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Abstract

Since the early 1990s the European Community has sought to make the protection of human rights and democracy an essential condition of its cooperation (both developmental and economic) with third states. This action combines economic and political objectives in a manner which pushes the boundaries of Community competence to its limits, both internally and externally.

This thesis examines first the development of human rights in the international legal system, to establish the legitimacy of any international actor to take such action. It also examines the extent to which the international legal order has developed to accommodate a non-state actor such as the Community.

Then, once these wider questions have been considered, the thesis focuses on the internal aspects. The development of human rights within the Community and the developing concern over human rights violations in third states are examined. The definitions of "human rights" in each context are compared. Finally, it examines the operation of the policy, with particular reference to the experiences in the negotiations with Australia and Mexico.

No attempt is made to judge the morality of this policy, the question throughout is whether the Community possesses the competence to pursue these aims, and whether the legal mechanism chosen is appropriate to the pursuit of these aims. Ultimately it concludes that the universal approach adopted lays the Community open to unwarranted criticism. The Community is attempting to achieve greater consistency and transparency in the operation of this policy: it is submitted that this does not require a uniform mechanism. The Community should recognise, both in the expression of the policy itself, and in the expression of the rights to be protected, the differences that warrant different implementation in different cases.

The Emergence of the Human Rights and Democracy
Clause in Agreements between the European Community
and Third States

Emily Sarah Reid

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The Emergence of the Human Rights and Democracy Clause in Agreements Between the European Community and Third States

Introduction

In 1990 the European Community¹ entered a new phase in its external relations, in which it now endeavours to include a basic “human rights and democracy” clause in every international agreement it concludes.

This clause first manifested itself in the context of development cooperation, in Article 5 Lomé IV.² Prior to this, human rights had been referred to in the preambles of development cooperation agreements but did not find expression in the treaties themselves, due to the intrinsic political sensitivity surrounding them. The Community had sought to incorporate such a clause as early as Lomé II (as a reaction to the situation in which it found itself, having to continue payments to states grossly violating human rights).³ However the partner states were suspicious of both perceived political intervention, and the differing interpretations which may be given to human rights.⁴

Since its inclusion in Lomé IV however, the human rights clause has become generalised, and since 1992⁵ it has formed an *essential element* of the Community’s international agreements. Commissioner Marin stated in 1993 that “very explicit clauses on human

¹ Hereafter Community or EC.

² OJ 1991 L229/1.

³ See René J.H. Smits, “*The Second Lomé Convention: an assessment with special reference to human rights*” 1980/2 LIEI.

⁴ See Cremona, “*Human Rights and Democracy Clauses in the EC’s Trade Agreements*” Emiliou and O’Keefe 1996, or (1995) Law and Justice; Kuyper, Pieter Jan “*Trade Sanctions, Security and Human Rights*” in Maresceau; Ulimubenshi, Pierre-Celestin “*La problematique de la clause des droits de l’homme dans un accord de co-operation economique: l’exemple de la Convention de Lomé*” (1994) AJICL 253.

⁵ See, for example, agreements with Brazil; OJ 1992 C163; the Baltic States OJ 1992 L403; Albania OJ 1992 L343; the Andean Pact countries OJ 1993 C25.



rights and basic freedoms are now an integral part of all agreements concluded by the Community with non-member countries.”⁶

The body of Commission Communication (95) 216 makes it clear that the reference point for human rights (for example the Helsinki Agreement) should be selected according to circumstances.⁷ The framework agreement with Korea, thus refers to the Universal Declaration of Human Rights. Whichever the terms of reference, this clause is accompanied by a complementary clause concerning its potential breach which can take two forms: either that of explicit suspension (the “Baltic” clause) or a general non-execution (“Bulgarian”) clause.⁸ Either party therefore may suspend or vary the operation of the agreement if a violation of human rights or democracy occurs.

The non-discriminatory approach, which stipulates inclusion of the clause in some form in every agreement (association and economic cooperation), was adopted in 1993.⁹ Nevertheless in its assessment in 1995 the Commission observes that “although Commission guidelines [on the inclusion of these clauses] have been respected, the objectives of a systematic approach have not yet been achieved.” It concludes “that there is a need ... to improve the consistency, transparency and visibility of the Community approach and to make greater allowance for the sensitivity of third countries.”¹⁰

It should be noted however, having regard to the sensitivity of other countries, that the “Baltic” clause was only used in agreements with the Baltic States, Albania and Slovenia. The, less extreme, “Bulgarian” clause, has been used more frequently. Even the more conciliatory approach has encountered problems however. The generalisation away from a purely development cooperation context, to include such a clause indiscriminately, has varying effects and implications. Its attempted inclusion in the EC’s trade negotiations

⁶ Com (95) 216.

⁷ COM (95)216 final pp.12-13.

⁸ See Annex A for texts of clauses.

⁹ Commission Decision of 26/1/93, MIN 93 1137 pt XIV.

¹⁰ COM (95) 216 final.

with Australia¹¹ was perhaps not anticipated on its first application in the context of development cooperation. The Commission expresses the inclusion of a human rights clause in such a case “not as imposing a condition, but in the spirit of a joint undertaking to promote universal values”.¹²

This view expresses an *intensely political agenda*, raising questions concerning the basis of the Commission’s competence in this respect. Clearly the question of Community competence can be resolved only with reference to the provision made for human rights within each of the Treaties, as well as the express external competencies with which it has been endowed.

The establishment of the scope of the Common Commercial Policy (CCP) was particularly controversial, and hard fought, with Member States jealously guarding their power. The new concerns of the Community raise further external questions. It appears that having finally determined the extent of the CCP, the Community is opening a new debate, concerning external relations which do not *prima facie* fall under the heading of “commercial policy”. Like sanctions, the human rights and democracy clause may well demonstrate another instance in which foreign policy is implemented through the CCP. The extent to which inclusion of this clause can itself be said to be non-commercial is, however, far from clear. This thesis demonstrates that there are strong economic factors at play in the operation of this policy. However, regardless of its commercial implications, the intensely political agenda pursued raises the question: does such a common policy come within Community competence, or the Union’s Common Foreign and Security Policy (CFSP)?

This is a field in which it is easy to be distracted by moral judgments of the motives involved, however this thesis aims to maintain a purely legal analysis. No final

¹¹ For discussion see Chapter 7.

¹² COM (95) 567 final.

judgments are reached on the policy's success, or on its morality, in anything other than legal terms. Thus it does not attempt to make a political judgment upon the policy.

Part I lays the groundwork for an analysis of the Community's policy. Initially, it considers the development of international law which permits any kind of international action to protect human rights, and who the actors in this respect may be. It thereby establishes the basis upon which the Community may have any role in the international legal order. Secondly, it establishes the competence of the Community, as an actor in the international legal order, to play the role it has adopted for itself with this policy. As an essential element of this it examines the development of the CFSP framework, assessing the role of the Community from the internal, European Union perspective.

Part II assesses the internal aspects of Community competence to protect human rights. Although the development of this competence has provoked a great deal of academic comment, it is essential to explore it in analysis of the emergence of human rights in the Community's external relations. This exploration considers first the Treaties. It continues by examining the relationship between the European Convention on Human Rights and the Community, and the role of the European Court of Justice in both the establishment of this relationship, and in the development of protection of human rights as a matter of Community concern. It then considers whether this has given rise to a parallel, external power in relation to human rights. It should be noted at this point that although the clause refers to both human rights and democratic principles, this thesis focuses, in its assessment of the clause, on the Community competence in relation to human rights.

Finally, Part III examines the practical experience of the Community in the implementation of this policy, focussing in particular on case studies relating to the Community's negotiations with both Australia and Mexico, in each of which the inclusion of the human rights clause proved to be problematic. It is in this section that the ambiguities caused by the lack of effective definition of "human rights" in this field, become evident.

Part I: Human Rights and the European Community in the International Legal Order

Introduction

Examination of the human rights and democracy clause in the European Community's¹³ agreements is complicated because many of the relevant issues are interrelated, to establish one particular aspect becomes very difficult without making assumptions about the others. It is submitted, however, that before assessing any aspect of this Community policy, it is first necessary to understand the potential for *any* international actor to invoke such a policy. If no actor can legitimately do so, further questions as to Community (or European Union¹⁴) competence, internal or external, become unnecessary. Therefore before embarking on a study of *how* the Community should act (or indeed whether it is competent to) in the sphere of development and protection of human rights outwith its internal jurisdiction, it is essential to consider whether these rights, relating as they do to individuals, have developed sufficiently to override the founding purpose of international law, the protection and regulation of the affairs of states. Accompanying this primary question is the issue of whether, in an international order created by and revolving around the sovereign state, an organisation such as the EU (or any of its constituent pillars) can have any independent international role. Similarly, it is irrelevant whether or not the Member States have endowed the Community or Union with the necessary competence if it is not theirs to give. If international law denies the possibility of action in this field the member states cannot confer such competence on an international organisation, whatever its unique status. Thus, before assessing the potential role of the EU in this sphere, and how this can best be fulfilled, it is essential to establish the status of these foundations of international law.

Part I therefore establishes first the competence of any legal person, state or other, to take action in relation to the protection of human rights and democracy, and the scope of this

¹³ Hereafter EC or Community.

¹⁴ Hereafter EU or Union.

competence where it comes into conflict with other, traditional, principles of international law. It then examines whether the Community has been given the competence to develop this policy.

Chapter 1: The Development of Human Rights in International Law

International law developed to protect and regulate the affairs of states. Clearly, therefore, the development of the international concept of human rights has had a considerable impact upon the manner in which fundamental principles are now considered.

Traditional Position: The Protection of the Individual Sovereign State.

The protection of the sovereign state was traditionally guaranteed under international law by the concept of domestic jurisdiction and the operation of the principle of non-intervention in the affairs of a sovereign state.¹⁵ The internal affairs of a state were a matter exclusively for its own domestic jurisdiction and could not be interfered with by other states. Unless international law has developed sufficiently to override these traditional tenets, the individual Member States of the Union/Community would be unable to take any action to protect human rights in another state.

Oppenheim classically defined intervention as:

“dictatorial interference by a state in the affairs of another State for the purpose of *maintaining or altering the actual condition of things.*”¹⁶

While “dictatorial interference” would be an extreme description, the *aim*, of maintaining or altering the actual condition of things, is clearly applicable to the Community’s inclusion of human rights and democracy clauses in its international trade agreements. If the Community’s conduct can thus be interpreted as intervention, does it contravene the principle of non-intervention? The response to this is not as straightforward as initially appears.

¹⁵ See Dominic McGoldrick: “*The principle of non-intervention: human rights*” p.85 *et seq.* on the close link between these.

¹⁶ H, Lauterpacht (ed.) “*Oppenheim’s International Law*”.

Examination of the case law of the Permanent Court of International Justice (PCIJ)/International Court of Justice (ICJ) can aid in the identification of what may or may not contravene the rule of non-intervention (or constitute a breach of domestic jurisdiction). *The Nicaragua Case*¹⁷ deals expressly with this principle. Here the Court stated that this principle is tied up in the right of every sovereign nation to conduct its own internal affairs and that this is a corollary of the principle of sovereign equality of states. While observing that violations of the principle are not infrequent, the Court maintained that the principle is “part and parcel” of Customary International Law. The Court then concluded that:

“..A prohibited intervention must accordingly be one bearing on matters which each state is permitted, by the principle of state sovereignty to decide freely. One of these is the choice of a political, economic, social and cultural system and the formulation of foreign policy. Intervention is wrongful when it uses measures of coercion in regard to such choices which must remain free ones. The *element of coercion which defines and indeed forms the very essence of prohibited intervention* is particularly obvious in the case of intervention which uses force.”¹⁸

Thus it is coercion which is decisive in establishing wrongful intervention. Those obligations a state undertakes *freely* are binding upon it, even if they relate to what previously was within its domestic jurisdiction. The enforcement of these obligations however, may well involve “intervention”. In this respect the Court stated:

“Where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the Convention themselves.”¹⁹

¹⁷ *Case Concerning Military and Para-military activities In and Against Nicaragua* [1986] ICJ Rep 14 at para. 202 *et seq.*

¹⁸ *Ibid.* para. 205.

¹⁹ *Supra* note 18, para. 267.

This indicates that obligations will be enforceable by means of intervention, as stipulated and agreed in the Convention. However, if none is specified, no *intervention* will be permissible.

With regard to domestic jurisdiction, the PCIJ stated in the *Nationality Decrees* Advisory Opinion²⁰ that while the question of whether a matter is solely within the jurisdiction of a state is a relative one, dependent upon the development of international relations: “the right of a state to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other states.”²¹ It then draws this to its natural conclusion that: “jurisdiction which, in principle, belongs solely to a state, is limited by the rules of international law.”

The conclusion drawn from the International Court’s jurisprudence in relation to these classic principles of international law, is that states may curtail their sovereignty but only freely. Where they have done so there is no infringement of the principle of non-intervention in the event that *agreed enforcement measures* are utilised. Without a specific enforcement clause however, the Vienna Convention²² allows a “fundamental change of circumstances” to be invoked to suspend or terminate an international convention if, and only if, the change concerned an essential element of the agreement, or its effect radically transforms the extent of the obligations.

Generally, however, any action in this field requires two stages: the setting of standards, and reaching agreement on the enforcement measures to be used. The Community has selected “universal standards of human rights” as those to be upheld in its agreements. Furthermore, it has established an enforcement mechanism: that it will suspend the relevant agreement in the event of non-compliance with these standards. Thus it would

²⁰ *Nationality decrees issued in Tunis and Morocco* (1923) P.C.I.J. Rep. Series B, No.4, 27; World Court Reports, Hudson, Vol.1 1922-26, pp.143-162.

²¹ At p. 156 (Hudson).

²² Article 62.

appear that the Community is acting legitimately and transparently in the implementation of this policy.

There are, however, certain questions which arise. First, the agreement of parties (or absence of coercion) is a key factor; therefore the implication which may be drawn from the relative bargaining strengths of the parties involved must be considered. If one party is markedly stronger than another, can the weaker state be presumed to have freely accepted the stronger state's standards? Second, the lack of specification as to which "universal human rights" the Community is concerned with, has caused unnecessary problems. Thirdly, although there is a "non-execution" clause, there is no mechanism by which either party can be *compelled* to bring it into effect. Therefore there is no guarantee of either uniformity or transparency in relation to the enforcement of this policy.

The Development of Internationally Recognised Human Rights

The development of international human rights law marks a watershed in the scope of international law, which traditionally had no bearing upon individuals' rights. Against this background, no assumptions can be made about the validity of citing human rights as justification for an action which is *perceived to encroach upon the domestic jurisdiction of another state*.

The PCIJ failed, in the *Nationality Decrees Advisory Opinion*²³, to specify which circumstances may bring a matter irrevocably into international law. It is possible to argue however that the development of human rights obligations (in both treaty and custom) brings this matter outside the realm of the individual state and into that of international law. To substantiate this requires the establishment of the *extent to which human rights have developed as a constituent part of international law*.

²³ *Supra* note 20.

This is consistent with the Court's statement (above) in the *Nationality Decrees* Advisory Opinion²⁴ that whether a matter remains within domestic jurisdiction is a relative question, the answer to which is dependent upon the *development of international relations*.

The Court's comment, that a state can limit its own discretion through its obligations undertaken towards other states, is explicit: where a state has given guarantees to other states regarding human rights, it should be bound by these guarantees, even though this may encroach on what was once its exclusive jurisdiction. This is not *per se* revolutionary in international law terms: the doctrine "*pacta sunt servanda*" is well established and it is an application of this doctrine which binds states with regard to what was once their domestic jurisdiction.

This notwithstanding, before it can be said that human rights has moved definitively into the realm of international law, the true extent of commitment to human rights (the underlying development there has been in this field in international relations) must be established. To do so requires an examination of the treaty obligations relevant to this field, particularly the United Nations Charter (the Charter).

