PARLEMENT EUROPEEN

DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION
DIRECTORATE B
- POLICY DEPARTMENT -

NOTE

HUMAN RIGHTS CLAUSES IN THE EU'S EXTERNAL RELATIONS

Content:

The human rights clause today: assessment of the problems and proposals

DGExPo/B/PolDep/Note/2005_192 **27/07/2005**

[PE N°] **EN**

DV/576418EN.doc
External Translation

This note was requested by the Subcommittee on Human Rights of the European Parliament.

This document is published in the following languages: French (original version)
English
Italian

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Manuscript completed in July 2005.

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Brussels, European Parliament, 27 July 2005.

HUMAN RIGHTS CLAUSES IN THE EU'S EXTERNAL RELATIONS

1. Contents

2. Summary: the human rights clause today: assessing the problems and proposals

2.1. The content of human rights clauses

- References to human rights as essential elements do not always draw on precise concepts. Definitions of human rights, democracy or good governance may be vague, and their interpretation controversial. When references to human rights are vague, human rights clauses become meaningless and ineffectual. If they refer to texts that have no legal status within the national judicial structure of the signatory countries, they are technically ineffectual insofar as the conditions they lay down do not require an automatic and effective protection mechanism simply by virtue of the agreements being signed. More support must be given to efforts to put these mechanisms in place, otherwise clauses will be purely declaratory.

- Since the content of human rights clauses can vary depending on the agreement, the clauses give the impression that there is a hierarchy within human rights, with some human rights appearing to be more essential than others. Civil and political rights as well as economic, social and cultural rights are generally listed in all human rights clauses, but the necessary guarantee mechanisms are not uniformly implemented. In practice, the EU seems to place more emphasis on respect for civil and political rights than on economic, social and cultural rights.

2.2. The agreement negotiation phase: the inclusion of human rights clauses

- The inclusion of human rights clauses in agreements appears to be done 'selectively'[1], depending on commercial and political interests. To what extent does the state of the balance of power between the EU and the countries concerned influence the decision? (e.g.: Countries that represent a commercial interest are harassed less, China)

- The decision making process in negotiating human rights clauses lacks transparency. We might wonder how the Council's mandate is defined: the criteria for defining the limits that must not be exceeded do not appear to be the same for each country. What is the basis for the Council's mandate? How can the complete exclusion of the EP and civil society from this mandate be justified? It seems essential to make the negotiation process on the content of human rights clauses more transparent and to involve the EP, national parliaments, local civil society and independent experts.

- Additional obligations should not be imposed without taking into account how they will be effective in national law: ambitious clauses including specific legal texts referring to the content of the essential elements will remain purely declaratory if no provision is made for a policy to support the setting up of the necessary national mechanisms. The signatories must have the means to make the changes necessary to ensure respect for the essential elements in the long term.

[1] Bulterman M., *Human rights in the Treaty Relations of the European Community – Real Virtues or Virtual Reality?* Intersentia, 2001, pp. 252-258.

2.3. The basis for the discussion to decide whether to activate the human rights clause

- What criteria are used in deciding whether to trigger the application of human rights clauses? How 'objective' are these criteria? Political and commercial reasons sometimes appear to lie behind the indulgence of EU Member States towards some countries that violate human rights (historical links, special relationships).
  Example: Sanctions against Cameroon were blocked by France[2].

- We need an open and transparent approach based on independent indicators to enable human rights situations to be assessed. However, independent indicators should still be no more than a tool. They are not necessarily appropriate to the wide variety of situations and could result in rigid categorisation. Their use would be a step forward but under no circumstances would it be an ideal solution.

- Given that the decision making process appears not to be sufficiently transparent, how open is it to independent experts? What place do consultations with local civil society have in this process? NGOs, independent experts and the EP should definitely be involved in this process. Opening it up in this way would give legitimacy to the decision to apply the clause, giving it weight and giving the EU credibility on human rights. It seems particularly strange for the EP not to be involved in this decision making process: the ratification of external agreements is done in accordance with the assent procedure, so it is legitimate to wonder about the lack of EP consent in a suspension or cancellation procedure.

2.4. The application phase

[Application of the human rights clause refers to the methods for triggering it and the form in which it is done. Activating the human rights clause consists of a set of measures ranging from imposing sanctions to suspending or cancelling the agreement.]

- The imposition of sanctions must be accompanied by intermediate, progressive measures. There must be a detailed step-by-step process of applying sanctions so that progress can be made towards improvements.

- Sanctions must be accompanied by positive tools. This is the current trend, but it needs to be refined so that the results are not purely declaratory. Sanctions must assist initiatives to promote human rights and democracy. This assistance is part of a 'capacity building' perspective and includes, for example, increasing aid to civil society. This type of measure is seen as a sanction by a non-complying State, and the support of civil society enables more positive action than simply suspending relations. In order to be coherent and more effective, the human rights clause needs to provide for supporting initiatives promoting human rights and democracy.

- Activating the human rights clause must be part of the EU's human rights measures as a whole. The human rights clause needs to be backed up by other external policy tools (enhanced political dialogue for example) in order for the EU to be credible on the

[2] See Smith K., *The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective*?, Kluwer Law International, 1998.

international stage. This involves taking measures to increase the actual weight given to human rights in EU policy. The European Commission delegations already include a leader from civil society. Strengthening the position of those with these responsibilities would help to make the human rights clause work better. This role must be enhanced, and entrusted to people who have authority in the field (experts, or even academics) and have a strong position in the institutional hierarchy. The positions that they take need to be followed up more; their work should form a data information base to provide greater objectivity in the application of the human rights clause but also in the progressive lifting of sanctions.

3. Origins, legal basis and development of human rights clauses

3.1. International context[3]

For a long time the international community, through the major powers and international institutions, paid very little attention to the often chaotic political and economic management of Third World countries. In the 1970s, Western States and the financial institutions agreed with Third World leaders on the need to build strong, stable States. A relative consensus emerged that countries first need a certain level of development before they could think about democratic reforms[4]. Since the late 1980s, with the end of the Cold War, there has been a U-turn in thinking. The Bretton Woods institutions and, a little later, the countries themselves, began to say that good administration was essential for countries requesting international aid. Economic conditions were therefore the first to make an appearance. Their prime objective was not to promote democratisation, but rather to impose on countries receiving aid an obligation of transparency and of good management of the aid granted. The World Bank and the IMF then put in place structural adjustment and stabilisation programmes. However, the consequences of these plans are difficult for population groups that have already suffered from economic crises to bear. The attitude of the international institutions then became one of pressing authoritarian regimes to adopt democratic systems, because they think it would be easier for a regime with the legitimate backing of the people to bring in austerity policies. Gradually Western agencies made the connection between human rights, democracy and development, the thinking being that the latter is determined by the first two.

3.2. The first human rights clauses take shape at European level

The European Union (EU) was not immune to this way of thinking. Significantly, it considered the issue of respect for human rights in its external relations in the context of the Lomé Conventions with the African, Caribbean and Pacific countries (ACP). Bound by this agreement, the EU found itself in the uncomfortable situation of having to continue aid to countries that were massively violating human rights.

For the first time, a reference to human rights was therefore included in Article 5(2) of the Lomé IV Convention (1989). The provisions of this article closely linked human rights and development but did not provide for a sanction mechanism for human rights violations and did

[3] See Jean-Louis Atangana Amougou, *Conditionnalité juridique des aides et respect des droits fondamentaux*, in *La Conditionnalité juridique en Afrique*, Revue Afrilex, No 2, September 2001.

[4] The corruption of national elites suits former colonisers, see Jean-Louis Atangana Amougou, *L'Etat et les libertés publiques au Cameroun*, law thesis, Université Jean Moulin, Lyon III, 1999.

not make human rights an essential element of the agreement[5]. In 1990, this form of human rights clause was used again in agreement with Argentina. With a clearer definition of human rights, the clause therefore had greater force (this agreement's provisions on human rights would be repeated in various agreements with Latin American countries between 1990 and 1992)[6].

During the same period, the fall of the Berlin wall led the EU to pursue a policy of reunification of Europe and to position itself as an important player in the management of the conflict in the former Yugoslavia in order to put an end to massive human rights violations.

3.3. The link between human rights, democracy and development at European level: affirming political conditionality

That is why (among other reasons[7]) in 1991, the Commission adopted a Communication[8] to be followed by a Council Resolution on human rights, democracy and development[9].

This Resolution confirmed the interdependence of human rights and development and laid the foundations for future human rights policy in EU external relations[10]. It highlighted the universal and indivisible nature of human rights and emphasised the fact that development cooperation must promote not only economic and social rights but also civil and political liberties by means of representative democratic rule. The Council and the Member States decided to give priority in future action to a positive approach (positive conditionality, 'the carrot') involving active support for third countries that endeavour to respect these values, in particular by increasing assistance when substantive positive changes are seen. However, they allowed for the possibility of adopting negative measures in the event of grave and persistent violations of human rights or of democratic principles (negative conditionality: 'the stick'). Such measures would involve the reduction, suspension or removal of aid granted. However, they should not penalise the population or endanger humanitarian or emergency aid.

