elections in Nigeria, in many senses, presented an ideal opportunity for the then newly created Union to assert its identity on the international scene. While common positions and joint actions could have been adopted after the TEU came into force in 1993, the first such measures with regard to Nigeria were not taken until November 1995. In the meantime, elections had been annulled, the trials of the Ogoni leaders had taken place, as had the executions of opposition leaders on the basis of an alleged coup. Pressure for action thus existed in numerous multilateral fora. The Commonwealth Ministerial Action Group (CMAG) meeting in Auckland in November 1995 had suspended Nigeria, pending compliance with the 1991 Harare Declaration. In a meeting on 23 April 1996 it was pushing for further restrictive measures.²²³

The Union was under considerable pressure to be seen to be acting. The measures adopted, however, reflect the disagreement between the Member States as to the action to be taken. Britain had already agreed (with its Commonwealth partners) that an oil embargo and general economic sanctions would not be imposed, on the basis that they would hurt the Nigerian population.²²⁴ On the basis of the then Article J(2) of the TEU the Council adopted two common positions, 95/515/CFSP on 20 November 1995²²⁵ and subsequently 95/544/CFSP on 4 December 1995.²²⁶ The common positions were a direct response to the execution of the Ogoni activists as opposed to the annulling of the elections or the executions of the alleged coup leaders. The execution of the Ogoni activists was perceived to be a failure by Nigeria to comply with its international treaty obligations. While true, the same can be said of the execution of the alleged coup leaders as well. The common positions

²²³ See, Commonwealth Secretariat Press Release—"Commonwealth Talks with Nigeria", 4/6/1996 and Statement by the Chairman of the CMAG on the Harare Declaration at the Conclusion of the Group's Mission to Nigeria, 26/11/1996.

²²⁴ *The Glasgow Herald*, "Countries Agree Nigeria Sanctions" 24/4/1996, p.8. The Vice-Chairman of the CMAG is quoted as saying, "We realise an oil embargo is totally impractical. We are trying to target members of the regime and not hurt 100 million Nigerians."

²²⁵ OJ L 298, 11/12/1995 p.1.

²²⁶ OJ L 309, 21/12/1995 p.1

also strongly hint that one of the primary reasons behind their adoption was the failure of the Nigerian authorities to comply with Union requests for clemency.

The first common position adopted what is increasingly becoming a worryingly standard formula. Having condemned certain acts in very strong terms, the common position, a legally binding document, followed this with a relatively weak operative part. There is value in, what were then, relatively new legally binding powers being utilised but if such responses are to be anything other than token gestures then the operative part of a common position should reflect the sentiments expressed in the declaratory part. In this case the operative part simply reiterated many of the measures already adopted under EPC. It therefore, gave the impression of taking new steps under the CFSP, when many of the measures in question were already in place, something surprisingly not picked up by the European Parliament in its resolutions.²²⁷ The common position, for example, introduced visa restrictions on members of the PRC and the Federal Executive Council and their families, who were already covered by the decision adopted under EPC. The common position also encompassed an embargo on arms, munitions and military equipment which also covered spare parts, repairs, maintenance and transfer of military technology. Contracts entered into prior to the date of entry into force of the embargo were not affected.²²⁸ It is only these measures which may genuinely be seen as additional, as under EPC, cooperation with the military had only been suspended. With no shortage of countries exporting arms, the gap this may have left was easy enough to plug. The all important oil embargo was nowhere to be seen. The common position of December 1995 really only added legal force to the existing measures.

The Union had also committed itself to pursue the adoption of a resolution on Nigeria at the 50th UN General Assembly and the inclusion of Nigeria on the agenda of the Commission on Human Rights. In practical terms there was already significant pressure for this and the Union had adopted a practice under EPC to use the Commission on Human Rights and the General Assembly to condemn third

²²⁷ The European Parliament has issued various declarations on Nigeria. Among, many others, see, OJ C 80, 16/3/1998 p.233 and OJ C 292, 21/9/1998 p.154.

²²⁸ For confirmation of this view see EFPB Doc., 96/034.

States. The more practical measure to undertake, however, (which was supported by the Union in practice) was the adoption of a resolution providing for a UN Special Rapporteur on Nigeria.²²⁹ While this policy was adopted in practice, the common position did not refer to it, yet in many respects it was one of the most important measures the Union could have undertaken in a non-EU context.²³⁰

Considering the threats and language used by the Council after the Ogoni executions, the measures adopted are good example of the EU not following up its words with sufficiently strong action. The Council declarations of 9²³¹ and 10²³² November (adopted prior and subsequent to the Ogoni executions) provide a clear example. The Council in the latter stated that it “condemns this cruel and callous act carried out in contempt of the appeal of the European Union (made on 9 November) and those of the whole international community. The Council will consider the immediate steps it will take in its relations with Nigeria and also asks the Commission to make appropriate proposals.” No further proposals were forthcoming from the Commission, however, and the Council only adopted the common positions discussed above. The view of the Council was that as a consequence of the common positions and the measures implemented by it “the members of the shameful military regime in Nigeria will take thought and, if they cannot bring back to life Ken Saro-Wiwa and the eight others executed with him, at least we trust that their sacrifice will not have been in vain.”²³³ As the majority of the measures in question had been in place since 1993, repackaging them into common positions was not about to make the Abacha regime reconsider its policies and practices. What the Union did significantly do, however, was step up the diplomatic crusade. It had made representations through the Troika and Presidency to the Nigerian authorities as well as issuing numerous declarations. Member States also summoned Nigeria’s ambassadors in their capitals to express the Union’s

²²⁹ See Statement in the Third Committee of the 50th UN General Assembly, reproduced as EFPB Doc., 95/387.

²³⁰ It is unusual to find punitive common positions which contain undertakings for joint action on an item in an international organisation.

²³¹ Reproduced as EFPB Doc., 95/322.

²³² Reproduced as EFPB Doc., 95/346.

²³³ *Ibid.*

concern at the situation, with explicit reference to the detentions and imprisonments.²³⁴ Also acting on behalf of the Presidency, the French Ambassador to Nigeria made representations to the Nigerian Minister for Foreign Affairs to express the Union's concern at the lack of a precise timetable for a return to a constitutional regime and at the human rights situation.²³⁵

The limited regime imposed by the common positions did not stand the test of time. The European Parliament, for example, regularly condemned the sanctions as not being effective enough and asked for an oil embargo.²³⁶ This may have been discussed in the Council but it is unlikely that agreement could have been reached on this issue. The Clinton Presidency in the US March 1996, for example, was publicly proposing to ban all foreign investment in Nigeria and freeze all assets abroad, belonging to the military regime.²³⁷ British Foreign Office officials stated, at this time, that any measures agreed upon by the EU would not be effective without the US also imposing an oil embargo, as it was buying 60% of Nigeria's output at the time. The Clinton government was not countenancing such a measure, due to the impact this would have had on the US economy.²³⁸ The then British Foreign Office Minister, Baroness Chalker, however, was opposed to even the relatively limited measures being proposed by the US. In particular, the Treasury, was reluctant to damage London's position as an international financial centre and was thus against the freezing of the Nigerian military's assets.²³⁹

The coming to power of General Abubaker in 1997, however, ensured that any remaining determination among some Union Member States to impose more punitive measures soon became completely implausible. Abubaker undertook reforms almost immediately. For whatever reasons, it was clear that Abubaker's regime was much more receptive towards the EU, than his predecessor's, and

²³⁴ See for example, EPC Bulletin, Doc., 93/460 and EFPB Docs., 94/217, 95/197 and 98/077.

²³⁵ See EFPB Doc., 95/242.

²³⁶ See, for example, OJ C 362, 2/12/1996 p.261 and OJ C 166, 10/6/1996 p.200.

²³⁷ *The Guardian*, "Allies at Odds Over Nigeria" 13/3/1996 p.12.

²³⁸ *Ibid.*

²³⁹ *Ibid.* It should also be noted that a Dutch, French, Italian and British consortium had at this time signed a \$3.8 billion contract with the Nigerian government to build a natural gas plant.

engaging in dialogue and discourse regarding its internal situation. This allowed for much less hostile discussion which proved beneficial to all those involved. The Union felt it was now increasingly able to make way with the regime and its concerns were being taken on board. This mellowing by the Nigerian authorities further weakened the resolve of the less hawkish Member States in the Union. In contrast to the French and German governments and the previous British Conservative government, Robin Cook, the then Foreign Secretary of the new Labour government, stated at this time that human rights would “dominate British policy concerning Nigeria” and that strict sanctions should be imposed on Nigeria.

²⁴⁰ France and Germany, however, had started to call for most of the existing measures against Nigeria to be lifted. The common position was designed to be renewed every six months to take account of changing circumstances. This is a standard formula allowing the imposition of further measures if the situation so dictates. Its downside is that it can also be weakened by the intransigence of a Member State in the pursuit of a particular interest, especially a short-term one. In November 1997 the GAC, pushed by France and Germany had already voted to relax existing visa restrictions. Both States had different reasons. France wished to ensure that the Nigerian football team could play in the 1998 World Cup and also wished to allow exceptions to visa restrictions on “humanitarian grounds” - a euphemism for private medical care. Germany was motivated by more altruistic reasons. It did not wish for the Nigerian authorities to be further isolated and wanted to encourage dialogue and discussion. As Abubaker had displayed willingness to engage in dialogue the German approach had more to commend it, than that adopted by the British and French governments. The common position was thus amended to accommodate France, which was prepared to take a more intransigent line than Germany by vetoing its renewal.²⁴¹

The weakening consensus on Nigeria began to disintegrate further, once the promised transition to democracy became a reality under Abubaker. While his regime was still engaging in significant breaches of Nigeria’s international treaty

²⁴⁰ Quoted in *Human Rights Watch World Report 1998-Nigeria*, npg.

²⁴¹ See Article 1(2), Council Decision 97/820/CFSP, OJ L 338, 9/12/1997 p.1 and OJ C 323, 21/10/1998 p.129.

commitments, they were not on the scale prevalent under Abacha.²⁴² Once a process towards democracy and the holding of elections became apparent, the Union was true to its word and involved itself in the election process by sending observers. Many of Abubaker's actions, the release of prisoners, for example, were seen in a very positive light by the EU. As a result the Commission was prepared to intensify the dialogue between it and the Member States, on the one hand, and Nigeria, on the other, including its role in the framework of the Lomé Convention.²⁴³

The announcement of the holding of elections by Abubaker and the transition of power led to the Union not only issuing Presidency statements endorsing the process but also to the further weakening of the common position and the adoption of joint actions, so as to establish election monitoring teams. In a common position of 30 October 1998, prior to the elections being held, the Council repealed the earlier common position, subject to the proviso that there would be no military cooperation, and an arms embargo would stay in place.²⁴⁴ Between the coming into force of the new common position and the restoration of democracy, however, development cooperation could only continue for actions supporting human rights and democracy, which is exactly as it was before.²⁴⁵ The significance of this common position cannot be overestimated. In practical terms it removed all remaining visa restrictions on the regime and their families, as well as those concerning the recall of European military attachés posted to Nigeria. The other limited sanctions remained. The basic premise, however, is that steps towards democracy, despite continuing concern about human rights problems, were enough for the loose consensus that existed to break down. There did not have to be an improvement in human rights abuses, although there was one, which the common position noted, but democracy had to be in place or measures to give effect to it had to be undertaken. Developments which should have led to a civilian government

²⁴² *Human Rights Watch World Report 1999*, npg, noted a substantial improvement in the situation under Abubakar.

²⁴³ See OJ C 188, 29/4/1999 p.1.

²⁴⁴ 1998/614/CFSP, OJ L 293, 31/10/1998 p.77.

²⁴⁵ Articles 1-4, 1998/614/CFSP.

coming to power, at some stage in the future, was sufficient for most of the restrictive measures in place, as weak as they were, to be lifted. The Union for its part considered that “the current democratisation process, should permit the normalisation of ...relations and enable Nigeria to regain a place within the international community in keeping with its aspirations and capabilities.”²⁴⁶

The Union did consider, however, that any elections must at least be multi-party elections with universal suffrage based on democratic principles.²⁴⁷ To this end the Union established an election monitoring team.²⁴⁸ The joint action which was the basis for this, was the EU’s concrete measure in response to an earlier declaration,²⁴⁹ which indicated the EU’s willingness to support the legislative and Presidential elections which had been announced. The Commission, acting on behalf of the European Community and its Member States, undertook a number of activities to provide assistance for the preparation of, and observers for, the elections, including support to the functioning of the Nigerian Independent National Election Commission. On 3 March 1999 the Presidency issued a declaration on the elections considering that they were fair and based upon democratic principles and expressed its willingness to cooperate and help with the reforms, as needed, for the strengthening of the rule of law, respect of human rights and good governance²⁵⁰ Common Position 1999/347/CFSP²⁵¹ accordingly repealed the remaining punitive measures. In April 2003 President Obasanjo was re-elected as President of Nigeria. There were widespread allegations of vote rigging and the Final Report of the EU Election Observation Mission, which was invited to observe the elections, referred to, “serious inconsistencies in the legal framework, significant evidence of malpractice....and...the Presidential elections....being....marred by serious irregularities and fraud.”²⁵² The Union Presidency while expressing some concerns

²⁴⁶ OJ L 293, 31/10/1998 p.77.

²⁴⁷ See (1999) 3 *EU Bull* 1.4.12.

²⁴⁸ Joint Action 98/735/CFSP, OJ L 354, 30/12/98 p.1.

²⁴⁹ Declaration on Nigeria, reproduced as EFPB Doc., 98/277.

²⁵⁰ See EFPB Doc., 99/030.

²⁵¹ OJ L 133, 28/5/1999 p.5.

²⁵² Final Report of the EUEOM to Nigeria at <http://www.eueomnigeria.org/media.html>.

about the conduct of the election accepted the outcome.²⁵³ In the overall context of relations with Nigeria the fact that elections had actually been held, despite their shortcomings, and that they were conducted peacefully in most parts of the country was more important for the Union. As the Presidency statement noted, the elections further consolidated democracy in Nigeria.²⁵⁴ The Union also reiterated its willingness to cooperate with the authorities to help improve the quality of democracy in Nigeria. It is to such projects we next turn.

4.4. Positive Action, Ethical Values and Nigeria.

Since democratic elections were held in Nigeria in 1999 the Union has taken a far less interventionist approach. There has generally speaking been little or no public scrutiny of the general situation prevalent in Nigeria, for example, the non-implementation of the suspended Constitution or the treatment of minority groups.²⁵⁵ The one partial exception to this has been the introduction of very orthodox religious laws to some of Nigeria's Northern States, most importantly Zamfara. In October 1999 the Governor of Zamfara signed into law two bills aimed at instituting *Shari'a* into State legislation. The Parliament²⁵⁶ and Council²⁵⁷ have reserved their condemnation to particular incidents. This is part of a more recent overall strategy in relations with Nigeria, where the Union has sought to take positive action to help consolidate democracy and promote human rights, among other values and to use condemnation as sparingly as possible.

The Presidency in a statement issued after the 1999 elections acknowledged that the incoming government would face serious problems. It thus expressed a willingness to "continue to promote political and economic reforms...to cooperate with the

²⁵³ Presidency Statement on Nigerian National Assembly Elections, (2003) 5 *EU Bull* 1.6.16.

²⁵⁴ *Ibid.*

²⁵⁵ The 1979 Constitution was suspended and the 1989 Constitution was never implemented. A new Constitution, which in Article 45 justifies broadly defined limitations on the rights enunciated, has been effective since May 1999.

²⁵⁶ See, for example, (2001) 1/2 *EU Bull* 1.2.9.

²⁵⁷ See, for example, (2001) 1/2 *EU Bull* 1.6.30.

elected authorities towards strengthening the rule of law,....respect of human rights and good governance.”²⁵⁸ As the Community’s powers for positive action were fairly limited prior to the TEU coming into force, the extent to which it had previously promoted ethical values in Nigeria is highly questionable.²⁵⁹ The only activities it had really engaged in since it did obtain the requisite competence in 1993 were punitive. Since the 1999 election, however, the Union has placed greater emphasis on “positive measures” in Nigeria. In 2000, for example, it provided €1.5 million in funding for a number of projects which contribute to justice being accessible to all, information networks on civil society and the promotion of international human rights.²⁶⁰ Furthermore, despite tinkering with several budget lines which channelled funds to the sophisticated human rights groups which now operate freely in Nigeria, substantial funds are now being allocated.²⁶¹ These amounts are intended to support an incentive-based approach. Measures to promote human rights and democracy in Nigeria can also be financed from the European Development Fund. There is also a “Special Programme for Democracy and Good Governance in Nigeria” Budget Line, under which a number EU based organisations have been funded to help develop democracy through, for example, support for the media or the training of judges.²⁶² Commissioner Patten has stated, however, that the quality of most of the submitted projects for Nigeria has been disappointing.²⁶³ Nigeria has also been a major recipient of Member State funds.²⁶⁴

This positive approach has now been consolidated in a common position adopted by the Council regarding the objectives of relations with Nigeria.²⁶⁵ This approach is

²⁵⁸ (1999) 3 *EU Bull* 1.4.12

²⁵⁹ See Common Position 98/350/CFSP, OJ L 158, 2/6/1998 p.1.

²⁶⁰ (2000) 12 *EU Bull* 1.2.11.

²⁶¹ Budget-lines for Nigeria include B7-7020 “Democratisation, Human Rights in Developing Countries” which amounted to ECU 20 million in 1998, see OJ C 142, 21/05/1999 p. 4.

²⁶² This information is derived from the *EIDHR Compendiums* of 2000/2001/2002/2003.

²⁶³ See OJ C113 E, 18/04/2001 p.244

²⁶⁴ See the webpage of the British Department for International Development at <http://www.dfid.gov.uk> for details of British funded projects.

²⁶⁵ See Common Positions 2001/373/CFSP, OJ L 132, 15/5/2001 p.132 as repealed by 2002/401/CFSP, OJ L 139, 29/5/2002 p.139.

unique. No other common positions have yet been adopted regarding a single State, which is already party to a multilateral treaty with the Community, which further establish objectives and priorities to inform the basis of that relationship. While most of the objectives overlap with those found in the Community's development cooperation treaties, the emphasis on human rights, civil society, the consolidation of democracy and the democratic process is very noticeable.²⁶⁶ While the latest common position does not have a budget line, it further establishes institutions and fora for bilateral discussion with Nigeria. While it is still too early to determine how the Commission has responded to the adoption of the common position, this approach does display a serious commitment by the Council in its relationship with Nigeria.

5. Conclusions.

This chapter set out to investigate the manner in which the Union has, in practice, aimed to promote and protect ethical values in its dealings with certain third States. The case-studies allow a number of conclusions to be drawn. In the first instance the Union has, as an actor promoting such values, an identity closely related to but separate to that of its Member States. As a collective, the Union has the capacity to address and to tackle or at least contribute to global and regional issues in a manner that the individual Member States cannot match. For example, further to the latest common position on Myanmar in April 2004, the then 15 Member States were joined by a further twenty States, who were either, acceding countries, candidate countries, potential candidate countries, countries of the Stabilisation and Association Process, or EFTA countries. All of these countries undertook to ensure that their domestic legislation was in conformity with the common position.²⁶⁷ The impact of joint action by 25, or in this case 35, States is significant by any yardstick. The action the Union can take, however, reflects only those elements on which views are shared by all of its Member States. Effective policy is hostage to the

²⁶⁶ Article 3, 2002/401/CFSP.

²⁶⁷ Council Common Position 2004/423/CFSP, OJ L 125, 28/4/2004 p. 61. See Declaration by the Presidency 30/4/2004, 8946/04 (Presse 128).

interests of each of and every Member State. This is why it can be argued that despite having its own identity, the Union does not have its own dynamic, separate from the Member States. It only acts where interests and values shared by all the Member States are affected. The foreign policy of the Union is a common one, not a single one.

The Union has introduced discussion and dialogue concerning human rights and democracy, among other ethical values, into its dealings with all third States. In setting out to achieve its objectives the Union has used, among other instruments, diplomatic pressure, threats, dialogue, legally binding instruments and financial inducements. The “requests” made have included abstention from certain activities, i.e., testing nuclear weapons, as well as specific actions, for example, the holding of democratic elections. The approach adopted is a multi-faceted one. The problem with such an approach is one of coordination and consistency with regard to each particular State. The boundaries between Union and Community competence have not, on the whole, been problematic.

Although attention has been paid by the Union to those UN obligations which require action,²⁶⁸ there has, in the case-studies at least, been little conscious reference to some of the international legal obligations of the Community, Member States and the third States in question. Torture and slavery as State policies do not by themselves usually provoke a result any different from restrictions on, for example, freedom of expression. The Union has been working to its own agenda and attempting to promote and protect those values which it considers important. The Union has condemned and indeed imposed some punitive measures for breaches of democratic principles, the normative status of which is still questionable. The Union has, however, contributed to the formation of a customary norm in this regard – self-determination and democracy, for example, are now for the Union Member States a part of the discussion on the recognition of a State or government. Annulled elections in the case-studies, however, only led to limited punitive measures being imposed. More extensive punitive measures have only been agreeable when the third State(s) in question have further acted in a way

²⁶⁸ See Chapter Three.

considered objectionable by the Union; the death of the Danish consul in Myanmar and the execution of the Ogoni activists in Nigeria. The extent of cooperation that is forthcoming from the third State in question is also clearly an important consideration for the Union in determining what punitive action to take. The execution of Saro-Wiwa, despite a Union plea for clemency and the failure of the authorities in Myanmar to cooperate with the Union over either Nichols' death or the GSP investigation were important considerations in taking punitive measures. The willingness of the Pakistani authorities to cooperate and take Union concerns aboard ensured that no such measures were adopted against it.

No matter how systematic the human rights abuses in the case-studies, in the absence of an annulled election or *coup d'état*, the Union has not downgraded development cooperation.²⁶⁹ Even when it has acted, however, the punitive measures have sent out mixed messages. The measures still in force against Myanmar and now repealed against Nigeria simply were not and are not strong enough to compel a regime to act in a particular way. Any proposed action has to consider the legality of such action, including the impact of such measures upon a population and the targeted regime, as well as the interests of the Member States themselves. A total trade embargo and investment ban by twenty five States would clearly have an impact on the regime in Myanmar beyond the measures already in place. The Presidency and Member States have in the General Assembly of the United Nations and Commission on Human Rights consistently voted against resolutions aimed at classifying economic sanctions as a means of political and economic coercion against developing countries.²⁷⁰ It clearly wishes to be able to resort to such measures when they are considered appropriate. It is simply a question whether the political will exists among all of the Member States and there is a perceived need for such measures to be adopted.

²⁶⁹ See OJ C 280 E, 21/11/2003 p.63, where it was stated in answer to a Parliamentary question that "as of today, no Agreement containing a human rights 'essential elements' clause has been suspended" because of violations of such rights.

²⁷⁰ See EFPB Doc., 87/485, for one example among many and the discussion in Chapter Two.

Although the case-study on relations with Pakistan can be used to criticise the inconsistency of the Union's practice in response to breaches of democracy and to illustrate the relativity of ethical values, one overall conclusion at the end of these case-studies is inescapable. Ethical considerations are now an established part of the equation in the Union's dealings with third States. The weight they are given in determining what action, if any, to take in any given situation will depend on a number of other considerations. It is unlikely that any State or organisation will prioritise concerns about ethical values in a third State, over its own security and well-being. Ethical matters cannot stand alone from, for example, security considerations, relations with vital allies and trading links. There are at times serious shortcomings with the Union's approach but there is clearly a concerted and at times valuable contribution being made to the promotion of the values *it* considers most important.

Chapter Five.

Ethical Values and Foreign Policy in Practice: The Role of the Union in the Middle East Peace Process and Relations with the Palestinian Authority and Israel.

1. Introduction.

It is arguable that one of the reasons for the Union's somewhat ambivalent responses to the violation of certain values in the case-studies examined in Chapter Four, is due to the lack of tangible benefits to it in promoting those values at the expense of other interests. It is an inescapable fact that abuses of such norms in far off countries, no matter how abhorrent, do not usually directly threaten a State's fundamental interests. The Union's commitment to the Western Balkans, for example, is precisely because the detriment to the interests of the Union and its Member States, if further instability breaks out on its eastern borders, is obvious.¹ A major distinguishing feature therefore, between the previous case-studies and those under examination in this chapter, is physical proximity. The Union's direct interest in stability and peace in the Middle East and Mediterranean region has been made clear on a number of occasions, for example, by the 1996 Florence European Council,² the Mediterranean Common Strategy of June 2000³ and in the proposals for an EU Strategic Partnership with the Mediterranean and the Middle East.⁴ Furthermore, the historical involvement of some of the Member States has ensured that the Middle East Peace Process (MEPP) is a major issue in the foreign policies of the Union and its Member States.

¹ See Cremona, M., "Creating the New Europe: The Stability Pact for South-Eastern Europe in the Context of EU-SEE Relations" (1999) 2 *CYELS*, 463 and COM (2003)104 on the Wider Europe Neighbourhood.

² Declaration on the Middle East Peace Process (1996) 6 *EU Bull* 21/23.

³ Common Strategy on the Mediterranean Region, 2000/458/CFSP, OJ L 183, 22/7/2000 p.5.

⁴ An interim report on the proposed partnership was adopted by the European Council on 22/4/2004. The final report is due to be adopted at the European Council meeting in June 2004. MEMO/04/151.