Article 2(7) of the Charter deals expressly with the principle of domestic jurisdiction and non-intervention: "Nothing in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state..." how human rights can develop in international relations, depends largely upon the interpretation given to this provision. Brownlie states that:

"... the domestic jurisdiction reservation does not apply if the United Nations agency is of the opinion that a breach of a specific legal obligation relating to human rights in the Charter itself has occurred. In practice, organs of the United Nations have further reduced the effect of the reservation, by construing certain

²⁴*Supra* note 20.

provisions relating to human rights, which might seem only hortatory, as presenting definitive and active legal obligations.”²⁵

This interpretation indicates that, in the event that a state has entered into a treaty obligation, (whether or not within the Charter), relating to human rights, it will not be able to rely on Article 2(7) to avoid external intervention. This, when viewed alongside the potentially wide ambit of Articles 55 and 56 of the Charter²⁶ would seem to indicate that the concept of domestic jurisdiction is far weaker than it once was.

It is now apparent that, by their adherence to the Charter, individual states have inhibited their sovereignty in human rights even before concluding agreements bearing upon this field with the Community. This itself raises the question of what (if any) role the Union (or Community) may have in the enforcement of the rights and principles of the Charter. Even before that its authority as an international actor must be established. Again, this is a matter on which recent developments in international relations and law, and the implications of the direction of these developments have some bearing.

The Shift from Individual Sovereign State to Community of States

Together, the development of new rights in international law and the erosion of fundamental principles, as discussed above, have profound conceptual implications. In the development of the law relating to the protection of human rights we are witnessing a

²⁵ Brownlie, *Principles of Public International Law* Oxford, Clarendon Press, 5th Edition, 1998, 557-558.

²⁶ Art. 55 “With a view to the creation of conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self determination of peoples the United Nations shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”

Art. 56 “All members pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.”

transformation in the basis, and function, of international law. International law has shifted to such an extent that the rights of individuals can now take precedence over traditional fundamental principles relating to the sovereignty of states. If we consider this not only in relation to the principles of non-intervention and domestic jurisdiction, but within the global picture of international relations and law, this transformation may mean that although a supra-national organisation, such as the Union, traditionally had no independent role as an international actor, it can now fulfil such a role.

What has been established is a shift in emphasis in international law from protection exclusively of the sovereign state to protection of individuals' rights. This has been paralleled by a shift in organisational terms away from the sovereign state to a growing emphasis on supra/international organisations or institutions. These together indicate a declining influence of the sovereign state.

Schreuer²⁷ asserts that it is not the *existence* itself of such bodies which indicates this shift but rather that the conclusive factor is the transferral of what traditionally had been state power to them. In the light of what has been discussed above this could relate to the transferral of jurisdiction in relation to the protection of human rights from the state itself to, for example, the United Nations, through its accession to the UN Charter or similar international treaty. Schreuer continues:

“To the extent that these institutions become international actors in their own right and exercise some measure of authority and control they must be seen as a new dimension in the international community.”²⁸

This corresponds with the leading authority on the legal personality of international organisations: the judgment of the ICJ in the *Reparations Case*.²⁹ Although there is no

²⁷ Schreuer: “*The waning of the sovereign state: towards a new paradigm for international law?*” 4 EJIL (1993) at p. 451.

²⁸ *Ibid.*

²⁹ *Reparations for injuries suffered in the Service of the United Nations* [1949] ICJ Rep 174.

explicit conferral of personality in the UN Charter the ICJ examined the content of the Charter, focusing in particular on the functions and organisation of the UN and on its relationship with the members. From the fact that the UN clearly had a position quite separate from that of its members and an evidently political role, the Court concluded that the UN must possess personality in order to fulfil its functions.³⁰

Thus it is not clear from the terms of a Treaty *per se* whether or not the organisation created is a legal person; instead, the substance must be examined. The powers granted, position created and relationship with member states must all be taken into consideration. If these functions are such as would normally demand fulfilment by a legal person, or legal capacity to carry them through, this would be indicative of legal personality.

Schreuer views the Community as being at the forefront of developments in these terms. It has its own independent legislature and judiciary, whose powers extend to the regulation of external trade. Moreover, judicial activism has carried its powers far beyond what was perhaps envisaged in 1957. In addition to these indicators the EC Treaty is, in fact, explicit that the Community shall have full legal personality.³¹

This reinforces the view that a change in the role of the individual state has occurred. However it is important to see this not as the replacement of state power by supra-national power but instead as the development of a co-existing power which may take precedence in such areas as it is practical for it to do so. Such a view requires us to adjust our perspective and understanding of international legal relations: adding a further dimension to be incorporated, rather than merely replacing one type of actor with another. As Schreuer observes:

³⁰ It should however be noted that the Court explicitly stated that the personality of the UN was not as wide-ranging as that of a State, *ibid*, pp 179-180.

³¹ Article 210 states "The Community shall have legal personality", any doubts as to the extent of this personality are resolved by Article 211: "...the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws...." In contrast, the Union has not been endowed with such characteristics.

“under this functionalist approach what matters is not the formal status of a participant (province, states, international organisation) but its actual or preferable exercise of functions.”³²

It should at this point be borne in mind however that a “community of states” (such as the EC) has no greater competency than that of its individual members *vis-à-vis* third states. That is, it cannot, as a supra-national organisation, take action that an individual member state would not be competent to take. Thus, if the member states have attributed competence to, for example, the UN, the Community would have no role other than that given by the UN. *Vis-à-vis* its constituent members, it is clearly established under Community law that the powers of a supra-national organisation extend only so far as those attributed to it by the member states. Again, however, the members cannot attribute competency relating to third states that they do not individually possess. Accordingly, the full recognition and attribution of legal rights to the Community under Article 211 is expressly limited to “within the Member States.”

In conclusion, two things have been established thus far: first, the principles of non-intervention and of domestic jurisdiction have been substantially weakened through the development of international law on human rights; secondly, the increasing influence of non-state actors in international law gives a community such as the EC a role to play in the protection of human rights, providing the necessary transferral of powers from the Member States has taken place. This field exemplifies the complexities of the interrelationship between international and both EC and EU law.

³² Schreuer, *supra* note 27, p.453.

Chapter 2: The Role and Status of the European Union in the International Legal Order

It has been established above that the international legal order has changed during the twentieth century. While once it regulated only the affairs of sovereign states, it now protects the rights of individuals against those same states, and will allow actors other than states to play a role in this. It has been demonstrated that the European Community (Community or EC) is one of these new actors. However, there are questions outside the international law context which from an European perspective must be addressed. Before the *extent* of the Community's potential role as an international actor may be identified, it is necessary to understand the distinction between the Community and the European Union (EU or Union).

Three pillars of the Union

Difficulty arises in the confusion as to the separation of powers of the Community, from those that have been given to the Union. To understand this it is essential to grasp the structure of the Union, and the place of the Community within that overall structure.

The "Community", in the "first" of three pillars of the Union, developed from the European Economic Community (EEC), and its powers remain *primarily* concerned with economic integration and smoothing the functioning of the internal market created. The exercise of these powers was endowed to specially created supra-national institutions. There was always, behind the EEC, some desire to move towards deeper political integration, although this has been a constant battle, well illustrated by the difficulties encountered in the development of Common Foreign Policy.

The second pillar of the Union is the Common Foreign and Security Policy (CFSP). This differs from the first pillar in that the CFSP operates *inter-governmentally* through the

European Council³³ rather than through the institutions of the Community.³⁴ As the Union has no conferred legal personality, policy developed by the Union must be implemented by the Community, or by the Member States collectively. Significantly, the Community has no power to act independently in the fields attributed to the Union, other than those falling under the first pillar. Thus the Community acting alone has no power to develop the CFSP, but must wait for prior action by the Union.³⁵

Fundamentally, the *Union* is the Political umbrella. Whereas the *Community* may regulate and integrate economic matters and may enter into such agreements as are necessary to fulfil its specific, stated, aims and objectives, Foreign Policy is a separate pillar of the Union (a political matter, to be dealt with inter-governmentally). Thus the distinction between the Union and the Community is not one purely of semantics. It is the result of an express desire on the part of the Member States to restrict the Community's mandate. This desire also presumably motivated the decision of the Member States not to endow the Union with legal personality, although this was the subject of some debate at Amsterdam. Accordingly it can be safely assumed that divisions of competence reflect the wishes of the members. The basis of the Community and the Union lies in Treaty. Fundamentally, as with any other international organisation created by treaty, the powers of the organisation cannot exceed those given by the signatories. Its character cannot be other than that given.

³³ The European Council developed from the Hague Summit of Heads of Member States of the Community, held in 1969. Subsequent intergovernmental summits were to become known as the European Council. The European Council was formalised as the organ responsible for political co-operation (and the subsequent development of Common Foreign Policy) in the SEA. The European Council should not however be confused with the Council [of Ministers] which is one of the institutions of the European Community. Although it is possible for a meeting of the Council of Ministers to comprise the same members as a meeting of the European Council, these different "Councils" have different powers and responsibilities. Article D of the TEU provides that: "The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof." Article J3 illustrates the distinction in relation to foreign policy: "The council [of ministers] shall decide, on the basis of general guidelines from the European Council, that a matter should be the subject of joint action."

³⁴ This notwithstanding that discussions in conjunction with the EC Council (of Ministers) were explicitly mentioned and the European Parliament and Commission were to be "assured of close association" and "fully involved" respectively.

³⁵ The CFSP, and the impact of the Amsterdam Treaty are discussed more fully below. The Third pillar, "Justice and Home Affairs", is not discussed as it is not of relevance here.

A Community of States

To have any international role whatsoever the Union must initially establish itself clearly as a Community of States. The Member States have endowed the Community (the first pillar of the Union) with legal personality and full legal rights. They have also transferred competence to the Community in many fields, for example the development and operation of a Common Commercial Policy (CCP).³⁶ The second and third pillars constitute areas in which the Member States have agreed to work together for the achievement of certain objectives. Thus the Member States have clearly formed a community which co-ordinates its policy through different mechanisms, dependent upon the field of action. From an external perspective however, irrespective of whether the States act inter-governmentally, or through the institutions of the Community, the end result is that there is a clear voice being expressed, representing what is a community of states.

The limiting factor is the degree of power which has been transferred to the Union or Community. From the internal perspective, the Member States clearly envisage only the Community exercising any kind of active autonomous international role. In either circumstance the potential role of the Union or Community must remain unfulfilled in the absence of action within the EU or EC.

External Powers of the Community

The powers of the Community are limited to those conferred in the EC Treaty. The express powers concerning external relations are fairly limited. The European Court of Justice³⁷, however, has expanded Community competence in this field through the doctrines of implied and parallel powers. Before briefly examining these developments, however, it is worth noting the express powers.

³⁶ Article 113 EC.

³⁷ Hereafter ECJ, Court of Justice, European Court or Court.

Express Powers

The fundamental external powers of the Community are; first, under Article 113, the power to develop a Common Commercial Policy; second, under Article 130 the Community has the power to enter into international agreements in relation to research and technological development,³⁸ protection of the environment,³⁹ and development cooperation.⁴⁰ Each of these powers was developed in either the Single European Act (SEA) or the Treaty of European Union (TEU). These powers are all exercised following the procedures of Article 228. The TEU also introduced the power of the Community to conclude international agreements in relation to monetary union.⁴¹ Third, Article 235 empowers the Community to take appropriate measures necessary to attain one of the objectives of the Community.⁴² Finally, under Article 238, the Community can conclude international agreements (with either states or international organisations) establishing an association, and involving reciprocal rights. The power under Article 113 aroused vigorous debate due to the lack of specificity as to its scope: this question was comprehensively addressed in Opinions 1/94⁴³ and 2/92⁴⁴.

Article 228 is clear that the power of the institutions to negotiate and conclude international agreements applies in the situations for which the Treaty has provided. Even under Article 235 the powers of the Community are limited. However, an expansive approach by the Court of Justice has meant that the Community has concluded agreements in a far wider field than the express powers may justify.

³⁸ Article 130m (Introduced in the Single European Act).

³⁹ Article 130r paragraph 4 (Single European Act).

⁴⁰ Article 130y (Introduced in the TEU).

⁴¹ Article 109.

⁴² Unanimity is required for any action proceeding upon this "catch all" basis. This is in contrast to the powers which may be exercised following the procedures of Article 228 which requires (in most cases) a qualified majority. This distinction proved to be of importance in Case C-268/94 *Portugal v. Council and Commission* [1996] ECR 6177, [1997] CMLR 331. See Chapter 6 for discussion of this case.

⁴³ *Opinion 1/94* Re the Uruguay Round Treaties [1995] ECR. I-5267, [1995] 1 CMLR 205.

⁴⁴ *Opinion 2/92* Re the OECD Third Revised Decision on National Treatment [1995] ECR I-521, [1996] 2 CMLR 325.

The Doctrine of Implied Powers

The exclusive competence of the Community to act in specific fields has been outlined above, including the power to take such action as may be necessary to achieve the objectives of the Community. (One may wonder then what room there is left for “implied powers” as any power which is implied is express, but not specific, by virtue of the operation of Article 235 EC.) The doctrine of implied powers was initially formulated in *ERTA*,⁴⁵ where the Court ruled that the external power of the Community reflects its internal power. Thus, in parallel to any internal competence, the Community has an implicit external competence to act in that field. Whether this competence is exclusive or not is dependent on whether the Community has taken action in the sphere internally: until it has done so the power is concurrent with the residual power of the Member States. However, when the Community acts upon its internal power it occupies the field, and the Member States lose their competence, thereby giving the Community exclusive competence. In Opinion 1/76 the Court stated that the Community has external competence without the enactment of internal measures in the relevant field, where “the participation of the Community in the international agreement is ... necessary for the attainment of one of the objectives of the Community.”⁴⁶ Nevertheless *Opinion 1/94*⁴⁷ clarified that internal legislation would be required for the Community to acquire exclusive competence. It also clarified that to give rise to external exclusive powers, attainment of the objective and the exercise of the external power must be inextricably linked to each other.

In conclusion: where the Community has an express power to act in a specific field, such as Commercial Policy, this power is exclusive regardless of the existence of internal action in that field. However, where the power of the Community is implied, it becomes an exclusive power only upon the adoption of internal measures in that field. Whence therefore does the Community acquire the competence to include a human rights clause

⁴⁵ Case 22/70 *Commission v. Council (Re ERTA)* [1971] ECR 263, [1971] CMLR 335.

⁴⁶ *Opinion 1/76* Re the Draft Agreement establishing a European laying-up fund for inland waterway vessels [1977] ECR 741.

⁴⁷ *Opinion 1/94* *supra* note 43.

in its international agreements? It is indisputable that in the context of development cooperation, the Community is competent to include respect for human rights as a condition of the relevant agreement. The correct legal basis for this was raised in *Portugal v. Council*.⁴⁸ In relation to other fields the competence of the Community to take this action is more doubtful.

The Effect of Community Law vis-à-vis the Member States

Having accepted that the Community is competent to act internationally (albeit in restricted fields) and has its own independent legal system, it is necessary to establish the practical extent of this within the Community. The status (and effect) of Community law upon the Member States is a matter quite separate from the question of the status of Community law *vis-à-vis* third countries. This is exemplified by the fact that the legal personality conferred upon the Community operates only within the Member States. This is consistent with the fact that states cannot legislate outwith their own jurisdiction, and cannot form treaties having external effect without the participation of the relevant third states. The question here is: to what extent have the Member States bound themselves through the conclusion and ratification of the EC treaties? Conversely, what is the status of Community law within the Community and what effect does it have upon its members?

Fundamentally, the Community's independent legal system is unique: one feature of this is that a variety of norms have been incorporated into the legal systems of its constituent states. Although the treaties refer to harmonisation of laws the greatest impact in this field has been achieved through the stance adopted *vis-à-vis* the EC Treaty by the European Court of Justice.