Based on this Resolution, the EU decided to make economic relations with third countries more systematically dependent on their respect for human rights by including a human rights clause in its agreements. However, this human rights clause is ineffective; legally it does not allow the agreement to be suspended, nor does it provide for sanctions or mechanisms to make it possible to respond. Its value is symbolic, and above all it is a reminder of the EU's commitment to human rights.

The EU therefore still has no direct recourse against human rights violations perpetrated in countries with which it has agreements. It cannot suspend or terminate an agreement without

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[5] Miller V., *The Human Rights Clause in the EU's External Agreements*, House of Commons Library, 16 April 2004, p. 12.

[6] On the content of the human rights clause and for a list of the agreements affected by this clause, see Miller V., *The Human Rights Clause in the EU's External Agreements*, House of Commons Library, 16 April 2004, p. 13.

[7] On the reasons for and stages in taking account of human rights in the EU's external policy, see Fierro E., *The EU's Approach to Human Rights Conditionality in Practice*, Martinus Nijhoff, 2003.

[8] Commission Communication on human rights, democracy and development cooperation, SEC (61) 91 of 25 March 1991.

[9] Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, 28 November 1991, Bull. EC 11/1991, 122-3.

[10] For an analysis of this Resolution and its scope, see P. Eeckhout, *External Relations of the European Union - Legal and Constitutional Foundations*, Oxford University Press, 2004, pp. 467-468.

linking that sanction to international provisions (custom, General Principles of Law laid down in the Vienna Convention of 1969 - VCLT -) allowing treaties to be broken[11].

3.4. Legal force of the human rights clause: the use of the legal concept of 'essential element'

From 1992, shortly after the cancellation of an agreement with Yugoslavia under these circumstances[12], clauses defining human rights and democratic principles as 'essential elements' of the agreement were introduced in cooperation agreements with Brazil and the Andean Pact countries as well as with the Baltic States and Albania.

The concept of 'essential elements' is vital in that it allows the Parties to suspend an agreement in full compliance with the Vienna Convention on the Law of Treaties [Article 60(3)(b) VCLT]:

> Article 60 Termination or suspension of the operation of a treaty as a consequence of its breach
>
> *'1. A material breach of a bilateral treaty by one of the Parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.*
>
> *2. A material breach of a multilateral treaty by one of the Parties entitles:*
>
> *(a) the other Parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:*
> *(i) in the relations between themselves and the defaulting State, or*
> *(ii) as between all the Parties;*
>
> *(b) a Party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;*
>
> *(c) any Party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one Party radically changes the position of every Party with respect to the further performance of its obligations under the treaty.*
>
> ***3. A material breach of a treaty, for the purposes of this article, consists in:***
>
> *(a) a repudiation of the treaty not sanctioned by the present Convention; or*
> ***(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.***
>
> *4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.*

[11] The Vienna Convention of 1969 (VCLT) codifies the law of treaties. Its provisions take up standards accepted as international custom (i.e. having universal value and applying to all subjects of international law except those who have expressed their opposition and have the status of persistent objector). As the EU is not a Party to the VCLT, it is bound by international custom but not by the procedural rules required by the Convention and therefore does not have to comply with the obligations of prior notification for the suspension or termination of treaties.

[12] Cooperation Agreement of 1983, the trade concessions of which were suspended by the Council in 1991 (No 3300/91 of 11 November 1991 - OJ 1991 L 315). The whole agreement was then suspended by a Decision of the Council and the Representatives of the Governments of the Member States, as the agreement was joint (OJ 1991 L315). For an explanation of the legal arguments that allowed a suspension in compliance with international standards, see Kuyper, *The European Community's Commercial Policy after 1992: The Legal Dimension*, Maresceau (ed), 1993 cited in Brandtner B. & Rosas A., *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, EJIL 9 (1998), p. 474.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.'

Human rights are now described as 'essential elements' for achieving the purpose or aim of agreements. Violating them is therefore a material breach of agreements and is treated in law as a ground for suspending them. This 'essential' clause also establishes human rights as a subject of common law and therefore also allows for positive actions.

It was, however, the Maastricht Treaty that first enshrined respect for human rights as one of the objectives of EU external policy[13]. The Court of Justice also had occasion to enshrine respect for human rights, through the use of the 'essential' clause in the EU's external agreements, as a sphere of competence devolved to the EC[14].

3.5. The 'essential' clause and the additional clause: the structural basis of human rights clauses

In a 1992 Declaration on relations with the States participating in the Organisation for Security and Cooperation in Europe (OSCE)[15], the Council announced that all agreements with those States would henceforth have an additional clause.

Initially, this clause was in the form of an explicit suspension clause, known as the Baltic clause. It allowed the Parties to suspend an agreement in whole or in part with immediate effect if a serious violation of the essential provisions occurred[16]. Its wording makes it difficult to apply in that it limits the suspension solely to serious violations of human rights (without further clarification) and does not provide for the establishment of a dialogue or notification.

It was replaced in practice by what is known as the Bulgarian clause[17]. This is a non-execution clause that introduces consultations (within the Association Council created by the agreement) and requires action taken to be in proportion to the violations. However, consultations leading to long and difficult negotiations with the sole aim of keeping the agreement in operation can also contribute to rendering the clause ineffective. The Bulgarian clause therefore had interpretative declarations as annexes to the agreements in which it was included, and it specifies in particular that 'cases of special urgency' are violations of an essential element of the agreement and allow immediate negative measures to be taken without conciliation[18].

This additional clause (initially provided for the OSCE countries) was gradually introduced into agreements with States in other geographical areas such as Africa and Asia[19].

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[13] See Article 12 EU and Article 177 EU then Article 181a introduced by the Treaty of Nice.
[14] Case C-268/94 *Portugal v Council*, CJEC, ECR 3 December 1996, I-6177.
[15] Bull. EC 5-1992, point 1.2.13
[16] Article 21(3) of the Agreement on trade and commercial and economic cooperation with Estonia (1992) OJ L 403/2.
[17] Article 118(2) of the Europe Agreement with Bulgaria (1994) OJ L 358/3
[18] See Riedel E. and Will M., *Human Rights Clauses in External Agreements of the EC* in Alston P. (ed), *The EU and Human Rights* (OUP, 1999), pp. 726-732 and P. Eeckhout, *External Relations of the European Union - Legal and Constitutional Foundation*, Oxford University Press, 2004, p. 476.
[19] Soriano M., *L'Union européenne et la protection des droits de l'homme dans la coopération au développement: le rôle de la conditionnalité politique*, Revue Trimestrielle des Droits de l'Homme, 2002.

The modalities of this Bulgarian clause along with those of the essential element clause are the basis for the standard formulation of current human rights clauses.

4. The current standard formulation of the human rights clause

In 1995, following a Communication from the Commission[20], the Council adopted a Decision standardising the clause to be included in future Community agreements with third countries with the aim of ensuring consistency in the text used and its application[21].

The standard human rights clause is defined as follows:

- An essential clause = A provision stipulating that respect for human rights and democratic principles as laid down in the Universal Declaration on Human Rights (UDHR) [or in a European context, the Helsinki Final Act and the Charter of Paris for a new Europe] underpins the internal and external policies of the Parties and constitutes an essential element of the agreement.

- An additional clause = A final provision on non-execution of the agreement requires each Party to consult the other before taking measures save in cases of special urgency. It clarifies that cases of special urgency include breaches of an essential element of the agreement. It also appears that the measures envisaged must respect the principle of proportionality between the breach in question and the reaction.

Measures taken under the human rights clause may take different forms:
(By increasing order of severity, see Annex 2 of the Communication from the European Commission)

- confidential or public measures
- alteration of the content of the cooperation programme
- reduction of cultural, scientific and technical cooperation programmes
- postponement of a Joint Committee meeting
- suspension of high-level bilateral contacts
- postponement of new projects
- refusal to follow up partners' initiatives
- trade embargos
- suspension of arms sales
- suspension of military cooperation to suspension of cooperation

Since 1995, bilateral trade agreements and the various types of association and cooperation agreements between the EU and third countries or regional organisations have included a human rights clause based on this model.

Exceptions[22]:

[20] COM (95)216 of 23 May 1995 on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries
[21] Council press release 7481/95, 29 May 1995

- There are no human rights clauses in EU agreements with third countries in the fisheries, agriculture and textile sectors
- There is no trade agreement with Cuba[23]
- There is no human rights clause in old agreements with China
- There is no human rights clause in agreements with several ASEAN countries, the United States, Canada, Japan, Australia and New Zealand[24].