Relations between the Union, on the one hand, and, on the other, Israel and the Palestinian Administered Territories also differ from those with Myanmar, Nigeria and Pakistan (described in the previous chapter) in a number of other ways. In the first instance, Israel does not have a development cooperation based Agreement with the Union, such as exists for the benefit of the Palestinian Administered Territories. The 1995 Agreement is mixed in nature.⁵ The dynamic of relations is thus different. Israel is not a developing country and this thesis focuses mainly on relations between the Union and such countries. As noted in Chapter One, the primary focus of this chapter is the relationship between the Union and the Palestinian Authority and the role ethical values play. This cannot be examined in isolation, however, from the prevailing political situation in the region and the Union's relations with Israel. The rule of law, good governance, human rights and other ethical values are not only discussed within the confines of the institutional structure established by the respective bilateral treaties but are also closely tied up with the MEPP and the Union's policy towards the Mediterranean region as a whole. This policy, known as the Barcelona Process,⁶ as well as the Mediterranean Common Strategy and the MEDA Regulation⁷ between them complement and support the dialogue and relations between the Union and Israel and the Palestinian Authority. The aim of the following sections is to discuss the role that ethical values have played in the Union's discussion with the region as a whole and to then focus upon relations with the Palestinian Authority and Israel.

⁵ Euro-Mediterranean Agreement Establishing an Agreement Between the European Communities and their Member States, of the One Part, and the State of Israel of the Other Part, OJ L 147, 21/6/2000 p.3.

⁶ From the Barcelona Declaration adopted at the Euro-Mediterranean Conference, 27-28/11/1995.

⁷ Council Regulation No.1488/96 OJ L 189, 30/7/1996 p.1 (MEDA I) now superseded by Council Regulation No.2698/2000, OJ L 331, 12/12/2000 p.1. (MEDA II).

2. Ethical Values and the Middle East Peace and Barcelona Processes.

The Union, which perceives itself as a promoter of a just and lasting peace in the Middle East, has essentially sought to make the MEPP and the Barcelona Process “separate but complementary”.⁸ The Barcelona Process and the other institutional aspects to this dimension of Union policy have, however, been affected by the tensions and problems of the peace process.⁹ The two are inextricably tied-up, despite attempts to keep them separate. The Commission, in particular, perceives that stimulating economic growth and development and enhancing dialogue and cooperation may lead to a lasting peace.¹⁰ It is equally aware that a lasting peace will lead to economic and social development in the region. Israel is, however, usually able to withstand pressure of every sort from the EU. It can almost always court and rely upon economic, political and moral support from the US to counterbalance it.¹¹ It is for this reason that the Union attempts to maintain the separate identities of the different fora. This is in the hope that if progress is thin on the ground in one area, it does not adversely affect dialogue in another. The problem is one of maintaining a consistent approach in the different fora. The timescale of the objectives and priorities they pursue are different and the emphasis they place on certain facets of the dialogue also differ.¹²

⁸ See the Preamble to the Barcelona Declaration.

⁹ See, for example, the Presidency Conclusions of the Vth Euro-Mediterranean Conference of Foreign Ministers, Valencia, 22-23/4/2002.

¹⁰ For criticism see Nienhaus, V., “Promoting Development and Stability Through a Euro-Mediterranean Free Trade Zone” (1999) 4 *EFARev.*, 501.

¹¹ See Marr, P., “The United States, Europe and the Middle East: Cooperation, Cooptation or Confrontation?” in Robertson, B. (ed.), *The Middle East and Europe: The Power Deficit*, (1998) p.74 and Lesch, D.(ed.), *The Middle East and the United States: A Historical and Political Reassessment*, (1999, 2nd edn.).

¹² See Edwards, G., and Philippart, E., “The Euro-Mediterranean Partnership: Fragmentation and Reconstruction” (1997) 2 *EFARev.*, 465 and Pierros, F., Meunier, J., and Abrams, S., *Bridges and Barriers: The European Union's Mediterranean Policy*, (1999).

2.1. The Union and the MEPP.

2.1.1. Introduction.

While a general discussion of the MEPP is beyond the scope of the chapter it is necessary to make a few initial observations, so as to provide some context for the discussion below. A number of the Member States, in particular Great Britain, France and increasingly Germany, are major players in the MEPP. Domestic politics, as can be expected, play a major role in the stance taken. France with its traditional ties with the Arab world has, except for a very brief period, adopted a very critical approach towards Israel. Germany, on the other hand, has historically felt a moral responsibility to support Israel.¹³ Britain due to its historical connection to the region has in some way or other been involved since the end of the First World War. The articulation of a coherent policy by the Community and later Union has not been straightforward. There are clear differences of approach between some of the Member States, as well as the desire of at least three of them also to maintain an individual presence. The importance of the issue has meant, however, that the Member States of the Community have attempted to formulate a common policy since the early 1970s.¹⁴ The most important document on the MEPP under EPC is the declaration adopted by the Venice European Council of June 1980.¹⁵ In this declaration, which still largely forms the basis of the Union's approach, the Heads of States and Governments considered that the traditional and common ties between them and the other parties obliged them to play a special role and work towards peace.¹⁶ The position of the Member States with regard to the Israeli occupation of

¹³ See Gerhard Schröder's comments, for example, as reported by *BBC World Internet News*, "Germany to Supply Missiles to Israel" 27/11/2002. Germany stopped providing unqualified support to Israel in the 1970s and has in recent years occasionally publicly condemned Israel. See, for example, *IHT*, "German Harsh Words for Israel" 10/4/2002, internet edition.

¹⁴ For a historical perspective see Soetendorp, B., *Foreign Policy in the European Union*, (1999) p.99 and *ibid.*, "The EU's Involvement in the Israeli-Palestinian Peace Process: The Building of a Visible International Identity" (2002) 7 *EFARev.*, 283 and Aoun, E., "European Foreign Policy and the Arab-Israeli Dispute: Much Ado About Nothing?" (2003) 8 *EFARev.*, 289.

¹⁵ Available at: http://www.europa.eu.int/comm/external_relations/mepp/index.htm.

¹⁶ Para. 2.

certain territories and their practices highlighted, however, that the Community (and later Union), despite its internal differences, was generally adopting a more critical approach to Israel's policies and practices than the United States. The Venice Declaration, for example, at an early stage supported Palestinian self-rule, considered Israeli settlements in the Occupied Territories to be illegal and has been the basis for repeatedly demanding that Israel comply with Security Council Resolutions 242 and 338,¹⁷ which Israel has consistently failed to implement.

Due to the approach it has adopted, the Community/Union and its representatives have, by and large, been treated with a degree of suspicion by both Likud and Labour politicians in Israel. More recently some Israeli politicians have become openly contemptuous of the Union and the role it plays in the MEPP. It has, for example, been suggested that the Union should limit itself to funding Palestinian reform.¹⁸ A widely held perception in Israel and the US, as expressed by Henry Kissinger, is that there is nothing to be gained by engaging "Europe" as it is "keen to preserve its links with the Arabs and unlikely to ask them of the sacrifices needed".¹⁹ Ariel Sharon, for example, has unequivocally stated that Israel will only be prepared to allow the Union to play a greater role in the MEPP if it takes a "more even-handed approach".²⁰ Due to the perception of bias, interventions on behalf of the Union are routinely summarily dismissed by Israeli politicians. Benjamin Netanyahu, while Prime Minister, for example, in response to Union criticism of Israeli policies argued that "the Europeans" simply did not understand the situation that Israel finds itself in.²¹

The promotion and establishment of peace and stability, not only in Europe but globally as well, is mentioned as an objective in the preambles to both the EC and EU Treaties as well as in the Draft Constitution.²² Such activities in third States are a part of the ethical practice of the Union. The ultimate objective of the role the Union seeks to play in the MEPP is the normalisation of relations between Israel and some

¹⁷ See, for example, the Conclusions of the Seville European Council, 21-22/6/2002.

¹⁸ *Know Europe*, "Israel Says EU Should Stay out of Middle East Peace Process" 18/7/02 p.7.

¹⁹ Kissinger, H., *Toward a Diplomacy for the Twenty-First Century*, (2001) p.184.

²⁰ *The Guardian*, "Sharon Pours Scorn on European Peace Efforts" 29/1/2003 p.4.

²¹ See EFPB Doc., 98/426.

²² Article I-3(4) DC.

of its Arab neighbours. Helping to broker a solution to the “Palestinian issue” and helping to sustain it will lead to a greater degree of stability in that region and should have an appreciable effect on the protection and promotion of those values to which the Union is committed.

2.1.2. The Union as an Actor in the MEPP.

The Union contributes to the MEPP in various differing ways. The first is as a member of the *Quartet*, an *ad hoc* arrangement alongside the US, UN and Russia, which first met in April 2002. The *Quartet* was established with two main aims - to help to broker a solution to the situation in the Middle East and in the intermediate to allow the four partners to take collective action in response to events on the ground. It is no secret, however, that the US is the primary member of the *Quartet* and often acts on its own outside of it. Sharon has argued that as far as Israel is concerned the “*Quartet* is nothing...only the US matters.”²³ Sharon’s courting only of President Bush in April 2004 to approve Israel’s planned unilateral withdrawal from Gaza, is evidence of this.

The ultimate aim of the *Quartet* is to implement a “roadmap to peace” which will lead to a two-State solution, as well as resolution of the Israeli-Syrian and Israeli-Lebanese conflicts.²⁴ One of the 14 reservations Israel put forward in accepting the roadmap was that it did not accept the legitimacy of the *Quartet*.²⁵ Thus when Sharon received the roadmap in April 2003 he only allowed the US Ambassador, Dan Kurtzer, to come and see him, not representatives of all *Quartet* members.²⁶ Similarly at the meeting in June 2003 at Aqaba of Bush, Sharon and Abu Mazen to

²³ *The Times*, “Sharon Rejects ‘Irrelevant’ Mediators” 20/1/2003 p.12. Franco Frattini, during the Italian Presidency, was candid enough to state that the Union was only a minor partner in the *Quartet*, *Le Figaro* “Les priorités européennes de Franco Frattini”, 17/7/2003, internet edition.

²⁴ The roadmap was formally published on 30 April 2003.

²⁵ See the communiqué issued by the Israeli government, “Government Meeting About the Prime Minister’s Statement on the Roadmap”, 25/5/2003 and “Statement on UN Security Council Roadmap Resolution”, 20/11/2003

²⁶ See the interview with Saeb Erekat in *Bitter Lemons*-<http://www.bitterlemons.com>, 17/7/2003.

implement the roadmap, the EU's participation was vetoed by Israel as Sharon refused to meet Solana for having met Arafat prior to it.²⁷

The *Quartet's* effective functioning is also dependent upon agreement between all its members, which involves the search for a solution acceptable to and with the support of all. This is clearly a difficult condition to meet. The differing approach of the US and Union to Arafat, especially after Israel's attempts to render him irrelevant, is an example of major differences between the parties. The Union considers him the legitimate interlocutor for the Palestinians.²⁸ The US and Israel consider him tainted by terror. In September 2003 Israel decided, in principle, to "remove" him.²⁹ A proposed Security Council Resolution condemning the Israeli threat was vetoed by the US, with the UK abstaining. France and Germany, along with nine others, voted in favour of it.³⁰ Three days later the General Assembly adopted a Resolution condemning Israel by 133 votes to 4. All 15 EU Member States voted in favour of it after amendments, inserting stronger language condemning both Israel and the Palestinian Authority, were accepted.³¹ In October 2003 Sharon stated that Israel would not assassinate Arafat, although in April 2004 he reneged on his pledge not to harm him.³² A compromise currently exists, Arafat is still recognised as a legitimate representative by the EU but he has had to cede some of his power to a Prime Minister, (initially Abu Mazen and subsequently Ahmed Queria) with whom Israel and the US nominally deal.³³ Even here, however, the Union's unified approach to Arafat has at times collapsed. The Italian Presidency, for example, refused to

²⁷ *Ibid.* Similarly, on 1/9/2003, Sharon cancelled a meeting with Solana, due to the EU's refusal to sideline Arafat. See *EU Observer*, "Sharon Cancels Solana Meeting" 2/9/2003.

²⁸ See, the Statement by the Presidency on the Formation of the Palestinian Legislative Council, 29/4/2003.

²⁹ See the Israeli government communiqué, 11/9/2003. The EU Presidency issued a statement on 12/09/03, where it expressed a "deep preoccupation over the serious implications" of expelling him.

³⁰ UN News Centre, "US Vetoes Security Council Resolution Demanding Israel Not Deport Arafat" 16/9/2003.

³¹ Press Release GA/10152, 19/09/2003.

³² See *BBC World Internet News*, "Israel 'will not kill' Arafat" 28/10/2003 and *The Guardian*, "Sharon: 'We May Kill Arafat'" 24/4/2004 p.1.

³³ The reality is that Israel and the US wish to deal with a Palestinian leadership which has no connections with Arafat.

negotiate and deal with Arafat. Frattini, the Italian Foreign Minister, throughout the Presidency insisted upon meeting only Mazen and subsequently Queria, even though other Union actors continued to meet Arafat. In retaliation the Palestinians refused to meet with representatives of the Italian Presidency.³⁴

The *Quartet* is not attempting to impose a solution regardless of the context and views of the parties involved. It has taken a somewhat different approach to that adopted by the Union based upon the 1980 Vienna Declaration. Under the Declaration the Member States and later Union formulated their own compromise solution and then tried to persuade the parties to implement it. The agreed approach of the *Quartet*, as noted above, is a two-State solution. All parties are publicly at least still committed to this process, although how is to be achieved and the details are yet to be negotiated. Peace between the parties is the ultimate objective, and it is argued that this can be achieved by the creation of a democratic Palestinian State and a secure Israel. Despite the public commitment of the Union to the roadmap, France, Belgium, and Ireland have increasingly championed an alternative peace plan, known either as the “Geneva Accords” or “Geneva Initiative”.³⁵ These States, much to the annoyance of Israel, have attempted to persuade the other Union Member States to adopt this alternative plan as their formal policy.³⁶ They have not yet succeeded. Despite these problems, the Union still routinely reaffirms its commitment to the *Quartet* and the Security Council considers it to be the current best mechanism by which a solution can be brokered.³⁷

³⁴ See *Dawn*, “Abbas Refuses to Meet Italian PM” 10/6/2003 p.1.

³⁵ Although the Presidency has also welcomed it, see Presidency Statement on the Initiatives by the Israeli and Palestinian Civil Societies, 2/12/2003, 15583/03 Presse 358.

³⁶ See *Euractiv.com* “France, Belgium draw Israeli ire over Geneva Accord” 6/11/03. Colin Powell has also been attacked by Israel for his support for the Accord, see *The Independent*, “Israel Criticised Powell for ‘Mistake’ Over Peace Plan” 3/12/03 p.3.

³⁷ See Security Council Resolutions 1397(2002) and 1515(2003).

The Union is also directly involved in the MEPP outside of the *Quartet*. The Presidency, Troika,³⁸ President of the Commission, Commissioner for External Relations, Commissioner for Development and Humanitarian Aid, High Representative of the CFSP and the Special Representative for the Middle East Peace process have all made different and at times differing contributions to it.³⁹ The Special Representative, who is accountable to the Council,⁴⁰ acts independently of the Troika and High Representative in an attempt to help broker deals, in accordance with the terms of his mandate. Solana (who was a part of the Mitchell Commission which asked for an unconditional end to Palestinian terror) is treated and seen as being more impartial by the Israeli negotiators, whereas Moratinos (the first Special Representative) was generally seen as being favourable to the Palestinians although not anti-Israeli *per se*.⁴¹ The Israelis have vetoed all contact with the current Special Representative, Marc Otte, due to his insistence on meeting Arafat.⁴² The High Representative is and has historically been preferred to the Special Representative, whose post was specifically created to increase the Union's contribution to the MEPP.⁴³

The post of Special Representative for the MEPP was initially created by the GAC of 28 October 1996, with Miguel Moratinos being appointed.⁴⁴ On 14 July 2003 he was replaced by Marc Otte.⁴⁵ The joint actions which establish his mandate use Articles 14 and 18(5) TEU as their legal bases. Article 14 provides for joint actions, requiring

³⁸ Troika visits have at times been controversial, for example, when Robin Cook during the British Presidency visited Orient House. As a consequence a number of Troika visits were cancelled, see EFPB Docs., 96/281 and 97/178.

³⁹ This is also true in the *Quartet* as well, see the question and answer session of 10/4/2002 and the differing views of Piqué (on behalf of the Spanish Presidency) and Solana.

⁴⁰ Article 18(5) TEU. Although see Article 4(1), Joint Action 2003/837/CFSP, OJ L 326, 13/12/2003 p.46 which states that the Special Representative is accountable to the High Representative.

⁴¹ When Moratinos was Special Representative, his webpage confirmed this.

⁴² See para.2, EU Declaration at the Fourth Meeting of the EU-Israel Association Council, 17-18/11/2003, 14796/03(Presse 328).

⁴³ The envoy was originally appointed by Joint Action 96/676/CFSP, OJ 1996 L 315, 4/12/1996 p.1. Joint Action 2000/794/CFSP, OJ L 318, 16/12/2000 p.5 renamed the envoy as a representative.

⁴⁴ See EFPB Doc., 96/317.

⁴⁵ Joint Action 2003/537/CFSP, OJ L 184, 23/7/2003 p.45.

commitments of money, men or both, to be taken by the Union, whereas Article 18(5) provides the Council with a specific power to appoint “whenever it deems necessary” a Special Representative with a “mandate in relation to particular policy issues”. The use of both legal bases is a consequence of the structure and provisions of the TEU.

The mandate of the Special Representative is primarily to work with the various parties involved in the peace process and to try and provide good offices and contribute to and ensure the smooth implementation of the agreements reached. He also works as a conduit between the parties to the peace process and the Council to provide information on the initiatives and interventions the Council may wish to make.⁴⁶ With regard to human rights, in particular, the Special Representative has two important functions. First, he is required to engage constructively with signatories to agreements, within the framework of the peace process, in order to promote compliance with the basic norms of democracy, including respect for human rights and the rule of law. As he is to contribute to the implementation of “agreements reached between the parties” his engagement would seem to link to the human rights and fundamental freedom clauses, which have been inserted in the various agreements brokered between the parties. It is not a mandate to independently promote human rights or the rule of law in the region, as a part of the process. As human rights clauses are increasingly a standard feature in internationally sponsored peace agreements, the Special Representative potentially has a major task on his hands, with regard to this aspect of his mandate.⁴⁷ This has not, however, been a major part of his work. The Special Representative has been far more concerned, in practice, with ensuring that the peace process, as a whole, stays on track. From the limited information available, it seems that the human rights and rule of law aspect of his mandate has not received a great deal of attention.⁴⁸ The other aspect of his mandate is his responsibility to report to the Council on possible initiatives it may wish to take in the peace process. In this context he can advise on

⁴⁶ Article 3, 2003/837/CFSP.

⁴⁷ See Bell, C., *Peace Agreements and Human Rights*, (2000) Ch. 4 and Watson, G., *The Oslo Accords*, (2000) Chs. 9 and 13. The roadmap does not envisage such clauses and has been condemned by a number of NGOs for this. See ICG, *A Time to Lead: The International Community and the Israeli-Palestinian Conflict*, (2002).

⁴⁸ This is based upon the information available on the Special Representative’s webpage.

which development projects should be pursued or indeed suspended, due to their impact or interference with the peace process. Again whether any initiatives concerning human rights, democracy or the rule of law, for example, have been taken as a result of the Special Representatives work is uncertain.⁴⁹ What this does further prove, however, is the close relationship between the different aspects of the dialogue. The Special Representative can potentially have a major influence on the development of projects and the objectives and priorities they pursue, which the Commission is then likely to redesign or amend accordingly. To date very few, if any, such projects have been specifically designed due to recommendations by the Special Representative.

2.2. The Union, Ethical Values and the Barcelona Process.

The Barcelona Process, which was a Spanish led initiative seeking a European policy towards the Mediterranean region, basically represents the Union's alternative strategy towards peace and stability in the wider Mediterranean region.⁵⁰ This policy aims to create economic prosperity, by establishing a free trade area.⁵¹ As noted above, peace and stability in the region may stem from peace negotiations or economic interdependence. Indeed in many respects they will succeed or fail together.⁵²

The Mediterranean region is not homogeneous, from either a political, economic, social or cultural perspective. Due to the different relationships and political conditions within the wider Mediterranean region, the Union had until the Barcelona

⁴⁹ This may be incorrect but Commission desk-officers did not recall any such projects and no references could be found either.

⁵⁰ See more generally Hakura, F., "The Euro-Mediterranean Policy: The Implication of the Barcelona Declaration" (1997) 34 *CMLRev.*, 337 and Stavridis, S., and Hutchence, J., "Mediterranean Challenges to the EU's Foreign Policy" (2000) 5 *EFARev.*, 35.

⁵¹ The *Euro-Med Regional Strategy Paper 2002-2006* and *Regional Indicative Programme 2002-2004*, both attempt to reinvigorate this.

⁵² The Presidency Conclusions at the Vth Euro-Mediterranean Conference illustrate this very clearly.

Declaration adopted a very piecemeal approach to these countries.⁵³ Remnants of this approach still exist. The individual Association Agreements, for example, differ in the legal bases they use and their nature. The Agreement with Israel is mixed and does not have a development based focus. The Member States are not parties, however, to the Agreement with the Palestinian Authority which does have a development based focus.

The main goals of the EU's Mediterranean policy are now set out in the Barcelona Declaration, which develops an earlier Commission Communication,⁵⁴ as supplemented by the Common Strategy adopted at the Feira European Council and the Conclusions of the Conferences of Foreign Ministers.⁵⁵ The most important objective of the policy, for our purposes, is to create an area of peace and stability based on fundamental principles, including respect for human rights and democracy. The Barcelona Declaration identifies a number of principles with regard to both internal and external security, which are aimed at promoting and upholding human rights and other values. With regard to the internal dimension, each partner is committed to the principles in the United Nations Charter and the Universal Declaration; the development of the rule of law; good governance; and democracy in the form of holding free and regular elections. Furthermore, the parties have committed themselves to the fundamental freedoms of expression, association for peaceful purposes, thought, conscience, religion, pluralism and tolerance between different groups in society, as well as non-discrimination with regard to race, nationality, language, religion and sex. With regard to external security, the most relevant commitments in the Barcelona Declaration are a commitment by each party to respect the sovereign equality of other partners in accordance with international law; a commitment to non-interference in the internal affairs of other partners; respect for the territorial integrity of the other partners; and the peaceful settlement of disputes.⁵⁶

⁵³ For a historical perspective see Pierros, *Bridges and Barriers*, *supra* note 12.

⁵⁴ COM (1994)427. Also see COM (1995)72.

⁵⁵ Available at http://europa.eu.int/comm/external_relations/euromed/.

⁵⁶ These commitments are contained in the Political and Security Pillar of the Declaration. Also see the Presidency Conclusions, Cannes European Council, 26-27/6/1995.

Although the first pillar of the Barcelona Process contains broad ranging commitments to human rights and democracy, the question of cooperation on such issues is reserved to a relatively narrowly focused range of activities in the third pillar. The third pillar, among its other objectives, aims to “support...democratic institutionsthe rule of law and civil society.” A dialogue on ethical values does exist within the Euro-Mediterranean Ministerial Conferences established by the Barcelona Process, although it has not been very extensive or indeed pushed vigorously by either side. In fact the Ministerial Conferences only seem to have reiterated support for those principles espoused in the original Ministerial meeting at Barcelona.⁵⁷

In a number of Mediterranean countries, human rights and democracy are particularly sensitive and in an area which comes within the final areas of cooperation, discussion has been thin on the ground. As Edwards and Phillipart note, only the European Parliament has sought to give human rights a high profile image in the context of the Barcelona strategy.⁵⁸ The Commission in its 2000 Communication, *Reinvigorating the Barcelona Process*,⁵⁹ recognised that the lack of focus on human rights issues had been one of the major shortcomings of the process since it came into being. It was felt that there had not been a sufficiently frank or serious dialogue on human rights or the prevention of terrorism and migration. It also noted that human rights policy in the region had lacked consistency and that more needed to be done.⁶⁰ The Vth Conference at Valencia has expressly recognised the failure to pursue and have frank and constructive discussions on these issues.⁶¹ The Commission has now attempted to address this shortcoming, by adopting strategic guidelines to reinvigorate both human rights and democracy in relations with the Mediterranean partners.⁶²

⁵⁷ See, for example, the Conclusions of the Foreign Ministers Conferences at Malta, Palermo, Stuttgart and Marseilles.

⁵⁸ Edwards and Phillipart, “Euro-Mediterranean Partnership” *supra* note 12, 465.

⁵⁹ COM (2000)497.

⁶⁰ *Ibid.*, p.4.

⁶¹ Para. 3, Conclusions of the Foreign Ministers Conference at Valencia.

⁶² COM (2003)294.

The Community has, as noted above, also adopted the MEDA Regulations, which set out the details of the Community's internal competence to fund human rights and democracy programmes in the region. These are in addition to the EIDHR and the funding available under that initiative. It is the human rights and democracy provisions of the MEDA Regulation, based upon Article 308 EC, in conjunction with the relevant provisions in the Association Agreements and EIDHR that provide the Community with the competence to fund such programmes in the Mediterranean region. The Mediterranean Common Strategy, in particular, considers democracy, human rights and the rule of law to be one of the fundamental objectives of the Union's policy in the region. Other than stressing the importance the Union attaches to human rights, however, the manner in which such rights are to be promoted is through the funding of projects which support, among others, judicial reform, freedom of expression and institution building.⁶³ The manner in which such programmes have been funded in Israel and the Palestinian Administered Territories will be described below.