Under the traditional law of treaties, the constitutional law of the signatory state will determine the domestic effect of an international treaty. In other words, a treaty *per se* has no internal, domestic effect, but is reliant upon national (constitutional) law to give it such. Thus, in a *dualist* state such as the United Kingdom, international treaties do not

⁴⁸ *Supra* note 42.

give rise to rights or interests which citizens of the state party can plead before national courts without implementation measures at the national level. Even if designed for the protection of individuals, the provisions of international treaties bind the parties only at the inter-governmental level. In contrast, in a *monist* state, provisions of the treaty would require no further (implementing) measures to be enforceable by individuals.

The EC Treaties themselves are silent as to their intended effect, which could reasonably have meant the traditional law of treaties would apply. However, the Court of Justice took a rather more purposive approach to the interpretation of their intended effect.

The Principle of Direct Effect of Community Law

The activism of the Court is renowned, in particular for its development of this principle, by which treaty provisions (and indeed other measures of the Community) may be relied upon by individuals before their national courts.

It was in *Van Gend en Loos*⁴⁹ that the Court established the groundbreaking principle of direct effect. The first of the questions put to the Court in this case was:

“whether Article 12 of the EEC Treaty has direct application within the territory of a Member state, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the Court must protect.”

to which the response of the Court was:

“To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of these provisions ”⁵⁰

⁴⁹ Case 26/62, *N.V. Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen*[1963] ECR 1; [1963] CMLR 105.

⁵⁰ *Ibid*, p.12.

Having considered the objectives of the Treaty, the terms of its preamble, and the creation of Community institutions limiting the sovereign right of the Member States, the Court went on to conclude that:

“... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member States and upon the institutions of the Community.”

The Court came to this conclusion despite submissions on behalf of the Member States to the effect that such direct effect had not been in the contemplation of the states when the treaty was negotiated and signed.

Conditions of Direct Effect

Within *Van Gend en Loos* the Court set out certain conditions which a provision of the Treaty must comply with in order to be directly effective. These were that it be clear, unconditional and that there is no discretion to be exercised by the Member States. These conditions in turn have benefited from a liberal interpretation by the Court in subsequent judgments. In *Costa v. ENEL*⁵¹ the Court considered separately two parts of a provision: Article 37(1) of the Treaty could not constitute a precise obligation on the state, merely imposing an obligation on the state to “progressively adjust over time”. Article 37(2), in contrast, constituted an absolute prohibition on which the Court ruled as follows:

⁵¹ Case 6/64, *Flaminio Costa v. ENEL* [1964] ECR 53, [1964] CMLR 425.

“Such a clearly expressed prohibition which came into force with the Treaty throughout the Community, and so became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it creates individual rights which national courts must protect.”⁵²

In *Reyners*⁵³ and *Defrenne No. 2*⁵⁴ the Court adopted what can be interpreted as a legislative approach. These cases concerned treaty provisions which clearly intended to lead to Community legislation, or (in the second case) to guarantee the application of a Community “principle” by the Member states. Neither of these constituted a clear, unconditional and prohibitive provision. Yet the Court, having examined the intention of the Treaty and the status of a fundamental principle within the Treaty, found them to be directly effective.

This principle, alongside that of supremacy of Community law,⁵⁵ exemplifies the unique nature of Community law in the international legal order, and, not less, the profound effect Community law has had upon the laws of its member states.

A further question, requiring consideration for the present purposes, is that of the existence of direct effect of international agreements concluded by the Community or its Member States.

⁵²*Supra* note 51.

⁵³ Case 2/74, *Reyners v. Belgium* [1974] ECR 631, [1974] 2 CMLR 305.

⁵⁴ Case 43/75, *Defrenne v. Societe anonyme Belge de Navigation Aerienne (SABENA)* [1976] ECR 455, [1976] 2 CMLR 98.

⁵⁵ Supremacy of EC law was referred to in *Van Gend in Loos* *supra* note 48 and developed in *Costa v. ENEL*, *supra* note 51. Case 11/70 *Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Futtermittel und Getreide* [1970] ECR 1125, 1972 CMLR 255 provides confirmation that not even a fundamental rule of national constitutional law could be invoked to challenge the supremacy of directly applicable Community law.

Direct Effect of International Agreements

When considering the direct effect of international agreements, regard should be had once again for their context. Such agreements regulate the behaviour of states, consistent with the traditional operation of international relations and international law. Granting such an agreement direct effect means that it is enforceable by individuals, unlike traditional international law.⁵⁶ However, although the grant of direct effect within the Community does not directly affect the partner states (whether they would give it direct effect would remain a matter for their own law), the interpretative developments could be interesting.

The Court of Justice has developed a two pronged test to establish whether an international agreement has direct effect. The first element is that the “spirit, general terms and scheme” of the Treaty must be consistent with the possibility of it having direct effect. The second element is that the provision be “clear and unconditional”. In *Pabst*,⁵⁷ the Court applied both tests and found that the agreement was directly effective. Yet the Court does not require the presence of both elements in order to grant direct effect. In *Sevince*⁵⁸ it found that notwithstanding that the agreement *per se* is too general and conditional to be relied upon by individuals, further elucidation of its provisions by an authoritative body may cure that defect and confer direct effect.

There is a further factor to be noted in the cases where the Court has recognised the direct effect of an international agreement: that the purpose of the agreement is similar to that of the Community.⁵⁹ It has been suggested that the Court may only have jurisdiction in this manner to review the actions of the Community in relation to an international obligation

⁵⁶ On the relationship between Community law and international agreements see Case 181/73 *Haegemann v. Belgium* [1974] ECR 449, [1975] 1 CMLR 515; Joined Cases 21-24/72 *International Fruit Company v. Produktschaap voor Groenten en Fruit* [1972] ECR 1219.

⁵⁷ Case 17/81 *Pabst* [1982] ECR 1331, [1983] 3 CMLR 11.

⁵⁸ Case C-192/89 *Sevince* [1990] 1 ECR 3461, [1992] 2 CMLR 57.

⁵⁹ See for example *Pabst*, *supra* note 57 and Case 87/75 *Conceria Daniele Bresciani v. Amministrazione delle Finanze* [1976] ECR 129, [1976] 1 CMLR 183.

where that obligation falls within internal Community competence. However, Cheyne has argued that this approach is unnecessarily restrictive, suggesting that:

“The institutions are required to comply with the Treaty under which they derive their powers, including those in relation to external affairs, ... the Court has the power and the duty to ensure the Treaty is complied with. The Member States have the right to require compliance with international obligations since the Community acts in their name and it must act within the constraints of the Treaty, including any rule of law relating to its application. ... The Court of Justice therefore has the power to prevent outright violations, even of legal obligations that are external to the Community legal system, and it should not necessarily be assumed that the executive institutions’ right to conduct external affairs is entirely discretionary where not limited expressly by the EC Treaty.”⁶⁰

This notwithstanding, even where the Court is willing to recognise that the provisions of an international agreement may be directly effective, the biggest challenge remains to be for an individual to acquire *locus standi*.⁶¹

Even if the Community is competent to conclude an agreement with an essential elements human rights clause, and suspension clause, the difficulty remains as to how it should be enforced. Individuals and associations are unlikely to be able to demonstrate *locus standi* under the fourth paragraph of Article 173 EC, as interpreted by the Court. Therefore it will be the responsibility of the privileged parties⁶² to ensure that the clauses are complied with, yet it is unlikely that they will wish to take a strong stance on such a

⁶⁰ Ilona Cheyne “*International Agreements and the European Community Legal System*” [1994] 19 ELRev 581-598.

⁶¹ Article 173 EC requires not merely that an individual show sufficient interest, but that he/she demonstrate “direct and individual concern”. This has been construed fairly narrowly by the court as requiring that the individual demonstrate that his/her rights have been affected in a manner in which has not applied to others. See *inter alia* Case 25/62 *Plaumann and Co. v. Commission* [1963] ECR 95, [1994] CMLR 29.

⁶² Article 173 EC, second paragraph.

politically, and economically, sensitive issue. As a result there is, effectively, a potential vacuum in the enforcement of these clauses.

The Conclusion of International Agreements by the Community

It is only through untangling the respective roles of the Community and Union that the competence of the Community to impose human rights standards on other nations may be established, along with the identification of the appropriate legal base. Where the Community possesses exclusive competence, it alone, acting predominantly through the Commission,⁶³ negotiates the Agreement, which is then concluded by the Council. The Community possesses explicit powers *vis-à-vis* the *external relations* of the European Community but only in the strictly limited contexts and spheres outlined above. The exercise of this power however must not be contrary to the foreign policy of the Union.⁶⁴ This correlates with Article 30(5) of the Single European Act, which stated that the “external policies of the European Community and European Political Cooperation had to be coherent”.

Thus the Community alone cannot enter into agreements other than those involving its areas of exclusive competence.⁶⁵ Without the Member States, it cannot conclude international agreements bearing upon human rights unless it establishes that it has been attributed the power to do so. Otherwise it will exceed its competence and encroach upon a matter reserved for the second pillar: *foreign policy*.

⁶³ Article 228 EC Treaty. C.F. The development of Foreign policy under the European Union which is done exclusively inter-governmentally, and in which the Commission has no role. The Amsterdam amendments give the Commission a participatory role, however this will be upon invitation by the Council. The Commission will still have no right to initiate proceedings.

⁶⁴ Article 228a EC Treaty states that “where it is provided, in a Common Position or Joint Action adopted according to the provisions of the Treaty on European Union relating to the Common Foreign and Security Policy, for an action by the Community to interrupt or to reduce, in part or completely economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

⁶⁵ See *Opinion 1/94*, *supra* note 43.

International agreements concluded by the Community can, in certain circumstances, enter into Community (and thus National) law under the principle of direct effect. It was clearly however the express intention of the Member States that matters of Common Foreign Policy would not be developed by the Community acting alone in this way.

The European Union: an Independent International Actor?

In contrast with the explicit conferral of legal personality upon the Community, there is no such provision regarding the Union. This suggests that there was no intention to confer upon the EU the power to act as an independent legal person. Examination of the *Travaux Préparatoires*⁶⁶ of the Treaty confirms this. However the terms of Article F of the TEU provide an interesting contrast: “the Union *shall provide itself* with the means necessary to attain its objectives and carry through its policies.”⁶⁷

This would be difficult to achieve without the power to act itself: which suggests legal personality.⁶⁸ On the other hand, it may mean that the Union has the power to act internally, as it certainly does through the Community, and can thus provide itself with whatever powers are consistent with its objectives. Alternatively, it may merely mean that the Member States of the Union shall act inter-governmentally to provide “the means necessary to achieve the objectives of the Union.” Thus, on one interpretation the “Union” would be acting to provide itself with the necessary measures, while in fact it would be the Member States, who constitute the Union, acting.

This discussion ultimately turns on semantics. However, even if it is the Member States acting inter-governmentally who shall so provide the “necessary means...” the least Article F does, is create an obligation on the states, acting as the Union. It is submitted, however, that “the Member States shall” is quite different to “the Union shall”, which

⁶⁶ As discussed by McGoldrick “*International Relations Law of the European Union*” p.38.

⁶⁷ F.3, TEU, emphasis added.

⁶⁸ See also Art J.8.

indicates an independent identity for the Union *as an entity*, quite separate from that of its constituent members.

Notably, although in the Amsterdam Treaty Article J.14 empowers the Council,;

“where it is necessary to conclude an agreement with one or more States or International Organizations... to authorize the Presidency, assisted by the Commission as appropriate, to open negotiations to that effect. Such agreements shall be concluded by the Council acting unanimously on a recommendation by the Presidency.”

the Union has not yet been conferred legal personality by its Member States. However, this provision is clearly a compromise in this direction. If used, it may substantiate the requirement that the Union “shall act”. Thus any such action, although carried out by the Presidency, remains essentially inter-governmental; all the Member States must authorise both the negotiations and the agreement.

The present legal framework clearly does not endorse the Union with the potential to play a full role on the international stage, either alongside or instead of individual Member States, other than through the Community. Even when the provisions of Amsterdam are fully exercised, such action through the Union must be (inter-governmentally) approved at both the outset of negotiations, and as to its end result.

Issues Arising from the Distinction Between the Union and the Community

It is, as has been seen above, the transferral of competence in particular spheres which characterises the Community as an actor in the international order. The economic strength and associated influence of the Community give it huge potential as such. The responsibility which accompanies such power, and the potential for abuse of the power, are of particular importance where loss of domestic jurisdiction (through the conclusion of an international treaty) is dependent upon *obligations undertaken freely*. In such

circumstances the economic strength of one partner must not be allowed to double as a tool of coercion. To fulfil the responsibility in this respect there is a clear need that, where it is established that the necessary transferral has been effected, the Community, just as any other major international actor, should carry out its role coherently. Such role certainly may not be fulfilled without an established mechanism for action and legal framework to support it.

Apparently a general competence to act in relation to human rights is not one of the Community's attributed powers. Nor is it essential for the operation of Community policies. In addition to the common external policies developed within the framework of the Community, however, the second pillar of the Union comprises the framework for the Common Foreign and Security Policy of the Union. Any examination of "Europe's" role cannot consider either of these frameworks in isolation.

The procedures for, and institutions involved in, the development of Community and Union policies are quite distinct. This distinction reflects that between the Community and Union *per se*. The question may of course be raised as to *how* an international organisation may have a clear and transparent foreign policy when its constituent members do not, and when there are two separate frameworks in operation. Nevertheless, the Community, as a stronger and thus potentially more influential actor, has at least as great a responsibility, and therefore a greater need for transparency, as its constituent members.

Significantly, the UK Foreign Office Policy Document of July 1996 states that: "Human Rights in Foreign policy covers *inter alia* EU action on Foreign policy and Trade and Human Rights." It does not, however, indicate any Community action on Foreign Policy, and refers to:

“the inclusion of Human Rights clauses in *EU Cooperation Agreements* with third countries, which allow for the suspension of benefits, including trade and aid privileges, in the event of gross Human Rights violations.”⁶⁹

This is interesting on two counts. First, although it is not incorrect to categorise them as EU agreements, it is more precise to refer to such agreements as *Community Cooperation Agreements*. However, as the Foreign Office has made no reference to *Community Action* within the document,⁷⁰ such classification would appear somewhat surprising. Secondly, the Foreign Office omits to state that the EC now endeavours to include an essential elements clause relating to human rights and democracy in every international trade agreement it negotiates, *whether development cooperation or not*. This perhaps reflects discomfiture, on the part of the Foreign Office, with the fact that the Community is apparently encroaching on an issue for which the Member States have expressly placed competence with the Union.

A further issue for consideration arising from the distinction between the Community and the Union, is more functionalist. The inclusion of the human rights and democracy clause in every international agreement now concluded by the EC, assumes that it may be enforced. However, there remains the question as to whether the enforcement itself would fall into the competence of the Community. If not, it must be for the Union to enforce. But in such circumstances should the Community independently include this clause as an essential element? Either its inclusion is meaningless, or it binds the Union as to its enforcement. This however would bind the Union to a certain course of action in an area in which the Union's power should be absolute.⁷¹

⁶⁹ Emphasis added.

⁷⁰ In addition, there is no reference to Union action other than under second pillar.

⁷¹ The Union following Community action in this manner can be observed in its Common Position concerning human rights, democratic principles and good governance in Africa.

The Common Foreign Policy of the European Union

It was explicit from the inception of the Treaties of the European Communities in the 1950s that their ultimate goals would not be merely economic. The Preambles to the European Coal and Steel Community (ECSC) and the EEC contained references to the ultimate objective of political integration.⁷² This early political ambition reflects the environment in which they were created. In the post-World-War context the aim of greater union among the peoples of Europe is indicative of the intense desire to rid Europe of conflict definitively. Notwithstanding this desire, and the explicit expression of this wider aim, neither treaty contains provisions that could remotely be said to move towards anything other than economic integration. Early attempts to develop political union, for example the Draft European Political Community, were doomed to failure. Various factors were at work in this context including (French) nationalism, and doubts about the non-participation of the UK, and re-arming Germany under any circumstances.⁷³ The Fouchet Plan gave the first reference to the concept of European “Union” in relation to political integration. The draft treaty was aimed, essentially, at developing foreign and defence policies *at an intergovernmental level*, in a manner fundamentally similar to the framework developed to accommodate the CFSP today.