Decision making procedure[25]:

According to Article 300(2) of the Treaty of Amsterdam, the suspension or cancellation of a treaty or any of its provisions may be carried out only by the Council on a proposal from the Commission. The EP must be immediately and fully informed of such decisions.

The question of whether the Council acts by a qualified majority or unanimously depends on the legal basis of the treaty to be suspended. However, for external relations, unanimity is often the rule.

Examples[26]:

- Economic, financial and technical cooperation treaties with third countries treaties based on Articles 181 EC (ex Article 130y) and 181a EC] = qualified majority required to adopt measures.

- Association agreements and the Europe Agreements [shared competence treaties based on Article 310 EC (ex Article 238) in conjunction with Article 300 EC (ex Article 228)] = unanimous vote required to adopt measures or suspend.

- Partnership and association agreements [shared competence treaties based on Article 133 EC (common trade policy) and Article 308 EC in conjunction with Article 300 EC (ex Article 228)] = unanimous vote required to adopt measures or suspend.

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[22] Bartels L., *A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements, Mediterranean Politics*, Vol. 9, No 3 (Autumn 2004), p. 387.

[23] Cuba is the only country in Latin America that does not have a cooperation agreement with the EC. Cooperation between Cuba and the EU was initially guided by the EU Common Position of 2 December 1996. Following the arrest of 73 dissidents in 2003, the EU decided to strengthen its position towards Cuba by imposing diplomatic sanctions. However, in December 2004, then in June 2005, the EU amended its Common Position and restored diplomatic relations with Cuba. On the other hand, on 30 April 2003, the Commission decided to refuse to examine the Cuban application for membership of the Cotonou Agreement. Finally, Cuba has refused all aid from the EU since June 2003.

[24] In 1997, Australia and New Zealand refused to sign a cooperation agreement owing to the EU's insistence on including human rights clauses. Cooperation was therefore established through a Joint Declaration. The United States and Canada have specific relations with the EU based on exchanges of views on human rights.

[25] See E. Riedel & M. Will, *Human rights clauses in external agreements of the EC*

[26] Miller V., *The Human Rights Clause in the EU's External Agreements*, House of Commons Library, 16 April 2004, p. 25.

- Stabilisation and association agreements [shared competence treaties based on Articles 300 and 310] = unanimous vote required to adopt measures or suspend.

The EP is totally excluded from the process when ratification by assent is required for the entry into force of cooperation and association treaties. In the same way, national parliaments are asked to make a decision on the ratification of agreements reached with the EU, but are not systematically involved in the process of suspending or cancelling agreements.

Also, only the executive authorities are included in the consultation assemblies (or councils) established for the application of the human rights clause. This means that neither national parliaments nor the EP take part in discussions to negotiate sanctions.

It is interesting to consider the reasons why parliaments are excluded from an instrument that is in fact meant to promote democratic principles. In short, it is also important to establish mandatory mechanisms for consultation of parliaments in all types of agreements.

5. General comments on the use of human rights clauses

The link between establishing contractual relations, granting trade preferences and Community aid on the one hand, and respect for human rights, democracy and the rule of law on the other hand needs to be re-positioned in the EU's overall approach to external relations. The inclusion of human rights clauses in the EU's external agreements is one tool of this interdependence. They therefore need to be envisaged not only from the point of view of the other forms that conditionality may take, such as prerequisites, social clauses[27] or incentives, but also from the point of view of other EU external policy instruments such as political dialogue or common actions and positions.

It is also important to highlight the positive approach that the EU seeks to prioritise in the promotion of human rights in external relations. On 8 May 2001, a Communication from the Commission[28] stressed that the inclusion of a human rights clause does not necessarily signify a punitive approach. This step should not prevent political dialogue and an open approach. According to the EU Annual Report on Human Rights 2003[29], positive measures must enable us to support actions to promote democracy and human rights, provide technical assistance to implement international legal standards for the protection of human rights, and prevent crises by maintaining a consistent and sustained dialogue.

The human rights clause is a remarkable step forward in that it constitutes a recognised legal instrument. Respecting its provisions is therefore a binding legal obligation.

All human rights clauses work on the same model: an 'essential element' clause stating that respect for human rights and democratic principles constitute essential elements of the agreement / a non-execution clause defining appropriate measures that may be taken following

[27] This procedure was used against the Republic of Myanmar (Burma) for forced labour practices and resulted in the preferences granted to that country under the system of generalised preferences being effectively withdrawn from 1997. (Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, OJ L 85, 27.03.1997, p. 3)

[28] Com 2001 (252)

[29] EU Annual Report on Human Rights, 10 October 2003, 13449/03, COHOM 29.

the consultation procedure in the event of failure to comply with the obligations of the agreement / a clause defining the essential obligations for achieving the purpose or aim of the agreement or cases of special urgency.

However, the content of these clauses is negotiated and therefore variable. The extent to which the human rights requirements are operational depends on whether they refer to pre-defined and internationally accepted legal concepts. The effectiveness of the clauses depends above all on the provisions and flexibility of the non-execution clause. So far, the human rights clause has been activated only vis-à-vis the ACP countries.

The EU's insistence on including human rights clauses in its cooperation agreements with third countries has, however, prevented the signing of some agreements. This was the case with New Zealand and Australia in 1997. In the absence of a cooperation agreement, the EU and these countries signed a Joint Declaration. This was also the case with China, with which the EU now has an enhanced political dialogue exclusively based on human rights.

However, in practical terms the scope of the human rights clause is limited in that it is not applied (except in the context of the Cotonou Agreement).

Various reasons can be put forward to explain the poor results of this clause:

- The human rights clause is selective[30] and applied according to the state of the balance of power between the EU and the countries concerned. (e.g.: Countries that represent a commercial interest are harassed less)
- Political reasons lie behind the indulgence of the EU Member States towards some countries that violate human rights (historical links, special relationships).
- There are no objective, independent criteria to assess human rights situations that should lead to the application of the clause or to measure progress achieved under pressure from the EU.
- The inertia of EU bureaucracy makes it difficult to take a decision[31].
- The decision making process to trigger the human rights clause lacks transparency: decisions in the Council, debates that are not open to independent experts (NGOs).
- Human rights clauses depend on an analysis by politicians who do not assess external policies in a realistic way: despite the more significant role given to ethics nowadays, external policy operates on two levels, based on interests and principles that cannot always be reconciled[32].
- Since the content of human rights clauses can vary depending on the agreement, the clauses give the impression that there is a hierarchy within human rights, with some human rights appearing to be more essential than others.
- References to human rights as essential elements do not always mention precise concepts. Definitions of human rights, democracy or good governance may be vague, and their interpretation controversial. When references to human rights are vague, the human rights

[30] Bulterman M., *Human rights in the Treaty Relations of the European Community - Real Virtues or Virtual Reality?* Intersentia, 2001, pp. 252-258.
[31] Schmid D. *The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership's True Hierarchy of Objectives?* Mediterranean Politics, Vol. 9, No 3 (Autumn 2004), p. 401.
[32] Barrios C., *Spotlight on Democracy Promotion Enhancing the European Neighbourhood Policy*, policy paper commissioned by the EP's Committee on Foreign Affairs (EP/ExPol/2005/03)

clauses become meaningless and ineffectual. If they refer to texts that are not part of the national judicial structure of the signatory countries, they are technically ineffectual insofar as the conditions they lay down do not have an automatic and effective protection mechanism simply by the agreements being signed. More support must be given to efforts to put these mechanisms in place, otherwise clauses will be purely declaratory.

6. The human rights clause in the Cotonou Agreement

6.1. The Cotonou Agreement and human rights clauses

Articles 9 and 96 of the Cotonou Agreement signed on 23 May 2000 respectively contain an 'essential element' clause and a 'non-execution' clause. The human rights considered as essential obligations with which to comply are defined as follows in Article 9(2):

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

With no explicit reference to the UDHR, this clause takes up the standards constituting international custom, and has the merit of enshrining economic and social rights as well as civil and political rights.

The Cotonou Agreement also includes the creation of a 'fundamental element'. Good governance is now a fundamental element that does not lead to suspension of the agreement (except in serious cases of corruption) but the application of a special procedure laid down in Article 97. Consultations may be organised at the request of either Party; if they do not lead to a solution, appropriate measures proportional to the seriousness of the situation may be taken.