3. Ethical Values and Bilateral Relations With Israel and the Palestinian Authority.

3.1. Ethical Values, Israel and Bilateral Relations.

Economic relations between the Community and Israel have grown steadily closer. The various Agreements negotiated between the parties have ensured that the Union has become Israel's largest trading partner.⁶⁴ In 2001, trade with the Union represented 27% of all Israeli exports worth, €9.5 billion. The EU is the largest importer of Israeli goods, although the US exports more goods to it than the EU.⁶⁵

⁶³ Article 14, 2000/458/CFSP.

⁶⁴ In addition to the 1995 Euro-Mediterranean Agreement there was an EC-Israel Interim Agreement on Trade and Trade Related Matters, which entered into force on 1/1/1996, OJ L 71, 21/3/1996, p. 1. This sought to update the 1975 Agreement until the 1995 Agreement with Israel entered into force.

⁶⁵ Para. 9, EU Declaration of the Fourth Meeting of the Association Council.

Israel imported 43% of all its imports, worth in excess of €15 billion, from the Union.⁶⁶ In the last three years, the volume and value of trade has decreased.

The various financial protocols which have been signed with Israel by the Community are, by and large, less favourable than those granted to other States in the region. Israel is economically more prosperous, than those other States, with an annual per capita income of €15,600.⁶⁷ For this reason aid is largely limited to European Investment Bank (EIB) loans and other loans for cooperation projects. Israel, while not entitled to development funding as such, is eligible for regional or decentralised cooperation projects. The MEDA Regulations, which provide the legal basis for funding such projects, go beyond the framework of traditional development assistance and are intended also to apply to countries that are not classifiable as developing, so as to enable the implementation of the free trade area.

The current basis for the Union's bilateral dialogue on ethical values with Israel is a part of the general political dialogue that has been established with the coming into force of the 1995 Association Agreement.⁶⁸ For example, in the first meeting of the Israel-EU Association Council, human rights was raised in the dialogue alongside other political and economic issues. The President of the EU Council especially recalled that human rights were an "essential element" of the Agreement and used the opportunity to welcome a then recent judgment of the Israeli Supreme Court which outlawed the widespread use of "moderate physical pressure" by the Israeli security forces.⁶⁹ The four priorities of the Agreement highlighted, however, were concerned with trade issues. What is particularly noteworthy is that the Agreement does not make cooperation in human rights or other ethical values a specific field of activity. In the *Portugal* case, one of the reasons why the Court held that Article 177 EC was a valid legal basis for the Agreement with India was precisely because human rights

⁶⁶ Figures derived from http://europa.eu.int/comm/external_relations/israel/intro/index.htm

⁶⁷ *Ibid.*

⁶⁸ See further, Paasivirta, E., "EU Trading with Israel and Palestine: Parallel Legal Frameworks and Triangular Issues" (1999) 4 *EFARev.*, 305 and Hirsch, M., "The 1995 Trade Agreement Between the European Communities and Israel: Three Unresolved Issues" (1996) 1 *EFARev.*, 87.

⁶⁹ See (2000) 6 *EU Bull.* 1.6.57. The decision being referred to was *Public Committee Against Torture in Israel v. State of Israel*, HCJ 5100/94, Supreme Court of Israel, Sitting as the High Court.

was not a field of cooperation.⁷⁰ In this instance, where there is a mixed Agreement, the Member States clearly have such a competence and there is no legal reason why it has not been specifically addressed.

Extensive and detailed discussion on ethical values with Israel is imperative to placate some of the Union's Member States.⁷¹ Israel is party to the Covenant on Civil and Political Rights;⁷² the Covenant on Economic, Social and Cultural Rights;⁷³ the Convention Against Torture;⁷⁴ the Race Convention;⁷⁵ the Women's Convention;⁷⁶ and 45 ILO Conventions, including five of the eight core conventions.⁷⁷ While Israel is one of the few functioning democracies in the region, in which most issues bar nuclear capabilities are openly discussed, it also engages in systematic and gross violations of numerous international norms. The Jewish nature of the State, in particular, causes significant problems for non-Jewish minorities.⁷⁸ Israel does not have any basic laws providing for equality. Both the Committee on the Elimination of Racial Discrimination (CERD) and the Human Rights Committee (HRC) have found that Israeli laws systematically discriminate against the Arab minorities, who make up 20% of the population.⁷⁹ There have recently been attempts to classify some

⁷⁰ Case C-268/94, *Portuguese Republic v. Council of the European Union*, [1996] ECR I-6177.

⁷¹ Belgium, Finland, Sweden, France, Spain, Austria and Ireland tend to adopt a more critical approach towards Israel than the other Member States.

⁷² International Covenant on Civil and Political Rights, 1966, 999 *UNTS* 171.

⁷³ International Covenant on Economic, Social and Cultural Rights, 1966, 993 *UNTS* 3.

⁷⁴ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, 1465 *UNTS* 85.

⁷⁵ International Convention on the Elimination of all Forms of Racial Discrimination, 1966, 660 *UNTS* 195.

⁷⁶ Convention on the Elimination of all Forms of Discrimination Against Women, 1979, 1249 *UNTS* 13.

⁷⁷ Convention No. 29, Forced Labour Convention, 1930, 39 *UNTS* 55; Convention No. 87, Freedom of Association and Protection of the Right to Organise Convention, 1948, 68 *UNTS* 17; Convention No. 98, Right to Organise and Collective Bargaining Convention, 1949, 96 *UNTS* 257; Convention No. 105, Abolition of Forced Labour Convention, 1957, 320 *UNTS* 291; and Convention No. 111, Discrimination (Employment and Occupation) Convention, 1958, 363 *UNTS* 31.

⁷⁸ See COM (2003) 294 where the Union recognises this.

⁷⁹ See, Concluding Comments of the CERD: Doc.A/50/18 and Concluding Observations of the HRC: Israel CCPR/C/79/Add.93 and CCPR/CO/78/ISR.

of Israel's practices and policies towards its Arab populations as apartheid, genocide and ethnic cleansing and the issue of "Zionism as Racism" has been a regular feature on the agenda of the General Assembly, as well as causing a major schism at the World Conference on Racism held in Durban in September 2001.⁸⁰ Israeli Arabs are also disproportionately subjected to torture, inhuman and degrading treatment under the Landau Commission rules.⁸¹ Israel is the only democracy where legally sanctioned inhuman treatment exists.⁸² The Committee on Torture (CAT) has noted Israel's security concerns, but has stated that they cannot be used to justify torture. The legality of its continued use of derogations from its commitments under UN human rights treaties is also questioned.⁸³

Israel's practices in the Occupied Territories are also a major issue. On a number of occasions, bodies such as the HRC have expressed their grave concern at the situation there and noted Israel's responsibility for the implementation of the Covenant in the Occupied Territories.⁸⁴ The situation has been recognised as being of such gravity that the Commission on Human Rights appointed a Special Rapporteur on Occupied Palestine, with whom Israel has consistently refused to cooperate.⁸⁵ There are thus numerous relevant issues and concerns with regard to ethical values in relations with Israel. In practice, the most important has been the application of the "essential element" clause in the 1995 Agreement. The clause, however, and the applicability and continuance of the Agreement is inextricably tied up with the MEPP and the survival of the Palestinian Authority. The discussion thus turns to the relationship

⁸⁰ See *IHT* "Accusation of Genocide Puts Israel on Defensive" 3/9/2001, internet edition and Bishara, M., *Palestine/Israel: Peace or Apartheid*, (2002).

⁸¹ Concluding Comments of the CERD: Israel CERD 304/Add.45 and Concluding Comments of the CAT: Israel 9/5/1997, A/52/44 paras.253-260.

⁸² See Concluding Comments of the CAT: Israel CAT/C/XXVII/Conc.5.

⁸³ See Concluding Comments of the CAT, *supra* note 81 and Concluding Observations of the HRC: CCPR/CO/78/ISR.

⁸⁴ Concluding Observations of the HRC: Israel, CCPR/C/79/Add.93, para.10 and CCPR/C/77/L/ISR, 27/11/2002.

⁸⁵ See in particular, *Update to the Mission Report on Israel's Violations of Human Rights in the Palestinian Territories Occupied Since 1967*, E/CN.4/2001/30, 21/3/2001.

between the Union and the Palestinian Authority before examining the relevance of the clause and its application.

3.2. Ethical Values, the Palestinian Authority and Bilateral Relations.

The Agreement between the Community and the PLO on behalf of the Palestinian Authority currently represents the only development cooperation Agreement the Community has with a non-State entity.⁸⁶ Unlike the Agreement with Israel, mainly for political and legal reasons, it is not mixed in nature. The Agreement aims to establish a free trade area between the Community and the West Bank and Gaza by the end of 2001, something that has not been achieved. Article 1 of the Agreement states that its objectives shall include providing an appropriate framework for a comprehensive dialogue. Article 2 is the “essential elements” clause and Article 70 is a suspension clause. In substantive terms these are identical to those in the Agreement with Israel. Furthermore, Article 68 articulates the “security interests” exception, which is identical to that in the other Agreements negotiated under the Barcelona Process.

Relations between the Palestinian Authority, a non-State entity, and Union must take account of various special factors. In those territories where the Palestinian Authority has control its powers and competence are less than those of a State.⁸⁷ Further to the outbreak of the *Al-Aqsa Intifada*, those arrangements that were in place after the Oslo Peace Accords, have not survived following Israeli incursions and occupation of territory that should be under the control of the Palestinian Authority. A Select Committee of the House of Commons in 2003 described the Palestinian Authority as

⁸⁶ Euro-Mediterranean Interim Association Agreement on Trade and Cooperation Between the European Community, of the One Part, and the Palestine Liberation Organization for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the Other Part, OJ L187, 16/7/1997 p.3.

⁸⁷ See Malunczuk, P., “Some Basic Aspects of the Agreements Between Israel and the Palestinian Liberation Organisation From the Perspective of International Law” (1996) 7 *EJIL*, 485 and Watson, *The Oslo Accords, supra* note 47, *passim*.

having no *de facto* or *de jure* control over any territory.⁸⁸ Furthermore, there is no geographical continuity between the West Bank and Gaza. Palestinians are therefore, dependent upon the Israeli authorities for permission to travel between the two or indeed between towns and villages within the various zones, as well as to go to Israel to work, as many Palestinians do. As and when there is increased tension such permission is withdrawn ensuring that severe financial hardship is experienced in the Palestinian Administered Territories, due to the block in the flow of goods, services and employment.⁸⁹ In fact the entire economy of the Palestinian Administered Territories is highly dependent upon Israel and the Palestinian Authority is reliant upon it for its financial survival. 90% of all imports come from Israel and 80% of exports go to it.⁹⁰ Occupation has ensured that there is little or no infrastructure in place and thus the economy is small and poorly developed and highly reliant upon agriculture, services and some light manufacturing.⁹¹ Levels of malnutrition have now reached a level commensurate with sub-Saharan Africa.⁹² Some of these considerations make the promotion of ethical values particularly difficult. The Community has in place a sophisticated and complex set of programmes which aim to both support the infrastructure and the civil society which exists, as well as promoting ethical values. These are discussed below.

The Palestinian Authority cannot be a party to multilateral human rights treaties that are only open to States. It is bound, however, to respect those rights that have entered the corpus of custom and obligations *erga omnes*. Despite the relatively limited scope of these provisions, it is clear that the Palestinian Authority does engage in acts that are contrary to them. As in Israel, torture of suspected terrorists is widespread.⁹³ Prolonged detention and lack of due process are also problematic. Arbitrary arrest, unfair trials and impunity for those violating rights as well extrajudicial and political

⁸⁸ House of Commons Select Committee on International Development, *Development Assistance and the Occupied Palestinian Territories*, (2004) p.10.

⁸⁹ Referred to as the policy of “closure”. See further, Palestinian Centre for Human Rights, *The Israeli Policy of Closure*, (ndg) and HRW, *Israel’s Closure of the West Bank and Gaza*, (1996).

⁹⁰ US Department of State, *Human Rights Reports-The Occupied Territories 1998*, p.2.

⁹¹ *Ibid.*

⁹² Select Committee, *Development Assistance*, *supra* note 88, p.65.

⁹³ *Ibid.*

killings, as in Israel and the Occupied Territories, are also common.⁹⁴ Human Rights Watch has described the situation as “deplorable”.⁹⁵ A study commissioned by the European Commission to investigate the utility of the MEDA Regulation, found that in the areas under the control of the Palestinian Authority: there was no separation of powers; the rule of law was fundamentally deficient; censorship was widespread; intimidation of journalists and opposition parties was widespread; and rights to association were relatively limited.⁹⁶ Hussein has argued that although political developments have hindered the ability of the Palestinian Authority to govern effectively, its overall record has been one of substantial improvement.⁹⁷ Israeli action and curfews have allegedly undermined it and exposed its weakness.⁹⁸ These weaknesses have subsequently been used against it, leading to an international consensus that reform must be undertaken, when much of the blame does not lie at its door.⁹⁹ What cannot be denied, however, is that some of the abuses, discussed above, have been a direct result of the intense pressure the Palestinian Authority has been put under by Israel, the US and the EU to curb and control factions which conduct and engage in attacks against Israel. The “essential elements” clause of the Agreement has, as is the case with Israel, been crucial to relations between the parties and it is these we now turn.

⁹⁴ See the Amnesty International and Human Rights Watch Reports for the period 1997-2001 and *supra* note 90.

⁹⁵ HRW, *Palestinian Self-Rule Areas: Human Rights Under the Palestinian Authority*, (1997) p.1.

⁹⁶ Karkutli, N. and Bützler, D., *Evaluation of the MEDA Democracy Programme 1996-1998*, (1998) *passim*.

⁹⁷ Hussein, H., “Challenges and Reforms in the Palestinian Authority” (2003) 26 *Fordham Int’l L.J.*, 500, 532.

⁹⁸ *Ibid.*

⁹⁹ Select Committee, *Development Assistance*, *supra* note 88, *passim*. Much of the reform has been funded and supported by the Community, see *infra*.

3.3. The Relevance of the Essential Elements Clauses in the Agreements with Israel and the Palestinian Authority.

3.3.1. The Essential Elements Clause and Relations With Israel.

The “essential elements” clause in the Agreement with Israel has been considered in the context of its practices in both the Occupied Territories and those areas nominally under the control of the Palestinian Authority. It has not been particularly significant, in practice, with regard to the situation within Israel’s internationally recognised boundaries, even though systematic discrimination on the basis of race exists, which entitles the Member States to take some action.

Ireland, the UK, the Netherlands and Denmark all added Ministerial statements to the Agreement underscoring the human rights aspects of the Agreement and the fact that persistent abuse of such rights would be a breach of it. The complication with a mixed Agreement, however, stems from the difficulty in suspending such a treaty. The Agreement with Israel contains the standard “essential elements” clause, which needs to be invoked for violations, by either the Member States or Israel, of the norms it is concerned with. The preamble to the Agreement refers to economic freedom and the principles of the United Nations Charter, particularly human rights and democracy (which is not mentioned in the Charter) as forming the “very basis of the Association.” Article 2 of the Agreement, which is the “essential elements” clause, simply notes that “[r]elations between the parties, as well as the provisions of the Agreement itself, shall be based upon respect for human rights and democratic principles which guides their internal and international policy...”

Where human rights concerns have been raised, Israel has consistently invoked its security interests. The Council whenever it discusses such issues recognises the legitimacy of Israel’s security concerns, meaning that Israel will have to submit convincing arguments with regard to the question of proportionality and not necessity.¹⁰⁰ As that question is a more subjective one, it makes it more difficult for

¹⁰⁰ The Union in every almost statement on the MEPP recognises Israel’s legitimate security interests.

the Member States to come to any agreement on the response to such action. As part of the Barcelona Process, the Union and Member States have effectively allowed the parties on the other side to take any measures that they consider essential to their own security “in the event of internal disturbances affecting the maintenance of law and order, in time of war or serious international tension constituting threat of war.”¹⁰¹ This has ensured that Israel is able to rely upon this provision of the Agreement, in an attempt to justify its policies and practices. The Commission, in particular, however, has attempted to raise the issue of proportionality, which is clearly legitimate. Unless the Community and Member States are permitted to send fact-finding missions or have observers in place, it is more difficult for them to judge what is or is not proportionate. Israel considers that it is for it to determine the measures needed to counter the threats and danger it is under.

The disproportionate and illegal nature of some Israeli activities is, however, more than apparent. The destruction caused by Israeli troops during the occupation of Jenin between March and May 2002 and the on-going building of a security-wall are two examples.¹⁰² In Jenin, widespread international calls for observers and fact-finding missions to verify events, by among others the Security Council, were ignored by the Israelis who subsequently refused access to a team sent by the Secretary General of the United Nations to establish what had happened.¹⁰³ In its relations with Myanmar the Union has been very condemnatory of the authorities for their refusal to allow access to the Special Rapporteur and the Special Envoy, and used this as part of its rationale for restrictive measures. In the case of Israel such condemnation, not only with regard to events in Jenin but also of the continuing refusal to cooperate with the Special Rapporteur for Occupied Palestine, has not so far resulted in such action. As previously discussed, the Vienna Convention on the Law of Treaties, 1969 imposes restrictions on the circumstances in which the

¹⁰¹ Wording in, for example, Article 73, Israel-EC Association Agreement and Article 68, Association Agreement with the PLO.

¹⁰² Others include the occupations and destruction in Nablus, Bethlehem, Rafah and Ramallah since 2002.

¹⁰³ Security Council Resolution 1405(2002), 19/4/2001. See further *Report of the Secretary General Prepared Pursuant to General Assembly Resolution ES-10/10.A/ES-10/186*. (Hereinafter the *Jenin Report*).

“essential elements” clause can be legitimately used. Events in Jenin, however, give a very clear indication of the lack of political agreement with regard to its use among the Member States, even where the legal requirements are satisfied. The Secretary General’s Report on events in Jenin considered both the Israeli and Palestinian authorities to be culpable. Both are considered to have engaged in violations of provisions of the relevant Geneva Conventions of 1949. The Report indicates, however, that the breaches by Israel were substantially graver with some of the acts prima facie amounting to “war crimes” as defined under the Rome Statute of the International Criminal Court.¹⁰⁴ In July 2002, 30 aid agencies, in the aftermath of the Israeli occupation of Jenin, issued a formal and unprecedented joint statement condemning the Israeli action that impeded and hindered their work and further worsened a dire humanitarian crisis.¹⁰⁵ The Spanish Presidency, at this time not only summoned the Israeli ambassador to register its protest at Israeli activities but was also very critical of the Israeli action in public meetings of the Security Council, specifically with regard to events to Jenin. The Presidency considered that the action Israel had taken could in no way be justified.¹⁰⁶ In the Security Council it was particularly condemnatory of the humiliation of Arafat and destruction of Palestinian infrastructure.¹⁰⁷ A delegation of MEPs also considered that the situation in Jenin amounted to war crimes.¹⁰⁸ In the United Nations an EU statement recognised the right of Israel to combat terror but its condemnation and its assessment in political, if not legal terms, of Israeli practices is more than enough to justify suspension of the Association Agreement. The statement noted the building of Israeli walls, illegal occupations, “serious human rights violations”, an “alarming humanitarian situation” and “extrajudicial killings of Palestinians” as a direct consequence of Israeli action.¹⁰⁹

¹⁰⁴ Although the statute of the Court is not binding on Israel, the definition of war crimes can be argued to be representative of custom. Rome Statute of the International Criminal Court, 1998, 2187 *UNTS* 3. Israel is a party to the Fourth Geneva Convention, 1949 - Convention (IVth) Relative to the Protection of Civilian Persons in Time of War, 973 *UNTS* 287 which prohibits many of those same acts.

¹⁰⁵ *BBC World Internet News* “International Aid Agencies Condemn Israel,” 4/7/2002. Also see *The Independent*, “Israeli Army Warned by UN for Shooting at Aid Workers” 28/11/2003 p.6.

¹⁰⁶ On 8/2/02 Spain summoned the Israeli ambassador to explain and justify the attacks in Ramallah.

¹⁰⁷ See EFPB Docs., 02/131 and 02/248.

¹⁰⁸ EP Press Release 25/4/2002. “EP Delegation Denounces War Crimes Against Palestinians”.

¹⁰⁹ Presidency Statement at the General Assembly, 57th session, 21/4/2002.

A number of widely regarded and respected Israeli and Palestinian human rights groups at this stage issued statements calling upon the EU to take action against Israel.¹¹⁰ This was particularly important because at the same time the Union had begun to introduce restrictive measures against Zimbabwe.¹¹¹

In response to events in Jenin, the imposition of punitive measures was discussed by the Union, especially the suspension of arms sales which was being called for by resolutions of the European Parliament,¹¹² at the *Quartet* meeting held in April 2002.¹¹³ No such measures were taken. Prodi had warned, however, that unless Israel withdrew from the Palestinian Administered Territories the Agreement would be suspended.¹¹⁴ It is likely though that the refusal of the Israelis to allow Piqué and Prodi to meet Arafat, a few days earlier in Ramallah, played a role in his statement. As a day prior to the proposed meeting with Arafat, Prodi had stated that the Agreement with Israel could *not* be suspended as it provided “a forum for dialogue and was not there for the purposes of blackmail”.¹¹⁵ After the events in Jenin, the Member States could not even agree to call an emergency meeting of the EU-Israel Association Council.¹¹⁶

In a similar vein, the Union has occasionally condemned the building of the Israeli security-wall but has not yet responded to it in a manner commensurate with the seriousness of the situation.¹¹⁷ The Special Rapporteur of the Commission on Human Rights in his 2003 Report considers that over 210,000 Palestinians are directly affected by the security-wall. The subsequent humanitarian emergency that has

¹¹⁰ See, for example, “LAW Tells European Union: No More Words But Decisive Action” 7/2/2002.

¹¹¹ See Common Position 2002/145/CFSP OJ L 50, 21/2/2002 p.1 and Council Regulation No. 310/2002, OJ L50, 21/2/2002, p.10.

¹¹² Resolution P5 TA (2002) 173.

¹¹³ *NYT*, “Middle East Turmoil; Europeans Press Demands on Israel” 11/4/2002 p.1.

¹¹⁴ *The Guardian*, “Withdrew Now or Face EU Sanctions” 9/4/2002, p.4.

¹¹⁵ *Know Europe* “Palestinians Seek EU Arms Ban on Israel” 4/4/2002.

¹¹⁶ Due to the lack of unanimity among the 15, the Euro-Med Conference in Valencia was used instead.

¹¹⁷ See, for example, Statement at the General Assembly, *supra* note 109.

resulted in is not, however, the most serious issue.¹¹⁸ The Special Rapporteur considers that the security-wall very clearly amounts to “*de facto* annexation” of Palestinian territory, a fundamental breach of international law and its principles.¹¹⁹ He also considers that Israel’s arguments (vis-à-vis justifications for the security-wall) “are simply not supported by the facts” and that the construction of it violates the right to self-determination, an obligation *erga omnes*, and also amounts to the forcible acquisition of territory.¹²⁰ The Special Rapporteur considers Israel’s actions to be disproportionate, even after according it a wide margin of appreciation in responding to terror.¹²¹ The security-wall is also fundamentally incompatible with the roadmap itself. It protects illegal settlements, which Israel is obliged to dismantle under the plan, and makes the two-State solution impossible to implement as it prejudices the boundaries between them. Notwithstanding this, the Union’s response to the security-wall has to date been weak. A proposed resolution in the Security Council, condemning it and Israel’s continued settlement activities, was vetoed by the US.¹²² The UK and Germany both abstained whereas France voted in favour of the resolution. In the General Assembly, however, the 15 Member States cosponsored the resolution condemning the wall which was finally adopted.¹²³ The Member States abstained from General Assembly Resolution ES-10/14, however, which requested the ICJ for an Advisory Opinion on the legality of the security-wall. This is not because the Member States doubt that the security-wall, where it deviates from the 1949 armistice-line, is unlawful¹²⁴ but because they feel such an Opinion is not conducive to relaunching political dialogue.¹²⁵

¹¹⁸ Report of the Special Rapporteur of the Commission on Human Rights, *On the Situation in the Palestinian Territories Occupied by Israel Since 1967*, E/CN.4/2004/6, 8/9/2003. (Hereinafter *Special Rapporteur’s 2003 Report*). Also see the Special Rapporteur’s 2002 Report, E/CN.4/2002/32, 6/3/2002. The *Special Rapporteur’s 2003 Report*, para.21 considers that the humanitarian crisis is caused almost entirely by Israel.

¹¹⁹ *Ibid.*, paras. 6-16.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, para.5.

¹²² Press Release SC/7896, 14/10/2003.

¹²³ Resolution ES/10-13, 21/10/2003.

¹²⁴ See Presidency Statement at the General Assembly, 58th Session, 8/12/2003.

¹²⁵ *Ibid.* Nine of the then 15 Member States, as well as the Irish Presidency, submitted written observations to the Court on the request for an Advisory Opinion.