Many of the factors at work during this early period continue to have a role in the development of today’s CFSP framework, the roots of which lie in the European Political Cooperation, engendered at the Hague Summit in 1969. This summit marked the end of the transitional period, during which the six founding members of the EEC had substantially created the kind of economic community envisaged by the Treaty of Rome. It was a watershed in the development of the Community, for at this point the six could have concluded that sufficient economic and institutional development had been achieved

⁷² The Schumann declaration, fundamental in the creation of the ECSC referred to “common foundations of economic development as a first step towards a European Federation” which was itself “fundamental to peace” while in the preamble itself it was pledged to “create, by establishing an economic community, the basis for a broader and deeper community among people long divided by bloody conflicts” The preamble to the treaty of Rome referred to “determination to lay the foundations for an ever closer union among the peoples of Europe”.

⁷³ For further discussion of this area see Petersen Nikolaj, “*The European Union and Foreign and Security Policy*”, Nørgaard, Pedersen and Petersen.

and that no further integration was either desirable or possible. They decided the reverse, reflecting the economic and “European” optimism of the period. The Hague Summit transformed the role of such summits. In the future they were to be far more active in the identification of new areas of Community activity, becoming known as the *European Council*: and developing what was to be known in turn as “*European Political Cooperation*”. It was in the context of the European Council that the insertion of the human rights clause in economic cooperation agreements with third countries was raised.⁷⁴

European Political Cooperation remained informal and intergovernmental when both the European Parliament and the European Council picked up the issue in 1984. Notwithstanding that their proposals were by no means identical, it is important to note the consideration of the matter in both *fora*, and the evident climate for deepening integration of some sort. The European Council convened an Intergovernmental Conference (IGC) the purpose of which was, *inter alia*, to negotiate a Single European Treaty. The Commission’s contribution to this, the Cockfield Report (White Paper), was heavily influential. The report of this IGC led ultimately to the agreement of what was to become the Single European Act (SEA), the negotiations for which included foreign policy cooperation. In this context the SEA constituted the codification of existing practice and understandings, and imposed an obligation upon Member States, relating to information and consultation of each other on foreign policy matters in general, to take full account of each other’s positions and to “give due consideration to the desirability of Common European positions”. Even under the SEA however, the decision-making mode in relation to EPC was to remain entirely inter-governmental, and was to continue to operate through the European Council rather than through one of the institutions of the European Community.⁷⁵

⁷⁴ Declaration on Human Rights, June 1991, para.11.

⁷⁵ This notwithstanding that discussions in conjunction with the EC Council were explicitly mentioned and the European Parliament and Commission were to be “assured of close association” and “fully involved” respectively.

Thus it can be seen that the combined initiative of the Community institutions was required to introduce even the barest bones of formal political cooperation into the framework of European cooperation. Continuing pressure during 1989 and 1990 from both the European Parliament⁷⁶ and certain member states led to a further IGC on political union, the express objective of which was, *inter alia*, to define and implement a Common Foreign and Security Policy. Increased cooperation was opposed by both the UK and Spain however, and the compromise reached was the distinction within the CFSP, in the TEU, between Article J2 (referring to “systematic cooperation”/ “common positions”) and Article J3 (referring to “joint action”). Article J2 represents broadly a continuation of EPC while J3 is more ambitious, giving rise to binding cooperation. Significantly, the TEU placed the CFSP outside the Community, making it the second pillar of the Union.

This leaves the entire issue of common foreign policy in the ambiguous position of being developed by the Union, which has no conferred legal personality. Policy developed by the Union must be implemented by the Member States collectively or by the Community as discussed above. The Community has no power to develop CFSP itself, but must rely on the Union in this sphere.

Article J8 provides that the Council, when implementing CFSP decisions, must act unanimously (with the exception of actions under Article J.3). At the Maastricht Summit, however, states were obliged not to block measures where a qualified majority exists in support of the measure. This proviso did not succeed in entering the Treaty as ‘decision-making by a qualified majority’. Although effectively the same, it was clearly politically unacceptable so to express it.

Its limitations notwithstanding, the TEU widened the scope of cooperation in relation to CFSP. In addition, in relation to both commitment and the policy instruments available,

⁷⁶ The European Parliament charged its Committee on Institutional Affairs to draw up specific plans on Political Union: resulting in the Martin I Report which argued that EPC should be integrated into the Community. (Endorsed by the Italian Government).

the depth of cooperation deepened.⁷⁷ Thus there is now an existing mechanism by which the European Union develops its CFSP, which, once agreed, must be complied with by both the Member States, *and* the European Community, acting in the sphere of its external relations. It remains an interesting juxtaposition of intergovernmental and Community powers.

It is necessary at this point to give some brief consideration to the effect of the Amsterdam Treaty (ToA) upon the CFSP. One of the fundamental aims of the 1996 IGC was to strengthen the CFSP. It may be asked, however, whether substantively this has been achieved. Notably, under Article C, the Council and Commission are obliged to cooperate to achieve consistency in the Union's external activities. Such cooperation is exemplified by Article J. 4(4), under which the Commission may now be asked to participate in any proposals to ensure the implementation of a joint action. Such participation by the Commission is new: the role of the vice president may be crucial, as will be his/her relationship with Secretary-General of the Council. Article J4(4) strengthens Article J.17 (former J9), that "the Commission shall be fully associated with the work carried out in the common foreign and security field." However the Commission's role remains one of participation rather than of initiation in this field. It must continue to wait for the Council to act, emphasising the Member States' continuing desire to avoid conferring political power upon the Community.

This distinction and the implications thereof are effectively demonstrated by the success of the Community's external economic relations, compared with the political external relations of the Union, which have been notable for their comparative failure.⁷⁸ This suggests that a tightening and clarification of the EU's approach to foreign policy action (perhaps towards a more integrative and less intergovernmental approach) would be helpful, aside from considering the more general issue of having a wider role in the protection of human rights.

⁷⁷ Articles J.3. and J.4. outline the means for adopting either a common position (J.3.) or a joint action (J.4.) which is binding upon the member states once adopted thereby committing them, potentially, to specific courses of action, whereas previously this was not envisaged.

⁷⁸ For example, with reference to the former Yugoslavia.

The International Perspective

An additional question concerns the Community's competence to include the human rights and democracy clause, in view of the international obligations of its members, and indeed itself, under other international treaties in the sphere of trade and human rights. The *Centro-Com*⁷⁹ judgment recognised the priority of the UN charter over Community law. Accordingly, the obligation under the UN Charter to promote human rights may override or limit the potential role of the Community or Union in this sphere because neither is a member, although their constituent members are members of UN.

There are further doubts about the legality of this clause under international trade law, given the Community's obligations under the GATT. The WTO recently refused to include a minimum labour standards clause in GATT, begging the question whether the EU can legitimately, under international trade law, invoke human rights standards in this context.⁸⁰

⁷⁹ Case C-124/95 *R. v. HM Treasury and the Bank of England ex parte Centro-Com Srl* [1997] ECR I-81, [1997] 1 CMLR 555.

⁸⁰ While this is an area of considerable interest, its exploration is beyond the scope of this work, which has to focus primarily upon the Community competence from the internal perspective.

Conclusions to Part I

The development of international law whereby actors other than states are now recognised has, from an international perspective, undoubtedly given the EU/EC an international role in the promotion and protection of human rights and democracy.

From the internal perspective, some mechanism for the development of CFSP has been established under the auspices of the Union, if not the Community. The implementation of that policy must however be disentangled from the Community's exclusive competence vis-à-vis external relations to ascertain the best manner and place to develop the international role of the Union, in particular in relation to the international protection of human rights. It is submitted that the deliberate placing of foreign policy outwith the realm of the Community demonstrates the clear intention of the Member States. This is particularly important given the effect of Community law on the Member States and the special nature of rights conferred by the Community upon individuals. The Community's power to conclude international agreements is expressly restricted and its express power to develop "foreign policy" is limited to a specific field, development cooperation, outside which it can take no further action on the promotion of human rights without prior action by the Union. The inclusion of an "essential elements" clause relating to human rights and democracy in every trade agreement concluded by the Community is therefore a highly questionable practice, unless it can be proved that the statement of the European Council in 1991 constituted the development of foreign policy binding upon the Community. (This statement was made, however, before the role of the European Council and its relationship to the Community were formalised under the SEA. Furthermore, no joint actions or common positions have been adopted which would substantiate such a view). Alternatively, the policy may be legitimate if an implied or parallel power to develop this field exists.

Part II: The Protection of Human Rights in the European Community

Introduction

As has been demonstrated, the issue of competence of the European Community⁸¹ with respect to human rights is complicated by both internal and external pressures. It has been established that there is no (general) express Treaty power to act in the field of human rights. The Community however, despite having been founded with primarily internal, economic objectives, has turned these into a prerogative to take international action with respect to non-economic objectives, *inter alia* in the field of human rights. It is necessary at this stage to address the question of how the Community has achieved this.

The development of the protection of “*human rights*” occurred gradually, as will be seen, as part of the development of the protection of “*rights*”. This development, however laudable in spirit, has raised certain questions: primarily that of which “rights” are referred to in any particular instance and to whom they apply. This question is by no means unique to the Community. It caused particular problems in the US where in the original draft for the American Declaration of Independence Thomas Jefferson, stated that:

“all men are created equal and independent; that from equal creation they derive rights inherent and inalienable, among which are the preservation of life and liberty, and the pursuit of happiness.”

this was in sharp contrast to the approach to slaves, who clearly did not equal “men”.

Although the Community does not provide us with such obviously extreme examples, the definition of what rights will be protected, and for whom, has troubled it since its

⁸¹ Hereafter Community or EC.

inception. Indeed, its significance in this context is that the nature of the “right” being developed may affect the competence of the Community to act in that particular field. Thus the Community has, *prima facie*, a more obvious role (and one which was earlier accepted) in relation to economic than to human rights, and this is reflected in legal comment over the years.⁸² Thus it is necessary to identify what are included as rights in the Community context.

Despite the controversy about what kind of role, if any, the Community should play in the protection of rights, the European Court of Justice⁸³ has recognised its role in the protection of “human”⁸⁴, “moral”⁸⁵, “individual”⁸⁶, “constitutional”⁸⁷, “community”⁸⁸ and “fundamental personal human rights”⁸⁹. However, all the rights referred to by these varied terms have also all fallen under the heading of “fundamental rights”.

The reason for this is probably largely political and rooted in the history of the status of rights in the Community. It cannot be explained by the Court’s reluctance to adopt the terminology of other jurisdictions, but probably rather the reverse: the adoption of rights terminology from other contexts, without the clear establishment of distinctions between rights. Nor was attention given to the fact that the nature of rights conferred can affect (rightly or wrongly) the manner in which they are applied (and who may benefit from them). However, whatever its explanation, it is not satisfactory. The global descriptor of

⁸² See for example, Mendelson “*The European Court of Justice and Human Rights*” YEL (1982) 125; Toth “*The Individual and European Law*” 24 ICLQ (1975) 659.

⁸³ Hereafter Court of Justice, ECJ or Court.

⁸⁴ Judgment of the Court in Case C-260/89 *Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis* [1991] ECR I-2925.

⁸⁵ Advocate-General in Case C-1168/91 *Konstantinidis v. Stadt Altensteigstandesamt* [1993] ECR I-1191, [1993] 3 CMLR 401.

⁸⁶ Judgment of the Court Case 118/75 *The State v. Watson and Belman* [1976] ECR 1207, [1976] 2 CMLR 552.

⁸⁷ Judgment of the Court, Case 44/79 *Hauer v. Rheinland-Pfalz* [1979] ECR 3927, [1980] 3 CMLR 42.

⁸⁸ Advocate-General in *Hauer*, *ibid.*

⁸⁹ Case 149/77 *Defrenne v. SABENA (no.3)* [1978] ECR 1380, [1978] 3 CMLR 312.

“fundamental” belies the fact that some individuals resident in the Community benefit from “fundamental” rights not available to others, such as that to free movement. These can be dependent upon factors such as Union citizenship or Community nationality, whereas other “fundamental” rights apply to all residents and workers of the Community, for example the right to equal pay. Having analysed the terminology used by the Court therefore, a simple means by which to distinguish these rights, where appropriate, has been developed. Thus: those rights given by the Treaty to Community nationals/ Union citizens can be described as “community nationals’ rights”. Rights such as that to equal pay which apply to everyone regardless of nationality or citizenship can be described as “Community rights”. Those recognised in international law as “human rights” can be so described. Finally, “fundamental rights” can continue to be used to describe any of these collectively, where the distinction is not significant.⁹⁰

In order to understand the development of the protection of human rights within the Community, and indeed to assess its legitimacy, it is essential to examine the provisions relating to human rights within the Treaty of Rome, and its successors. This therefore constitutes the first chapter of this section (Chapter 3). Chapter 4 examines the European Convention of Human Rights (ECHR), and its relationship with, first, the Member States, and, secondly, the institutions of the Community, as it is necessary that this be established before considering the role of the Court of Justice both in the emergence of fundamental rights as guiding (and ultimately binding) principles of Community law and the development of the relationship between the Community and the ECHR. It also briefly considers the “problem” of dual jurisdiction over human rights within the Community. Chapter 5 examines the development within the Community of concern over human rights violations in third states and, finally, assesses the protection offered to fundamental rights within the Community itself.

⁹⁰ See Appendix B for table of examples.

Chapter 3: Provision for the Protection of Rights Within the EC/EU Treaties

The Treaty of Rome

The Constitutions of France, Germany, Italy and indeed most members of the European Community are based upon the rights of man and the protection of fundamental rights. Nevertheless, it proved impossible to include within the Treaty of Rome a provision relating to human rights.

The European Coal and Steel Community (ECSC) and European Atomic Energy Community focussed on economic objectives, steering well clear of more political questions. The Draft Political Community included ambitious provisions on human rights (including the incorporation of Section I of the ECHR). These ambitions, however, died with the attempted Political Treaty. The European Economic Community (EEC) avoided the non-economic concerns of the draft Political Community which had ended in failure. It should be noted that at that time human rights were perceived as including only those which would today perhaps be seen as “fundamental human rights”. Social and economic rights, now also included under consideration of human rights, developed later. This provides some explanation for the lack of human rights provision within what was essentially an economic treaty. In 1975 it was thought that:

“the essentially economic character of the Communities makes the possibility of their encroaching upon fundamental human values, such as life, personal liberty, freedom of opinion, conscience etc, very unlikely.”⁹¹

The right to property provides a clear example of a right that has straddled the boundaries: this is one of the classical liberal rights, yet its recognition in the twentieth century is less than universal. It was not included in the European Convention, but added, subject to many qualifications, in the First Protocol. It is, of course, not provided for as a right to be protected in the EC Treaty (except in the context of intellectual

⁹¹ Toth, *supra* note 82.

property in Art. 222). Yet in view of its economic implications, the enjoyment of private property has been much discussed at the Court of Justice.⁹² Social and economic rights were internationally recognised in 1966 in the International Covenant of Economic, Social and Cultural Rights.⁹³ Evidently the dividing line between categories of rights is blurred. It has been suggested⁹⁴ that if it is considered that social rights demand state action (as opposed to limiting state action as classical human rights do) there are certain indications of early recognition of such rights in the Treaty of Rome, for example in Articles 117 and 118.

However, these provisions may equally be seen to be fundamentally economically inspired and thus do not actually reflect early consideration of fundamental rights of any kind. Similarly, the right to equal pay in Article 119 was included on economic grounds - the desire to create a level playing field, thus eliminating (labour) market discrepancies.

Having stated that there is no provision for the protection of human rights in the Treaty of Rome, it is necessary to consider briefly the "Foundations of the European Community": free movement of goods, services, capital and persons. The freedom of movement of persons is described in Council Regulation 1612/68 as being a "fundamental right of workers and their families." These "foundations" are not generally described as *human rights* however: not least because they do not apply universally, but are conditional upon the status of the individual concerned, for example that he/she is a Community national.