It should also be noted that the Cotonou Agreement is interesting in terms of the enhanced, permanent and relatively flexible political dialogue (Article 8). This dialogue process is an important instrument for promoting respect for human rights and therefore preventing violations that would result in the application of the non-execution clause. However, this dialogue is not used in the best way. It is too often implemented by the EU solely to warn against violations and announce future sanctions. Giving warnings and raising the spectre of possible condemnation may be a sufficient and effective method of applying pressure. However, this is not the only function of the dialogue, which should be more regular and not set up only in problematic situations. In practice, holding dialogue is also often associated with the start of sanctions, when it should be held regularly[33]. The use of dialogue as a means of prevention in the area of human rights should be developed more with a view to supporting third countries in the long term than simply reacting, as a last resort before suspension, to violations that are already evident.

6.2. The practice of human rights clauses in the Cotonou Agreement

[33] This was the case with Zimbabwe, as the EC proposed entering into political dialogue under Article 8 at the beginning of 2001 only in the hope of not having to invoke Article 96, when this type of dialogue could have been initiated in a more sustained way and not with this sole purpose.

The only sanctions arising from human rights clauses were directed at the ACP countries, which means that the Cotonou clause can be said to be the only one to have worked relatively well.

However, it also indicates that application of the human rights clause is selective[34]. It could be supposed that the human rights clause in the Cotonou Agreements works because the countries concerned have little economic clout. They are among the poorest countries in the world and are very dependent on EU aid and therefore more inclined to make the required effort. In the same way, they do not have sufficient clout to enter into a balance of power with the EU that would be more advantageous to them.

In addition, the way decisions are made about activating human rights clauses (in general as well as in the context of Cotonou) is not transparent. It is by definition subject to the interests of the Member States or of certain Member States and requires unanimity. Their activation is dependent on elements that are sometimes very remote from human rights[35].

However, even drawing up a human rights clause is a step forward because the EU was able to use Article 96 to sanction countries violating human rights and/or democratic principles. It is the application of this clause through consultations that makes the human rights clause relatively effective with regard to the ACP countries. The flexibility introduced by Article 96 means that the dialogue can be kept open and 'intelligent sanctions' can be applied. This enables better use of the consultation process as a crisis resolution tool. Under pressure, progress can then be made because a strong emphasis is placed on the responsibility of the country concerned by taking a close interest in the measures it takes to remedy the situation. An important condition for sanctions to work well is that they must be targeted and support a range of other measures to advance human rights in a positive way. Finally, the Article is used only in cases of disputes between the Parties on guaranteeing essential elements of cooperation but it does not necessarily mean a breakdown of informal political dialogue. (This consideration, which is included in the Cotonou text, is not sufficiently implemented in practice).

- Examples of the use of the human rights clause:

The case of Togo

Article 96 was implemented for the first time against Togo. The Council, having observed the lack of transparency in the presidential elections in Togo in June 1998, decided, at the initiative of the Commission, to open consultations with this country[36] (in accordance with the procedure in Article 366a of the Lomé Convention, which became Article 96 of the Cotonou Agreement). The Council cited the failure by Togo to fulfil its obligations under Article 5 of the Convention. In September 1998, the Council asked the Togolese Government to submit information on the measures it had taken, or envisaged taking, to remedy the situation[37]. Given that no solution was found for this situation and as no specific measures were taken by the Togolese authorities, on 14 December the Council decided to close the consultations undertaken and not to resume cooperation with the Government, while avoiding penalising civil society.

The case of Niger

[34] Bulterman M., *Human rights in the Treaty Relations of the European Community - Real Virtues or Virtual Reality?* Intersentia, 2001, pp. 252-258.
[35] Barrios C., *Spotlight on Democracy Promotion Enhancing the European Neighbourhood Policy*, policy paper commissioned by the EP's Committee on Foreign Affairs (EP/ExPol/2005/03)
[36] Bull. EC 7/8-1998, point 1.4.150
[37] Bull. EC 9-1998, point 1.3.143

The Council decided to open consultations with Niger following the military coup of 9 April 1999. They were closed in July, given the commitments made by the Niger authorities to implement a programme of transition towards democracy.

The case of the Comoros

A similar situation occurred with the Comoros where following a military coup the Council opened consultations with the authorities who then reaffirmed their commitment to restoring democracy by the end of April 2000. The Council decided to close the consultations in January 2000, but cooperation has been gradually re-established on condition of real progress being made by that country in restoring democratic rule.

The case of Zimbabwe

In 2002, the Council opened the consultation procedure with Zimbabwe, in view of the serious violations of human rights committed in that country and the Government's attitude of preventing European observers and the media from having access to the elections. On 18 February 2002, the Council decided to put an end to the consultations and adopted the following restrictive measures: prohibiting the direct or indirect sale or supply of equipment capable of being used to repress the people of Zimbabwe, freezing all funds, financial assets or economic resources of natural or legal persons engaged in activities that seriously undermine democracy, respect for human rights and the rule of law in Zimbabwe, and suspending financial support for all projects except those in direct support of the population.

The case of Sudan

'Formal EC-Sudan development co-operation was suspended in March 1990 and ongoing development assistance was phased out due to concerns about lack of respect for human rights and democracy, and because of the civil war. In November 1999, the EU and Sudan started a political dialogue aimed at addressing concerns about human rights, good governance and rule of law and democratisation. Parallel discussions were held in 2002 and 2003 with the SPLM/A. In June 2002, after acknowledging improvements in several areas of the dialogue, the EU pledged to fully normalise relations and to resume co-operation as soon as a peace agreement is signed between the GoS and the SPLM/A. ... Full cooperation can start as soon as a political settlement of the conflict in southern Sudan is reached. ... In December 2003 the EU sent a Troika mission to Sudan and reconfirmed its continuation of the political dialogue. During this mission, particular attention was given to the crisis in Darfur. ... Although formal development assistance to the Sudan could not be implemented since 1990, the EU has provided substantial humanitarian assistance to the victims of the civil war and natural disasters, according to basic humanitarian principles.'[38]

On 25 January 2005, the European Commission and Sudan signed a Country Strategy Paper to allow gradual resumption of cooperation. The European Parliament was informed and reacted against this initiative through its President, Josep Borrell. In a letter of 10 February 2005 addressed to José Manuel Barroso, Josep Borrell stated that the European Parliament was not in favour of resuming cooperation because of the situation in Darfur and pointed out that 'it would therefore have been right for Parliament to be consulted, or at least informed in writing, or through the Commissioner speaking before the appropriate committee'.

Consultations were also conducted with Guinea Bissau, Côte d'Ivoire, Haiti and the Fiji Islands.

[38] See European Commission website, DG RELEX.
http://europa.eu.int/comm/development/body/country/country_home_en.cfm?cid=sd&status=new

7. The human rights clause in Euro-Mediterranean relations[39]

7.1. The EU and the countries of the Euro-Mediterranean Area

The Euro-Mediterranean Partnership (EMP) dates back to the mid 1970s, as in 1976 cooperation agreements were signed between the Community and three Maghreb countries. This bilateral framework has developed and constitutes a large proportion of the EMP: it covers twelve countries or territories in the Mediterranean region (Morocco, Algeria, Tunisia, Egypt, Israel, Jordan, the Palestinian Authority, Lebanon, Syria, Turkey, Cyprus and Malta). Since 1995 the EMP has had a multilateral dimension added through the Barcelona Declaration. This Joint Declaration was adopted on 27-28 November 1995 by the twenty-seven partners (the EU-15 and the twelve EMP members).

7.1.1. Respect for fundamental rights within the bilateral framework

The bilateral association agreements concluded between the EU and the 10 Mediterranean countries that are currently Parties to the EMP vary from one partner to the next, although they do have a common structure, which includes the requirement to respect fundamental rights and democracy as essential elements of the agreement (Article 2).

Although this clause has been cited numerous times in the EMP since the adoption of the Barcelona Declaration, it has never resulted in coercive measures[40]. This lack of capacity to bring sanctions is partly explained by the specific political constraints on EU decision making and by the spirit of consensus that reigns in the EMP[41].

- Countries affected:

Article 2 of the association agreements affects nine of the twelve EMP member states:

- Tunisia, Israel, Morocco, Jordan, the Palestinian Authority, Egypt, Lebanon, Algeria and Syria.

- Turkey concluded specific 'first generation' association agreements. As a candidate for accession, it must incorporate the *acquis communautaire*, which includes the essential requirement of respect for fundamental rights. Turkey is in a particular situation.

- Cyprus and Malta are now EU countries but, like Turkey, had concluded specific 'first generation' association agreements.

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[39] For this part, see Bartels L., *A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements* and Schmid D., *The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership's True Hierarchy of Objectives?* in Mediterranean Politics, Vol. 9, No. 3 (Autumn 2004)

[40] For a list of the occasions that have resulted in the citing of human rights clauses, see Bartels L., *A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements, Mediterranean Politics*, Vol. 9, No 3 (Autumn 2004), p. 375.

[41] See Schmid D., *The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership's True Hierarchy of Objectives?* Mediterranean Politics, Vol. 9, No 3 (Autumn 2004), p. 404.