On 9 July 2004 the ICJ delivered its Advisory Opinion. This will increase pressure on the Union to respond to the security-wall in a manner commensurate to the seriousness of the situation.¹²⁶ The Court by a majority of 14-1¹²⁷ considered that the security-wall, where it enters the Occupied Palestinian Territory, including in and around East Jerusalem, is contrary to international law. The Court, in as detailed an Opinion as was possible in the circumstances,¹²⁸ considered the applicable humanitarian and human rights law. It concluded that the security-wall severely impedes the Palestinian's right to self-determination;¹²⁹ violates a number of international human rights and humanitarian law obligations incumbent upon Israel;¹³⁰ was tantamount to *de facto* annexation;¹³¹ and took a route which was not essential for security purposes.¹³² In sum the Court concluded that, “..Israel cannot rely on a right to self-defence or on a state of necessity in order to preclude the wrongfulness of the construction of the wall.....”¹³³ Sharon immediately denounced the Court's Opinion.¹³⁴ The Dutch Presidency, clearly wishing to keep its options open for the time being, stated that the Court's Opinion “will need to be studied carefully”.¹³⁵ The Opinion of the ICJ was delivered nine days after a decision of the Israeli Supreme Court which considered that specific parts of the security-wall caused

¹²⁶ Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9/7/2004.

¹²⁷ Judge Buergenthal dissenting.

¹²⁸ Israel contested the Court's jurisdiction to give an Advisory Opinion but did not cooperate with the Court further. The Court based its understanding of the facts on the *Special Rapporteur's 2003 Report*.

¹²⁹ Para. 122.

¹³⁰ Paras. 123-137.

¹³¹ Para. 121.

¹³² Paras. 114-137.

¹³³ Para. 142.

¹³⁴ See *NYT*, “Sharon Pledges to Defy Court on Barrier” 12/7/2004 p.1 and *The Guardian*, “Sacred Right to Fight Terror Overrides Court, Says Sharon” 12/7/2004 p.11. The US State Department described the Opinion as “inappropriate”. *BBC World Internet News*, “US Critical of UN Barrier Ruling” 10/7/2004.

¹³⁵ Joint Press Statement by the EU Foreign Ministers on the Advisory Opinion of the International Court of Justice, 12/7/2004. Javier Solana was equally cautious in his response. See Comments by Javier Solana on Today's ICJ Opinion, SO189/04, Brussels, 9/7/2004.

unjustifiable harm and suffering to certain Palestinians.¹³⁶ As opposed to the Opinion of the ICJ, the basis for the decision of the Israeli Supreme Court was violation of Palestinian rights to property and freedom of movement.¹³⁷

The Union has discussed the issue of the security-wall with Israel in bilateral negotiations. It has, as noted above, also occasionally condemned the wall in the UN. In bilateral meetings the issue has not been raised consistently. In the third meeting of the EU-Israel Association Council held in October 2002, for example, there was no mention of it in the EU's declaration, despite a long list of other concerns, such as extrajudicial killings and collective punishments, being raised by the Union.¹³⁸ In the fourth meeting of the Association-Council in November 2003,¹³⁹ the Union did raise the issue, using much of the language it had already adopted in the Presidency Conclusions of the October 2003 Brussels European Council. In the declaration of the fourth meeting the Union recognised that the wall results in a *de facto* change of the legal status of many Palestinian villages and requests that Israel dismantle the wall, something Sharon had repeatedly refused to do.¹⁴⁰ Sharon has, however, only in the light of the Israeli Supreme Court's decision agreed to reconsider certain parts of the route taken by the security-wall.¹⁴¹ The Israeli Supreme Court does not require the security-wall to be dismantled, only partially re-routed. The *de facto* annexation of land referred to by the ICJ was not of central concern to the Israeli Supreme Court.

The building of the security-wall and events in Jenin provide clear examples of the type of violations of international law by Israel that are certainly enough to justify suspension of the Association Agreement or at the very least the introduction of some sort of punitive measures. In the case of Jenin, *prima facie* grave breaches of the principles of international humanitarian law had been committed by Israel.

¹³⁶ *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*, HCJ 2056/04, Supreme Court of Israel, Sitting as the High Court, 30/6/2004.

¹³⁷ *Ibid.*, para. 60.

¹³⁸ Declaration of the European Union at the Third Meeting of the Association Council EU-Israel, 21/10/2002.

¹³⁹ EU Declaration of the Fourth Meeting of the Association Council, para. 4.

¹⁴⁰ See for example, the *Quartet* Statement further to the New York meeting, 26/9/2003.

¹⁴¹ *The Economist*, "The Wall and the Law" 15/7/2004 internet edition.

Collective punishments, stifling of humanitarian aid, the destruction of infrastructure¹⁴² and civilian property and extrajudicial killings were all rife and part of a systematic policy.¹⁴³ While the Secretary General's Report considered the Palestinian Authority to also be guilty of seriously violating international humanitarian law and human rights, it did make clear that culpability primarily lay with the Israelis.¹⁴⁴ With regard to the security-wall the violations of international law are at least as stark. The ICJ in its Advisory Opinion considered that all States, while respecting international law, must try to bring the impediment to the Palestinian's right to self-determination to an end. It further stated that all States parties to the Fourth Geneva Convention (which includes all of the Union's Member States) are under a similar obligation with regard to violations of that Convention.¹⁴⁵ In the case of Jenin, the Union has used language which suggests that suspension of the Agreement was a very real possibility. This has not yet been the case as far as the security-wall is concerned.

Suspending the Agreement with Israel is difficult, as noted above, for the Community and its Member States because of its mixed nature. Article 79 of the Agreement contains the standard clause that if one party considers that another has failed to fulfil its obligations, under the Agreement, it may take appropriate measures to that effect. Before doing so, however, it must supply the Association Council with sufficient information to allow a thorough investigation of the situation. The only exception to this is in cases of special urgency. The Association Council, as established by Article 69, is composed of representatives of the Members of the Council of the European Union and Commission, on the one hand, and, on the other, Israel. Thus Israel is able to put forward its arguments concerning the alleged breach of the essential elements of the Agreement. These will invariably be based upon State security. For the Agreement to be suspended, on any basis, the consent of all the Union's Member

¹⁴² The World Bank, *Twenty Seven Months-Intifada, Closures and the Palestinian Economic Crisis: An Assessment*, (2003) p.19 considers that Israel has destroyed \$930 million worth of Palestinian infrastructure.

¹⁴³ The EU Presidency has asked for an inventory of the damage done, see the speech by Commissioner Patten, No. 68 *EuropaWorld*, 8/2/2002 p.5.

¹⁴⁴ *Special Rapporteur's 2003 Report*, *supra* note 118, para. 55.

¹⁴⁵ Advisory Opinion, *supra* note 126, para.159.

States as well as the Commission is required. Despite the fact that the Union has taken a more critical line on Israel than the US, this is highly unlikely to happen. While provision is made for such an eventuality, the reality of the situation is different. There are a number of reasons for this.

First, Commission officials consider Israeli delegations, not only in the Association Council but also in Troika meetings, Euro-Med Conferences and any other fora, to have a very business-like and professional approach to the issue of human rights and other ethical values. Israeli delegations are generally considered to be at least prepared to discuss concerns raised by the Member States or Commission in their meetings.¹⁴⁶ Commitments to keep the “situation under review” and “necessity” have so far always been enough to placate some of the Member States and thus any consensus to take action which may have existed has broken down. On a number of occasions Israel has, to some extent, responded to criticism. For example, Israel initially consistently failed to comply with a series of Security Council Resolutions, such as Resolution 799 of 1992 on the deportation of 415 Palestinians. The deportations were subsequently discussed in the EC/Israel Cooperation Council on 1 February 1993, where the Community raised its concerns. It was argued by the EC Council that the continuance of discussion and non-suspension of that Agreement (which did not have an “essential elements” clause) provided the Community and its Member States with “another opportunity to exert pressure on the Israelis to take immediate action with regard to the deportees.” As a consequence of not only European but also global condemnation, the then Israeli Foreign Secretary Shimon Peres informed the EC Foreign Ministers that 100 deportees had been allowed to return and the duration of the exile period had been halved for the others. The Community and its Member States considered this to be an important step forward in complying with Security Council Resolution 799, although it fell considerably short of what was actually stipulated, and thus felt their approach was vindicated.¹⁴⁷ In the Cooperation Council the Community had stated that it did not wish to be put in a position where it would have to adopt a position on the 415 deported Palestinians

¹⁴⁶ Interview with Commission desk-officers, 12/6/2001.

¹⁴⁷ See EFPB Docs., 93/096 and 93/167.

while negotiating the 1995 Agreement.¹⁴⁸ The Israelis ensured that they did not have to.

Secondly, even in the event that agreement can be reached between the Member States that the Agreement should be suspended, the Union is well aware that if this were done Israel would be likely to refuse to agree to its further participation in any negotiations concerning the MEPP. The tension between the Community and Israel was apparent, for example, at the signing of the peace agreements in Madrid in 1991. Israel had initially refused to let the Community take part in the negotiations. Only once the Community had agreed to and negotiations had taken place over updating the 1975 Agreement with Israel, did it consider the Community's participation to be acceptable.¹⁴⁹ The difference in the balance of power can be seen in the fact that Israel was largely dictating the agenda. The Community's role was still limited to a minor one, working on regional economic development.¹⁵⁰ Having obtained a role in the MEPP and in an attempt to maintain and promote itself as an international actor, the Union has condemned Israel as and when considered necessary but as a consequence it is unlikely the Association Agreement will be suspended. In this respect the general idea, in practice, seems to be that the peace process and the Union's role in it must take priority.

Thirdly, due to the dependence of the Palestinian Administered Territories upon Israel for their economic survival, the Member States consider that suspension of the Agreement with Israel is likely to have an adverse economic effect on it.¹⁵¹ While the economic and physical well-being of Israel has been a cornerstone of US foreign policy in the Middle East since 1948, it can be argued that since it has taken a stand on the MEPP in 1980, the Community and later Union has been attempting to give effect to the UN Security Council Resolutions that deal with the region. Protecting Palestinian rights has been central to the approach adopted by the Union. This has

¹⁴⁸ *Ibid.*

¹⁴⁹ See Tovia, A., "The EU's Mediterranean Policies Under Pressure" in Gillespie, R. (ed.), *Mediterranean Politics*, Vol. 2 (1996) p.14.

¹⁵⁰ See COM (1993)305.

¹⁵¹ See, for example, EFPB Doc., 98/426.

included attempting to lessen the impact of certain Israeli practices upon those most affected by them. A punitive approach has not been adopted towards Israel, even where it has destroyed infrastructure in the Palestinian Authority which the Union has paid for. Every tension and turn in relations between Israel and the Palestinian Authority has a direct impact on the viability and survival of the area nominally under the latter's control. Negotiation and dialogue have thus been maintained at all costs. A number of Member States generally consider the continuance of the Association Agreement with Israel to be vital if the peace process is to be kept on track. On numerous occasions when the suspension of the Agreement has been raised, the Council has stated that it did not consider the breaking-off of relations to be conducive to the resolution of the situation. "Discussion not threats" is seen as the "method" to employ with regard to Israel.¹⁵² Commissioner Marin stated, for example, that ratification of the Agreement ensured that the Community is "...in a better position to exercise a positive influence regarding all human rights related issues in the framework of the political dialogue..."¹⁵³ Benjamin Netanyahu, when Prime Minister of Israel, adopted a similar approach. He warned the Union against imposing sanctions, as they supposedly would have no effect and would lead to deteriorating relations between the Union and Israel as a result.¹⁵⁴

Fourthly, it is politically increasingly difficult for the Union's Member States to suspend the Agreement. The refusal to suspend it, following events that have already occurred, may mean that in future the violations will have to be even more serious before the Member States suspend it. In legal terms the position has probably not changed although Israel may be able argue that estoppel is now a relevant consideration. The Member States have never stated, however, that Israel's conduct in Jenin or its assassinations of Palestinian leaders, for example, do not amount to a material breach of the Association Agreement. The "essential elements" clause can legally still be used whenever the Member States consider there has been a material breach. The political reality is that only graver and more fundamental breaches of

¹⁵² See EFPB Doc., 97/357.

¹⁵³ See OJ C 117, 16/4/1998 p.86.

¹⁵⁴ *The Daily Telegraph* "Israel Urges Blair to Veto Arab Lobby" 21/7/1998 p.7.

international norms than those which have already occurred will probably lead to such action.

In fact until Israel complied with the demands of the Union in November 2003,¹⁵⁵ it was always much more likely that the Israel-EU Agreement would be suspended over a dispute as to whether products from Israeli settlements in the Occupied Territories are entitled under the Association Agreement to preferential access to the Community market.¹⁵⁶ Chris Patten at a plenary session of the European Parliament, for example, made it very clear that the Israel-EU accord was likely to be suspended due to the disagreement.¹⁵⁷ At the Fourth-Meeting of the Association Council, held a week before the Israeli announcement, the Union continued to express regret that the dispute had not been resolved.¹⁵⁸

Numerous allegations of trade impropriety by Israel exist in this respect. As disputes over agriculture were the most difficult in the negotiation of the 1995 Agreement, the Commission took the issue very seriously indeed and, for example, called the 12th meeting of the Community-Israel Cooperation Committee specifically to discuss the issue.¹⁵⁹ The Union's position over rules of origin is closely tied-up to its overall approach to the MEPP. The Union could not publicly declare that the settlements are illegal under international law and then accept goods produced in them, which help to finance the settlements, as being entitled to preferential access as a part of Israeli territory.¹⁶⁰ Illegal settlements must be dismantled, as Israel has agreed to (with regard to some of them anyway) under the *Quartet's* roadmap, if the two-State

¹⁵⁵ On 25/11/2003, Minister Olmert announced that Israel will geographically label goods produced in settlements in the Occupied Territories.

¹⁵⁶ Rules of origin are set out in Articles 2-5, Protocol 4 to the Agreement.

¹⁵⁷ See (27) *Euromed Report*, 17/5/2001 p.1.

¹⁵⁸ Para. 15, EU Declaration of the Fourth Meeting of the Association Council.

¹⁵⁹ See OJ C 304, 2/10/1998 p.106.

¹⁶⁰ See Hirsch, M., "Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and Gaza Strip" (2003) 26 *Fordham Int'l L.J.*, 572 and Hauswaldt, C., "Problems Under the EC-Israel Association Agreement: The Export of Goods Produced in the West Bank and Gaza Strip Under the EC-Israel Association Agreement" (2003) 14 *EJIL*, 591.

solution is to be tenable. Exports to the Union from the settlements are worth approximately €140 million per year.¹⁶¹ Israeli exports to the Union, as noted above, are worth over €9.5 billion. Before the House of Commons Select Committee a Commission representative did argue that suspending the Agreement with Israel may do more harm to the EU than Israel due to the trade balance being “very very heavily” in the Union’s favour.¹⁶² Despite this, suspension of the Agreement due to the dispute over goods produced in the settlements was a real possibility. It made sense for Israel to agree to pay customs duties on €140 million worth of exports rather than risk losing benefits on all of them. The damage to the economic interests of the Union would have been shared by the Member States. Israel alone would have suffered on the other side. As noted above, trade and economic relations with Israel are necessary for the Union if it wishes to maintain political relations with it and a role in the MEPP. Although the amounts involved are relatively minor and the issue not so fundamental (since Israel does not consider the payment of customs duties prejudicial to its sovereignty over the settlements) the settlement of this dispute does highlight that by taking a tough approach the Union can compel Israel to compromise.

The difference in approach to events in Jenin or the building of the security-wall and Israeli exports from the settlements is not due to the priority given to trade over ethical values by the Union. If the Union relied upon the “essential elements” clause it may find that suspension of the Agreement had little effect upon Israel’s behaviour, it would no longer serve any purpose and the Union will have lost any influence it had. In the context of trade, countermeasures are not unusual. The suspension of an Agreement for human rights violations is far less common. Suspension of the Agreement over exports from the settlements would not cause as much collateral damage to EU-Israeli relations as the use of the “essential elements” clause for violations of international law.

The failure to suspend the Agreement with Israel does not mean that the Union is not condemnatory of Israeli practices. There has traditionally been relatively little public

¹⁶¹ *Haaretz*, Editorial, 26/11/2003.

¹⁶² Select Committee, *Development Assistance*, *supra* note 88, p.65.

criticism of Israel's discriminatory legislation or its legislation allowing administrative detention.¹⁶³ Prior to 2000 there were relatively few public démarches on such issues, with the last in 1989.¹⁶⁴ More recently, there was a noticeable shift from this approach although it is limited to certain Presidencies. The Swedish Presidency, for example, was publicly critical of Israel and its human rights record towards its Arab populations at the 57th session of the Commission on Human Rights.¹⁶⁵ With regard to Israel's behaviour in the Occupied Territories the situation is, as noted above, quite different and the Union is sometimes very vocal on such matters. For example, Israel has, as is well-known, drawn up "hit-lists" of Palestinians to be assassinated. After one of the first such incidents the EU almost immediately issued a strong statement on extrajudicial killings by Israel of Palestinians and a démarche reflecting this concern was made to the Israeli Foreign Ministry. The Union described Israel's activities as unacceptable and contrary to the rule of law and international law.¹⁶⁶ Each subsequent assassination by Israel has been followed by very strongly worded condemnation by the EU, although no further démarches have been issued on this matter.¹⁶⁷ In March 2002, however, a démarche was also issued to the Israeli Prime Minister's Office on settler harassment and violence.¹⁶⁸

The Union's overall approach towards Israel has been to emphasise dialogue and discussion and to resort to condemnation as sparingly as possible. Israeli politicians tend to be far more concerned with their domestic constituency and the view of the US than with other international pressure. They thus carry out the acts they so wish, such as the building of settlements, destruction of property and assassinations, with little regard to the views of others, including the Union.

¹⁶³ See, for example, EFPB Doc., 95/379.

¹⁶⁴ Which concerned the expulsion of 415 Palestinians. See EFPB Doc., 89/181.

¹⁶⁵ Available at http://www.eu2001.se/eu2001/news/news_read.asp?iInformationID=13758.

¹⁶⁶ (2000) 1-2 *EU Bull* 1.6.27.

¹⁶⁷ For example, see Presidency Statement on Extrajudicial Killings in Gaza, 10/4/2003.

¹⁶⁸ The démarche of 14/3/2002 was published on the Spanish Presidency's webpage.

3.3.2. The Essential Elements Clause and the Palestinian Administered Territories.

In terms of possible suspension, the Community has far more leverage in the case of the Palestinian Authority than it does with Israel. Paasivirta has noted, for example, that upon the ratification of the Agreement the President of the EU Council stressed “Mr Arafat will do everything possible to promote human rights.”¹⁶⁹ The situation in the Palestinian Administered Territories with regard to the rule of law and human rights is far from perfect. One of the ironies of the approach adopted by the Union and Member States towards Israel, however, is that they are equally unlikely to suspend this Agreement, even though it is far easier to do so institutionally, procedurally and politically. This is the case notwithstanding the Palestinian Authority’s own practices and the activities of certain groups that are based in the territory which is nominally under its control, who engage in destructive activities in Israel itself or in the Jewish settlements in the Occupied Territories.

Israeli practices in the Palestinian and Occupied Territories have had a direct and detrimental effect on many projects and objectives identified by the Community for development funding.¹⁷⁰ The Union has poured millions of Euros into the Palestinian Administered Territories, in an effort to develop an embryonic Palestinian State, only to often find its efforts often thwarted by the Israelis. In the Palestinian Administered Territories the Community’s projects face considerable logistical problems. A lack of geographical continuity between Gaza and the West Bank also causes Community funded projects substantial problems. In Gaza, for example, 30 years of occupation have led to problems, such as inadequate healthcare and basic sanitation facilities in some areas. Setbacks in the peace process, which often result in the Israeli policy of “closure”, directly affect the projects attempting to address these problems. If the Community and Member States suspend the Association Agreement with Israel then they have less leverage in persuading the Israeli authorities in permitting or at least not hindering their work in the Palestinian Administered Territories. Conversely,

¹⁶⁹ Europe No. 6922, 29/2/1997, p.4 cited by Paasivirta, *supra* note 68, note 25.

¹⁷⁰ See Court of Auditors, *Special Report No. 19/2000-On the Management by the Commission of the Programme of Assistance to Palestinian Society*, p.16.

suspending the Agreement with the Palestinian Authority is equally likely to lead to the failure of the MEPP and thus is equally unlikely. This is despite the fact that the lack of a countervailing power, such as the US, who can nullify the effects of suspension makes the Palestinian Authority far more pliable to the demands of the Union. Whereas it was argued above that the “essential elements” clause is now of negligible real value in relations with Israel, this is not the case in relations with the Palestinian Authority.

In June 2001, for example, when the situation between the Palestinians and Israelis was extremely dire, with reprisal killings endemic between the parties, rather than put huge amounts of pressure on the Israelis, although diplomacy was also at work there, it was Arafat who was targeted by the Union. It eventually managed to obtain his agreement to a truce. The methodology of “threats” which was seen as being inappropriate for Israel was ideal for the Palestinians. It was reported that Arafat only agreed to a truce with Israel after a heated debate with Joschka Fischer and the threat to cut-off all Union aid if he did not agree.¹⁷¹ The extent of the Palestinian Authority’s basic reliance upon Union aid can also be seen from the fact that the EU at this time bailed it out of a financial crisis, due to the implications of the Israeli policy of closure, and had to pay the salaries of those providing basic services. In return for this aid the Palestinian Authority had to agree, which it did, to a strictly controlled austerity budget.¹⁷²

The Community has also used simplified versions of “essential elements” clauses in some of the specific legislation it is implementing to deal with various issues in the Palestinian Administered Territories. One of the major and persistent problems in relations between Israel and the Palestinian Authority has been that of terrorism by Palestinians. Palestinian factions, such as *Hamas*, *the Al-Aqsa Martyrs Brigade* and *Islamic Jihad*, have adopted the tactic of deliberating targeting Jewish settlers in the

¹⁷¹ *The Times*, “German Threat Forces Arafat to Declare Truce” 4/6/2001 p.10.

¹⁷² *The Guardian*, “Europe Throws £37m Lifeline to Palestinians” 1/6/2001 p.11. For details of reforms funded by the Community see the Commission’s webpage on relations with the West Bank and Gaza at http://europa.eu.int/comm/external_relations/gaza/intro/index.htm.

Occupied Territories and the Israeli populace at large.¹⁷³ One of the methods used has been that of suicide bombings. Israel has argued that it is partly in response to such acts that it is building the security-wall. The pressure on the Palestinian Authority to clampdown upon such activists, who are largely outside of its control, has been one of the major factors contributing to unfair trials, arbitrary detention and torture in the Palestinian Administered Territories.¹⁷⁴ €10 million has been specifically granted by the Union to the Palestinian Authority to assist it in countering such activities. The current joint action which acts as the legal base for funding such activity, specifically states that the EU will suspend the programme if the Palestinian Authority either: refuses to cooperate *fully* with the Union; fails to allow the EU to monitor and carry out evaluations of the project; or fails to take appropriate measures to ensure respect for human rights in the implementation of the programme.¹⁷⁵

The joint action itself is based upon Articles 14 and 18(2) TEU and has been adopted to help further the Union's role in the MEPP and especially to make an important contribution to the "objectives pursued by the European Union in supporting the Palestinian Authority in its efforts to counter terrorist activity".¹⁷⁶ The basic approach adopted is that the Union will only contribute money, if it is satisfied that the programme implemented is effective according to a committee established by the Union and furthermore, that it respects human rights. Evaluation committees where the Union is allocating funds may be part of the parcel but what is unclear is who will assess the compatibility of human rights standards with the programme and by whose standards? Human rights conditionality in such circumstances is not unreasonable but clearly guidelines and standards need to be established. None are articulated or provided. In essence the programme will have to be entirely planned and designed in consultation with the Union and subject to its scrutiny, otherwise it will not be

¹⁷³ By 2003/646/EC Council Decision, OJ L 229, 13/09/2003 p.22 the Council has implemented restrictions on both the military and political wings of these organisations.

¹⁷⁴ The Palestinian Authority argues that it has little control over these groups, especially *Hamas*. The Israelis regularly contend, however, that they are directly accountable to Arafat.

¹⁷⁵ Emphasis added. Article 7, Joint Action on a European Union Assistance Programme to Support the Palestinian Authority in its Efforts to Counter Terrorist Activities Emanating From the Territories Under its Control, OJ L 97, 19/4/2000 p.4.

¹⁷⁶ Article 3, *ibid*.

funded. The problem for the Palestinians, however, has been that where they have designed counter-terrorism projects, the allocation of funds from the Union has been from different budget heads depending on the exact project in question, each having its own procedures and financing decisions. This has caused inordinate delay in some projects which have had to be cancelled, as they were no longer of relevance and led to additional complications in the working of the programme.¹⁷⁷ Furthermore, the destruction of Palestinian infrastructure by the Israelis has often destroyed those very apparatus which are essential for such projects to be effective.¹⁷⁸

3.4. The Promotion of Ethical Values.

3.4.1. Positive Measures and Israel.

Civil society in Israel, unlike its Arab neighbours, is relatively well developed. The majority of funding made available under the EIDHR and MEDA Regulations and through the MEDA Democracy Programme (MDP) has therefore been to those NGOs addressing issues which the Community has identified as its priorities. Twenty percent of the projects funded attempt to address discrimination against Arab-Israelis. Although the Union rarely condemns Israel publicly for anti-Arab discrimination it is well aware of the problem and tries to tackle it through promoting understanding between the various communities in Israel.¹⁷⁹ As the Member States have a legal interest in such discrimination the approach adopted is an interesting one. The Union is aware that in the overall context of the MEPP public condemnation of discriminatory treatment in Israel will achieve little. Promoting understanding between the communities may contribute something. The same is also true of a number of projects which are funded by the Community and provide legal aid to Palestinian victims of Israeli human rights abuses.¹⁸⁰ The funding of such projects by the Community again illustrates the extent to which the Community is aware of

¹⁷⁷ *Special Report 19/2000, supra* note 170.