Thus, although the Treaty of Rome contained certain provisions which could potentially have the effect of conferring rights upon individuals, and others which certainly do confer rights upon individuals within the Community, these could not be said to amount to human rights. There was certainly no express reference to human, or fundamental, rights within the treaty.

⁹² See, for example, *Hauer*, *supra* note 87; Case 5/88, *Wachauf v. Germany* [1989] ECR 2609 [1991] 1 CMLR 328.

⁹³ Earlier recognition had come at regional level in 1961: The European Social Charter.

⁹⁴ Mendelson, *supra* note 82, at 127.

Single European Act

The Single European Act (SEA)⁹⁵ finally introduced, in its preamble, the first explicit reference to human rights in the Community Treaties.

“Determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice. ... ”

It continued with reference to the Community’s commitment to the international human rights standards endorsed by its members. This commitment was reaffirmed by the Community Foreign Ministers when they met later that same year.⁹⁶ This was unprecedented, and important in its own right, but the Treaty of European Union (TEU/Maastricht Treaty) subsequently retreated from the terms of this declaration.

The Treaty of European Union

By the time of the negotiation and conclusion of the TEU many things had changed. The preamble contains a general statement relating to human rights, that the signatories:

“Confirm their attachment to the principles of liberty, democracy, and respect for human rights and fundamental freedoms and of the rule of law.”

This statement in fact follows from the preamble to the SEA. There are, however, certain fundamental differences. The TEU departs from the reference to the European Social Charter. Indeed its most significant provision on human rights, Article F.2, states that:

⁹⁵ OJ 1987 L169/1.

⁹⁶ Statement of 21 July 1986, meeting in the framework of European Political Co-operation.

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the *constitutional traditions common to the Member States*, as general principles of Community Law.”

Thus, in fact, the TEU, while introducing a general provision on human rights, moves back from the wider recognition of the importance of social rights which had been seen in the Preamble to the SEA. It reverts to something more closely allied to the economic influence requiring the development of certain fundamental rights, while paying little attention to the newer, more modern understanding of fundamental rights: that which recognises also social rights.

Article J1 then includes as an objective of the Union: “to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.” and continues that: “The Union shall pursue these objectives: by establishing systematic cooperation between Member States in the conduct of policy, in accordance with Art J.2...and J.3...” that is, by means of joint actions and common positions. Both of these require action by the Council on the initiative of the European Council. This does not envisage independent action by the Community. Thus we must look to the provisions of the EC Treaty to establish the extent of any relevant Community competence in this field.

Although the TEU appears, *prima facie*, to constitute a step forward for human rights protection within the Union, certain questions remain, including the limitation as to what may be included in the fundamental rights to be protected. It is important to note that the general provision on human rights has been kept *outside* the EC Treaty, enshrined as it is in the TEU. Furthermore, Article L, TEU, excludes Article F from the competence of the ECJ. The Court has, however, consistently (since the 1970s) developed the protection of “fundamental” (including human) rights as a key element of its case law, on occasions where the issue, and the possibility, have arisen. Therefore, although, *prima facie*, the exclusion of Article F from the jurisdiction of the Court may limit the extent of judicial activism possible in this field in the future, this may not result in a reduction in the legal

protection of human rights in the Community. It may well, however, demonstrate a lack of political will to bring this issue to the same level as the achievement (and enforcement) of the economic objectives of the Treaty.

The distinction that existed in the Treaty of Rome, between the development of fundamental *Community* rights for Community nationals, and fundamental *human* rights for all of mankind, is reinforced by the inclusion of rights relating to Union citizenship within Title II of the TEU⁹⁷. This again reflects the economic foundations of the Community, and the fact that rights' protection tends to arise as a by product of the process of economic integration and the achievement of a Single European Market, rather than as a direct result of concern for human rights. This is also perhaps reflected in the fact that there is no "Bill of Rights" or such list of rights protected under the Community or Union. This must be qualified, however, with recognition of the fact that the drive towards rights of "Union Citizenship" reflects in addition to economic concerns a desire to give citizens of the Union something more in the way of political rights. Thus there is still some confusion over the objectives and direction of the Community, with many concerns pulling in different directions. Those who gain least are ultimately the group with least to offer however, third country nationals. The question the Community has to address is how fundamental are the rights and protection it will uphold and for whom?

The provisions relating to Development Cooperation⁹⁸ expressly state that the promotion of respect for human rights and development cooperation are indivisible. Article 130u paragraph 2 provides that: "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms".⁹⁹ What is clear is that this power has been conferred within strict limits and that there is no further power for the Community relating to human rights or their promotion within the Treaty. Thus in the

⁹⁷ Which is subject to the jurisdiction of the ECJ.

⁹⁸ Title XVII, EC.

⁹⁹ Articles 130w 130x and 130y give the Community the competence to adopt measures necessary to the attainment of the objectives, where necessary in co-operation with other third countries.

context of development cooperation the Community may make respect for human rights a condition of the trade agreement but outwith this specific context there appears to be no attributed power. This is consistent with the reservation of foreign policy to the (inter-governmental) Union.

Treaty of Amsterdam

The Treaty of Amsterdam (ToA) is interesting in several ways. In the Preamble it reverts to some degree to the terms and concerns of the SEA:

“Confirming their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers.”

The amended Article F of the TEU has as its first Paragraph that:

“The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.”

The new Article F.1 adds weight to this provision, providing for the determination of a “serious and persistent breach by a Member State of principles mentioned in F(1)...” by the Council¹⁰⁰ and for the *suspension* of rights deriving from the application of the Treaty.¹⁰¹ In addition to these provisions relating to current Member States, Article O imposes respect for the Principles enshrined in Article F(1) as a pre-condition for any state wishing to accede to the Union. Furthermore, Article L(d) gives the ECJ jurisdiction with respect to actions of the Community institutions in relation to Article F(2), thereby enhancing its role in relation to human rights.

¹⁰⁰ Article F.1 (1).

¹⁰¹ F.1 (2).

The strengthening of the provisions relating to fundamental rights (both in substance and procedure) in the ToA, as compared with the earlier Treaties, perhaps reflects the growing *public* concern relating to the rights of citizens, as well as those of aliens and immigrants to the Union.¹⁰²

With regard to specific provisions, certain Articles relating to Community rights have been strengthened by provision for Community action, particularly in the sphere of the principle of non-discrimination. For example, Article 6A provides that:

“ ... Council *may take appropriate action* to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”

The Community may also under Articles 2 and 3 take positive action to promote the equality of men and women, for the *achievement of all its objectives*. Thus, if and when the ToA is ratified and comes into force, it may be possible to say that there is a more genuine concern for fundamental and Community rights *per se* emerging within the Union, as opposed to more calculated economic considerations. However the question as to what will happen *if and when* these provisions are acted upon, and newly recognised and developed rights come into conflict has not yet been addressed. The placing of “fundamental rights” at the core of the Union and of the Community *may* mean that economic objectives will become secondary where they would infringe “fundamental rights”. At present however, and until such time as the ToA is ratified and brought into force the law which must be adhered to and the priorities which should be followed are those of the TEU.

¹⁰² This is further reflected in the communitarisation of the Schengen Acquis and elements of the Third Pillar of the Union. These issues of course also reflect concerns over the ever closer prospect of enlargement of the Union.

Chapter 4: The European Convention on Human Rights and the European Community

It has been established above that notwithstanding that there is no reference to the protection of human rights *per se* in the TEU, the Union “shall respect fundamental rights as guaranteed by the European Convention on Human Rights”.¹⁰³ It is now time, therefore, to examine more closely the relationship between the ECHR and both the Member States, and institutions, of the Community.

The initial confusion that often arises, is in the misconception that the ECHR is somehow related to the Community. Although all the Member States of the Community are signatories of the ECHR, and adherence to the ECHR standards is a pre-condition for accession to the Union, the institutional frameworks behind each of these are quite distinct. The ECHR was created by the Council of Europe which itself was formed at the end of the 1940s under similar sentiments to those inspiring the Community. However, where the Community sought to prevent the recurrence of war within Europe by the development of *economic* strength through integration and interdependence, the Council of Europe, on a larger scale, sought to improve the *social, cultural and political life* of Europe which had been devastated during the war.

Initially, in 1949, the Council of Europe had ten signatories: but it has grown rapidly since then.¹⁰⁴ Its primary aim today is to protect human rights and pluralist democracy, yet the importance of this aim from very early on in its development is demonstrated by the fact that the ECHR was concluded in 1950.

Various issues arise with regard to the relationship between the ECHR and the Union/Community. The first is, of course, that neither the Union nor the Community is a signatory to the ECHR. Given that the Union has no legal personality and thus no power

¹⁰³ Article F.2 TEU.

¹⁰⁴ 40 Members by 1998; in addition Belarus has lodged its application for membership.

to accede to international organisations or to sign international agreements this is not surprising. However, the Community does possess the necessary personality¹⁰⁵ so, the question arises, why has it not acceded?

It must not be ignored that there are two sides (at least) to every international obligation. Under the terms of the ECHR only *states* are competent to accede to it. This technical difficulty alone leaves the Community in a somewhat paradoxical situation, regardless of whether it desires or is indeed competent to accede to the ECHR from an internal perspective.

The Position of the Member States of the Community vis-à-vis the European Convention on Human Rights

Each of the Member States of the Community is bound by the obligations it has undertaken in the ECHR. In international law it is the primary responsibility of the individual state to ensure the observance of its international obligations within its own jurisdiction, leaving it to the discretion of the individual state to select the means and mechanisms by which it does so.

The result of this is that certain states, for example France and Germany, operate a “monist” system of law, by which international law obligations are automatically, from the moment of ratification, part of the domestic legal system and are thereby directly effective within that legal system. Other states, however, for example the United Kingdom, operate a “dualist” system of law. In these states obligations of international law do not give rise to directly effective rights until such time as they have been explicitly incorporated into the domestic legal system by an Act of the national parliament. This does not permit avoidance of international law obligations: it means that individuals cannot assert rights arising from international law before the domestic courts until incorporation. A violation of the provisions of an international treaty would be open to an inter-state challenge even if there were no means of individual

¹⁰⁵ Article 210 EC (Chapter 1 above).

enforcement. In the case of the ECHR, however, individuals, including those from "dualist" states, may petition the European Court of Human Rights directly to enforce their rights.¹⁰⁶ Thus the domestic law of each Member State must be consistent with obligations under the ECHR. This is where a paradox arises in relation to the position of the Community.

The Relationship between the European Community and the European Convention on Human Rights

The ECHR was already established when the Community was formed in 1957. The original members of the Community were already members of the Council of Europe and signatories to the Convention. Yet it was not possible to include within the Treaty of Rome reference to either the issue of the protection of human rights generally, or, more specifically, to the ECHR itself. This position has now changed; the TEU provides that the Union "shall respect fundamental rights as guaranteed by the European Convention on Human Rights",¹⁰⁷ however the practical effect of this is limited by Article L, whereby the Court of Justice has no jurisdiction over this matter. Furthermore, regardless of whether the Union may consider that it shall respect these rights, it is not bound by the ECHR, nor is it subject to its enforcement mechanisms.

This raises an interesting distinction between the actions of the Union and the Community. It is unlikely that the Member States, acting inter-governmentally within the context of the Union would collectively breach their obligations under the ECHR. The situation may arise, however, whereby the Community, not being bound, legislates in the pursuit of its legitimate objectives in such a way as breaches the ECHR. While clearly this is unlikely to be a direct breach, a Community measure in one sphere may have the

¹⁰⁶ This is provided for under Article 25 of the Convention. Although this is a discretionary provision, all the Member States have in fact adopted measures allowing individual petition. Until September 1998, petition was made to the European Commission of Human Rights which screened cases, only about 100 arriving before the Court of Human Rights itself. For details of the new system see Schermers, "Guest Editorial" (1998) 35 CMLRev 2.

¹⁰⁷ Article F.2. TEU.

effect of breaching a right conferred by the ECHR. *Prima facie*, the situation may arise where a Community measure is in conflict with a provision of the ECHR. The Member States of the Community, bound under the doctrine of supremacy of Community law, would be faced with the situation in which they must breach either Community law, by not implementing the measure, or their obligations under the ECHR by implementing the measure.

Various solutions have been offered to resolve this problem, the root of which lies in the two parallel legal systems operating within Europe, each in the pursuit of different aims. On the one hand there is the ECHR with its objective of improving and guaranteeing human rights protection, on the other hand is the Community, whose *primary* objective remains the achievement of economic growth through integration and inter-dependence. At the time of the Community's conception and for many years thereafter, it was not envisaged that there would be any overlap of jurisdiction between the two.¹⁰⁸ Since the 1970s it has become increasingly clear however, that the two systems do overlap and that, *potentially*, measures under one system may impede the realisation of the objectives of the second.

The Role of the Court of Justice in Determining the Position of Fundamental Rights in the Community

The importance of fundamental rights within the Community initially arose in the jurisprudence of the Court, as a corollary of the need to provide effective protection within the Member States of rights conferred upon individuals by the Community. This itself was a live issue in the Court from the outset of the Communities. The ECJ was vital in the development of the protection of human rights in the Community through its jurisprudence relating to the protection of "rights" generally. This has given rise to confusion and imprecision in the terminology relating to the protection of rights in the Community.

¹⁰⁸ e.g. Toth and Mendelson, *supra* note 82.

As stated above,¹⁰⁹ the case by case basis on which the protection of rights was developed in the Community gave rise to a haphazard categorisation of “fundamental rights” which were also described in other terms in other cases. An analysis of the terminology of the ECJ in its case law developing the protection of “fundamental rights” supports the definitional distinction laid out above.¹¹⁰ This analysis demonstrated a clear line of development. However, the uncertain ground on which the Court was treading, coupled with the fact that the development of any field by the Court must be to some extent haphazard, as it depends on the nature of the cases coming before it, disguised the consistency of this development. Furthermore, the broad terminology used, and the fact that the only term consistently used was “fundamental rights” obscured in some measure the breadth of the development.

(i) The Development of the Protection of Fundamental Rights

The protection of “fundamental rights” was first raised before the ECJ in 1958 in *Stork v. High Authority*,¹¹¹ which concerned the right of an undertaking to challenge decisions taken by the High Authority. In this case it was the Applicant who used the term “fundamental rights”, referring to rights under the constitutions of virtually all the Member States. Stork argued that the High Authority should have considered German Constitutional Law when taking its decision. The case related to a decision by the six joint selling agencies of the Ruhr, to limit direct sales to wholesalers whose turnover was greater than that of Stork. Stork sought annulment of this decision, arguing that it contravened Articles 2 and 12 of the (West) German Grundgesetz which guarantee to each individual the rights to freely develop his own personality and to choose his own trade or occupation respectively. The Court rejected this argument, stating that it was competent only to apply Community law in annulling a decision. Thus it avoided any consideration of “fundamental rights”, confining itself to interpretation of the Treaty and

¹⁰⁹ *Introduction to Part II.*

¹¹⁰ *Introduction to Part II.*

¹¹¹ Case 1/58 *Stork v. High Authority* [1959] ECR 7.

the issue of its competence only to apply Community Law. Nor did Advocate-General Lagrange pick up the invitation to bring rights, “fundamental” or other, into consideration. The approach of the Court was confirmed in 1960 in *Geitling*.¹¹² These joined cases also involved a challenge by a Ruhr coal wholesaler to a decision of the High Authority, with the additional ground of challenge on the basis of Article 14 of the Grundgesetz (which guarantees private property).

It should be noted in relation to these cases that they preceded the establishment of the relationship between Community and national law. The fact that the Community constituted a new legal order, giving rights to individuals and Member States, and the principle that this new legal order was supreme over those of the Member States had not yet been laid down. Thus the nature of the relationship between the different legal orders operating within the Community had not yet been defined. That the Court was feeling its way in these early cases is clearly demonstrated in *Humblet v. Belgium*.¹¹³ Here the Court stated the need for effective enforcement of “rights” conferred by Community law, but emphasised also that the means of enforcement was left to the individual Member States, and that the European Coal and Steel Community (ECSC) Treaty was developed following a strict doctrine of separation of powers. The Court *could not* annul an administrative measure of a Member State (even where it was in contravention with Community law), *nor could it* enforce a provision of national law.