- Wording of Article 2:

The most common wording of Article 2 seems to be as follows:

> *'Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles which guide their domestic and international policies and constitute an essential element of the Agreement.'*

By associating human rights with essential elements of the agreement, this provision creates a human rights clause, which has general application and applies horizontally to the whole agreement. However, the wording of this article varies depending on the agreement:

- The wording may refer to the UDHR:

(Palestine, Jordan, Israel, Egypt, Lebanon – but also Algeria and Morocco in different terms)

In these cases, the effect of the human rights clause is to require respect for all the rights listed in the UDHR, thus civil and political rights as well as economic, social and cultural rights. However, not all countries have ratified the UDHR and not all the rights listed in it have the status of international custom. For example, the principle of democracy is not considered as a customary right. So the human rights clause does not simply make the agreement dependent on respect for the international obligations of each country, but imposes new obligations. Moreover, imposing requirements is not enough to make them effectual if there are no accompanying guarantees (legal recognition and protection mechanisms must exist in national law[42]).

- The wording may be more vague:

(Tunisia – Algeria and Morocco?)

As human rights and democratic principles are not defined by reference to specific regulations, the human rights clause in the agreement with Tunisia is limited to human rights and democratic principles regarded as international custom.

Although the clauses included in the agreements with Algeria and Morocco refer to the UDHR, one might wonder whether their wording does not also limit their scope to protecting only those standards regarded as international custom.

In all cases, civil and political human rights as well as economic, social and cultural rights are guaranteed. However, the practice of the EU institutions is to only take into account civil and political rights and the right to work[43].

- Non-execution clauses[44]:

[42] See Schmid D., *The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership's True Hierarchy of Objectives?* Mediterranean Politics, Vol. 9, No 3 (Autumn 2004), p. 400.

[43] See Bartels L., *A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements, Mediterranean Politics*, Vol. 9, No 3 (Autumn 2004), p. 386.

[44] See Bartels L., *A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements, Mediterranean Politics*, Vol. 9, No 3 (Autumn 2004), p. 378-386.

It is the non-execution clause that enables the essential clause to produce effects. However, in the EMP agreements, the non-execution clause does not expressly refer to the essential clause, because it applies to all the obligations contained in the association agreement. Most importantly, it must regulate the appropriate measures that can be taken in the event of serious loss owing to imports or dumping, so interpreting it and applying it to human rights violations poses problems. It is a matter of knowing whether the wording of essential clauses introduces obligations or conditions[45] since the non-execution clause will be applied only if there is a violation of the obligations accepted in the agreement. If they are only conditions, the non-execution clause will be operational only if there are violations of the essential clause. However, this will not render the clause ineffective, because it can lead to the suspension of the agreement under the circumstances laid down in the Vienna Convention.

However, generally the first paragraph of the non-execution clause stipulates:

'The Contracting Parties shall take any general or specific measures required to fulfil their obligations under this agreement. They shall see to it that the objectives of this agreement are attained.'

If we consider that the essential clause establishes obligations, this wording suggests that the Parties have the positive obligation to do everything they can to fulfil their obligations. If we continue with this analysis, this could mean that a violation of the essential elements could be caused as much by a positive action by governments as by a failure such as not implementing effective mechanisms to protect human rights in the national structure.

The appropriate measures to be taken in the event of inability to comply with the provisions of the essential clause are not laid down in the non-execution clauses. The measures would probably essentially be in the form of suspending the benefits granted by the agreement[46]. However, one might also wonder whether the measures adopted could be positive measures in the form of financial support from the EU. The majority of the Euro-Mediterranean agreements provide for financial cooperation, but are the funds provided for that purpose also available to fund additional projects under the appropriate measures for non-execution? Funding positive measures under the non-execution clause could therefore be envisaged, so the EU should provide an additional basis for funds used specifically for human rights purposes when a Party does not manage to satisfy the requirements of the agreement. At present, EU aid to Euro-Mediterranean countries is guaranteed by regulations that are legally separate from association agreements: direct aid via MEDA and aid to NGOs and International Organisations through the European Initiative for Democracy and Human Rights (EIDHR).

If negative sanctions have to be adopted, they must 'least disturb the functioning of the agreement'. This requires only measures with a very limited scope. In short, the measures must be proportional to the violations, except in the agreements with Tunisia and Israel. It is thus clear that the agreement may be totally suspended only in extreme cases.

- Procedures to be followed:

The EMP established two types of procedure for applying the human rights clause. There is a procedure for activating the clause within the Association Council (created by the Euro-Mediterranean Agreements) in which the Parties have an equal number of votes, for 'normal' violations. In cases of 'special urgency' or 'material breach', the Parties may act unilaterally

[45] See the arguments in the debate on this issue, Bartels, op.cit., p. 379-381.
[46] The Communication from the Commission in 1995 takes this line, see COM (95) 216 final, 23 May 1995.

without even informing the Association Council. It is specified that cases of special urgency are cases of material breach, and a material breach is a repudiation of the agreement under conditions not sanctioned by international law or a violation of the essential clause (Article 2). Therefore, whatever the violation of the essential clause (a normal or serious violation), it constitutes a material breach of the agreement and may lead to a unilateral decision.

In the agreement with Egypt, unilateral measures may be taken only in cases of 'material breach' as it is defined, therefore a 'normal' violation may be sanctioned unilaterally.

In the agreements with Tunisia and Israel, unilateral measures may be taken in cases of 'special urgency' without this concept being further defined.

In all the other Euro-Mediterranean agreements, unilateral measures may be taken in all cases of violations of democratic principles and human rights protected by the essential clause.

It is also important to note the strengthening of interparliamentary dialogue in the Euro-Mediterranean Parliamentary Assembly (established following decisions taken in April 2002 at the Ministerial Euro-Mediterranean Conference in Valencia, and officially adopted at the Conference in Naples on 2 and 3 December 2003[47]). The principal task of the new assembly is therefore parliamentary monitoring of the Euro-Mediterranean association agreements on questions of democratisation and human rights. This trend of associating parliamentary activities with the mechanisms of the human rights clause is something to be highlighted and should be more strongly encouraged.

7.1.2. Respect for fundamental rights in the Barcelona Declaration

The multilateral framework is presented as a general version of the association agreements. The same themes are covered but from a more general perspective, although the Barcelona Declaration does not legally bind its signatories. The twelve countries or territories of the Mediterranean region that helped to draw up the Barcelona Declaration thereby commit to a process of partnership with three components:

- enhanced and regular political dialogue ('political and security partnership')
- development of economic and financial cooperation ('economic and financial partnership')
- increased importance of the social, cultural and human dimension ('partnership in social, cultural and human affairs').

The three components of political, economic and cultural partnership are interdependent. It is about creating a framework for Euro-Mediterranean cooperation. The EMP primarily has political and economic objectives, but respect for human rights and democracy is explicitly mentioned in the Barcelona Declaration as a condition for these objectives to be achieved. References to economic and social rights appear in the second and third components, but the most comprehensive reference is in the first component, in which the Parties undertake to respect a list of rights and democratic principles[48]. The Barcelona Declaration is not a document that carries legal obligations, however it can have a legal effect as a basis for interpreting all the human rights clauses signed in the association agreements in the same way[49]. It offers general guidelines for the association agreements and reinforces the obligation to respect human rights.

[47] See also Resolution P5_TA-PROV(2003)0518 adopted on 20 November 2003.

[48] EU Council, 1995.

[49] Bartels L., *A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements, Mediterranean Politics*, Vol. 9, No 3 (Autumn 2004), p. 372-373.

The MEDA programme is the EU's main financial instrument for implementing the EMP (mainly through programmes at national level conducted bilaterally and, to a lesser extent, regional activities conducted multilaterally). This programme offers technical and financial assistance to Mediterranean partners, and its objectives derive directly from the Barcelona Declaration. The MEDA Regulation[50] also contains an essential elements clause[51] in Article 3:

'This regulation is based on respect for democratic principles and the rule of law and also for human rights and fundamental freedoms, which constitute an essential element thereof, the violation of which element will justify the adoption of appropriate measures.'

The wording of this clause poses the same problems of interpretation as the human rights clauses inserted in the bilateral agreements. Here, as in the human rights clause in the agreement with Tunisia, it can be supposed that human rights constituting essential elements refer to the human rights and democratic principles that have the force of international custom. However, the MEDA Regulation is a legally autonomous instrument, and must therefore be interpreted in the light of EU provisions: human rights must be protected in accordance with EU law (direct reference to the ECHR) and not according to international public law.