¹⁷⁸ *Ibid.*

¹⁷⁹ Under Article XXII, Oslo II both parties agreed to seek to foster mutual understanding and tolerance between themselves.

¹⁸⁰ See Karkutli and Bützler, *Evaluation, supra* note 96, p.144.

Israeli abuses but which in reality it can only address by providing funding to appropriately designed projects.

What is also very noteworthy is that no project has to date been funded which targets the Israeli security forces, the main perpetrators of the abuses that the Union and Member States are opposed to. As the Union does not pay for the security services in Israel, as it does in the case of the Palestinian Authority, it has no leverage in this regard. For this reason, among others, priority has been given to projects which are directed towards confidence building and dealing generally with Palestinian-Israeli issues on all levels and attempting to improve relations between the different groups.¹⁸¹ The amounts spent in Israel under the MDP are comparatively small, however, when compared to the funds the Community has pumped into the Palestinian Authority. This is both in terms of infrastructure funding and projects which promote ethical values, such as human rights, democracy and the rule of law.

3.4.1. Positive Measures and the Palestinian Authority.

The Oslo Accords of 1993 are considered by the international community to have introduced a new phase in the relationship between the Palestinian and Israeli communities and prompted promises of huge amounts of assistance. The Community has historically provided assistance to Palestinian society through funding to the United Nations Relief and Works Agency (UNWRA) although it was not until the October 1993 donors' conference in Washington in which pledged it US\$ 2.5 billion between 1994 and 1998 that it took on another dimension.¹⁸² As a direct consequence of this the Community adopted Regulation 1734/94.¹⁸³ In total the Community has pledged €500 million per year from 1994 until 2003. A Commission document in 1997 estimated that Palestinians received €258 per head of a population as opposed to €23 for the ACP countries and €11 for the other Mediterranean countries.¹⁸⁴ The EU

¹⁸¹ *Ibid.* 65% of all funding is given to such projects.

¹⁸² *Special Report 19/2000, supra* note 170, p. 8.

¹⁸³ Council Regulation No.1734/94, On Financial and Technical Cooperation with the Occupied Territories, OJ L 182, 16/7/1994 p.4 as subsequently amended.

¹⁸⁴ COM (1997)715.

has now contributed over €5 billion in aid to the Palestinian Authority since 1994,¹⁸⁵ making it by far the largest donor to Palestinian society. The number of budget heads used to fund this commitment is hard to pin down. Council Regulation 1734/94, the EC-UNWRA Conventions, and Council Regulation 1488/96 form the legal bases for some expenditure. Three separate budget heads are used to fund the Palestinian commitment, B7-4200 which is concerned with the Israel-PLO Peace Agreement, UNWRA is funded through B7-4210 and B7-4100 which also funds all other projects to Mediterranean non-member countries.¹⁸⁶ The Court of Auditors has identified a further twelve different budget headings for projects for the Palestinian Authority.¹⁸⁷ Some of these are concerned with the EIDHR, as this is a more specific budget line in terms of the objectives of some projects. The different relevant projects in existence have different priorities and objectives, although there is an overlap between them.

In a 1995 Communication the Commission had already adopted an approach attempting to set out the future relationship and economic assistance to be provided to the West Bank and Gaza Strip.¹⁸⁸ The European Parliament for its part adopted a report which called for “support for an independent and democratic Palestine which is respectful of human rights and a free press” a sentiment shared by the Council.¹⁸⁹ The Union’s first major project and concrete measure outside of direct dialogue and negotiation concerning the MEPP therefore, was the sending of monitors to elections to the Palestinian Legislative Council in 1996.

Article 5 of Joint Action 94/267/CFSP in support of the MEPP, based upon Article 13 TEU, provided for a European contribution to the preparation of the observing of elections, if requested, in the Occupied Territories.¹⁹⁰ The precise arrangements were

¹⁸⁵ Statement by the Swedish Presidency to the Commission on Human Rights, 3/4/2001. Available at http://www.eu2001.se/eu2001/news/news_read.asp?iInformationID=13758. At the time of the statement the figure was over €3 billion.

¹⁸⁶ *Special Report 19/2000*, *supra* note 170, p 9.

¹⁸⁷ *Ibid.*

¹⁸⁸ COM (1995)505.

¹⁸⁹ See European Parliament Report A4-0129/96, 24/5/1996 and (2000) 6 *EU Bull* 1.47.

¹⁹⁰ OJ L 119, 7/5/1994 p.1. It was then Article J.3 TEU.

subject to Council Decision 95/205/CFSP of June 1995,¹⁹¹ which provided for ECU 10 million to be charged to the general budget of the EC, and Council Decision 95/403/CFSP of September 1995,¹⁹² which established a European Union Electoral Unit (EUEU) which was involved with the detailed aspects of the administrative and financial procedures for observing the elections. Council Decision 95/403/CFSP set out the objectives of the EUEU as well as its composition. The elections themselves took place on 20 January 1996. Due to financial irregularities in complying with Community procedures, the observation was not as effective as had been hoped. There had additionally been a degree of uncertainty over the timing which had hindered the observations. There were also problems with logistic support, which had gone out to competitive tender. The preferred support was not put in place due to cost restrictions. Some of expense of the observations was borne by Member States and some by Budget Line B8-103. The wrong budget heads were also used to fund some programmes, such as a seminar on the work of the EUEU, due to the restrictions imposed by the Council and Parliament on the use of CFSP funds.¹⁹³

The election itself was won by Yasser Arafat and candidates from his *Fatah* organisation, who won 60% of the seats. In a number of public statements, including at the 52nd session of the Commission on Human Rights, the Presidency expressed its “deep satisfaction” with the election and on the commitment to human rights in the areas under the control of the Palestinian Authority.¹⁹⁴ What is most surprising about the Union’s involvement in the election is the assessment that an election in which the rules had been manipulated to provide for an Arafat victory was deemed satisfactory. The EUEU observed an election whose actual conduct was according to most accounts free of major malpractice. The mandate of the EUEU did not extend to assessing the design of the election. Yet Arafat had himself appointed a Commission which designed the election in such a manner that winning 30% of the vote gained his party over 60% of the seats. Conversely those who won 60% of the

¹⁹¹ OJ L 130, 14/6/1995 p.1.

¹⁹² OJ L 238, 6/10/1995 p.4.

¹⁹³ See Court of Auditors, *Special Report 4/1996, Concerning the Observation of the Palestinian Elections*, OJ C 57, 24/2/1997 p.1.

¹⁹⁴ See EFPB Docs., 96/078 and 96/115.

vote only gained 23 seats out of 88. A significant number of important parties, mostly opposed to the Oslo Accords, boycotted the election as it gave them little or no chance of winning a seat. The International Commission of Jurists, for example, urged that a different electoral system be adopted, to ensure that the election was more representative of the views of Palestinians.¹⁹⁵ Despite this the Union, no doubt with an eye on the MEPP having a greater chance of success if Arafat had a semblance of democratic legitimacy and a strong mandate, wholeheartedly approved of the election. Arafat, despite all his shortcomings, was and is seen by the Union as being vastly preferable to groups such as *Hamas* and *Islamic Jihad*. At the Laeken European Council, for example, it was expressly demanded that Arafat dismantle *Hamas* and *Islamic Jihad's* terror networks as a part of the two-State solution.¹⁹⁶ *Hamas* and *Islamic Jihad*, among other factions, however, continue to enjoy widespread support in the Palestinian Territories due not only to their commitment to social reform and welfare programmes but also, in part, their continuous armed struggle with the Israelis. Having obtained the semblance of legitimacy it was Arafat who was in a position to negotiate with and expect international donors to deliver on the promises they had made of assistance as inducements to ease the peace process along. The Union, for its part, adopted a multi-headed approach. A lack of relevance and appropriateness, however, has been one of its defining features.

In the first instance, projects under the MEDA Regulations, even though they go beyond the framework of traditional development assistance, cannot extend to public authority tasks. In the Palestinian Administered Territories institution building must be a key priority to ensure that basic tasks are being performed. The decision-making procedure for those projects which have been identified by the Commission for funding, however, has tended to be heavily layered and complex, so that decision-making is slow, cumbersome and at times unclear.¹⁹⁷ The reorganisation of the Commission has led to further fragmentation and complications in the decision-making process.¹⁹⁸ The Commission has furthermore been in the almost unique

¹⁹⁵ The representation was made by LAW, an affiliate body of the ICJ.

¹⁹⁶ Declaration on the Situation in the Middle East, (2001) 12 *EU Bull* 4/54.

¹⁹⁷ It is also often duplicitous and not very effective. See COM (1999)494, p.2.

¹⁹⁸ See *Special Report 19/2000*, *supra* note 170, p.19 for some of the problems this has caused.

position of having too many funds on its hands to be able to deal with. In conjunction with the cumbersome decision-making procedure this has resulted in the Commission not being able to set up a proper and effective scheme to ensure that projects are identified and prepared and approved as a continuous process.¹⁹⁹ In fact the lack of coherence of the projects funded has been a consistent criticism of the Commission.²⁰⁰ Many project decisions have been made under intense pressure to ensure that the funds allocated are actually being spent. This has resulted in little consideration being given to the size of the project portfolio which can be effectively managed and the ability of the Palestinian Authority to absorb and use the help that it is being given.²⁰¹

A specific example of Community projects being badly designed and of limited utility is the Palestinian Housing Council. This was a project specifically designed to provide low cost housing and indeed spun by the Commission as a contribution to housing rights. The units, however, became far too expensive due to the extensive use of Italian marble in the design (as a consequence of poor design as opposed to tied-procurement) which contributed to the increases in price, taking them out of the reach of the low-income families they were meant to be helping.²⁰²

Other projects have been more successful, in that they have been designed and properly implemented, although it is difficult to determine their effect. Projects which raise awareness of human rights issues, promote harmonious relations with Israel and fund NGOs who provide legal assistance to those seeking to use the Courts in an effort to gain compensation must all contribute to ensuring that various ethical values are being promoted and respected.²⁰³ Unlike in the case of Israel, the Community is also funding human rights courses for Palestinian security forces to ensure they are knowledgeable about the permissible limits on the use of force.²⁰⁴ In the case of Israel they are unlikely to be given permission to do so and, even if they

¹⁹⁹ *Ibid*, p.47.

²⁰⁰ See COMs (1999)494 and (1998)524.

²⁰¹ See *Special Report 19/2000*, *supra* note 170, p.18 for examples.

²⁰² *Ibid*.

²⁰³ The information on the projects is from Karkutli and Bützler, *Evaluation*, *supra* note 96.

²⁰⁴ (2000) 12 *EU Bull* 1.2.11.

are, the rules of engagement will not change. In the case of the Palestinian Authority the Community is aware that such projects may make a difference due to the leverage it has in the overall political relationship. The Community also continues to regularly commit funds to assist in the rehabilitation of torture victims, of both the Palestinian Authority and Israel.²⁰⁵ The Union's fundamental problem in promoting and protecting ethical values in the Palestinian Authority is that events on the ground move so quickly. This is especially the case after the outbreak of the *Al-Aqsa Intifada*. In the Palestinian Authority, as a consequence of the approach adopted towards Israel, the Union's efforts are currently overwhelmingly engaged in damage limitation exercises, i.e., trying to prevent the situation deteriorating further as opposed to improving it *per se*.²⁰⁶ However valuable Community projects may or may not be, their impact will only really be tangible once a viable settlement has been found to the Palestinian issue.

4. Conclusions.

The basic vulnerability of the Palestinian Authority has ensured that it is pliable to the demands of the Union. As its major financial backer and international supporter the Union is in a unique position in the Palestinian Administered Territories. Considering that the Union is dealing with a small territory and relatively speaking an excess of funds, a very substantial contribution could have been made towards the economic development of the Palestinian Administered Territories as well as the creation of a pluralistic area with human rights respected and the rule of law and democracy established and protected. The Union is instead routinely providing the Palestinian Authority with emergency financial assistance and its population with humanitarian aid. Israel's policy of "closure", its incursions into Palestinian territory and its refusal to pay tax revenues to the Palestinian Authority has brought it to the brink of financial and physical collapse.²⁰⁷ Since 2002 the Union has primarily sought to prevent the situation in the Palestinian Territories deteriorating even further.

²⁰⁵ (2000) 10 *EU Bull* 1.2.7.

²⁰⁶ For examples of the tasks and projects the Community is currently funding see *supra* note 172.

²⁰⁷ Select Committee, *Development Assistance*, *supra* note 88, p.55.

The Cooperation Agreement and relations with the Palestinian Authority are being hindered by Israel, a country which is itself benefiting from its own Agreement with the Community and its Member States. It is difficult to envisage such latitude being accorded to any other State. The inconsistent approach adopted by the Union towards Israel and the Palestinian Authority, however, must be assessed holistically. The ultimate objective of its policy in the region is to help find a solution to and sustain any settlement in the dispute between Israel and some of its Arab neighbours. Keeping the MEPP on track is the priority. Such latitude would not be afforded to Israel if this were not the case. There is much to be said in support of the Union's overall approach. It takes a long-term perspective and attempts to tackle the root cause of the region's problems. If the Arab-Israeli dispute is resolved and relations normalise between the protagonists, then the approach the Union takes towards both the Israelis and Palestinians will also change. This does not mean, however, that the current approach is without its problems and shortcomings.

The first is the balance that is currently being struck between the pursuance of other ethical values and keeping the peace process on track. Although the two are compatible in the long-term this is not always the case in the short-term. The utility of the "essential elements" clause in the Agreements with Israel and the Palestinian Authority is as an instrument to maintain dialogue on such issues. There is a point, however, at which the failure to use the clause will render it meaningless. Promoting and protecting the rule of law or civil society in Israel or the Palestinian Administered Territories while ignoring systematic violations of fundamental norms by either side is laudable only so long as a viable peace is still possible. As and when either side makes the achievement of this objective very difficult, if not impossible, then the clause must be used with a view to compelling a change of policy.

In relations with Israel, those parts of the security-wall which deviate from the green-line have surely reached the point at which the Community and Member States must seriously consider taking punitive action by using the "essential elements" clause, even if this means relations with Israel deteriorating as a result. The humanitarian consequences of the security-wall for some Palestinians are well documented but there are, as the ICJ has stated, more fundamental issues at stake - violation of the right to self-determination and the forcible acquisition of territory. The continuous

building of the security-wall is rendering the objective of a just and viable two-State solution increasingly impossible. This is as important as the gross violations of international law, if not more so, to the Union's overall approach to the MEPP. The practices of the Palestinian Authority have not quite reached this stage yet. The failure to stop suicide bombings, as abhorrent as they are, does not make the two-State solution physically impossible. The difference, however, is that Israel has the power and friends to help it withstand economic and political pressure from the Union. The Palestinian Authority does not. As a consequence the "essential elements" clause is effective in relations with the Palestinian Authority, as its threatened use is enough for some remedial action to be forthcoming.

The second is that the Union does not have the confidence to implement the steps required to give effect to those objectives it can agree. This issue is very closely related to the question of the Union's structure. The contribution of the Union to the promotion and protection of ethical values in relations with the Palestinian Authority and Israel highlights very clearly that collective action is a double-edged sword. Notwithstanding the shortcomings of the Community's project portfolio, particularly in the Palestinian Administered Territories, the Union has made a far more valuable contribution to the MEPP than the Member States would have been able to individually. It is because of the Union pushing the roadmap and two-State solution, for example, that it is now the preferred international approach. The collective voice of the Member States is a powerful one. On the other hand, the need for unanimity has also been a hindrance. The Member States sometimes cannot agree how to act due to their own historic and domestic considerations. The consequence of having a mixed Agreement with Israel means that unanimity is essential. Israel can still ultimately rely upon the US not to withdraw support and the Union, due to differences between the Member States, not to act to curtail it. It is for this reason that on a political level the Union plays a minor role compared to the US. If the Member States could agree and took action against Israel then, despite the bravado of Netanyahu and Sharon, it would have very serious consequences for Israel. This will still be the case if the US tries to mitigate the impact of such measures.

Thirdly, the Union has too many different voices in its relations with Israel and the Palestinian Authority. This is again closely related to the question of the Union's

structure. The position of the Presidency, High Representative, Special Representative and External Relations Commissioner can differ. These differing voices are especially damaging when they are part of the Union's contribution to the *Quartet*. Similarly, a number of the Member States, in particular the UK, Germany and France, wish to ensure that their separate voices are also heard. Although the plethora of views further serves to highlight the complexity and emotive nature of the issues involved, for the effectiveness of the Union's contribution to be enhanced, there need to be fewer clearer voices.

Fourthly, having backed Arafat and considered him the democratically elected leader of the Palestinians the Union continues to support him, despite pressure to marginalise him from the US and Israel. The initial decision to back Arafat, however, ignored the quite legitimate concerns expressed by other Palestinians. It was with a view to the overall success of the peace process that he was backed. The failure of that process has in part been because views held by groups such as *Hamas*, continue to enjoy widespread support amongst many Palestinians. The Union having gained a role in the MEPP has been keen to ensure it has maintained it. Accepting that *Hamas*, for example, had legitimate objections to the election of 1996 was not about to gain the Union any favours or influence with Israel and the US. Thus the Union, for understandable reasons, backed Arafat. It is now living with the consequences of that choice.

The Union's actions in its relations with the Palestinians have largely been reactive and not proactive. It has quite rightly placed tremendous pressure on the Palestinian Authority to clamp down on "terror" but the pressure put on Israel is not in anyway commensurate with the activities it engages in. The Union does not wish to be sidelined, even as a member of the *Quartet*, in the peace process. As things stood after Oslo, the Union allowed itself to be marginalised and was expected to pay the bill for the agreement reached by others. Israel cannot now effectively veto the participation of the Union in the peace process. The Palestinian Authority is simply not financially viable without the Union's backing. There will be no peace and solution to the situation in the Middle East without the consent of the Palestinians. For this reason the Union can be guaranteed a place at the negotiating table.

The pursuance of an ethical foreign policy by any State when dealing with Israeli-Arab relations will never be straightforward. The Union certainly cannot be blamed for the malaise that exists but it has not contributed as positively as it could have. Despite the conflicting national perspectives of some of the Member States and its shortcomings, the Union's contribution to the pursuance of ethical values has overall been a positive one. Neither the US, UN or Arab League, for example, have managed to help broker a lasting peace either. The Union's contribution has not been as effective as it could have been for the reasons outlined above. The test to evaluate its role, however, is not to consider its failings but to try to envisage the situation if the Union played no role in the region at all. If the same test were to be applied to the incumbent US regime, for example, then the value of the Union's contribution is more than apparent.

Chapter Six

Ethical Values and Foreign Policy in Practice: Humanitarian Aid and the European Union.

1. Introduction.

The final substantive chapter of the thesis aims to assess the role played by the humanitarian aid policy of the Union. As noted in Chapter One, humanitarian aid is an ideal litmus test to assess the implementation of an ethical foreign policy. For example, in a Development Council Statement, it has been stated:

humanitarian aid the sole aim of which is to prevent or relieve human suffering, is accorded to victims without discrimination ...and must not be guided by, or subject to, political consideration. ...Decisions must be taken impartially and solely according to the victim's needs and interests.¹

For his part, Poul Nielsen, the current Commissioner for Development Cooperation and Humanitarian Aid has stated:

“Humanitarian assistance is viewed as a true ‘success story’ of Community external relations, not only by the European institutions but more importantly by the international community. Community humanitarian assistance has indeed become the expression of the values of humanity on which the EU is founded.”²

The theory of humanitarian assistance as advocated by not only the Union but also organisations such as the International Committee of the Red Cross (ICRC) is one based solely upon need. It should not be influenced by any other interests or

¹ Development Council Conclusions, 10/12/2000, quoting almost verbatim from the preamble to the Humanitarian Aid Regulation, Council Regulation No. 1257/97, OJ L 163, 2/07/1996 p.1.

² WG VII-Working Document 48, *Note From Mr. Poul Nielsen, Member of the European Commission on Humanitarian Assistance.*

geopolitical considerations.³ This, however, presents problems for the Union, in particular, due to the place of humanitarian aid within the overall context of the Union's foreign policy. The first part of the discussion therefore, looks briefly at the basic principles of humanitarian aid, namely neutrality and impartiality, to provide a framework for discussion. It then goes on to examine the role of humanitarian aid as an instrument of the Union and the relationship between differing Union policies. The chapter finally looks at practice and the use of humanitarian aid by the Union to pursue political objectives, as opposed to adhering to the principles of neutrality and impartiality.

2. The Concepts of Neutrality and Impartiality and Their Relationship With Humanitarian Aid.

Neutrality is a principle of abstention. In a natural disaster it means that assistance must be given solely on the basis of need. In the context of an ongoing conflict, it means that humanitarian actors must not act in a way which will assist or hinder the belligerents in their military objectives.⁴ Relieving the warring factions of any obligations they may have towards civilian populations, i.e., by feeding them, does assist belligerents by releasing resources. It is the non-involvement in hostilities, however, that is the issue here.⁵ Neutrality is both ideological as well as being concerned with non-participation in hostilities.⁶ Maintaining neutrality is exceptionally difficult, especially where in civil-war situations the objective of one of

³ See the Statute and Rules of Procedure of the International Red Cross and Red Crescent Movement and General Assembly Resolution 46/182, Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations, A/RES/46,182, 19/12/1991. Also see, ECHO, *ECHO Aid Strategy 2001* and *ECHO Aid Strategy 2003* as well as its numerous Mission Statements which declare that decisions to grant aid are determined "solely by the assessment of needs" and are not guided by political considerations and Neilsen's lecture entitled, "World Solidarity and Global Stability: The Role of the EU Development Policy" reproduced in *EuropaWorld*, 15/11/2002.

⁴ See Curtis, D., "Politics and Humanitarian Aid: Debates, Dilemmas and Dissension" *HPG Report* 10.

⁵ *Ibid.* See generally, Pirotte, C., Husson, B., and Grunewald, F., *Responding to Emergencies and Fostering Development: The Dilemmas of Humanitarian Aid*, (1999).

⁶ See, for example, Article 23(c), Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949, 973 *UNTS* 287.

the parties is the eradication of another ethnic or religious group.⁷ The idea of neutrality is not, however, all encompassing. For the ICRC, for example, the *Taliban's* treatment of women in Afghanistan was not their business. Interference with an ICRC male doctor treating a female patient in an ICRC hospital would have been.⁸ To be practicable neutrality must have its limits.⁹

Impartiality is a principle of action which must be defined according to an objective standard which is applied equally to all parties.¹⁰ Impartiality does not mean that the same amount of assistance is distributed to all. It requires an assessment of needs and aid is distributed accordingly on an objective basis, without any regard to other considerations. Non-discrimination, proportionality and the absence of subjective distinctions are all essential. Abiding by the principle is exceptionally difficult, especially for organisations such as the EU. The European Community Humanitarian Office (ECHO), for example, will often fund agencies and NGOs providing aid in a conflict and at the same time the EU will be involved in UN or other efforts at negotiating an end to the hostilities. International pressure for the end of hostilities can lead to less assistance being provided to one side or the other, regardless of need, depending on the strength of the legal and moral culpability of the belligerents. This ensures that impartiality is difficult to achieve.¹¹ This is especially the case where one of the parties has a strong legal claim to being the victim of an act of aggression. Neutrality and impartiality do not mean indifference to the plight of groups, they are operational principles. Humanitarian action, if impartial and neutral is a political act and will have a political effect. It should not, however, have a political intention.¹²

⁷ DAC, *DAC Guidelines on Conflict, Peace and Development Cooperation*, (1997) p.30.

⁸ Minear, L., "The Theory and Practice of Neutrality: Some Thoughts on the Tensions" 833 *IRRC*, 63.

⁹ *Ibid.*

¹⁰ Weller, M., "The Relativity of Humanitarian Neutrality and Impartiality" *The Journal of Humanitarian Assistance*, <http://www.jha.ac/articles/a029.htm> .

¹¹ See Baitenmann, H., "NGOs and the Afghan War: the Politicisation of Humanitarian Aid" (1990) 12 *Third World Quarterly*, 62 and COM (2001) 231.

¹² See Macrae, J., and Leander, N., "Shifting Sands: The Search for Coherence Between Political and Humanitarian Responses to Complex Emergencies" *HPG Report* 8 and Middleton, N., and O'Keefe, P., *Disaster and Development: The Politics of Humanitarian Aid*, (1998) *passim*.

3. Humanitarian Aid as an Instrument of the Union.

3.1. The Role of Humanitarian Aid in the Context of the Union's International Relations.

Humanitarian aid in the Union context is, as noted in earlier chapters, clearly linked to development cooperation policy. The Community's development cooperation policy is far from impartial or neutral and makes no pretences to that effect. Humanitarian aid is often portrayed as being separate and distinct from the politics of not only foreign policy but also from development cooperation policy. As Macfarlane notes, humanitarian actors, in their most condescending form, consider themselves superior to both politics and foreign policy.¹³ If ECHO's work is considered to be separate from such policies, then it is difficult to perceive it as a serious player, or one that can influence the policy debate, except possibly at the margins. The geostrategic interests of donor States rarely coincide with those of the victims of a humanitarian disaster. ECHO's mandate may require it not to be swayed by any political considerations, yet that does not in any way stop it being used as a general foreign policy instrument of the Union. Efforts to make humanitarian aid more efficient and to have less recourse to it have led to efforts to coordinate and indeed make the "different" policies complementary and coherent.¹⁴ Complementarity requires action at differing levels to improve the effectiveness of that action. Coherence must imply that humanitarian aid is part of a set of responses to a particular situation. This requires the working out of overall strategies between different Union bodies and Directorates General of the Commission and giving effect to their different responsibilities. The link between development and humanitarian aid in the context of the Community is thus obvious.¹⁵

¹³ MacFarlane, N., "Politics and Humanitarian Action" *Thomas J. Watson Jr. Institute Occasional Paper* 41.