In these early cases the Court was defining the limits of its power. Significantly, at this time, it was operating in a context in which human rights had recently been expressly omitted from the Treaty of Rome. Judicial activism in this field at that time would therefore have been rash, if not indeed fatal to the authority of the Court of Justice. Thus, although it was later to develop the protection of fundamental rights within the Community in a manner which *prima facie* conflicts with its early approach, to suggest that the Court performed a U-turn in this field ignores the context of its early jurisprudence. Rather, the Court stated the limits of its jurisdiction and competence and

¹¹² Joined Cases 36-38, 40/59 *Geitling v. High Authority* [1960] ECR 423.

¹¹³ Case 6/60 *Humblet v. Belgium* [1960] ECR 559.

then proceeded to build upon these limits, as and when cases came before it and the opportunity arose.

The establishment of the nature of the relationship between Community and national law was to be crucial to the development of, *inter alia*, fundamental rights within the Community. Of seminal importance in this were the *Van Gend en Loos*¹¹⁴ and *Costa v. ENEL*¹¹⁵ cases.

In *Van Gend en Loos* the Court stated that:

“The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields”¹¹⁶

The Court subsequently took this a stage further, in *Costa v. ENEL*¹¹⁷ when it introduced the doctrine of the supremacy of Community law :

“The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system adopted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community Law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Article 5(2) and giving rise to the discrimination prohibited by Article 7.

...

¹¹⁴ Case 26/62 *Van Gend en Loos v. Nederlandse Administratie der Belastingen* [1963] ECR 1; [1963] CMLR 105.

¹¹⁵ Case 6/64 *Flaminio Costa v. ENEL* [1964] ECR 585, [1964] CMLR 425.

¹¹⁶ *Supra* note 114, para. 4.

¹¹⁷ *Supra* note 117.

The precedence of Community Law is confirmed by Article 189, whereby a Regulation “shall be binding” and “directly applicable in all Member States”. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community Law.

It follows from all these observations that the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question

The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.”¹¹⁸

This excerpt from the judgment, although relatively lengthy, provides a comprehensive explanation of the Court’s view of the nature of the Community legal system, and the consequences of the transfer of sovereignty from the Member States to the Community institutions, the institutions of this new, independent, legal order.

Van Gend en Loos,¹¹⁹ in addition to establishing that the Community created a new and independent international legal order, clearing the way for the establishment of the supremacy of Community law, served the additional purpose of placing the individual at the heart of the Community.

¹¹⁸ *Ibid* “On the submission that the Court was obliged to apply the national law”.

¹¹⁹ *Supra* note 114.

“Independently of the Member States, Community law therefore not only imposes obligations upon individuals but is also intended to confer upon them rights which become part of the legal heritage”

Traditionally, international law had regulated only inter-state relations, but this was a further element distinguishing Community law from what had formerly been understood as international law.¹²⁰ The establishment of the doctrine of direct effect and of the supremacy of Community Law, in *Van Gend en Loos* and *Costa v. ENEL*, established also the nature of the relationship between Community and national law.

Following this development, the Court, in *Sgarlata*,¹²¹ was once again offered the opportunity to consider the rights of individuals. It is notable that this case concerned not the ECSC, as the previous cases had, but the EEC, with its rather wider ambit and competencies. In this case the applicant had requested the annulment of certain regulations. The Court held, however, that Article 173(2) does not allow *individuals* to challenge regulations:

“The applicants object that, if recourse to Article 173 were to be refused by reason of a restrictive interpretation of its wording, individuals would thus be deprived of all protection by the courts both under Community law and under national law, which would be contrary to the fundamental provisions governing all the Member States.

However these considerations, which will not be considered here, cannot be allowed to override the clearly restrictive wording of Article 173, which it is the Court’s task to apply.”¹²²

¹²⁰ See Part I above.

¹²¹ Case 40/64 *Sgarlata and Others v. Commission* [1965] ECR 215, [1966] CMLR 314.

¹²² *Ibid* at p.227 ECR, p.324 CMLR

This case once again concerns an attempt by an individual to overturn a Community act, not on this occasion on the basis of the Constitutional provisions of one Member State, but on the basis of the *fundamental principles shared by all the Member States*. The Community however, invoked the supremacy of Community law over *even shared* national law. The provision of the Treaty was clear, and the Court had no choice but to apply it.

The challenges against Community acts contravening fundamental rights and principles, however, reflected genuine concern in the Constitutional courts of the Member States and the doctrine of the supremacy of Community law was not sufficient to quash this. Rather, it raised the question of the authority of national legislatures to derogate from constitutional principles through the transferral of authority to a supra-national body. Clearly the authority to derogate from constitutional rights, even in this way, did not exist. It was eminently possible therefore that a national court would refuse to apply Community law on the grounds that it was constitutionally unlawful.

The Court began to address this concern in *Stauder*.¹²³ This case involved the assertion by the applicant that an obligation under the (German) implementing legislation of a Community Decision breached his fundamental rights. The Court avoided dealing directly with the question of the relationship between fundamental rights and Community law, side stepping it to rule that the correct interpretation of the Community Decision was the most liberal one and that:

“interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court.”¹²⁴

¹²³ Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419, [1970] CMLR 112.

¹²⁴ *Supra* note 121, para. 7.

Thus, the breach had arisen at *national* level and was not a matter for the Court. This dictum was however significant, in that it was the first occasion on which the Court acknowledged human rights among the fundamental principles of Community law.

In *Stauder* it had been relatively easy for the Court to interpret the Community provision appropriately, avoiding violating fundamental constitutional principles. The place of respect for human rights at the heart of the Community legal order was confirmed, however, in the *Internationale Handelsgesellschaft*¹²⁵ case. This case arose following a series of rulings by the Administrative Court of Frankfurt that certain agricultural regulations were in violation of the fundamental principle of proportionality. In 1970 it referred the *International Handelsgesellschaft* case to the ECJ. The ECJ ruled once again that the fundamental (constitutional) rights or constitutional principles of a Member State could not bring into question the validity of a Community act as this would question the legal basis of the Community itself. It did however state that:

“... respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member States, must be ensured *within the framework of the structure and objectives of the Community...*”¹²⁶

The Court was thus explicit that although fundamental rights were to be protected within the Community, they were secondary to achieving the objectives of economic integration.

This alone was not sufficient to reassure the guardians of the constitutions of the Member States, particularly Italy and Germany, from which two states most of the litigation in this field had arisen. In *Internationale Handelsgesellschaft*¹²⁷ the German Federal

¹²⁵ *Supra* note 55.

¹²⁶ Emphasis added.

¹²⁷ *Internationale Handelsgesellschaft* [1974] 2 CMLR 540.

Constitutional Court held, that as long as the Community did not have a democratically elected parliament, with legislative power and a codified Catalogue of Human Rights, directly applicable secondary legislation of the Community would not be capable of overriding national constitutional human rights provisions. Similarly, in *Frontini*,¹²⁸ the Italian Constitutional Court reserved the right to declare the Treaty incompatible with the Constitution in the event of Community legislation which breached the “fundamental principles of our constitutional order or the inalienable rights of man”.

By the time of *Steinike*¹²⁹ in 1980 the German Federal Constitutional Court was less certain about whether the principles of its 1974 decision (*Internationale Handelsgesellschaft*¹³⁰) were still valid in relation to “derived Community norms”. No doubt because *inter alia* the European Parliament was by that time directly elected, although not having the legislative powers the German Constitutional Court had sought, nor, of course, did (or does) the Community possess a codified Bill of Rights. However, the *Joint Declaration of the Parliament, the Council and the Commission* in 1977¹³¹ after referring to the jurisprudence of the Court refers to the rights guaranteed by the Constitutions of the Member States and to the European Convention on Human Rights. A further contribution to the relaxation of the German Constitutional Court’s stance must doubtless have been the continued development of the ECJ’s own approach.

The Court’s approach was initiated in the *Transoceanmarine Paint Association*¹³² case. Advocate-General Warner here built on the *shared principles of Member States* as fundamental rights to be protected by Community Law, acknowledging that *audi alteram partem* was a principle of neither Italian nor the Netherlands’ law, yet concluding that it

¹²⁸ *Frontini v. Ministero delle Finanze Giurisprudenza Costituzionale* [1974] CMLR 372.

¹²⁹ *Steinike und Weinlig* [1980] 2 CMLR 531.

¹³⁰ *Supra* note 127.

¹³¹ OJ 1977 C 103/1. This Declaration was an indirect endorsement of Court’s approach to HR protection.

¹³² Case 17/74 *Sadolin & Holmblad A/S, members of the Transocean Marine Paint Association v. Commission* [1974] ECR 1063 [1974] 2 CMLR 459.

was a principle which the ECJ should protect.¹³³ The Court did not refer to this in its judgment. It did, however, refer to the “general rule that a person whose interests are perceptibly affected by a decision taken by a public authority must be given the opportunity to make his point of view known”¹³⁴ without referring to this “general rule”’s source.

In *Van Duyn*¹³⁵ the ECJ referred to a further source of rights to be protected, ruling that:

“it is a principle of *international law*, which the EEC Treaty cannot be assumed to disregard in the relations between the Member States, that a State is precluded from refusing its own nationals the right of entry or residence.”¹³⁶

The next key development was in *Defrenne (no.2)*.¹³⁷ The Court ruled that Article 119 EEC, (the principle of equal pay between men and women) was “part of the foundations of the Community”. Once again, however, the Court did not, at this stage, go as far as its Advocate-General: Trabucchi had suggested, that the principle constituted a “fundamental human right”. (The Court recognised the involvement of a “fundamental human right” in this regard in *Defrenne (no.3)*.¹³⁸) The Court did however establish the existence of horizontal direct effect in *Defrenne (no.2)*, by recognising that the principle of equal pay could be invoked *between individuals* as well as against the national authorities. This was of profound importance in the development of the protection of individuals’ rights in the Community.

¹³³ *Ibid*, pp. 1088-9, ECR; pp.469-470 CMLR.

¹³⁴ *Ibid* p.1080, para. 15.

¹³⁵ Case 41/74 *Van Duyn v. Home Office* [1974] ECR 1337, [1975] 1 CMLR 1.

¹³⁶ *Supra* note 135, para 22 (emphasis added).

¹³⁷ Case 43/75 *Defrenne v. SABENA* [1976] ECR 455, [1976] 2 CMLR 98.

¹³⁸ Case 149/77 *Defrenne v. SABENA (no.3)* [1978] ECR 1380, [1978] 3 CMLR 312.

Thus throughout the 1970s the Court actively developed the protection it could offer to fundamental rights and to individuals, drawing on a widening range of sources: from the outset, at which point it considered only the Treaty, to considering even principles of international law.

The above account, focusing as it does on the development of the protection of fundamental rights within the Community, has bypassed a very important source increasingly drawn on by the Court, the ECHR itself. The Court, crucial in the development of the protection of rights in the Community, was also vital in the establishment of the relationship between the Community and the ECHR.

(ii) The Development of the relationship between the European Community and the European Convention of Human Rights

While expanding the range of sources that could be considered in its judgments, the ECJ did not neglect the existence of the ECHR. As it established the shared principles of the Member States as a valid source of fundamental principles to be protected by the Community, it became possible for the ECJ to include the ECHR (to which all the Member States were party) as guidance in establishing these principles.

It was Advocate-General Mayras, in *Boehringer*,¹³⁹ who first relied upon the ECHR, alongside reference to principles of national law of the Member States. Although the ECJ, typically, did not itself refer to the ECHR in its judgment, this was only to be a question of time. Within eighteen months the Court had moved one step closer to doing so, referring in *Nold (2)*¹⁴⁰ to the applicant's reliance on the ECHR, as well as the German Grundgesetz:

“As the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from the constitutional

¹³⁹ Case 7/72 *Boehringer Mannheim GmbH v. Commission* [1972] ECR 1281, [1973] CMLR 864.

¹⁴⁰ Case 4/73 *Firma J. Nold v. Commission* [1974] ECR 491, [1974] 2 CMLR 338.

traditions common to the Member States, and it cannot uphold measures which are incompatible with fundamental rights recognised and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated, or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law.”¹⁴¹

Although this judgment did not explicitly refer to the *European* Convention on Human Rights, this was clearly the Court’s intention: the applicant’s reference to the ECHR had, in turn, been referred to by the Court. In addition by the wording “on which the Member States have collaborated or of which they are signatories” is unmistakably a reference to the ECHR, which until a week before the *Nold (2)* judgment had not been ratified by France.

It is interesting, however, that the ECJ, having stated that it was “*bound* to draw inspiration from the constitutional traditions common to the member States”, went on to state only that “international treaties.... *can supply guidelines which should be followed*”, thereby suggesting that the shared constitutional traditions of the Member States are more important than the Conventional provisions, which are not necessarily binding. Certainly if these had come into conflict at this point, the shared constitutional traditions would have had supremacy. Consequently, it can also be argued that had a provision of the Treaty come into conflict with a provision of the (European or other) Convention, the provision of the Treaty would have been upheld.

In *Rutili*¹⁴² the ECJ finally explicitly referred to specific provisions of the ECHR. It must be noted in this respect however, that it referred first to Article 48 EEC, stating that it was a: “specific manifestation of the more general principle, enshrined in Articles 8, 9, 10 and 11 of the Convention on Human Rights and Fundamental Freedoms”.

¹⁴¹ *Ibid*, para.13.

¹⁴² Case 36/75 *Rutili v. Minister of the Interior* [1975] ECR 1219, [1976] 1 CMLR 140.

This suggests that at this point the ECJ, while emphasising the importance of the ECHR, was not yet ready to rely solely upon a provision of it and would still require a corollary provision within the Treaty to apply. Conversely, the Court may have been interpreted here as indicating that the ECHR had been incorporated into Community law and that its provisions were therefore directly effective.

Advocate-General Trabucchi, not surprisingly, in *Watson and Belmann*¹⁴³ quashed any such suggestions.

“In fact, in that judgment [*Rutili*], the Court substantially reaffirmed the principle which had already emerged from its previous decisions that the fundamental human rights recognised under the Constitutions of the Member States are also an integral part of the Community legal order.

The extra-Community instruments under which those states have undertaken international obligations in order to ensure better protection of those rights can, without any question of their being incorporated as such into the Community order, be used to establish principles which are common to the States themselves.”

The Court followed this approach in its judgment. It upheld the principle of supremacy of Community over national law while using sources such as the ECHR to identify shared principles, yet without being accused of having incorporated such Conventions into Community law and thus without running the risk of becoming bound by them. This was in marked contrast to the submission of the Commission which had stated that:

“Following its ratification by the member States, the Convention is now legally binding upon the Community, both in relation to measures adopted by the Community institutions and each time that a provision of Community law is invoked.”

¹⁴³ *Supra* note 86.

Again in *Royer*¹⁴⁴ the ECJ resisted the Commission's invitation to declare itself bound by the ECHR. It was not until *Hauer*¹⁴⁵ that the Court finally proved itself willing to deal explicitly with the nature of the effect of the ECHR upon Community law. This was the first case in which the ECJ dealt with a provision of the ECHR in detail and, indeed, it even construed it.¹⁴⁶ Even in this case, however, the Court still felt obliged to refer also to national law in its analysis of Article 1 of the First Protocol to the ECHR. The ECJ arrived at its ruling on slightly different grounds from those of its Advocate-General (Capotorti). Both, however, arrived at substantially the same conclusion. Typically, the ECJ acknowledged that the provision of the ECHR did give rise to a right which should be protected in Community law, but held that that right had not been violated in the instant case.