8. The human rights clause in relations with Latin America

8.1. The EU and the countries of Latin America

(Source: Europa website, http://europa.eu.int/scadplus/leg/en/lvb/r14004.htm)

The EU's relations with Latin America as a whole comprise two bi-regional components:

- The political dialogue with the Rio Group
- The Summits between the Heads of State and Government of the EU, Latin America and the Caribbean[52]

The EU also has special relations with regional organisations and specific countries:

• With Central America (Costa Rica, Belize, El Salvador, Guatemala, Honduras, Nicaragua and Panama), cooperation is based on the 1993 framework agreement, which remains valid until the ratification and entry into force of the new political dialogue and cooperation agreement signed in December 2003. The renewal of the San José political dialogue in 1996 and the Florence Declaration of the same year contributed to giving new impetus to the EU's involvement in the region's development. Emphasis is placed on consolidating the rule of law, modernising government, social policies, trade development and regional integration.

[50] See the 1996 MEDA Regulation (Council Regulation (EC) No 1488/96) amended in 2000. It is now referred to as MEDA II.

[51] On the essential elements clause introduced into the MEDA Regulation, see Bartels L., *A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements, Mediterranean Politics*, Vol. 9, No 3 (Autumn 2004), p. 375.

[52] Rio Summit of 28 and 29 June 1999; Madrid Summit of 17 and 18 May 2002; Guadalajara Summit of 28 May 2004.

• With the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela), the EU instituted a framework for political dialogue in 1996, known as the Rome Declaration, which provides for meetings at presidential and ministerial level. In December 2003, the dialogue resulted in the signing of a political dialogue and cooperation agreement which will replace the 1996 Declaration once it is ratified. Combating drug production and trafficking is one of the main issues in the region and is the subject of a high-level dialogue between the EU and the Andean Community. The Andean countries are beneficiaries of the GSP in their trade relations with the EU.

• In the case of Mercosur (Argentina, Brazil, Paraguay and Uruguay), the basic instrument is the interregional EU-Mercosur framework cooperation agreement (signed in December 1995 and which entered into force on 1 July 1999). It aims at enhancing political dialogue, progressively establishing a free-trade area and deepening cooperation.

• With Mexico, an economic partnership, political coordination and cooperation agreement (global agreement) was signed in 1997 and entered into force on 1 October 2000. There is also an interim agreement on trade. With these agreements, the EU and Mexico have embarked on an enhanced political dialogue, the liberalisation of their trade through the establishment of a free-trade area and the introduction of cooperation instruments.

• The EU's relations with Chile are based on the 1996 framework agreement for cooperation, which replaced the 1990 agreement. In November 2002, an association agreement was signed and some provisions (trade, institutional framework, etc.) have been in force on a transitional basis since February 2003.

8.2. Human rights clauses and these agreements

All the agreements made between Latin America and the EU include a human rights clause. However, there is no mechanism in place for applying the clause and in practice it is limited to being nothing more than a declaration of intent. The human rights clause has two provisions, an 'essential element' provision and a non-execution clause.

- In all cases, the essential clause always includes a reference to the Universal Declaration of Human Rights as an essential element of the agreement.

• The EU-Central America and EU-Andean Community political dialogue and cooperation agreements contain an essential clause defined in Article 1, as does the bilateral cooperation agreement with Chile, in which the wording of the clause is identical:

Article 1 Principles

1. *Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, as well as for the principle of the rule of law, underpins the internal and international policies of the Parties and constitutes an essential element of this Agreement.*

The reference to 'the rule of law' seems unnecessary. It does not refer to any specific legal provision. Moreover, it is the democratic principles and certain fundamental human rights enshrined in the UDHR that define the principle of the rule of law.

• The EU-Mercosur interregional cooperation agreement and the EU-Mexico cooperation agreement also contain an essential clause in Article 1. Although the reference to the 'principle of the rule of law' is not included, the content of the clause is identical to the above essential clauses.

Article 1 Basis for cooperation

Respect for the democratic principles and fundamental human rights established by the Universal Declaration of Human Rights inspires the domestic and external policies of the Parties and constitutes an essential element of this Agreement.

- The non-execution clause always includes a reference to appropriate measures and immediate appropriate measures.

• The EU-Central America and EU-Andean Community political dialogue and cooperation agreements have a non-execution clause in Article 56 of each agreement. Article 58 of the EU-Mexico agreement and Article 200 of the EU-Chile agreement also have such a clause. The wording is identical in the four agreements.

• The EU-Mercosur interregional cooperation agreement also has a non-execution clause defined in Article 35. Although the wording of the clause is different from the above clauses, their content is essentially identical.

As in the Euro-Mediterranean agreements, the non-execution clause does not expressly refer to the essential clause since it applies to all the obligations in the association agreement but the Parties have a positive obligation to do everything that they can to fulfil their obligations.

If one of the Parties fails to fulfil the obligations in the agreement, the dispute must be dealt with using appropriate measures in the Joint Committee created by the agreement. In the context of this provision, the EU-Mercosur agreement does not require any predetermined deadline for monitoring by the Joint Committee. The EU-Andean Community, EU-Central America, EU-Mexico and EU-Chile agreements stipulate that before taking appropriate measures, the Party that considers that the other failed to fulfil its obligations must supply the Joint Committee within 30 days with all the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. However, in all the agreements, the selection of measures must give priority to those which least disturb the functioning of the Agreement. These measures are not defined in the agreement, but they must be notified immediately to the Joint Committee and shall be the subject of consultations in the Committee if the other Party so requests. It seems essential for the clause to function properly for practice to place an emphasis on positive measures.

However, each Party may also immediately take the appropriate measures in accordance with international law, in:

- 'cases of special urgency' for the EU-Mercosur and EU-Mexico agreements.
- cases of denunciation of the agreement not sanctioned by the general rules of international law or a violation by the other Party of the essential elements of the agreement for the EU-Andean Community, EU-Central America and EU-Chile agreements.

This difference in wording does not have any practical consequences insofar as cases of special urgency are defined in the EU-Mercosur and EU-Mexico agreements as either a denunciation of the agreement not sanctioned by the general rules of international law, or a violation by the other Party of the essential elements of the agreement.

- Political dialogue, working groups and participation from civil society[53]

The agreements binding the EU and third countries generally allow for the possibility of the Parties establishing a special working group in charge of monitoring a specific issue of the implementation of the agreement. This is particularly the case for all the agreements signed by the European Union since 2000. As regards the agreements made with Latin America, we can cite:

- EU-Chile agreement (signed on 18 November 2002): 'The Association Council may decide to set up any Special Committee.' (Article 7).

- EU-Mexico agreement: 'The Joint Council may decide to set up any other special committee or body to assist it in the performance of its duties.' (Article 49)

These working groups should be created on the subject of human rights, whether civil, political, economic, social or cultural rights, in order to examine these issues in more depth in the context of the political dialogue taking place under the agreement. Although human rights currently appear to be covered more or less systematically during meetings that take place under agreements with a human rights clause, the short duration of these meetings combined with a heavy agenda mean that human rights cannot be discussed in depth. Establishing specific working groups on these matters should overcome this handicap. These working groups would involve officials from both Parties to the agreement, but also representatives of civil society. Currently this participation from civil society is not expressly provided for in the agreements; however, the ministerial body is sovereign and may decide not only to create such a working group, but also its composition. These members of civil society would be chosen according to how representative they were, and would come from both Parties to the agreement (the EU and the third country in question). They would be representatives with real expertise in the field of human rights. This deeper dialogue, involving civil society, would enable us to get to the heart of human rights issues, in a spirit of dialogue, cooperation and reciprocity. The working group could therefore produce proposals for cooperation on human rights. Individual cases could also be dealt with in this context. It is, however, essential that this deeper dialogue does not end up removing the issue of human rights from the agenda of the top-level meetings, such as ministerial meetings that take place under the agreement. This mechanism must not in any way result in the issue of human rights being kept within a technical group and out of the political field. On the contrary, the conclusions and recommendations of this working group must be passed on to the Parties to the agreement, who will use them in the enhanced political dialogue.

The place reserved for civil society in agreements binding the EU to third countries is variable, and the most complete provisions that leave the most room for non-State involvement

[53] See FIDH comments, *Proposals with regard to the implementation of the Human Rights clause on the occasion of the Fourth EU Human Rights Forum*, December 2002, and FIDH comments of 31 October 2003 on the EU-Central America and EU-Andean Pact agreements.

are in the Cotonou Agreement. The agreement signed between the European Union and Chile also makes room for civil society in a provision that is visibly inspired by the Cotonou Agreement, while significantly reducing its scope. This provision (Article 48) states that civil society *may* be consulted on cooperation policies and strategies, while the Cotonou Agreement states that it *must* be consulted (Article 4).

Article 48: Participation of civil society in cooperation

The Parties recognise the complementary role and potential contribution of civil society (social interlocutors and Non Governmental Organisations) in the cooperation process. To that end, subject to the legal and administrative provisions of each Party, civil society actors may:
(a) be informed about and participate in consultations on cooperation policies and strategies, including strategic priorities, particularly in the areas concerning or directly affecting them;
(b) receive financial resources, insofar as the internal rules of each Party allow it; and
(c) participate in the implementation of cooperation projects and programmes in the areas that concern them.