¹⁴ See *infra*.

¹⁵ See ICEA/DPPC, *Development and Humanitarian Assistance of the European Union: An Evaluation of the Instruments and Programme Managed by the European Commission-Final Synthesis Report*, (1999) and COM (2001)231.

The relationship between humanitarian aid and development cooperation, however, is not the only issue. The Rapid Reaction Mechanism (RRM),¹⁶ a much broader instrument than the provision of emergency assistance, is with regard to some activities a potentially competing mechanism. The discussion therefore, turns to the relationship between the RRM and humanitarian aid before looking further at the relationship between development and humanitarian aid.

3.2. The Relationship Between Humanitarian Aid and the Rapid Reaction Mechanism.

The Helsinki European Council of December 1999 called on the Commission to take specific measures to set up a “non-military crisis management mechanism ...to coordinate and make more effective the various civilian means and resources, in parallel with the military ones, at the disposal of the Union and the Member States”.¹⁷ This implies that humanitarian aid is perceived to be part and parcel of the non-military response. The Commission confirmed this view in its Communication on the issue, when it stated, “[r]ecent conflicts ...have shown that the EU possesses a wide range of humanitarian, economic, financial and civilian resources.”¹⁸ While Presidency documents gave the impression that humanitarian aid would be a part of the RRM, the Commission has subsequently attempted to ensure that a suitable distance is maintained between them.¹⁹ The aim of the RRM has not been to create new instruments *per se* but to use those that already exist.²⁰ It is a complementary mechanism which aims to improve the capacity for rapid and flexible action. New procedures may be needed but new instruments will not be introduced. The overall

¹⁶ Council Regulation No. 381/2001, Creating a Rapid Reaction Mechanism, OJ L 57, 27/2/2001 p.5.

¹⁷ See Annex IV. The Helsinki European Council was further developing the work of the Cologne European Council.

¹⁸ COM (2000)119.

¹⁹ See *Civilian Instruments for EU Crisis Management* (2003) p.10. Neilsen, *supra* note 2 has also expressed the view that humanitarian aid should not be subordinated to or absorbed by crisis management.

²⁰ See the Annex to Regulation 381/2001.

objective is for the RRM and the Commission's crisis management unit to facilitate early intervention and overall coherence.²¹

The distinction drawn by the Commission between humanitarian aid and the RRM is that ECHO's objective is to alleviate the suffering of the individual from man-made and natural disasters, while the RRM is intended to provide resources for urgent operations of crisis management and conflict prevention linked into the overall context of the CFSP and EDSP.²² Contrasting humanitarian aid and the ESDP, the aim of the latter is to implement the Petersberg tasks.²³ This does raise problems, however, for humanitarian aid actors. In particular, it can cause confusion between humanitarian and non-humanitarian actors in the delivery of relief. This may result in some humanitarian actors withdrawing; as the overlap will compromise or at least threaten their neutrality and impartiality. Furthermore there will be fundamental problems in obtaining a coherent response to a civilian crisis from the Union.²⁴ Linking crisis management, for example, in with development cooperation while simultaneously maintaining a distinction from humanitarian aid and coordinating with aid agencies will not be straightforward. The Commission has proposed providing information to the beneficiaries of such assistance, to enable them to demarcate the distinction between humanitarian aid and the RRM.²⁵

The legal base of Article 308 EC for the RRM does distinguish it, to some extent, from humanitarian and development aid but the competing, if not overlapping, objectives of the RRM and humanitarian aid cannot be ignored. The RRM must be

²¹ *Ibid.*

²² See COM (2000)119.

²³ See Opi, S., and Floyd, R., "A Shaky Pillar of Global Security: The Evolution of the European Union's Common Foreign and Security Policy" (2003) 9 *CJEL*, 299, 323. The Petersberg tasks are listed in Article 17(2) TEU and include humanitarian and rescue tasks, peacekeeping and crisis management.

²⁴ See Missiroli, A., "European Security Policy: The Challenge of Coherence" (2001) 6 *EFARev.*, 177, 194.

²⁵ See the Preamble to Regulation 381/2001. The European Council has committed itself, since the Cologne Council, to developing capacity in the Petersberg tasks. With regard to conflict prevention, see COM (2001) 211. Many of these developments are expressly recognised in the Draft Constitution.

used for projects which have strictly defined time-limits, the funds must not be available elsewhere and there must be a financial limit of €12 million. Thus in the event of a security-related crisis, it should work as an accelerated decision-making mechanism for specific and immediate interventions which act as a precursor, if needed, of action under regular Community instruments. The RRM Regulation is explicit that activities covered by the ECHO Regulation should not be funded under the RRM Regulation.²⁶ ECHO has, however, in practice, focussed on complex emergencies as opposed to natural disasters (which due to their unpredictability make long-term planning difficult) and thus the overlap between activities funded under the RRM, development and humanitarian aid will at times be clear. To take one example, demining operations are funded by ECHO, under development cooperation policies and are specifically mentioned by RRM documentation as activities to be covered by it.²⁷ The RRM is likely to substitute for ECHO's work where the EU wishes to overtly influence a particular course of events in a security-related crisis but maintain the pretence of neutrality or impartiality for humanitarian aid. Although there is no other reference in any documentation to the relationship between the RRM and ECHO, it is conceivable that the RRM will be used in many instances where ECHO previously funded activities. ECHO has been accused of drifting from its core mandate.²⁸ The RRM, in this sense, is a welcome development for ECHO if it genuinely wishes to ensure its neutrality and concentrate on the core of its mandate. The other side of the coin, however, is that RRM intervention will clearly further politicise the EU's intervention in any crisis. The RRM will at the very least confuse the role of EU actors in an emergency. Official documentation on the RRM does not refer to any necessity to rescue ECHO from the political repercussions of its activities. A review of ECHO's activities reaffirmed the desire of the Member States to maintain a distance between humanitarian aid and the political sphere²⁹ but the RRM was not initiated as a response to that desire.

²⁶ See the Preamble and Article 2, Regulation 381/2001.

²⁷ See COM (2000) 119.

²⁸ See COM (1999) 468.

²⁹ *Ibid.*

The RRM was conceived to allow the EU to respond quickly to emergencies without having to engage in cumbersome lengthy bureaucracy. On 13 June 2001, however, a new primary emergency operation procedure also came into force for ECHO. The Commission decided that ECHO should have an instant response capacity to add to its existing capability. ECHO can now arrange with its partners, within hours of the onset of an emergency, for the immediate despatch of assistance.³⁰ As the RRM Regulation notes, one of its aims is to "...re-establish in situations of crisis or emerging crisis, the conditions of stability essential to the proper implementation and success of these aid, assistance and cooperation policies and programmes."³¹ Speed is of the essence in both cases and in theory the two procedures should be complementary. It is precisely because humanitarian aid can be mobilised far more quickly, relatively speaking, than normal development cooperation aid that it is so often used outside of the "humanitarian ambit".

Examining the five instances the RRM was used in 2001 - twice in Macedonia and once each in Afghanistan, the Congo and one programme which covered Indonesia, Nepal and the Pacific, it appears that with the exception of the last programme, ECHO could have acted instead. While the RRM budget is relatively small,³² however, it is unlikely to overlap significantly in practice with humanitarian aid. If and when the budget is increased the potential for substantial overlap with such activity is very real. In particular, as EU foreign policy evolves, humanitarian aid will compete and have to fit in with other EU initiatives. There are already instances of NGOs refusing to accept funding or working with ECHO as it has been perceived to be too politically loaded and often also a part of the "political" crises management

³⁰ EHCO, *ECHO at a Glance 2002*, p.4. This enables projects to be financed within a period of 24 to 72 hours.

³¹ Article 3, Regulation 381/2001.

³² €25 million per annum, rising to €33 million by 2006, see *ICG Issues Briefing*, 29/4/2002.

operation.³³ The RRM and a more developed EDSP will accentuate such dangers in the future.³⁴

3.3. The Relationship Between Humanitarian Aid and Development Cooperation.

3.3.1. Introduction.

The general relationship between development and humanitarian aid is, as noted previously, a natural one. In particular, structural approaches to development can help to reduce vulnerability in a natural disaster. In the case of complex emergencies, development assistance may help to contribute against the slide into conflict and the crises that would ensue. There are, however, also drawbacks and dangers to the relationship. The end of an emergency and the return to development simply may mean disengagement by those providing assistance.³⁵ Projects which are making a valuable contribution may be abandoned. The major problem, however, is that of politicising humanitarian aid by linking it with the more overtly political objectives of development cooperation and foreign policy in general. In the UK, for example, the Department for International Development, which also acts in humanitarian emergencies, was specifically created to distinguish it from the more politically driven Foreign and Commonwealth Office and to avoid its work being compromised by it. In the EU context, the current incumbent, Poul Nielson, is Commissioner for both Development Cooperation and Humanitarian Aid. His predecessor, Emma Bonino, was Commissioner for Humanitarian Aid only.

As discussed in Chapter Three, the demarcation between development cooperation and humanitarian aid in the Community has, in particular due to the Rehabilitation Regulation, been increasingly eroded. It may well be that the end of the Cold War

³³ See Jaspers, S., "Solidarity and Soup Kitchens: A Review of Principles and Practice for Food Distribution in Conflict" *HPG Report 7*.

³⁴ Although if Solano has been correctly quoted as saying that the RRM is "only for show" then this should not materialise. See "EU Crisis Response Capability: Institutions and Processes for Conflict Prevention and Management" *IGC Issues Report No.2* (2001) p.9.

³⁵ See Smillie, I., "Relief and Development: The Struggle for Synergy" *HWP Occasional Paper 33*.

has ended the myth that humanitarian aid and development cooperation are two different concepts. Regardless of this, however, a continuum exists between the two, one that increasingly politicises all assistance to third States. This is in particular, due to the existence of the “grey-zone”.

3.3.2. The Grey-Zone.

European humanitarian assistance is intrinsically linked with development cooperation due to the “grey-zone”. ECHO’s recent strategy papers talk of streamlining the grey-zone, i.e., the need for such assistance to be more geographically neutral and also to free-up resources.³⁶ This requires a timely exit and the need to establish a more coherent and effective linkage between the handover phases of assistance as well as coordination. This can be difficult to achieve at the practical level for some organisations. The two different types of work tend to be specialised, in that most NGOs primarily focus on one and not the other.³⁷ Some intergovernmental agencies, as opposed to NGOs, however, have begun to broaden their work thus increasingly politicising the allocation of aid. The World Bank and the Development Assistance Committee (DAC) of the OECD, for example, are increasingly concerned with conflict situations, while the UNHCR and the Inter-Agency Standing Committee on Humanitarian Affairs (IASCHA) are moving into development.³⁸ This then compels decisions to be made, which may have been avoided in the past, on the desirability of certain practices and policies such as organising peace conferences which can drag “humanitarian” actors further into the political sphere. Where the dichotomy has been collapsed it is likely that overtly political objectives will prevail as the aid operation is, in a conflict situation at least, part of the process of moving towards peace and is not just about alleviating suffering.

³⁶ See ECHO, *ECHO Aid Strategy 2001 and ECHO Aid Strategy 2003*.

³⁷ Macrae. J.(ed.), “The New Humanitarianisms: A Review of Trends in Global Humanitarian Action” *HPG Report* 11. NGOs such as, Oxfam, Save the Children, CARE and World Vision are exceptions and at a competitive advantage in receiving allocations of aid.

³⁸ *Ibid.*

ECHO has in the past tried, and achieved in practice, the collapse of a strict dichotomy between development and emergency aid in line with the approach being taken by other international actors. The rationale behind this was that humanitarian aid created dependency and did little to assist in tackling the root causes of emergencies. The blurring of the approaches, while sensible in the context of the long-term effectiveness of the policies, was a step backwards as far as the non-political nature of humanitarian aid, which ECHO still professed, was concerned.

A distinction should be drawn, however, between the effectiveness of such an approach in natural disasters and man-made crises. In a natural disaster there is in many senses a linear progression. The regime(s) in power are usually not hostile to such aid and the key issues are ensuring that the assistance received is not detrimental to long term development assistance, while ensuring that urgently needed aid is being supplied.³⁹ Clearly this requires coordination and consistency in operations and a close working relationship with those assisting on the ground. Conflicts, however, are much more difficult. There is usually no linear change and the intensity of the fighting will differ from one part of the country to another and the situation will change continuously. Thus any infrastructure put in place can be destroyed. In such circumstances it often becomes very difficult to distinguish between humanitarian (short-term relief aid supplied to those in desperate need), rehabilitation (assistance which aims to stabilise the situation and prepare for development) and development aid. The Regulation for Uprooted Persons in the ALA,⁴⁰ for example, contains provisions on better linkage between development, rehabilitation and relief aid but others, such as the TACIS Regulation,⁴¹ do not allow for rehabilitation and thus other budget lines must be used.

³⁹ See United Nations Office for the Coordination of Humanitarian Affairs, *Humanitarian Report 1997: The Link Between Relief and Development*.

⁴⁰ See Articles 2 and 3, Council Regulation No. 443/97, On Operations to Aid Uprooted People in Asian and Latin American Developing Countries, OJ L 68, 08/03/1997 p.1.

⁴¹ Council Regulation No. 99/2000, Concerning the Provision of Assistance to the Partner States in Eastern Europe and Central Asia, OJ L 12, 18/1/2000 p.1.

The more recent express trend in ECHO and the Commission has been the revival of the relief–development continuum.⁴² Humanitarian aid is separate to but still linked with development assistance and the two should work in harmony, although there is no collapse of the distinction between the two, as was tried earlier. This conceptually ambiguous approach where the two policies merge in a large grey area now seems to be the favoured one. This linking of development and relief and the general objective, where relevant, of attempting to prevent slippage into conflict, is clear in recent policy documents.⁴³ In May 2000 the Commission launched a reform of the external assistance program⁴⁴ to prioritise six areas for aid, of these four were directly concerned with ensuring stability and avoiding conflict.⁴⁵ Defined in the strict sense, humanitarian aid is now provided where development cooperation policies have failed in their objectives and slippage into “disaster” has occurred. Conversely, humanitarian aid, where it is being provided, is also concerned with sustainability and long-term needs,⁴⁶ which may not equate with the immediate needs on the ground. Subordinating humanitarian aid to other objectives can in these circumstances cost more lives.

Humanitarian aid for ECHO is no longer about simply relieving suffering. It is also about ensuring sustainability and is part and parcel of the instruments used to achieve long-term development objectives. Macfarlane has noted, that this approach to humanitarian aid, i.e., where it is used as a component of an overall strategy to reform and create desirable circumstances in third countries, is part of a new humanitarianism.⁴⁷ The end of the Cold War and the absence of competing sources of funding and ideologies and consequently less apparent need for impartiality, has led to a broad spectrum of views as to what humanitarian aid should be aiming to

⁴² See COMs (1996) 153, (2001) 153 and SEC (2000) 514.

⁴³ See further on this “EU Crisis Response Capability” *supra* note 34 and COMs (2001) 211 and 231.

⁴⁴ European Commission, *Report on the Implementation of European Commission External Assistance*, (2001) Staff Working Document 32947.

⁴⁵ The four are: regional integration and cooperation; macroeconomic policies and equitable access to social services; aiming to achieve food security; and institutional capacity building.

⁴⁶ This idea is recognised in Articles 1-3, Humanitarian Aid Regulation.

⁴⁷ MacFarlane, “Politics and Humanitarian Action” *supra* note 13.

achieve.⁴⁸ ECHO is part of this shift in objectives and, in practice, is funding projects which aim to achieve far more than relieving basic suffering in an emergency situation. ECHO has increasingly tried to plan and have a strategy in place; global plans accordingly now exist, which set out priorities and objectives and budgets for a given region.⁴⁹ The problem, however, is that in the context of Sub-Saharan Africa for example, given the enormity of the situation, projects have barely had enough funding to focus on basic life-sustaining assistance let alone other objectives. ECHO cannot realistically pursue other objectives as well. In Kosovo, for example, assistance varied from core humanitarian aid to rehabilitation and resettlement and also aimed to help with the effects of the transition to a market economy.⁵⁰ Given the enormity of the situation elsewhere, it is difficult to see how this was a priority for ECHO.

The grey-zone is, however, in some respects crucial. It exists due to the absence of flexible and rapid instruments in other parts of the Commission and because of the awareness of the relationship between development and humanitarian aid. Funding under ECHO is, on the whole, easier and quicker than under all other Community programs and is often used for that reason, even in the absence of an emergency.⁵¹ In its 2001 Strategy Document, ECHO identified concentration on its core mandate, i.e., to save and preserve lives in emergencies, as a priority. This would leave less scope for the grey-zone. A reduction of the grey-zone in ECHO can give a clearer indication to agencies and NGOs as to the scale of the EU's intervention and its form, in turn allowing them to plan with greater accuracy. The problem would then be that of coordinating activities and programmes with other parts of the Commission and ensuring that a vacuum does not exist between relief and development. The aim should be to avoid a hiatus in the Union's external action during the different phases.

⁴⁸ See Leander, N., and Macrae, J.(eds.), "Terms of Engagement: Conditions and Conditionality in Humanitarian Action" *HPG Report 6* and Macrae and Leander, "Shifting Sands" *supra note 12*.

⁴⁹ See COM (1999) 468.

⁵⁰ See, Court of Auditors, *Special Report 2/2001, Concerning the Management of Emergency Humanitarian Aid for the Victims of the Kosovo Crisis*, OJ C 16, 12/6/2001 p.1.

⁵¹ See Court of Auditors, *Special Report 2/97, Concerning Humanitarian Aid From The European Union Between 1992 and 1995*, OJ C 143, 12/5/1997 p.1 and ICEA/DPPC, *Development Assistance*, *supra note 15*.

If past practice is anything to go by, the omens for such coordination and complementary action are not promising.

3.3.3. Food Aid and Security.

Humanitarian aid, a very blunt instrument, is now the primary form of geopolitical intervention in a complex crisis which is of no, or little, strategic importance to the EU.⁵² The EU can use ECHO's activities as evidence of foreign policy intervention to persuade its political constituencies, if they express concern, that they are active in a situation. At times that engagement may actually be quite minimal. There is currently no internationally agreed method for determining need in an emergency situation.⁵³ However, comparing apparent or estimated need to the commitments made and paid by donors, while crude, is a fair indicator of the importance to a donor of an emergency, as is the type of aid provided. The discussion addresses this in the context of food aid.

ECHO works through Framework Partnership Agreements (FPA) and thus donates to emergency aid oriented agencies and NGOs as well as those concerned with development in the broader sense, such as Oxfam and the UNDP.⁵⁴ One of ECHO's more recent objectives has been to move from food aid to food security.⁵⁵ Thus comparatively less is now spent, by ECHO, on emergency food aid in contrast to

⁵² Macrae and Leander, "Shifting Sands" *supra note 12*.

⁵³ The first in-depth study on this issue is Darcy, J., and Hofmann, C., "According to Need? Needs Assessment and Decision Making in the Humanitarian Sector", *HPG Report 15*.

⁵⁴ ECHO spending covers more than just the budget for humanitarian aid. For detailed discussion see Cox, A., and Chapman, J., *The European Community External Cooperation Programmes: Policies, Management and Distribution*, (1999).

⁵⁵ This is reflected in Council Regulation No. 1292/96, On Food Aid Policy and Food Aid Management, and Special Operations in Support of Food Security, OJ L 166, 5/7/1996, p.1. Also see Court of Auditors, *Special Report No. 2/2003, On the Implementation of the Food Security Policy in Developing Countries Financed by the General Budget of the European Union*, OJ C 93, 17/4/2003 p.1.

spending on emergency rehabilitation and temporary shelters.⁵⁶ In financial terms, however, food aid is still the most important item. It is also subject to the most abuse and manipulation. While it is possible that statistics as to the payments made may be inaccurate, as they reflect the use of ECHO budget lines for rehabilitation as well, it is an inescapable fact that ECHO's Annual Reports illustrate a very heavy bias in the assistance provided which is skewed to Europe. This includes not only the Balkans but also the Central and Eastern European countries and the CIS. For example, 42% of ECHO's total budget in 1999 of €813 million went to Europe and of this 55% went to Kosovo.⁵⁷

The Kosovo crisis can be invoked to illustrate how ECHO and its activities reflect the more general foreign policy objectives, alliances and concerns of the EU and its Member States.⁵⁸ Kosovo in percentage terms has received more aid, from the EU, than any other emergency, not only strictly speaking rehabilitation aid but also food aid.⁵⁹ In Kosovo, as far as nutrition levels were concerned, the major problem was not malnutrition but obesity. The number of malnourished children was steady at less than 2%. Forty percent of women and children were clinically obese or their body mass index classified them as substantially overweight.⁶⁰ Yet the scale of the humanitarian response from ECHO was unprecedented in volume and cash terms. Kosovo is the only occasion, as far as is known, when the World Food Programme

⁵⁶ Many States, for example Cuba and Russia, receive aid from ECHO in the absence of a humanitarian situation as such. Sometimes, this is due to the absence of the rule of law or because the Community does not have a development cooperation Agreement with that State. Any aid is thus classified as humanitarian to ensure legitimacy. On the elasticity of humanitarianism see Macrae, J.(ed.), "The New Humanitarianisms: A Review of Trends in Global Humanitarian Action" *HPG No. 11*.

⁵⁷ See COM (2000) 784 which is the 1999 ECHO Annual Report.

⁵⁸ See more generally, Court of Auditors, *Special Report 2/2001*, *supra* note 50. It should be noted that ECHO was part of a very complex group providing aid, including various Commission Directorates such as Development and External Relations, the EU Member States and national agencies from other States, as well as NGOs and the UN family. Another good example is assistance to Turkey following the Gulf Conflict of 1991/2 and the subsequent exodus of Kurds to south-east Turkey and Iran. According to MacFarlane, "Politics and Humanitarian Action", *supra* note 13, all Turkish claims for assistance, as opposed to 10% of those by Iran, were met.

⁵⁹ See COM (2000) 784.

⁶⁰ This information is derived from Jaspers, "Solidarity and Soup Kitchens" *supra* note 33.

(WFP) and UN more generally received more than their estimates and what they needed.⁶¹ ECHO actually sent out unsolicited funds for the purchase of fresh fruit and vegetables, Mars bars, Turkish-delight and cakes.⁶² Food rations were, for probably the first time in an emergency, based on supply and not need. Much of this was in an attempt to display to the population that alliance with the West was beneficial to the average person and in an attempt to help stir-up opposition to the incumbent regime. Such actions are in clear violation of the obligations owed by all the Member States as parties to the International Covenant on Economic, Social and Cultural Rights, 1966.⁶³ In General Comment 12 on Article 11 of the Covenant (on the Right to Food) the CESCR stated that it is clear that “food should never be used as an instrument of political and economic pressure.”⁶⁴ Yet this is exactly what it was used for in Kosovo, as well as in Afghanistan and Sudan among others, by the EU through ECHO.⁶⁵ This is hardly any different from the way in which development assistance has been used.

In some other respects, however, the Community’s food security policy displays an acute awareness of the priorities and needs of low-income countries, many of which desperately need assistance to feed their populations. The picture is thus, to some extent, a contradictory and conflicting one. As noted above, the 1996 Regulation on Food Aid Policy and Food Aid is very much aimed at pursuing a food security policy and not a food aid one. A key aspect of the regulation was that it changed the approach of the Community by aiming to increase the purchasing power of vulnerable groups. The Court of Auditors considers, however, that the required coordination to ensure this approach works properly does not exist in practice.⁶⁶ Despite this,

⁶¹ See COM (2000) 784.

⁶² Jaspers, “Solidarity and Soup Kitchens” *supra* note 33. Also see COM (1999) 468 which highlights that in a fast changing situation ECHO was unable to deal with the situation at hand. It intended to deliver 2kg of food per person in refugee camps in Kosovo, yet 12kg per person was being delivered to spend funds. The allocation in other camps, during the same crises, was less than 0.2kg per person for the same period.

⁶³ International Covenant on Economic, Social and Cultural Rights, 1966, 993 *UNTS* 3.

⁶⁴ General Comment 12 on Article 11 of the ICESCR, E/C.12/1995/5 CESCR, para.37.

⁶⁵ See *infra*.