In *Pecastaing*¹⁴⁷ shortly afterwards, Advocate-General Capotorti accepted without further discussion that "... regard must be had for the basic principles of a fair hearing which are to be inferred from Article 6 of the European Convention", and continued by discussing the case law of the Commission and Court of Human Rights. Once again, however, he did not see that the relevant directive violated the right under Article 6 and as established by the case law of the Court and Commission of Human Rights. The ECJ followed his advice on this. In its judgment it simply referred to the Convention, without any discussion of earlier case law to justify this move.

Thus it can be seen that although the ECJ was now willing to apply the ECHR, it had not yet been faced with the need to annul a Community act for violation of one of its provisions. The *National Panasonic*¹⁴⁸ case, decided in the same year as *Pecastaing*, saw a further shift in emphasis by the ECJ in its treatment of international conventions on

¹⁴⁴ Case 48/75 *The State v. Royer* [1976] ECR 497, [1976] 2 CMLR 552.

¹⁴⁵ *Supra* note 87.

¹⁴⁶ *Ibid*, para 17.

¹⁴⁷ Case 98/79 *Pecastaing v. Belgian State* [1980] ECR 691, [1980] 3 CMLR 42.

¹⁴⁸ Case 136/79 *National Panasonic (UK) Ltd v. Commission* [1980] ECR 2057, [1980] 3 CMLR 169.

human rights. Whereas in *Nold*¹⁴⁹ and *Hauer*¹⁵⁰ such conventions had been referred to as “providing guidelines” as to the existence of rights to be protected by the Community, in *National Panasonic* the Court stated that:

“As the Court stated in *Nold*, fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures, in accordance with constitutional traditions common to the Member States and with international treaties on which the member States have collaborated or of which they are signatories.”¹⁵¹

By the beginning of the 1980s it was clear that the Court had moved a long way from its initial *inability* to apply or enforce fundamental principles or rights not enshrined in the Treaty. It had first drawn on the “common constitutional traditions of the Member States”¹⁵² and had even limited this further, with a reference to “fundamental rights recognised and protected by the Constitutions of those states”.¹⁵³ But in *National Panasonic*¹⁵⁴ the Court moved back again to a slightly less stringent formula. At this point the ECHR was a source of Community law, notwithstanding that the Community could not accede to it without modification of both the EEC Treaty and the ECHR itself, nor was the Community bound by the enforcement mechanisms of the Convention.

Perhaps having foreseen the problems that were to arise, largely as a result of the fact that it was not subordinate to the enforcement mechanisms of the Convention, the Court, in its jurisprudence had not referred to the case law of the European Court of Human Rights (unlike its Advocates-General). It had also, expressly, made the binding nature of the Convention reliant upon the fact that the Convention expressed principles common to the

¹⁴⁹ *Supra* note 140.

¹⁵⁰ *Supra* note 87.

¹⁵¹ *Supra* note 148, para. 18.

¹⁵² *Internationale Handelsgesellschaft*, *supra* note 55.

¹⁵³ *Nold (2)* *supra* note 140.

¹⁵⁴ *Supra* note 148.

Member States, refusing to declare the Community institutions bound by the Convention in the context of Community law, as it had been repeatedly invited to do by the Commission.

Thus the Court kept control of its own autonomy, refusing to concede any possibility of becoming subordinate to the European Court of Human Rights and tying the fundamental rights which it will apply, and protect, very firmly to the Community legal order. The benefits of this were to become apparent through the 1980s.

In the *Cinéthèque* case¹⁵⁵ the Court was explicit that:

“although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community Law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.”¹⁵⁶

Although Lord Slynn stated:

“In my opinion it is right, as the Commission contends, that the exceptions in Article 36 and the scope of mandatory requirements taking a measure outside Article 30 should be construed in the light of the Convention”¹⁵⁷

What this reflects is the recurrent question of what falls within the scope of Community law. While the ECJ saw the matter as being one of purely national competence, Slynn viewed it as a matter that did indeed fall within the scope of Community law. The approach of the ECJ reflects its caution as to the extent of its jurisdiction.

¹⁵⁵ Joined Cases 60 & 61/84 *Cinéthèque SA and Others v. Fédération nationale des Cinémas français* [1985] ECR 2605, [1986] 1 CMLR 365.

¹⁵⁶ *Supra note 155*, para 26.

¹⁵⁷ *Ibid* p. 2616/ p.379.

This same caution was demonstrated once again by its judgment in *Demirel*.¹⁵⁸ In which there was, however, a subtle, but crucial, change of emphasis. In *Cinéthèque* the ECJ had stated that it was not competent to rule on a matter falling *within the jurisdiction of the national legislator*, this was turned round in *Demirel*:

“[The Court] has no power to examine the compatibility with the European Convention on Human Rights of *national legislation lying outside the scope of Community Law*”¹⁵⁹

Whereas *Cinéthèque* could be interpreted as meaning that a matter which fell within both national and community law fields would be outwith the scope of review of the Court in relation to fundamental rights, *Demirel* suggests that it would be subject to such review. Thus it is apparent that as regards a matter within the scope of Community law, the Court is competent to rule on an act of the national legislator as regards its compatibility with the Convention. The question is where the line is drawn within the grey area that may, in different respects, fall within Community *and* national competence.

In relation to the certainty arising from them, that the ECJ may rule on a matter falling within the scope of Community law, these decisions do not appear to be surprising. Two factors are of importance here: first, the ECJ's determination to limit strictly the impact of the ECHR in European law *per se*, and notably upon itself, and secondly, the sensitive nature of the protection of fundamental rights. The ECJ is always politically, as well as legally, very aware of the limits upon its jurisdiction. Additionally the effect of the ECHR, as of any other Treaty of international law, is determined, as has been seen above, by the individual legal system in each individual state. Therefore the ECJ *cannot* begin to interfere in this field, unless there is a link to an aspect of Community law which can be used to assert competence to rule in relation to the ECHR. It has been suggested¹⁶⁰

¹⁵⁸ Case 12/86 *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719, [1989] 1 CMLR 421.

¹⁵⁹ *Ibid*, para 28 (emphasis added).

¹⁶⁰ Dallon “An Overview of European Community Protection of Human Rights, with some Special References to the UK” (1990) CMLRev 27: 761-790 at p 782.

that the ECJ's approach in this respect has "added to the lacunae of rights protection in English law." However, the question of the adequacies or otherwise of the enforcement of the ECHR in the UK is one which is quite separate from, and should not be confused with, that relating to the extent of the ECJ's competence to ensure human rights. The effect of the ECHR in UK law is intrinsically linked to the dualist system of law in the UK. Individuals in the UK have the right of individual petition to the European Court of Human Rights, which, under the existent mechanisms for the enforcement of the Convention and *as compared with the ECJ*, is the correct forum for the enforcement of human rights provisions. The question of incorporation of the ECHR into UK law remains a matter of national law.¹⁶¹ This is not an area into which the ECJ can step, to fill perceived lacunae, particularly as it should be recalled that if the ECJ were to take such a stance to fill the "lacunae" observed in one state (the UK), by virtue of that same action it would encroach upon the jurisdiction of national judiciaries of the other member states. Additionally, to encourage the enforcement of the ECHR by the ECJ ignores the fact that there is no system for preliminary reference between the two jurisdictions, and that the ECJ is not in fact bound by the ECHR. This would only add to the interpretative problems discussed below.

The change of emphasis in *Demirel* was instrumental in the decision reached by the ECJ in *Wachauf*,¹⁶² where it declared itself competent to review the validity of the acts of the national legislature in accordance with the ECHR when implementing Community law which itself protects a fundamental right.¹⁶³ Clearly, in this context at least, the Court is declaring itself bound *not merely to respect* the principles and rights arising from the ECHR but indeed, that it will *ensure the respect of these rights by the Member States*. The ECJ went further still in the *ERT*¹⁶⁴ case, stating:

¹⁶¹ The ECHR has now been incorporated into UK law (The Human Rights Act (1998) which will come into effect in 2000).

¹⁶² Case 5/88 *Wachauf v. Germany* [1989] ECR 2609, [1991] 1 CMLR 328.

¹⁶³ *Ibid*, paras. 17-19.

¹⁶⁴ *Supra* note 84.

“the Court cannot assess, from the point of view of the European Convention on Human rights national legislation which is not situated within the body of Community law. By contrast, as soon as any such legislation enters the field of application of Community law, the Court, as the sole arbiter in this matter, must provide the national court with all the elements of interpretation which are necessary to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the European Convention on Human Rights - the observance of which this Court ensures.”¹⁶⁵

Thus measures that are incompatible with respect for human rights recognised and guaranteed in the Community legal order could not be permitted in the Community. The ECJ made it clear that in the event that national authorities restrict one of the fundamental freedoms of the Community, it will only be justified if it complies with the provisions of the ECHR.

In *Grogan*,¹⁶⁶ Advocate-General Van Gerven confirmed what has been observed above, referring to *Cinéthèque*:

“In that case, it was stated that the Court’s power of review did not extend to, “an area which falls within the jurisdiction of the national legislator”, a statement which, generally speaking, is true. Yet once a national rule is involved which has effects in an area covered by Community law (in this case Article 59 EC) and which, in order to be permissible, must be able to be justified under Community law with the help of concepts or principles of Community law, then the appraisal of that national rule no longer falls within the exclusive jurisdiction of the national legislator.”¹⁶⁷

¹⁶⁵ *Ibid*, para 42.

¹⁶⁶Case 159/90 *Society for the Protection of the Unborn Children (Ireland) Ltd (SPUC) v. Stephen Grogan and others* [1991] ECR I-4685, [1991] CMLR 849.

¹⁶⁷ *Ibid*, para. 31.

In its judgment the ECJ distinguished *ERT*, stating that in this case (*Grogan*) the relevant national legislation was outside the scope of Community law.¹⁶⁸

It has been suggested that the *Cinéthèque* case is inconsistent both with the later jurisprudence in *Wachauf* and *ERT* and with what had come before.¹⁶⁹ It can be argued, however, that the ECJ was effecting a gradual development of its human rights jurisdiction. It should be recalled that the ECJ is only competent to rule on the basis of the cases that come before it. If a case relates to national legislation (as in *Cinéthèque*) the ECJ must rule on that basis and cannot speculate as to what may happen if the relevant facts were a matter of both Community and national law. Such decisions could give rise to sweeping generalisations. Furthermore, the ECJ had to reassure Member States, where dealing with national legislation, that it will not start to interfere in areas in which it has not been given competence, otherwise Member States would feel that their domestic sovereignty was being infringed. On the other hand however, the Community is a dynamic organisation, and the ECJ must be able to reflect this. The ECJ does not operate exclusively in one field, for example fundamental rights, but must see the implications of its judgments for other fields. The dangers of being perceived to create even a potential risk of violating fundamental constitutional rights were demonstrated in the 1970s. When developing new fields the ECJ always acts with an eye to Member State reaction and, fundamentally, to the political climate operating within Europe. This is clearly demonstrated by the introduction of "fundamental rights" as principles of Community law, as a direct response to the German and Italian Constitutional Courts' threat to the supremacy of Community law in the absence of these principles as part of Community law. That the effect of being perceived to have overstepped its jurisdiction

¹⁶⁸ The implications for the Irish Constitution had the matter been held to be within the scope of Community law are interesting: would it have been held to conflict with fundamental rights as ensured by the Community? Has the ultimate effect of introducing fundamental rights to the Community to protect national constitutional rights, been to undermine the national constitutions where they protect values not forming part of Community law but which may have effects upon the operation of the economic freedoms protected by Community law?

¹⁶⁹ Coppel and O'Neil "*The European Court of Justice: Taking Rights Seriously?*" (1992) 29 CMLRev 669-692 c.f. Weiler and Lockhart, "*Taking Rights Seriously*" *Seriously: The European Court and its Fundamental Rights Jurisprudence - Part I*" (1995) 32 CMLRev 3251-95 and "Part II" (1995) 32 CMLRev 579-627.

could be to severely limit its development is a fact that the ECJ is not able to disregard. Thus developments may only be gradual.

Although the ECJ has now gone far further than the *Cinéthèque* judgment implied, the fundamental rule has remained the same: the recurrent question relates to matters outside the *exclusive* jurisdiction of the Community, but not within the exclusive jurisdiction of the national courts. The development of this field has been far-reaching. However the ECJ could still, on this basis, maintain that it is acting in the pursuit of the enforcement of Community law and that where the enforcement of Community law impinges also on matters relating to the ECHR, this must be respected as part of the Community legal order. On that ground it is also possible to argue that these cases *are* a logical development of the ECJ's earlier jurisprudence on human rights. As the Community has evolved so the considerations of the ECJ have also had to evolve.

What then falls within the scope of "Community law"? In *Konstantinidis*¹⁷⁰ Advocate-General Jacobs suggested that the scope of "Community law" could be very wide indeed, stating that any human rights violation suffered by a *civis europeus* would be *per se* a violation of Community law. This definition was not referred to in the judgment of the case, and it remained unclear how far the ECJ would be prepared to go in its interpretation of the scope of Community law. This question was revisited recently in *Kremzow*.¹⁷¹ In 1982 Friedrich Kremzow confessed to murder but later retracted the confession. In 1984, however, he was found guilty of murder (and unlawful possession of a firearm), sentenced to twenty years imprisonment and committed to an institution for mentally ill criminals. Following a subsequent hearing, at which he was not present (he had not requested to attend and the court had not ordered his attendance of its own motion), the conviction was upheld but the sentence was amended to life imprisonment in an ordinary prison. The European Commission and Court of Human Rights¹⁷² both held that, in accordance with Article 6(3)(c) ECHR, Kremzow should have had the

¹⁷⁰ Case C-1168/91 *Konstantinidis v. Stadt Altensteigstandesamt* [1993] ECR I-1191, [1993] 3 CMLR 401.

¹⁷¹ Case C-299/95 *Kremzow v. Austria*, [1997] I ECR I-2629, [1997] 3 CMLR 1289.

¹⁷² Judgment of 21 September 1993, *Kremzow v. Austria* series A, No. 268-B.

opportunity to defend himself in person on appeal. For this violation of his rights he was awarded expenses and fees. Following this, Kremzow brought (unsuccessful) proceedings for damages and payment of compensation for unlawful detention pursuant to Article 5(5) ECHR. The appeals he brought were equally unsuccessful. In an extraordinary appeal Kremzow argued that the violation of the ECHR had not been rectified by the proceedings and that the appeals should be resumed to achieve that result. He asked the national court to request a preliminary ruling from the ECJ, on whether the national court was bound by the judgment of the European Court of Human Rights. He submitted that the case related to the fundamental right of freedom of the person, and the civil sanction for its infringement, that is the basis for the exercise of all other freedoms. The national court requested the ECJ to give a preliminary ruling *inter alia* on whether the provisions of the ECHR are part of Community law, which would render them subject to interpretation by the ECJ. In its ruling the ECJ initially referred to *Opinion 2/94*¹⁷³, to reaffirm that fundamental rights are an integral part of the general principles of Community law. It then confirmed that: “measures are not acceptable within the Community which are incompatible with the observance of human rights thus recognised and guaranteed” referring in particular at this point to the *ERT* case.¹⁷⁴ The ECJ continued, with reference to *Grogan*:¹⁷⁵

“... where national legislation falls within the field of application of Community law the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the Convention - whose observance the Court ensures. However the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law.”

¹⁷³ *Opinion 2/94* Re the Accession of the Community to the European Human Rights Convention [1996] ECR I-1759, [1996] 2 CMLR 265.

¹⁷⁴ *Supra* note 84.

¹⁷⁵ *Supra* note 166.

Finally, the ECJ rejected Kremzow's argument that his rights in relation to freedom of movement had been violated, observing that:

“a purely hypothetical prospect of exercising that right does not justify the application of Community Provisions... .. Moreover, Mr Kremzow was sentenced for murder and for illegal possession of a fire arm under provisions of national law which were not designed to secure compliance with rules of Community Law”¹⁷⁶.

Therefore, the ECJ ruled that it was not competent to interpret the ECHR in this case as the matter was not genuinely within the field of application of Community law.