The EU-Chile agreement also provides for meetings and exchanges between European and Chilean civil society in order to strengthen the links that unite them[54]. These provisions are to be encouraged, as they have the benefit of recognising the existence and importance of civil society. However, civil society needs to be informed and suggestions need to be collected in order to improve the implementation of the agreement – although there is no guarantee that the suggestions given will be taken into consideration.

It seems that this possibility is not clearly left open to the Parties to the cooperation and political dialogue agreements with the republics of Central America and the Member States of the Andean Community. Articles 52(3) (Andean Pact) and 52(4) (Central America) do provide for the institutionalisation of consultation with civil society, which is, however, limited to the economic and social spheres, and in the case of Central America, to the European Economic and Social Committee and the Consultative Committee on the Central American Integration System (SICA), which we know do not represent the whole of independent European civil society and in particular human rights NGOs.

In terms of involving national parliaments of the EU Member States, the European Parliament and the national parliaments of the States party to the agreements, there are initiatives that should be highlighted, particularly in the Global Agreement with Mexico[55]. The fact that they have not achieved any results shows that the human rights clause ignores all parliamentary processes. It is important to remedy this situation in order for the clause to function better.

Neither the two resolutions of the German Parliament on human rights and the democratic clause during the ratification of the Global Agreement with Mexico[56], nor the

[54] See Articles 10 and 11 of the EU-Chile agreement.

[55] See M. Meyer, *Retos y Posibilidades en el Uso de la Cláusula Democrática - Experiencias de la sociedad civil en el Acuerdo Global entre la Unión Europea y México.* Centro de Derechos Humanos Miguel Agustín Pro Juárez, Mexico. Website: http://www.rmalc.org.mx/tratados/ue/documentos/meyer.pdf.

[56] With regard to human rights in the Agreement, the following was recommended: 'From a humanitarian and human rights point of view, the implementation of human rights commitments in the agreement should be respected to a greater extent. For this reason regular consultations and reports and monitoring of the human rights situation should be organised by the European Union, involving Mexican Non-Governmental Organisations'. (Recommendation of the Committee on Economic Affairs and Technology of the German Parliament, in Vargas, Margarita and Andrés Peñalosa, *El proceso de negociación y ratificación*, *Derechos Humanos y Tratado de Libre Comercio México-Unión Europea*, Mexico, December 2000). In the resolution on the democratic clause, the German Parliament stated that it would amount to nothing more than declaratory principles if actual mechanisms

recommendations of the report by MEP Caroline Lucas[57] in 2001 to make the clause operational and legally binding were listened to in order to improve the content of the human rights clause in the general agreement with Mexico. Neither has there been any resolution from the European Parliament or the Mexican Congress citing the human rights clause in reference to a situation since the entry into force of the Global Agreement in 2000.

9. Respect for human rights in the EU's external relations outside the use of human rights clauses

There are various instruments to promote respect for human rights in the EU's external relations. We will look at these instruments in order to consider how they could help improve human rights clauses.

9.1. The range of EU instruments that contribute to promoting human rights

Common strategies

Common strategies are an instrument within the Common Foreign and Security Policy (CFSP) introduced by the Treaty of Amsterdam (Title V). Article 13 of the Treaty on European Union states that the European Council shall define the principles of and general guidelines for the CFSP and that it shall decide on common strategies to be implemented by the Union in areas where the Member States have important interests in common.

The common strategies are decided by the European Council, on the recommendation of the Council. Each strategy sets out its objectives, duration and the means to be made available by the Union and Member States. The Council implements them by adopting joint actions and common positions by qualified majority (this does not, however, apply to issues with military or defence implications, as in this field decisions are always adopted unanimously). If a Member of the Council wishes to oppose a decision for important national policy reasons, the Council may refer it to the European Council, which will decide on the issue of unanimity. So far the Council has adopted three common strategies: on Russia, Ukraine and the Mediterranean region.

Common positions

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were not provided for monitoring the human rights situation. In this resolution, the German Parliament also asked the Federal Government to intervene in the negotiations between the EU and Mexico in order to have those mechanisms implemented in the Agreement. However, there was not the political will to implement those resolutions.

[57] In January 2001, the Green Party MEP, Caroline Lucas, presented a report on the EU-Mexico Agreement in which she said that there was a need to revise various aspects of the Agreement, even though it had only just entered into force. On one of the matters that Lucas recommended including on the next agendas of the Joint Council, she said that 'Effective monitoring of the human rights situation in Mexico as well as in the EU should be part of the agenda of the Joint Council. In order to make the very formal contents of the human rights clause operational and legally binding, the rapporteur proposes a reform concerning Article 58 and Article 39 of the Global Agreement. In this respect, the Joint Council should envisage a side agreement on Cooperation in Human Rights. A consultation with human rights organisations in Mexico and the EU on the scope of its provisions and enforcement mechanisms would be useful.' Lucas also recommended the introduction of references to the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Declaration on the Right to Development, and the main ILO Conventions, among others. *Lucas, Caroline, 'Report on the proposal for a Council decision establishing the Community position within the EC-Mexico Joint Council with a view to the adoption of a decision implementing Articles 6, 9, 12(2)(b) and 50 of the Economic Partnership, Political Coordination and Cooperation Agreement (COM(2000)739 – C5-0698/2000 – 2000/0296(CNS)), 20 January 2001. A5-0036/2001.*

Common positions are an instrument of the CFSP introduced by the Treaty of Amsterdam (Title V). The Council may adopt common positions defining the Union's position on a particular geographic or thematic matter, in relation to a third country or at an international conference for example.

The common position is designed to make cooperation more systematic and better coordinated. Member States must follow and defend positions that they have unanimously adopted in the Council, therefore they ensure that their national policies are in line with the common position. The case of Burma shows that in practice this instrument is limited in its operation because there is no common guideline for the Member States.

Joint actions

Joint actions are an instrument of the CFSP introduced by the Treaty of Amsterdam (Title V). They refer to coordinated action by the Member States, in which all types of resources (human resources, knowledge, funding, equipment, etc.) are used to achieve the objectives set by the Council, on the basis of the general guidance of the European Council.

Social clauses and generalized tariff preferences

'Apart from international agreements, and general international law as a basis for these agreements, human rights may be linked to *autonomous* acts of secondary Community legislation. In the first place, the Community's unilateral scheme of generalized tariff preferences (the 'GSP'), laid down in Regulations No. 3281/94 and No. 1256/96 in respect of certain industrial and agricultural products originating in developing countries, probably contains the Community's most extensive set of actions related to third countries' respect for (or neglect of) fundamental labour standards to date.

By virtue of Article 9 of the said Regulations, benefits granted to a particular country under the GSP may be temporarily withdrawn, in whole or in part, if the country is found to practise any form of forced labour, as this term is defined in the Geneva Conventions of 1926 and 1956 and ILO Conventions No 29 and No. 105. Thus, formal adherence to these conventions is not a necessary prerequisite for withdrawal of tariff concessions in case of non-compliance. The approach is again one of universally applicable standards, which are articulated in more specific conventions.'[58]

Role of the European Parliament[59]

The European Parliament seeks to carry out parliamentary monitoring of respect for human rights and democratic principles in external agreements.

It made a breakthrough on this in the ratification procedure for the Euro-Mediterranean association agreements with *Egypt, Lebanon and Algeria.* Parliament strengthened its role by expressing its strong concern regarding the human rights situation in those countries through adopting political resolutions[60]. The EP reminded the Commission and the Council of the need to involve it, along with national parliaments and civil society, in the mechanisms associated with the human rights clause (Article 2). Also, on 20 June 2002, the EP organised a public hearing highlighting the human rights violations committed by Israel in its internal policy

[58] Noble M., *Analytical Study of EU External Agreements with Third Countries and Regional Country Groupings,* EP internal working note, DG External Relations, July 2005.

[59] See Notice to members No 25/2003 of the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy.

[60] OJ C 153 E, 27.6.2002, p. 264; P5_TA(2003)0018) adopted on 16.1.2003; OJ C 279 E, 20.11.2003, p. 115.

towards Palestinian citizens. After debates on the nature of the violations (particularly with regard to the essential elements of the association agreement with the EU), the EP voted that the association agreement with Israel should be suspended due to serious human rights violations committed on the Palestinian territories occupied by Israel. The European Commission and some Member States refused to act on this vote.

The EP's attitude is even more significant given that Parliament does not officially have the right to invoke human rights clauses, either to open consultations or to suspend an agreement. The right to ratify the main external agreements does, nevertheless, allow Parliament to refuse to approve them. It therefore has the right to expect the Commission to inform it of the adoption of this type of measure and to take due account of the opinion of Parliament regarding the nature of the clause to be negotiated, launching consultations and suspending an agreement.