⁶⁶ *Special Report 2/2003*, *supra* note 55, p.18.

however, in some respects food security policy is well designed and thought out although not impartial or neutral. It attempts to link together supply, demand and crisis prevention. This is designed to pave the way for strengthening the capacities of active local and national partners, as well as the development of budget support to beneficiary governments. Various instruments are used in this process. The most important among them are access to production factors, credit and information, the development of non-farming jobs and the diversification of family income.⁶⁷ The 1996 Regulation also recognises that priority must be given to targeting the food security programme of the most vulnerable populations in the Least Developed Countries (LDCs). Within the Community context, however, Member States approve the strategic guidelines of the food security programme and the funding proposals per country and partner. This clearly leaves scope for other national interests, objectives and priorities to be pursued. Furthermore, there is a constant emphasis on coordination with other donors, in particular between the Commission and USAID.⁶⁸ This is surprising because the latter is widely perceived in the humanitarian community as being totally driven by the political objectives of the incumbent regime in Washington. In fact, during the current Iraqi crisis, Neilsen has stated publicly that he wants to keep EU aid neutral and away from the US.⁶⁹

Community intervention under the food security programme has been directed at 34 low-income countries, which are not self-sufficient.⁷⁰ These interventions are classifiable as structural and the States as crisis or post-crisis countries. Close to half (48%) of the food security programme goes to direct aid. This allows the Commission to intervene directly either by funding government programmes via budget support or by giving direct support to private or public bodies.⁷¹ Such assistance is only provided, however, if there is a funding agreement between the beneficiary government and the Commission, specifying the implementation arrangements as well as the conditions to which this aid is subject.⁷² Most aid in this

⁶⁷ Working Document (2001) 32947, *supra* note 44.

⁶⁸ See Article 1, Regulation 1292/96.

⁶⁹ *Financial Times*, "Keep Aid Neutral Urges EU Relief Chief" 30/3/2003 p.1.

⁷⁰ Working Document (2001) 32947, *supra* note 44.

⁷¹ *Ibid.*

⁷² *Ibid.*

context is given to the ACP (57%), followed by Asia (15%), Latin America (8%) and the Near and Middle East (6%). Of the ACP's share, the vast majority (61%) is given to East Africa where need has, over a prolonged period of time, been the greatest. A further 20% is given to Southern Africa where there has been, more recently, a substantial famine.⁷³

In the context of the Community's "long-term food aid programmes", i.e., excluding those implemented in the Balkans and Central and Eastern Europe since the early 1990s, the programmes display, on the whole, a well designed series of measures and instruments which aim to provide support and sustainability. They attempt to ensure that emergencies do not worsen in respect of nutrition levels, in particular, in those 34 identified countries. While there are conditions attached and some degree of bias, the programmes are designed and implemented and assistance provided, in practice, where the need is widely seen as being the greatest. In this limited context, the policy is impartial.

This somewhat inconsistent approach in ECHO's activities, (i.e., partisan and biased in some interventions and based upon need in others) has been confirmed in the 2001 ECHO Strategy Document. In terms of complex crises, ECHO now has Global Plans. These are comprehensive strategic frameworks for action for a particular country or region. Coordination with Member States and other donors and agencies is an inherent part of the process. An EU Joint Planning and Coordination Group has also been established to coordinate the activities of ECHO and other EU divisions providing assistance. If this functions, as envisaged, it should ensure that the most appropriate instruments are used in each intervention.⁷⁴ The question is of course, appropriate for whom and aiming to achieve what objectives? The 2001 Strategy Document does display an acute awareness of certain pertinent issues. Programmes are now to be designed using a needs-based assessment and aim to concentrate on

⁷³ *Ibid.*

⁷⁴ Court of Auditors, *Special Report 4/2000, On Rehabilitation Actions for ACP Countries as An Instrument to Prepare for Normal Development Aid*, OJ C 113, 19/4/2000 p.1 identified, however, that much of the programming has been *ad hoc* and unsystematic - DG VIII and ECHO have often acted as different donors rather than complementary units in the same organisation.

“forgotten emergencies.” Methodologies have been devised for both.⁷⁵ For “needs-assessments” the main criterion will be the vulnerability of a population. This will be based upon the number of internally displaced persons (IDPs) and refugees in a given country and the disaster proneness of an area as well as morbidity and mortality rates.⁷⁶ ECHO will also initiate measures to ensure per beneficiary allocation taking into account different levels of complexity. This is in some senses a major shift for ECHO. The issue, however, is what weight such assessments will be given when other geopolitical considerations and objectives are factored in? It is difficult, for example, to see the countries defined by ECHO as high priority, such as Chechnya and Yemen, as being of the highest priority in terms of needs. This is currently very firmly rooted in North-East and Southern Africa. It is still too early to tell whether this new approach will refocus ECHO’s activities but, what cannot be denied is that there is a concerted effort and awareness that ECHO can perform a more valuable function if it concentrates its humanitarian aid and efforts on its core mandate of saving and preserving lives. The 2001 Strategy Document attempts to give further effect to this approach.

What is generally revealing, is that while there has been a gradual and gentle increase in ECHO’s budget no matter what the extent of an emergency outside of Europe and the CEE countries, the amount of assistance allocated has not changed greatly over the last decade. As and when an emergency breaks out nearer to the Union’s own borders, then despite the fact that the nutritional needs are usually far less, with malnutrition being as noted above rare, huge amounts of extra funds with little reference to need are suddenly found. Here it can be argued that the action taken is primarily driven by pragmatism and self-interest and not the humanitarian imperative. In ECHO’s Annual Review of 2000, for example, it was noted:

it is not just a matter of moral duty, it’s a matter of self interest. If the EU wants to avoid having thousands of refugees knocking on its door as asylum seekers, it is in its interests to

⁷⁵ On this issue see European Parliament Committee on Development and Cooperation, *Report on Commission Communication on the Annual Report on Humanitarian Aid 2000*, (2001) and COM (2001)307.

⁷⁶ See ECHO, *ECHO Aid Strategy 2001*.

help them out on the spot. The cost per head of emergency .. aid is always much lower than, and cannot remotely be compared with, the legal and social costs of an asylum seeker.⁷⁷

4. Humanitarian Assistance and the Promotion of Human Rights and Other Political Objectives.

Most international agencies and NGOs have for some time now been considering the human rights implications of their humanitarian activities. Save the Children, Oxfam, UNHCR, WFP and UNICEF, among others, now describe their humanitarian work in human rights terms.⁷⁸ A major exception to this trend is the ICRC which does not, for fear of compromising its neutrality. In this general recognition of the need for an assessment of the relationship between humanitarian activities and human rights, ECHO has been very much at the rearguard. Although Commissioners for Humanitarian Aid have been very keen on espousing the contribution of ECHO's work to protecting human rights, it was not until a 1999 internal discussion paper was circulated by ECHO to the NGO sector, that the link was extensively explored.⁷⁹ The response of the NGO sector to the paper was, on the whole, not unfavourable. Considering the lack of conceptual analysis and formulation of concrete policy this is not surprising.⁸⁰ The paper considered that aid had lost its innocence and although it wished to ensure its impartiality, it did not address the many inherent biases of ECHO's activities. The basic premise of the paper is that ECHO is "a human rights actor as it funds the delivery of rights such as food and shelter."⁸¹ A major issue not directly addressed by it is, how to integrate human rights considerations into

⁷⁷ ECHO, *Humanitarian Crises Out of the Spotlight*, (2000) p.8.

⁷⁸ See Frohardt, M., Paul, D., and Minear, L., "Protecting Human Rights: The Challenge to Humanitarian Organisations" *HWP Occasional Paper* 35 and Kenny, K., "When Needs Are Rights: An Overview of UN Efforts to Integrate Human Rights into Humanitarian Action" *HWP Occasional Paper* 38.

⁷⁹ The discussion paper is an internal ECHO document, (hereinafter ECHO discussion paper). I am grateful to ECHO for providing me with a copy of it.

⁸⁰ See, for example, the discussion in the paper issued by Voice, "The Future of European Humanitarian Aid" (1999).

⁸¹ ECHO Discussion Paper.

humanitarian aid activities? This lacuna has, to some extent, been subsequently addressed in ECHO's 2001 and 2003 Aid Strategy papers.⁸² The approach espoused attempts to ensure that the distribution of aid does not lead to any detrimental or negative side effects.⁸³ It also wishes to create respect for the recipient's human rights and international humanitarian law by means of ECHO standard operations management instruments. This requires that all non-urgent proposals address two fundamental issues. First, does a project proposal consider the human rights situation in the field? Second, does it consider if and how it will impact on human rights?⁸⁴

The basic premise for ECHO therefore, is that any aid provided has to be "human rights conscious". This equates to the idea that assistance should not be provided if it will worsen the situation and it must be provided without discrimination. Similarly, this means that it should not be pursued at any cost but only if it is the most effective way to relieve suffering. Despite methodologies having been adopted for the identification of greatest needs and indeed the needs of a population, no methodology has been worked out to quantify if providing aid is the most effective way to relieve suffering bearing in mind the collateral consequences of that act.⁸⁵ Humanitarian action, if seen through a human rights prism is essentially an attempt to both protect and also provide relief from harm. In its documentation ECHO does not tend to elaborate on aspects of the former. In practice, it seems to be primarily concerned with relief from harm and not protecting even though the latter can be seen to be part of its mandate.⁸⁶ Assisting in isolation from the commitment to protect is short-sighted. There is often talk of the "well-fed dead syndrome". This tries to ensure that those who are fed are not simply being kept alive to be killed by a repressive regime or belligerents. Yet, this is exactly what the consequence of ECHO's approach seems to be.

⁸² ECHO, *ECHO Aid Strategy 2001* and *ibid.*, *ECHO Aid Strategy 2003*.

⁸³ For example, it is often argued that such aid perpetuates or can even lead to conflict. See Lischer, S., "Collateral Damage: Humanitarian Assistance as a Cause of Conflict" (2003) 28 *International Security*, 79.

⁸⁴ *ECHO Aid Strategy, 2001*.

⁸⁵ I asked three ECHO officials how this determination was made. None were able to provide an answer.

⁸⁶ ECHO Discussion Paper. See further Article 1, Regulation 1257/96.

Furthermore, there will be a substantial difference in effect depending on whether a “rights” or “needs-based” approach is taken to relief activities, although the two are not necessarily incompatible. To take an example from practice, the ICRC, UNICEF and Save the Children were all active in those parts of Afghanistan under the control of the *Taliban* during the late 1990s. UNICEF and Save the Children, as noted above, define their work in terms of human rights, with the latter using the 1989 Children’s Convention as its normative document. Both UNICEF and Save the Children consider that they have regard to all the implications of both acting and not acting where there is a humanitarian need.⁸⁷ In the *Taliban* controlled areas of Afghanistan both UNICEF and Save the Children stopped their programmes due to their objections to *Taliban* policies concerning females. In their assessment, the greater good could be achieved through not acting. Whatever the methodology, their approach dictated the winding-up of operations.⁸⁸ The fact that the *Taliban* were not concerned in the slightest with the perceptions of such actors (or indeed Western governments) and were not susceptible to conditionality was ignored. This action may have further highlighted the wholly exceptional nature of the *Taliban*’s practices to the international community but beyond this it is difficult to see how it equated to a human rights approach or achieved the greater good. Opposition to the absence of female education subsequently led to no schools in certain districts for boys either, where they were run by those agencies. Furthermore, food which was previously entering the market place no longer did so, which must have led to an inflationary effect as demand continued to further outstrip supply. The ICRC, however, which adopts a “needs-based” approach, did not pull out.⁸⁹ The 1999 ECHO discussion paper and 2001 Strategy Paper seem to imply that ECHO will adopt a “rights-based” approach although the 2003 Strategy Paper refers to a “needs-based” one. Notwithstanding this confusion, it is not a case of access at any price. It is a question of weighing up the options and taking the approach which is considered to be the most effective. If that means withholding assistance from the needy to achieve other objectives, then it seems to be the case that this is what will happen. In practice such

⁸⁷ See Kenny, “When Needs Are Rights” *supra* note 78.

⁸⁸ *Ibid.*

⁸⁹ See Rashid, A., *Taliban: The Story of the Afghan Warlords*, (2000) p.113.

an approach amounts to conditionality.⁹⁰ This is examined in more detail in the following discussion.

4.1. Conditionality, Humanitarian Aid and Human Rights.

In the 1999 discussion paper, ECHO considered that it did not use conditionality as a policy, although it did refer to the “incentivisation” of humanitarian aid.⁹¹ “Incentivisation” as understood in Community development cooperation parlance, is the idea that a programme is designed to achieve certain objectives, which in themselves are seen as intrinsically beneficial and their achievement is further rewarded. The nomenclature used is interesting, yet conditionality is an accurate description of the approach adopted, even though it has no role to play in the theory of such aid.⁹² Speaking in 2000 Mikael Barfod, the then Head of Policy Analysis at ECHO, argued, however, that ECHO uses three different types of humanitarian conditionality - impact conditionality, legal conditionality and political conditionality.⁹³ As the discussion above notes, some of these types of conditionality have been expressly or implicitly referred to in 1999 discussion paper and the 2001 and 2003 Strategy Papers. Others are apparent in practice.

Impact conditionality essentially adopts a utilitarian approach to the distribution of aid. As the 2001 Strategy Paper notes, aid should not be distributed if it results in negative consequences.⁹⁴ Unwelcome side effects, however, such as population movements or the possible manipulation of conflict in an effort to gain more aid, are common in contemporary complex emergencies. It is therefore, very difficult, if not impossible, to balance the benefits to a population in desperate need of aid against the collateral effects of such action. In its purest form, the argument can result in the

⁹⁰ See ECHO, *ECHO Aid Strategy 2001*.

⁹¹ ECHO Discussion Paper.

⁹² Also see Duffield, M., “Aid Policy and Post Modern Conflict: A Critical Review” *International Department, School of Public Policy, University of Birmingham, Discussion Paper 19*.

⁹³ Barfod, M., “Humanitarian Aid and Conditionality: ECHO’s Experience and Prospects Under the CFSP” conference paper reproduced in Leander and Macrae (eds.), “Terms of Engagement” *supra* note 48.

⁹⁴ ECHO, *ECHO Aid Strategy 2001*.

conclusion that if the distribution of humanitarian aid is likely to do some harm, then no aid is likely to do less. A needs-based approach, as opposed to a rights-based one, would clearly reject such an approach. For impact conditionality to be workable a “bottom-line” needs to be identified. If that line is reached then any assistance being provided must be withdrawn. In a practical context, this is a difficult choice to make. The danger of such conditionality becomes most acute where humanitarian aid is seen by European policy makers, especially in the Council, as a viable substitute for political action.⁹⁵ In such circumstances, where foreign policy (in)action is effectively delegated to ECHO, this particular “human rights approach”, if it is used, can become positively detrimental to the population in need. Such an approach is also apparently in conflict with the Humanitarian Aid Regulation, which in its preamble states:

... people in distress, victims of natural disasters, wars and outbreaks of fighting, or other comparable exceptional circumstances have a right to international humanitarian assistance where their own authorities prove unable to provide effective relief....humanitarian aid decisions must be taken ... *solely according to the victims' needs and interests.*⁹⁶

Notwithstanding the apparent conflict between impact conditionality and the regulation, such an approach is unlikely to be a violation of the legal obligations of the Community Member States under the Covenant on Economic, Social and Cultural Rights.⁹⁷

The conflict in Ethiopia is a classic example of some of the dilemmas involved in using impact conditionality.⁹⁸ Humanitarian assistance from the international community, including ECHO, was perceived to be assisting the war effort. The

⁹⁵ Although in the Madrid Declaration it is stated quite clearly that it will not be. Declaration of the Humanitarian Summit of Madrid, 15/12/1995, para.1.

⁹⁶ Paras.3 and 10, preamble, Regulation 1257/96. Emphasis added.

⁹⁷ See Chapter Two.

⁹⁸ See Borton, J., “The Changing Role of NGOs in the Provision of Relief and Rehabilitation Assistance: Case Study 3 - Northern Ethiopia and Eritrea” *ODI Working Paper 76* (1994), Tanguy, J., and Terry, F., “Humanitarian Responsibility and Committed Action - Response to Principles, Politics, and Humanitarian Action” (1999) 13 *Ethics and International Affairs* - <http://www.cceia.org/> and Barfod, “Humanitarian Aid and Conditionality” *supra* note 93.

international community paid for improvements to ports and transport links to ease the movement of such assistance. Those same facilities were also being used by the warring factions to move their arms. Aid was also leading to population movements and a dependency upon aid.⁹⁹ The essential question in such circumstances is, should a population in distress be allowed to starve due to the fact that in the short to medium-term, the provision of assistance will lead to other negative consequences? If a “rights-based” approach was used in conjunction with impact conditionality, this would not permit assistance to the affected population. This is despite the fact that those suffering were not in any way at fault. Furthermore, their immediate interests and needs would not be given priority as the Humanitarian Aid Regulation requires. As Barfod notes, however, so far there have been relatively few, if any, examples of ECHO adopting this approach in practice.¹⁰⁰

ECHO’s 2001 and 2003 Aid Strategies also refer, as noted above, to using humanitarian aid in an emergency to create respect for both the individual recipient’s human rights and international humanitarian law. Barfod refers to this as “legal conditionality”.¹⁰¹ According to this approach, violations of international humanitarian law or international human rights law will lead to any humanitarian assistance, to those in need, being withdrawn (if it is already being distributed) or not being granted until such norms are respected. This type of conditionality is only relevant in a man-made emergency, in particular conflict, although the situation can be compounded by natural factors, such as drought, as well. In contrast to the relationship between impact conditionality and the Humanitarian Aid Regulation, legal conditionality is arguably in accordance with the terms of the regulation. The preamble states:

...civilian operations to protect the victims of fighting or of comparable exceptional circumstances are governed by international humanitarian law and should accordingly be considered part of humanitarian action...¹⁰²

⁹⁹ Barfod, “Humanitarian Aid and Conditionality” *supra* note 93.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² Para.3, preamble, Regulation 1257/96.

Furthermore, the Community Member States as parties to the Four Geneva Conventions, 1949, are obliged, in accordance with Common Article 1, to “undertake to respect and to ensure respect for the ... Convention in all circumstances”.¹⁰³ Distinctions can be made between how such conditionality is used in practice. Under the first approach, where the conditions to work in a principled way do not exist, (for example, humanitarian workers are being attacked) no aid will be supplied until a secure environment is allowed to exist.¹⁰⁴ This occurred in Iraq in August 2003 when the ICRC, Oxfam and Save the Children, among others, pulled out after the attack on the UN headquarters in Baghdad. The ICRC returned when guarantees for their safety were forthcoming. The second approach is that assistance will be provided only if the State or militia in question comply with certain conditions, such as stopping certain human rights abuses.¹⁰⁵

It is difficult, however, to ascertain the exact relevance of violations of international human rights and humanitarian law for this type of conditionality. In a conflict between ethnic groups, for example, that in Rwanda after 1994 and the former Yugoslavia after 1992, genocide may be an inherent purpose of the conflict. Yet the withholding of aid in either situation would on a practical level have been untenable for the Union. In practice, however, there are examples of the imposition of this type of conditionality but only where the violations have been not central to the situation and the emergency of relatively little importance to the Union. For example, ECHO withdrew assistance to South Sudan due to attacks on projects funded by ECHO. As Commissioner Neilsen noted, the reason for withdrawal is due to a “serious breach of International Humanitarian Law.”¹⁰⁶ Yet in the Palestinian Administered Territories, serious attacks by both Palestinian groups and the Israeli Defence Force (IDF) upon the ICRC and other humanitarian workers funded by ECHO, during the occupation of

¹⁰³ See on this point, Advisory Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9/7/2004, as discussed in Chapter Five.

¹⁰⁴ Barfod, “Humanitarian Aid and Conditionality” *supra* note 93.

¹⁰⁵ *Ibid.*

¹⁰⁶ Quoted by Barfod, “Humanitarian Aid and Conditionality” *supra* note 93.

Jenin, did not lead to such a withdrawal.¹⁰⁷ It is difficult to argue that subjective factors do not creep into these determinations.

One of the limitations of legal conditionality is that where the destruction and eradication of other ethnic groups is an objective of the conflict, guarantees with regard to the security of humanitarian workers (who are assisting both sides) and human rights are unlikely to be forthcoming or, if they are, to be respected. Securing or attempting to secure such commitments can, however, further highlight the conduct of the warring parties to the international community. ECHO, as noted above, suspended all operations in *Taliban* controlled areas of Afghanistan. The 1998 ECHO Annual Report notes that aid to Afghanistan was suspended due to “continued violations of fundamental humanitarian principles” in the sense of targeting and threatening aid workers.¹⁰⁸ This, however, was not the reason. Violations, in the sense of targeting aid workers were rare, although they did exist.¹⁰⁹ The *Taliban* had no problems with aid agencies, so long as they respected their interpretation of Islam. It was due to the opposition to *Talibani* policies, in particular, from women’s groups in the US and in Europe, that ECHO suspended all operations.¹¹⁰ ECHO used legal conditionality in humanitarian aid as part of an approach where aid of every kind was used as an instrument to isolate the *Taliban*.

The *Taliban*’s treatment of women is closely related to a more fundamental issue in the relationship between legal conditionality in humanitarian aid and human rights. It was not the well-documented genocide of the *Hazaras*, a breach of an obligation *erga omnes* but discrimination against women, which for the Union was important. The then Commissioner for Humanitarian Aid, Emma Bonino, argued that the approach

¹⁰⁷ See Chapter Five.

¹⁰⁸ ECHO, *Annual Report on Humanitarian Aid 1998*, p.18.

¹⁰⁹ It is important to note that both the US and UK are widely acknowledged as having used emergency aid as a cover for security operations. This consequently resulted in some attacks on aid conveyors by the *Taliban*. See further Atmar, M., “The Politicisation of Humanitarian Aid and its Consequences for Afghans” *Humanitarian Exchange*, (September 2001) and MacFarlane, “Politics and Humanitarian Action” *supra* note 13.

¹¹⁰ See the discussion in Rashid, *Taliban*, *supra* note 89, p.113.

taken in Afghanistan over women's rights was a principled one.¹¹¹ To argue that such a course of action would improve the human rights situation in Afghanistan is at best naïve, especially as the on-going genocide was not being addressed. The politics of the *Taliban* are such that their entire ideological foundation relies upon resorting to selected aspects of society as it existed in 7th Century Arabia, regardless of the sociological context. The suppression of women is part of the puritanical trend in *Wahabbi/Deobandi* traditions. The demonisation of women, who are considered to provide a distraction from committing "God's work", and the complete merging of theology and politics is fundamental to *Talibani* ideology. Conditionality, sanctions or any other external action would under no circumstances lead to a change in that attitude. A "needs-based" perspective would have allowed the continuation of aid supplies to those Afghans in desperate need, no matter how repugnant *Talibani* practices were, not only towards women but also religious and ethnic minorities.

The final type of conditionality identified by Barfod is political conditionality.¹¹² In this case assistance is used solely to achieve specific foreign policy objectives. The aim, for example, may be to put pressure on a government or faction to end hostilities or to start peace negotiations.¹¹³ Traditionally it was thought that European humanitarian aid would not have a role to play in such matters, and this was confirmed by the Development Council.¹¹⁴ The occupation of the grey-zone, as discussed above, has made such objectives an issue. Again such conditionality sits uneasily with the Humanitarian Aid Regulation, which in its preamble makes clear that:

¹¹¹ In a speech entitled, "Principled Aid in an Unprincipled World" available at <http://europa.eu.int/en/comm/spp/rapid.html>Donald. Also see Brandt, P., "Relief as Development, but Development as Relief?" <http://www.jha.ac/articles/a024.htm>.

¹¹² Barfod, "Humanitarian Aid and Conditionality" *supra* note 93.

¹¹³ *Ibid.* For a critical analysis of such efforts in general see Scholms, M., "On the (im-)possible Inclusion of Humanitarian Assistance into Peace building Efforts" *The Journal of Humanitarian Assistance*, <http://www.jha.ac/articles/a072.htm>

¹¹⁴ *Supra* note 1.

...humanitarian aid .. is accorded to victims without discrimination on the grounds of race, ethnic group, religion, sex, age, nationality or political affiliation *and must not be guided by, or subject to, political considerations.*¹¹⁵

The Member States in the evaluation of ECHO's activities have confirmed that they wish to maintain a distance between humanitarian aid and political considerations.¹¹⁶ The real danger of humanitarian aid being sucked into a political vacuum exists when no other Union intervention exists. There are clear examples of this.

In Cambodia in the 1990s, the EU was financing a number of NGOs who had a very determined mandate to support opposition parties. The ICRC and Médecins Sans Frontières sought to maximise their distance from all factions. USAID and ECHO, however, worked mostly in the north and outside of the public health system and were part and parcel of a political policy and strategy to boost the opposition parties in the run-up to the elections. The intervention was not to boost the general sustainability of the health sector but rather to boost the legitimacy and capacity of the opposition.¹¹⁷

The 1999 evaluation of ECHO's activities considered that humanitarian aid was largely untainted by foreign policy considerations.¹¹⁸ As the above example illustrates, this is certainly not the case as far as all of ECHO's activities are concerned. Furthermore, it is difficult to consider this is an important achievement when there has been, vis-à-vis many geographic regions, little articulate common foreign policy. ECHO has, however, on other occasions resisted being overtly used as a foreign policy instrument, in particular in the Balkans. In Serbia, for example, before the fall of the nationalist government, ECHO provided aid through the ICRC. Member States, however, wanted to support the opposition and specifically strengthen them. The ECHO programme was thus halted and an "Energy for Democracy" (EfD) programme was started instead, funded by the Directorate General

¹¹⁵ Para. 9, preamble, Regulation 1257/96. Emphasis added.

¹¹⁶ COM (1999) 468.

¹¹⁷ See further Macrae, J., *Aiding Recovery? The Crisis of Aid in Chronic Political Emergencies*, (2001) p.85.

¹¹⁸ COM (1999) 468.

for External Relations.¹¹⁹ Aside from whether the average Serb was able to distinguish between the different administrative divisions of the Commission, the hijack of ECHO programmes by EXREL does nothing to maintain their neutrality, other than allowing the Commission to argue that humanitarian aid is not biased or tainted.¹²⁰

The difference between the situation in Cambodia and Serbia is that in the latter other Union bodies were active and thus could take over a pre-existing project. In Cambodia, where there was no other foreign policy action, ECHO was used for political purposes, as it was the only Union actor active at the time that could support the opposition.

It is also possible to find examples of conditionality in humanitarian aid being used by the EU to achieve both legal and political ends in one set of measures. Since the fall of the *Taliban*, the Union's special envoy to Afghanistan, Klaus Peter Klaiber, has stated on numerous occasions that its payment of promised reconstruction and rehabilitation, but not expressly humanitarian aid, is dependent upon Hamid Karzai's regime adhering to the Bonn Agreement.¹²¹ Aid will be halted if, for example, soldiers are not satisfactorily demobilised or if legal measures which provide for greater ethnic equality are not adopted.¹²² The Union's record on the distribution of aid in post-*Taliban* Afghanistan has been one where it has classified a substantial amount of its aid as humanitarian, regardless of the objective of the programme. In the absence of a development cooperation policy and Agreement it has used it flexibly.¹²³ Conditionality is widely being applied.

¹¹⁹ On the EfD programme see Commission MEMO/99/65, 3/12/1999. Also see, House of Commons Select Committee on International Development, *The Effectiveness of EC Development Aid*, 9th Report, (2000).

¹²⁰ Macrae, *Aiding Recovery*, *supra* note 117, p.42 notes it is significant that the DFID resisted FCO pressure to provide funds to the EfD programme.

¹²¹ Agreement on Provisional Arrangements in Afghanistan, Pending the Reestablishment of Permanent Government Institutions, 5/12/2001.

¹²² See, for example, the Statement by the European Union at the Afghanistan Reconstruction Steering Group, Washington, 26/9/2002.

¹²³ See *EuropaWorld*, 26/06/2002

The use of these types of conditionality in humanitarian aid by ECHO and the Union more generally sits somewhat uneasily with the underlying principles of humanitarian assistance. The use of impact and political conditionality in humanitarian aid does not correlate with the 1996 Humanitarian Aid Regulation. The human rights implications of (in)action may be a consideration in whether or not, or indeed how and to whom to provide aid, but they are far from the most important factor when weighing up options. Studies suggest that conditionality is of limited use and influence in such circumstances and is ineffective in forcing factions to respect rights and cajole them towards a political outcome.¹²⁴ Furthermore, in many instances the power and legitimacy a group seeks internationally may have little to do with their relationship with their subject population.

A human rights awareness or approach to humanitarian assistance does not, however, require the use of conditionality. If ECHO requested those bodies it funds to integrate human rights considerations into their work, then this, for some agencies, may be acceptable. Others, such as the ICRC, may resist on the basis that such an approach is of a political nature and thus counterproductive. It would also compromise their mandate. There are a significant number of stipulations/requests, however, that ECHO can make of its partners to try and further integrate human rights considerations in its work. Asking them to investigate and engage in fact-finding in cases of abuse or promoting the return of refugees, if appropriate, would assist in protecting a population from harm. Requests of this sort are not overtly political and can be seen to be part and parcel of effective humanitarianism and would not be objected to, on ethical grounds, by most agencies either.¹²⁵

¹²⁴ See Uvin, P., *The Influence of Aid in Situations of Violent Conflict*, (1999) and Scholms, "On the (im-)possible Inclusion" *supra* note 113.

¹²⁵ See McClintock, M., "Tensions Between Assistance and Protection: A Human Rights Perspective" in Minear, L. and Weiss, T. (eds.), *Humanitarian Action: A Transatlantic Agenda for Operations and Research*, BHWP Occasional Paper 39 and Holleuffer, G., "Images of Humanitarian Crises: Ethical Implications" <http://www.oneworld.org.eurofic/icirc/art1.htm>

5. Conclusions.

In a panel discussion in 1998 Emma Bonino the then Commissioner for Humanitarian Aid observed “ I have my doubts, looking at the array of conflicts in which humanitarian relief is called for today... that being neutral is still at all possible or indeed ethically just.”¹²⁶ It is clear that in many situations ECHO has compromised its neutrality and impartiality, in principle and in practice. It is for this reason arguable, that rather than continue to claim it is impartial and neutral ECHO should expressly adopt an approach which is usually referred to as “third-way humanitarianism.”¹²⁷

This would be a far more honest approach to the policies implemented by ECHO in practice. In third-way humanitarianism neutrality is not expressly abandoned.¹²⁸ Where neutrality is expressly abandoned, humanitarianism is subordinate to foreign policy objectives, as is the case with USAID. Third-way humanitarianism is also distinguishable from where neutrality is a pre-eminent principle,¹²⁹ as in the case of the ICRC. Third-way humanitarianism allows humanitarian assistance to have other objectives, such as peace building and tackling root causes, but is not biased *per se* between the parties to a conflict.¹³⁰ Although this approach is very unclear about the nature and politics of humanitarian aid and merges increasingly into development assistance, it does provide significant flexibility and in any case accords with the Community’s practice.

Although the ICRC continues to adhere to the principles of neutrality, impartiality and independence, it cannot but escape the political implications of its actions.

¹²⁶ Cited by Minear, “The Theory and Practice” *supra* note 8, footnote 12. Bonino was a member of a panel discussion entitled “Is Neutrality Still Possible?”

¹²⁷ See, for example, Leander, N., “The Politics of Principle: The Principles of Humanitarian Action in Practice” *HPG Report 2*, Scholms, “On the (im-)possible Inclusion” *supra* note 113 and Hilhorst, D., “Being Good at Doing Good?” *International Working Conference on Enhancing the Quality of Humanitarian Assistance*, 12/10/2001.

¹²⁸ Leander, “The Politics of Principle” *supra* note 127.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

Pictet's well-known reference to the ICRC as a swimmer up to its neck in politics, but one who needs to keep his head above water to survive, sums up the position well.¹³¹ This approach is not really possible for ECHO. Its role and function in the overall context of Union foreign policy means that the biases in the approach the Union has adopted towards third States in general have seeped into ECHO. The temptation to use humanitarian aid as an instrument amongst a myriad of other measures and policies has proved overwhelming for the Union. To abuse Pictet's analogy, the swimmer must very occasionally submerge his or her head into the water to see what is going on and possibly influence events in the undercurrents. Third-way humanitarianism would allow and importantly recognise the necessity of this. It emphasises capacity building and the continuum between development and humanitarian aid.¹³² ECHO already adopts this approach in practice. The danger of such an approach, however, is that "forgotten emergencies" (which ECHO has identified as a priority) and those which are of little significance to the Union will be moved further out of focus. Third-way humanitarianism, if adopted, is likely to be used in situations where the Union has some interest. The Council, in particular, already has a reputation of throwing money as a token gesture in situations which are of little importance to it. As need is not currently the Union's primary factor for the allocation of such aid, some emergencies would simply slide further down the scale of priorities and importance.

Community humanitarian aid policies are driven by pragmatism, which is the overriding principle and practice. ECHO's practices and policies are defined by their fluidity and ambiguous nature. A lack of conceptualisation of the issues is symptomatic of the approach to its activities. There is little, if any, reference to the legal obligations of the Member States but this is not surprising. Notwithstanding this, the Community can make a very significant contribution to alleviating suffering, especially with regard to short-term emergency food aid. This is where a needs-based approach can be of the greatest value. At other times, however, Community humanitarian aid is overwhelmed by the more politically driven of the Union's objectives and instruments. The contribution of Community humanitarian aid to the

¹³¹ Pictet, J., *The Fundamental Principles of the Red Cross*, (1979) p.56.

¹³² Leander, "The Politics of Principle" *supra* note 127.

promotion and protection of ethical values in third States is not consistent. This does not mean, however, that such considerations are not a part of the equation. They clearly are, but the weight given to them differs according to the Union's more general political objectives.

Chapter Seven.

Conclusions.

The Union has set itself the objective of promoting ethical values in all third States. This thesis has primarily been concerned with the Union's relations with developing countries. The aims of the thesis were to examine the legal basis for the Union's ethical foreign policy and its implementation through a series of case-studies.

The initiatives the Union can implement to promote ethical values in a third State and the responses available to it to protect them, are determined by the nature of its relationship with that State. As the Union, like other international actors, has no uniform approach either to developing or to developed States or between them, the basis for its relations with each State differs fundamentally. The nature and basis of relations with, for example, Myanmar and the other ASEAN countries, the countries of the Sub-Continent and the ACP States all differ. There may be a bilateral, multilateral or mixed treaty in force to regulate relations, or there may be no treaty relationship at all. Furthermore the various unilateral instruments the Union has adopted have different objectives and priorities. Therefore, the instruments, mechanisms and institutions which can be used to conduct relations with Nigeria, for example, will differ from those that can be used with Pakistan, as will the parties to the dialogue. The Union has attempted to forge an ethical foreign policy by implanting it into the existing frameworks for relations with third States. The transformation in both competence and approach over a period of time has, at times, been significant, for example, in food aid policy. Existing policies, however, on the whole, have not been fundamentally reviewed but mutated or adapted.

Not only will the role played by ethical values in the Union's relationships with third States differ but there will also be variable degrees of success, depending on the State(s) in question. The instruments and mechanisms that are used in relations with different third States vary greatly in their usefulness in pursuing such a policy. In its relations with developed countries the balance of power is also different and, if confronted with resistance, the Union has more to lose if it pushes these issues too

hard. In the case of developing countries the Union has more leverage which, as all donors do, it uses to pursue its objectives. Classic instruments of diplomacy, such as dialogue and condemnation, as well as positive and punitive measures are part of the arsenal in relations with all States. There is, however, no coherent set of overall guidelines as to which instruments and mechanisms should be used by the Union. Nor are there any guidelines as to when or how it should act or react to the situation in a third State. The Union's ethical foreign policy is still being formulated on an *ad hoc* basis.

The Union has at its disposal an impressively broad array of powers by which to give effect to an ethical foreign policy. The competence derived from the development cooperation provisions of the EC Treaty, for example, ensures that if the Community wishes to inform journalists in third States about the virtues of freedom of expression, if elections are to be monitored or water purified, then a legal base exists. Competence to pursue an ethical foreign policy can also be derived from, among others, Articles 310, 308, 133 EC or under the CFSP. There are, however, sometimes problems of consistency in the exercise of different policies. Development cooperation, on the one hand, and, on the other, trade policy and general foreign policy objectives, do not always coincide.

The structure and nature of the Union also makes it significantly more difficult for it, compared to a nation State, to implement an ethical foreign policy. Although the interests and views of the Member States largely coincide, there are invariably issues where they have differences of opinion, priorities and interests. The recent expansion of the Union will serve to further exacerbate these differences, which are sometimes a major factor in inhibiting the ability of the Union to take a principled and effective stance. States rarely publicly acknowledge their order of priorities. These priorities and the emphasis to be given to them are a product of each State's history, as well as its political, economic and security considerations. Denmark and Sweden, for example, are considered, especially when holding the Presidency of the Council, to be more vociferous and determined in the pursuance of ethical values than some of the other Member States. At times, this can adversely affect other aspects of the relationship with a third State.

For any policy aimed at promoting and protecting ethical values in all third countries, to be credible and principled, it should be coherent and consistent with little regard to the strategic or economic importance of a third State or the historical alliances that exist. Inconsistency in application, in particular, between developing and developed States and the use of conditionality in relations with the latter, exposes the Union to the accusation of cultural imperialism. As far as Cooperation Agreements with third States are concerned, where they exist, reference is usually made to those international conferences, treaties and declarations which all parties to the Agreement have accepted. Thus reference to the Universal Declaration of Human Rights is common place, even though the scope and content of the rights it contains is uncertain. The Union, however, also attempts to directly transplant and promote the principles and values *it* considers relevant to third States, sometimes without enough regard to their appropriateness or the difficulty those States will face in giving effect to them. The rule of law and good governance are examples, in particular, as the legal content of these principles is unclear in international law and the Union rarely articulates what it means by them.

In the Union's actions and responses in both promoting and protecting ethical values in third States, there is rarely any reference to the legal obligations the Member States and Community are under, with the notable exception of the implementation of UN sanctions. Union practice is, however, undeniably influencing the content of international law. Responses to the annulment of elections, for example, are part of a trend where non-democratic regimes are increasingly perceived as being illegitimate. Community Agreements require "democratic principles" to be respected. Yet deficiencies in that regard in third States are routinely overlooked by the Union, if it is politically expedient. Inconsistencies by those advocating the illegitimacy of non-democratic governments in their approach towards such regimes undermine that development. The Union has failed to scrutinise the behaviour of, for example, many oil rich Middle-Eastern States. It can be argued that the principle being developed by the Union only relates to where the expressed will of a population in multi-party elections is ignored and it is not concerned with the (il)legitimacy of regimes, where there has not been a plebiscite in the first place. Even if this distinction is a valid one, the disregard of the outcome of democratic elections in Algeria in 1991 serves to undermine that argument. The continuation of relations with Algeria is an aberration

and difficult to justify. The Union's apparent turnaround in relations with Pakistan is distinguishable. "Exceptional circumstances" are seen to exist and although the Union is open to accusations of double-standards, the promotion and protection of ethical values in a third State will never trump the vital security interests of the promoting polity. Relations with Pakistan simply serve to highlight the relative importance of ethical values in the hierarchy of the Union's interests and priorities.

There are, as cited in Chapter Two, numerous statements which place ethical considerations at the heart of the Union's foreign policy. From the case-studies it is clear that, in practice, this is not the case. As many Realists contend, it would be naïve to think it is. But whereas some Realists reject any role for such considerations in policy formulation, in the case of the Union, the pursuit of ethical values is *an* objective alongside others. The constitutive treaties imply this, even if the Court took a somewhat different approach to development cooperation in the *Portugal* case. A 1994 Communication on relations with Asia, for example, stated quite clearly that human rights will be a "major objective" of policy with Asia. Ethical considerations are now undeniably an established part of the equation in the Union's dealings with all third States.

The case-studies illustrate the role and weight given by the Union to differing considerations and factors while it attempts to promote and protect ethical values. In its relations with Myanmar, the Community displayed an initial unwillingness to take punitive measures. When the elections were annulled in 1991 the formulation of Community policy was in its infancy. The maintenance of dialogue and possibly influence as well as trade interests, even though relatively unimportant, initially only led to the downgrading of development assistance and the withdrawal of military attachés. The death of the Danish consul and the consequent Danish outrage compelled the Union to take some action. There are no security considerations or major quantities of vital natural resources at stake and an isolationist and repressive regime, which is engaging in gross and systemic violations of human rights, should make the formulation of policy relatively straightforward. It is clear, however, that the Community usually only downgrades development cooperation and assistance if there has, at some stage, been an effective suspension of the democratic process. Human rights violations are usually not the primary reason for such a reaction

although they are often the aggravating factor, which can lead to further punitive measures being adopted. The studies on both Nigeria and Myanmar illustrate this. In many senses, if the Union takes punitive action in response to gross and systematic violations of certain human rights, as opposed to violations of democratic principles, it is on much sounder legal ground. Due to the approach it has adopted to the relationship between human rights, development and democracy, however, it tends to see them as inseparable.

The Union is reluctant to unilaterally impose sweeping punitive measures which will have a negative impact on the population of a State at large. It attempts to refocus programmes to ensure that any punitive measures against a State have a limited impact upon the population at large and primarily target those in power. The commercial interests and perspectives of the Member States are also relevant. The legal obligations of the Member States and Community in this regard, as noted above, are rarely, if ever, publicly referred to but they too are a consideration. For these reasons, vociferous condemnation in the case of both Nigeria and Myanmar has not been followed by punitive measures commensurate with the outrage expressed. Condemning a third State for whatever reason does not, as discussed in Chapter Two, amount to interference in legal terms. Assuming the political will and capacity exists, taking action which will effectively curtail a regime in a third State, however, may not be legally permissible. Striking the correct balance, bearing in mind all the different factors referred to above, is difficult. As a consequence many of the measures implemented by the Union have a limited impact upon the regime(s) in question. This leads to routine accusations of, for example, the Union placing trade interests above ethics, which are not always justifiable.

The Union also sometimes fails to strike the correct balance in the promotion of values. Countless studies and reports criticise the relevance and effectiveness of some of the development projects funded by the Community in third States. To a large extent the Community via EuropeAid is reliant on appropriate projects being proposed by NGOs and other bodies. It does not design them itself, even if it does highlight the types of projects it wishes to fund. Some of its projects, however, do make a substantial and valuable contribution. The projects which aim to tackle child labour in Pakistan, as discussed in Chapter Four, are one example. Yet, even these

sorts of projects can suffer from problems, the continuity of funding being one. In a number of instances, much of the good work achieved in the short-term is later undone by the Community's lack of planning and foresight.

Notwithstanding these shortcomings, the Union has contributed to global and regional issues in a manner that the individual Member States simply cannot match. The impact of collective action by 25 States will always be significant. For example, as Chapter Five highlights, it is because the Union has pushed the roadmap and the two-State solution to the conflict in the Middle East that it is now the preferred international approach. In the MEPP, however, the Union has failed to take advantage of its own importance due to the Member States' differing opinions and perspectives. The Union and its Member States have not fully used the instruments available to them, especially the "essential elements" clause to put pressure on Israel to rein in its practices in the Occupied and Palestinian Administered Territories. The failure to respond to fundamental, systematic and gross violations of international law raises questions about the credibility of such clauses, where they exist, and the Union's ethical foreign policy in relations with all third States.

With regard to humanitarian aid, the contribution of the Union is again uneven. Its practice is conceptually ambiguous and there is little or no reference to legal obligations. The Union has struggled to find an appropriate role for humanitarian aid in its foreign policy instruments. It is not always clear, in practice, if it sees it as a part of the political process or apart from it. Due to the nature of the activity it cannot but help make a positive contribution to the survival of those in need but, as discussed in Chapter Six, the provision of such aid is intrinsically bound up with many other ethical problems and political considerations to which the Union has no clear approach. Funds are not usually spent where the absolute need is greatest and it is questionable whether sufficient coordination exists between humanitarian aid and development cooperation. Yet despite all of this, some of its contributions, in particular with regard to food-aid and food-security, are again exceptionally valuable.

It is important not to overlook the fact that any foreign policy, whether it is ethical or not, will always be limited in what it can achieve. Regardless of how well designed or coherent a policy is, it is usually difficult, while respecting international legal

obligations, to influence the situation in a third State so that the desired outcome is attained. Many such matters are simply outside of the control of a State or in our case the Union. For example, as noted in Chapter Four, the refusal of the Union and its Member States to sell arms and instruments of oppression to Myanmar has simply resulted in the military regime sourcing those goods from elsewhere. In practice, the impact of these measures in Myanmar has been negligible but it has not been without cost to manufacturers of those goods in the Union Member States. Furthermore, the Union has pumped billions of Euros into the Palestinian Territories to try and build a viable entity. The ongoing conflict has resulted in the Union, however, having to make damage limitation, as opposed to supporting civil society, building an infrastructure and developing the economy, its primary objective.

Even allowing for matters outside of its control, the Union, bearing in mind its wealth and political power, currently makes a less positive contribution in this regard than it should. This is not to deny the value of the contribution it does make. Simply put, it can make a more significant one. The promotion of ethical values in third States is not a purely altruistic endeavour. The Union promotes these values and norms because it believes in their inherent value and it also considers that it will in turn derive benefits from them. Foreign policies which emphasise certain values can make an important contribution to protecting the interests of the promoting entity and strengthening the pillars of the international legal order. The Union and its Member States will be more successful in “exporting” their own political philosophy if their actions are perceived to be both principled and consistent. This needs to be supplemented by creating or supporting conditions and institutions which provide the target States with the capacity to “import” the values in question. It is therefore, in the Union’s interests to consider reform of its policies and practice.

The fundamental problems that currently stand in the way of a more articulate, coherent and effective policy are the structure of the Union and its approach to relations with third States. The organisation of the Commission, the structure and mechanics of the Union and the use of differing competences, to name a few, make such issues very difficult to work out in a consistent and credible manner. The Union usually has too many voices for its position in foreign policy matters to be clear and authoritative. Solana, Patten, Nielson, Prodi, the Commission, the Presidency, the

Member States and, in the context of their mandates, the Special Representatives can all legitimately comment on the same issue. They do not all sing from the same hymn sheet. The creation of a European Foreign Minister is seen as a partial solution to this problem. This will still not deprive the others, in particular the Member States, of their prerogative to comment on issues of concern to them. The formulation of policy also requires clearer guidelines, as to when to act and which responses are appropriate. Such reforms and steps, however, are unlikely to be undertaken solely for the sake of pursuing a more effective ethical foreign policy.

A number of different aspects of the policy, however, can be improved without the need for major reform. In terms of positive action, there must be a clearer identification of where development needs are the greatest and what contribution can be made by funding a project? Although this approach has been adopted in policy terms it has not been properly implemented. There are many instances in which projects are funded and where a more substantial contribution could have been made elsewhere. Where the greatest contribution can be made is with regard to poverty reduction. Poverty reduction is considered to be *the* major human rights challenge of this century. The most concrete contribution that the Union can make is by targeting those populations most in need, regardless of the strategic and political importance of the States they are in. Humanitarian and food aid as well as development aid and cooperation should be targeted at these populations, depending on the circumstances, to alleviate their suffering. Subject to scrutiny, projects designed by the State in question, international organisations and NGOs on the ground, as well as on the initiative of the Union delegation should all work towards that end. Furthermore, the EBA initiative can be amended to take account of any produce that is exported, by such populations, regardless of its sensitivity. If there is no such produce, then projects can work towards establishing either an agricultural base or an industrial one so that goods can be exported to the Union. The Union should complement this initiative by targeting any adverse effects such a policy has on other populations, in particular those who export competing produce, by providing them with additional support and benefits. This approach has the advantage of not only assisting those in most need but is clearly where funds can be most effectively spent. It requires a long-term commitment which is not sacrificed to short-term objectives and priorities. The

food aid and security programme, discussed in Chapter Six, displays exactly what can be achieved.

Poverty reduction *is* considered to be the overwhelming priority of Community development cooperation but many projects have been poorly designed and poverty reduction policies have been all too easily compromised when political considerations have come to the fore. The “war against terror” and security are increasingly taking priority. While emphasis on the “war against terror” is understandable, the Union should not relegate the importance of poverty reduction. Effective poverty reduction strategies can help break the cycle of dependency, create wealth and contribute to better governance and development. All of these are explicit objectives of the Union and in any case poverty reduction should contribute to a safer world and a securer global environment.

Aspects of the “essential elements” clause should also be reconsidered. The failure to use it against Israel, as noted above, means that the Union will lose further credibility if the clause is invoked for similar or lesser violations by other States. Accusations of double-standards are particularly harmful to credibility, which is essential. This does not mean, however, that “essential elements” clauses are of little or no use. Some ACP States have long advocated the creation of a “court” under the terms of the Lomé/Cotonou Conventions to determine breaches of its provisions. In a different form, such an institution provides a way forward. An independent advisory body, which can determine whether the clause has been breached, would be a very welcome step forward. The opinion of the advisory body does not have to be legally binding. The expectation, however, would be that its opinions are be taken into consideration by the institutional bodies established under each treaty containing such a clause. The Community must also articulate more clearly what each principle in the “essential elements” clause means. The function of the advisory body would then be to consider the issues which arise under any treaty relationship between the Community and a third State(s) and determine whether it has been breached or not. It would also determine the best course of action for the Union to take in response to events in that State. It would be concerned with the legal obligations of the Community and its Member States, the legality of any proposed action and the legal obligations the third State in question is under. Furthermore, political considerations,

such as the willingness and capacity of the State to take action, should be taken into account. Accordingly, the advisory body could recommend a number of responses. These include the suspension of an Agreement; the downgrading of development assistance; the refocusing of existing programmes; new initiatives to assist sections of the population; that the Council adopt certain measures under the CFSP; or a combination of these. The opinions of the advisory body should be public, as this will help to provide transparency and allow scrutiny of the responses of the Union to events in third States.

If the advisory body considers that an Agreement should be suspended then it should also automatically follow that the GSP and EBA initiative, if appropriate for the State in question, are also suspended. In third generation Agreements there is currently no link with suspension of these benefits. As many third generation Agreements do not have a separate budget line attached to them, the automatic suspension of the GSP and EBA are an effective tool, along with dialogue, to achieve a change in the situation which is objected to. Both the EBA and GSP Regulations can be amended to this effect. Such action should be complemented with programmes and funding at the grass roots level to ensure that the impact of these measures on the general population is mitigated and, as far as is possible, only affects those in power. This should ensure, in case of any doubt, that by withdrawing unilateral benefits the Community is not violating any international legal obligations.

Numerous shortcomings in the Union's approach in practice have been highlighted in the various chapters of this thesis. The overall picture of the promotion of ethical values in third States is, however, a positive one. On occasions it is difficult not to see the futility of the course of action adopted but, on the whole, these are outweighed by the positive aspects of the policy. Reform is required on a number of different levels to make the Union's contribution more valuable in the promotion and protection of those values the Union considers are at its own core. Without reform and reassessment of what it is attempting to achieve and how it should do so, the Union's contribution will continue to be less meaningful than it can be. The question for the Union is to what extent is it really committed to those values and what price it is prepared to pay in pursuing them? Analysis of practice does display a commitment to these values but not an overriding one. It also highlights some shortcomings. The

fact that the Union does not always get things right, however, does not mean that it should not continue with its efforts.

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