When the EU imposes negative measures, the EP also pushes for them to be applied consistently. They should not simply be used to express disagreement. A prominent example is that of Zimbabwe, where a travel ban had been imposed on Government representatives. The EU decision to authorise the invitation to Robert Mugabe to the France-Africa Summit was therefore strongly criticised by the European Parliament, which considered it to be a lack of consistency in European policy. At the time of the meeting of the ACP-EU Joint Parliamentary Assembly, due to take place in Brussels from 25 to 28 December 2002, the Conference of Presidents of the Political Groups of the European Parliament decided to refuse access to the EP buildings to two Zimbabwean members of the ZANU-Patriotic Front. This decision resulted in the meeting being cancelled. The case of Zimbabwe also illustrates the need to take progressive measures. Suspending all relations with the authorities is not the solution as all means of pressure are therefore lost.

9.2. Examples of use by country

- Burma/the Republic of Myanmar: social clause and common positions

In October 1996, the first EU common position against Burma was adopted owing to the lack of progress in the democratisation process and to human rights violations. It imposed sanctions such as freezing visas for members of the military regime, members of the Government, military officers and their families. The EU also suspended top-level government visits. This common position reinforced the diplomatic sanctions put in place against Burma since 1990 such as the arms embargo and the suspension of all bilateral aid other than strictly humanitarian aid.

At the same time, the EU also terminated its trade agreement with Burma following the application of the social clause. This procedure was brought against Myanmar (Burma) for forced labour practices and resulted in the effective withdrawal from 1997 of the privileges granted under the system of generalized preferences[61].

In 2000, a Council Regulation[62] prohibited the sale, supply and export to Burma/Myanmar of equipment which might be used for internal repression or terrorism, and to freeze the funds and visas of certain persons related to important governmental functions in that country[63]. In April 2003, 2004 and 2005, the Common Position was repeatedly renewed and its content added to. The scope of application of the sanctions that it imposes was broadened

[61] See Council Regulation (EC) No 552/97 of 24 March 1997 temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar (OJ L 85, 27.03.1997, p. 3)
[62] Regulation (EC) No 1081/2000
[63] See Council Common Position 2000/346/CFSP concerning the extension of Common Position 1996/635/CFSP on Burma/Myanmar - OJ L 122, 24.5.2000, and Bull. EC 4-2000, point 1.6.62

without any positive result. Firstly, the sanctions are not sufficient; they do not affect the sectors of business that are most beneficial to Burma (oil, construction wood, gas). Secondly, the national attitudes of the Member States are not sufficiently in line with the common position to enable it to be applied strictly and effectively[64].

- Belarus[65]: suspension of negotiations

The EU signed a partnership and cooperation agreement with Belarus in 1994. However, this agreement never entered into force because in 1996 the EU criticised President Alexander Lukashenko for his inability to establish democratic political institutions. Consequently, in September 1997, it suspended negotiations on the entry into force of the partnership and cooperation agreement and froze its technical aid. All cooperation and aid from the EU was withdrawn except for humanitarian projects and support for democracy[66]. The re-election of Mr Lukashenko, in September 2001, under conditions disputed by the opposition and international observers, does not encourage optimism for the coming years. The EU has not closed the door on a partnership but the indispensable condition remains the improvement of respect for human rights and the introduction of economic reforms. The EU continues to fund projects for civil society (via TACIS, TEMPUS, the new neighbourhood programme)[67].

- China: enhanced political dialogue

In June 1989, in order to respond to the Tiananmen Square massacre, the EU suspended all its political and economic relations with China. An arms embargo was declared in an EU Joint Declaration at the Madrid European Council on 26 June 1989. From 1992, the Council decided to restore normal relations with China, but gradually. A formal political dialogue has therefore gradually been established. Owing to the human rights situation in China, the EU is not concluding a partnership and cooperation type agreement, but that does not mean that the EU is not involved in promoting human rights and democratic principles in China. Since 1995, China has had an institutionalised regular dialogue with the EU based solely on human rights.

On 19 May 2000, the EU concluded a bilateral agreement authorising China to become a member of the World Trade Organisation. This agreement, the standard model for members of the WTO, does not, however, include any references to human rights.

10. Guidelines

- Make the decision-making process for activating human rights clauses more transparent, and involve the EP and NGOs.
- Legitimise the decision to apply the clause to give it weight and give the EU credibility in terms of respect for human rights.

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[64] For an example of the role of Total in Burma and France's responsibility in the failure of the sanctions imposed by the EU Common Position, see *La France accusée de faire obstacle aux sanctions contre la junte birmane*, Le Monde, 4.07.05.

[65] Miller Vaughne, The Human Rights Clause in the EU's External Agreements, House of Commons Library, 16 April 2004, p. 48.

[66] For more details, see the website of the DG for Committees and Delegations, EP Delegation for relations with Ukraine, Belarus and Moldova (e.g.: see the activity report dated 17 December 2001, website: http://www.europarl.eu.int/meetdocs/delegations/ukra/20020219/458002EN.pdf)

[67] See the European Commission website on external relations with Belarus, (http://www.europa.eu.int/comm/external_relations/belarus/intro/index.htm)

- Use more objective and non-political criteria to evaluate human rights situations: depoliticise the use of sanctions to make it more credible but also fairer and more consistent. The decision must be based on material evidence (material evidence proving violations of the essential clause should allow sanctions whichever the country concerned). For example, it would be good to give greater clout to civil society leaders in European Commission delegations. This post should be an opportunity to set up an objective information base to help in fairly and effectively applying the human rights clause.
- Use independent indicators to measure violations and progress.
- Plan a detailed step-by-step process of applying sanctions to allow progress towards improvements.
- Provide support through positive tools: give assistance to initiatives promoting human rights.
- Maintain a consistent approach: activating the human rights clause should be accompanied by aid (sanctioning and supporting efforts made – when there is the will to make them – to eradicate the problem that led to the sanction) but also backed up by other external policy tools. The various instruments for promoting human rights and democratic principles should be used in a more concerted overall EU strategy.
- Do not impose additional obligations without taking into account how effective they are in national law: being ambitious in drawing up clauses by inserting specific legal texts to refer to the content of the essential elements will remain purely declaratory if there is no policy to support the establishment of the necessary national mechanisms. The signatories must have the means to make the changes necessary to comply with the essential elements in the long term.
- Disseminate the mechanisms for creating specialised human rights working groups as part of external agreements. The first working groups started under agreements with Bangladesh (May 2003) and Vietnam (November 2003). These working groups have now extended to neighbourhood agreements, but it would be good to extend them to all types of agreements in order to strengthen the effect of the human rights clause.

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12. Annex 1 Legal basis for the human rights clause

'The practice on the legal basis is not entirely coherent and does not follow an absolute rationale.

1. Article 6 of the Treaty of Amsterdam, amending the Treaty on the European Union, states that "the Union is founded on the respect of human rights and the rule of law".

2. Article 181 EC (ex Article 130y) in conjunction with Article 177 (ex Article 130u) can be regarded as the first ones to lay clear foundations for human rights clauses in external agreements of the Community.

3. Article 133 EC (ex Article 113). Apart from Article 181 in connection with Article 177, there is no other legal basis for the conclusion of external agreements which contain express human rights references in the EC Treaty.

4. Article 308 EC (ex Article 235). A reserve competence for stipulating human rights clauses in external agreements may be deduced from Article 308 EC, provided the insertion proves necessary to attain, in the course of the operation of the common market, one of the objectives of the Community.

5. Article 310 EC (ex Article 238). Association Agreements with third States or international organisations, such as the Lomé Treaties, Europe Agreements, and agreements with some Mediterranean States containing human rights clauses, could be concluded on the basis of Article 310 EC which aims to associate the Community with partner States by spelling out reciprocal rights and obligations, joint actions, and particular procedures geared towards harmonisation and progressively bringing the partner State's legal and economic system in line with the Community legal order. Human rights clauses may therefore be made a condition precedent for the conclusion of association treaties based on Article 310 EC.

In addition to Article 177 EC, which provides that Community policy in the area of development co-operation shall contribute to the general objective of respecting human rights and fundamental freedoms, the EC in the framework of the first pillar developed an external human rights policy by, inter alia, insisting on the insertion of specific human rights clauses in all agreements concluded with third countries, imposing economic sanctions, linking human rights to unilateral trade preferences, and carrying out comprehensive programmes on technical (financial) assistance for democracy-and human rights-building activities.'[68]

[68] Noble M., *Analytical Study of EU External Agreements with Third Countries and Regional Country Groupings,* EP internal working note, DG External Relations, July 2005.