In *Kremzow* the ECJ has clearly made an attempt to draw a line as to how far the interpretation of “scope of Community law” may go. This may allay some of the fears expressed as to the “offensive” use of fundamental rights, and the trespass by the ECJ into national states' jurisdiction.¹⁷⁷ The approach of the Court in this case is consistent with its condemnation of the abuse of Community law provisions in the context of free movement of goods.¹⁷⁸

However, although in this case the ECJ appears to be determined not to extend its competence without limit, its expansion of its jurisdiction, which has caused so much controversy, does exacerbate a problem inherent in the existence of two parallel legal systems operating within Europe. As seen above, the Community is not subject to the jurisdiction of the European Court of Human Rights. The ECJ has thus far refused to refer to the case law of the ECHR in its judgments, notwithstanding the fact that its Advocates-General have been willing to do so. Thus the possibility arises that the ECJ

¹⁷⁶ *Supra* note 171, para.s 16-17.

¹⁷⁷ See Coppel and O'Neill, *supra* note 169.

¹⁷⁸ See the “Sunday Trading” jurisprudence Case 169/91 *Stoke on Trent City Council and Norwich City Council v. B. & Q. Plc.* [1992] ECR I- 6635, [1993] 1 CMLR 426 and reaction of the Court in Joined Cases C267/91 and 268/91 *Keck and Mithouard* [1993] ECR I-6097, [1995] CMLR 101.

may interpret a provision in such a way as conflicts with the interpretation given by the Strasbourg Court. In the event that this occurs, the national court is bound to apply the interpretation given by the ECJ, as preliminary rulings are binding upon the referring court.

Such divergent interpretations have occurred. Perhaps the best known example involves the *Hoechst*¹⁷⁹ case. This case, like many of the others giving rise to divergent opinions in the two courts, related to the rights of a legal person and Article 8 of the ECHR (the right to privacy). Although there had been earlier case law relating to Article 8 of the ECHR and legal persons, the ECJ had avoided a direct ruling on the extent to which the right to privacy can be relied upon by a legal as opposed to a natural person.¹⁸⁰ In *Hoechst* the ECJ was explicit that:

“...although the existence of the fundamental right [to inviolability of the home] must be recognised in the Community legal order as a principle common to the laws of the Member States in regard to the private dwellings of natural persons, the same is not true in regard to undertakings, because there are not inconsiderable divergencies between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.

No other reference is to be drawn from Article 8(1) of the European Convention on Human Rights which provides that “everyone has the right to respect for his private and family life, his home and his correspondence”. The protective scope of that article is concerned with the development of man’s personal freedom and may not therefore be extended to business premises. Furthermore it should be noted that there is no case law in the European Court of Human rights on that subject.”¹⁸¹

¹⁷⁹ Joined Cases 46/87 and 227/88 *Hoechst AG v. Commission* [1989] ECR 2859.

¹⁸⁰ See for example *National Panasonic supra* note 146, Case 5/85 BV and *AKZO Chemie UK Ltd v. Commission* [1986] ECR 2585, [1987] 3 CMLR 716.

¹⁸¹ *Supra* note 179, para.s 17-18.

It continued, recognising the need to protect any person (natural or legal) from arbitrary or disproportionate intervention as a general principle of Community law. The interpretation by the ECJ in *Hoechst* was initially compared with the Strasbourg Court's decision in *Chappell*¹⁸² and criticised on that basis. It has subsequently been observed, however, that this is not a good comparison, because although *Chappell* did relate to the applicability of Article 8, the Strasbourg Court, in addition to examining the effect of the search upon the company, considered the applicant's private life and home.¹⁸³ In *Niemitz*, however, the Strasbourg Court (after referring to the ECJ's judgment in *Hoechst*) was explicit that:

"...More generally, to interpret the words "private life" and "home" as including certain professional or business activities or premises would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities .."¹⁸⁴

The Strasbourg Court reaffirmed this position early in 1993.¹⁸⁵ Thus there can be little doubt that the ECJ's judgment in *Hoechst* was in conflict with the correct interpretation to be given to Article 8 of the ECHR. Advocate-General Darmon, in *Orkem*, stated

"This Court may therefore adopt, with respect to provisions of the Convention, an interpretation which does not coincide exactly with that given by the Strasbourg authorities, in particular the European Court of Human Rights. It is not bound, in so far as it does not have systematically to take account, as regards fundamental rights under Community law, of the interpretation of the Convention given by the Strasbourg authorities."¹⁸⁶

¹⁸² European Court of Human Rights, *Chappell* Judgment of 30 March 1989, Series A No. 152.

¹⁸³ Lawson, "*Confusion and Conflict: Diverging Interpretations of the ECHR in Strasbourg and Luxembourg*" Lawson and de Blois, 1994.

¹⁸⁴ European Court of Human Rights, *Niemitz* Judgment of 16 December 1992, Series A No. 251.

¹⁸⁵ European Court of Human Rights, *Funke, Cremieux and Mialhe*, Judgments of 25 February 1993, Series A, Nos. 256A, 256B and 256C.

¹⁸⁶ Case 374/87 *Orkem v. Commission* [1989] ECR 3343, at 3351.

The crucial, practical question raised, is whether the protection offered in the Community, and ensured by the ECJ, meets in every case, the standard required by the ECHR. This is doubtful. Notably, there is no remedy for a complaint against a breach of the ECHR by Community institutions. In *CM & Co. v. Federal Republic of Germany*,¹⁸⁷ The Commission of Human Rights, found the applicant's complaint to be inadmissible on the grounds that the possible violation had been committed by the Community, which is not a party to the Convention. Germany's responsibility was limited to its fulfilment of its international obligation to execute the Community's decision. The Commission on Human Rights is clearly keen to avoid becoming involved in areas of Community competence, as it could have adopted a stricter approach to the breach of a right of the ECHR by a party to it. Demonstrating their commitment to resolve the problem, members of the two courts recently met to discuss dual jurisdiction.

Proposed Solutions to the Problem of Dual Jurisdiction over Human Rights

Although this problem merits, and has received, fuller discussion than can be given in this context it is essential, having raised the problem of divergent interpretations of the ECHR by the ECJ and the Strasbourg Court, to make some reference to potential solutions to it. Two main proposals have been put forward. Each of these has been debated to greater and lesser degrees. The first, and perhaps most obvious option is accession, the second is that the Community devises its own Bill of Rights. There is a third, more novel option, suggested by Toth,¹⁸⁸ that the Community should incorporate the contents of the ECHR into Community law and withdraw from the Convention.

Accession by the Community to the European Convention on Human Rights

Accession has been debated for almost as long as the ECJ has been considering fundamental rights. In 1976¹⁸⁹ the Commission stated that it considered the Community

¹⁸⁷ *C.M. & Co. v. Federal Republic of Germany*, Application no. 13258/87

¹⁸⁸ Toth, "The European Community and Human Rights: The Way Forward" (1997) 34 CMLRev 491.

¹⁸⁹ Report of 4 February 1976 from Commission to Parliament, Supplement 5/76 - Bull. EC.

to be bound by the ECHR, and that there was no necessity for the Community to formally accede to it. However in 1979 the Commission revised this opinion, publishing a memorandum on the accession of the Community to the ECHR.¹⁹⁰ In this it stated that the problems in not having a clear Bill of Rights were such that the Commission now considered accession to be desirable. The introduction to the memorandum states:

“The Commission believes that the best way of replying to the need to reinforce the protection of fundamental rights at Community level, at the present stage consists in the Community formally adhering to the European Convention ..”

It continues that, although in the long term the Community should “endeavour to complete the Treaties by a catalogue of fundamental rights specially adapted to the exercise of its powers” the best protection for individual citizens, until such time as the Member States can agree on the definition of “fundamental rights”, is accession. At paragraph 7 it states that:

“the decisive factor in this view is that the ECHR and the protection of fundamental rights ensured by the Court of Justice of the European Communities essentially have the same aim, namely the protection of a heritage of fundamental and human rights considered inalienable by those European States organised on a democratic basis. The protection of this Western European heritage should ultimately be uniform and accordingly assigned, as regards the Community also, to those bodies set up specifically for this purpose.”

It is perhaps difficult to reconcile this with the opinion expressed repeatedly throughout the memorandum, that accession should not be an obstacle to a Community catalogue of fundamental rights.¹⁹¹ In the event of accession, an additional Community catalogue would run the risk of being at the least superfluous, and could lead to confusion as to the

¹⁹⁰ Commission Memorandum “*Accession of the Communities to the European Convention on Human Rights*” Bulletin of the European Communities Supplement 2/79, Adopted by the Commission on 4 April 1979.

¹⁹¹ *Supra* note 190, para. 8.

appropriate legal basis on which to ground acts or actions relating to rights. Even if the Community catalogue related to "secondary" rights, not covered by the ECHR but relevant to the Community, there is potential for conflict unless such a catalogue is strictly defined.

A key factor in the change of opinion of the Commission between 1976 and 1979 was the realisation of the untenable position of Member States in the event that the Community introduced a provision which contravened the ECHR. Because the Community itself is not subject to the jurisdiction of the Strasbourg Court, the Member State would be held directly responsible for the breach of the ECHR if it implemented the Community law provision. In turn, the Community would have no opportunity to respond to the complaint against its provision in proceedings in Strasbourg. It was also believed *inter alia* that accession would strengthen the institutions of the Community when acting in the field of fundamental rights protection.

Among the arguments against accession considered by the Commission in 1979, was the fact that the rights contained in the ECHR are not really relevant to the Community, and would merely delay the Community in addressing the real issue: the problem of adequately guaranteeing fundamental rights relevant to the Community. The Commission rejected both of these claims, observing the relevance of various provisions of the ECHR. It was rather less than convincing in its consideration of the fact that the ECHR is only open to accession by *sovereign states* and that the Community could not exercise its procedural rights. It suggested that it may not be appropriate for the Community to "seek full and equal membership in all respects", stating that "accession must serve to extend the range of legal remedies available in the event of violations of fundamental rights by the Community".

Whatever its merits, the Commission's memorandum failed to bring the Community any closer to accession. The European Parliament, in 1989, adopted a Declaration of Fundamental Rights and Freedoms (12 April 1989). This was followed by a renewed attempt by the Commission to bring the Community to accede to the ECHR.

In 1994 the Parliament produced its own Resolution on the accession of the Community to the Convention.¹⁹² It based the need for this upon the fact that there “will be gaps in the system for protecting fundamental rights until such time as the Community is subject to the monitoring procedures provided for under the ECHR in the same way as its Member States”.¹⁹³ It observed that the increasing competence of the Community leads to an increased risk of interference in fundamental rights and freedoms. While the Parliament recognised the political, institutional and legal problems inherent in accession it saw no reason why the ECJ should not be subject to the jurisdiction of the Strasbourg Court, and envisaged accession being possible upon the legal basis of Articles 235 EC and F(2) and K(2)(1) of the TEU.

Shortly after this, the Council of the European Union requested an Opinion¹⁹⁴ from the ECJ, on the possibility of accession to the ECHR by the EU. The Opinion was delivered on March 28 1996.¹⁹⁵

In brief, the ECJ stated that:

“As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms because no provision of the Treaty confers on the Community institutions in a general way, the power to enact rules concerning human rights or to conclude international agreements in this field and such accession cannot be brought about by recourse to Article 235 of the Treaty.”¹⁹⁶

¹⁹² *Resolution on Community Accession to the European Convention on Human Rights* OJ 1994. C44/32 18.

¹⁹³ *Ibid*, para.1 C44/33.

¹⁹⁴ Pursuant to Article 228(6) EC.

¹⁹⁵ *Opinion 2/94*, *supra* note 173.

¹⁹⁶ *Supra* note 173, para. 6.

The Court then stated that accession would have such a profound effect upon the system of protection of human rights in Europe and equally profound institutional implications, that such a change would require the amendment of the Treaty. It was categorical that Article 235 could not be used as the legal basis for accession, contrary to the opinion of the Parliament. Its reasoning in this was that Article 235 can only be used to achieve the existing objectives of the Treaty; it cannot be used to widen the powers or competence of the Treaty or, effectively, to amend the Treaty.

Thus from the Community perspective accession to the ECHR is not an option, unless the required amendment is made to the Treaty. However, as Noreen Burrows has observed "Treaty amendment is a long and complex business and ... there is no consensus on how to ensure protection of human rights in the Community."¹⁹⁷ It can be argued that if there is no such consensus then this itself provides ample evidence to support the ECJ in its opinion that the necessary powers have not been conferred upon the Community in this field. Burrows however questions the lack of application of the doctrine of parallelism in this context: "If Article 164 allows the Court to recognise general principles of human rights in the internal legal order why does it not provide a basis for action in the external sphere?" She continues, speculating that perhaps in this the ECJ is motivated by its desire to guard its jurisdiction, reluctant to submit to the jurisdiction of the Strasbourg Court which would very likely be part and parcel with accession.¹⁹⁸

It is possible that the ECJ is protective of its jurisdiction. However, it is submitted that there is a reason why the doctrine of parallelism does not apply. As has been seen, the doctrine of parallelism is applied where the Community has an internal power, and where application of this power externally is essential to the achievement of one of the objectives of the Community. The Court has established that it is competent to uphold human rights within the Community. It has done this, however, as a reflection of the values of the Member States, which should be protected. Its powers in this sphere are

¹⁹⁷ Noreen Burrows "Question of Community Accession to the European Convention Determined" (1997) ELRev 58, at 61.

¹⁹⁸ The debate as to the potential relationship between the two courts, although interesting, is not strictly relevant, in the light of the Opinion, and is not one which can be properly discussed here.

limited to within that specific context¹⁹⁹ which does not equate to an objective of the Community.

At this point the question referred to briefly above, as to whether the Council of Europe would be inclined, *or able* to make the necessary amendment to the ECHR to enable the Union to accede (even in the event that the necessary amendments are made to the EC Treaty) should be recalled. It becomes ever more unlikely as the membership of the Council expands: persuading the forty, very different, member states to agree to the necessary changes could prove difficult, if not impossible.

Development of a European Union Catalogue of Rights

The second significant proposal to resolve the problem of dual jurisdiction is that the Union (or Community) develops its own Catalogue of Human Rights. The limitations of this are clear however. Initially, it might be difficult to find a consensus on the nature of rights to be included; subsequently, any overlap with the ECHR would raise serious jurisdictional problems. Where a conflict arose between rights under the different systems, demanding a balance to be struck, which jurisdiction would be appropriate? A further factor to bear in mind is the dynamism of the Community: had a list of rights been in existence throughout the 1970s and 80s, it could have severely limited the developmental approach of the ECJ which proved so important in this field. In the 1970s it was believed that the Community was not and would not be concerned with human rights. That being no longer the case, there may still be rights declared to be outside the scope of the Community. Yet in ten years time, however, perceptions may be very different. Cataloguing the rights to be protected by the Community would have to be done in a manner which does not limit future rights to be considered. These factors taken together call into question the purpose and merit in developing a Catalogue of Rights.

¹⁹⁹ This will be discussed in more detail below.

Withdrawal from the Council of Europe and Development of a Union Catalogue of Rights

Toth has proposed a novel solution.²⁰⁰ In the light of Opinion 2/94 he suggests the Community has three options: the continuation of the *status quo*, the development of a Community Catalogue of Human Rights, or Accession to the Convention. He rejects the first, stating that the protection of human rights now deserves more “concrete, tangible material” than the protection by general principles of law. The second he rejects on the grounds that it would undermine the authority of the Convention, it would establish a dual system of human rights protection in Europe, the drafting of it would be very difficult, and, finally that it would require Treaty amendment. Accession he rejects for various grounds: *inter alia* the internal and external consequences of accession, and its ultimate incompatibility with the Treaty. Having dispensed with his three “options” Toth proposes “the solution”. This takes as its starting point the achievement of enlargement of the Union, (to 26 states). On enlargement the Union:

- “1. [should incorporate] all of the substantive provisions of the European Convention into the Treaty of European Union as a separate Title....
2. [should extend] the jurisdiction of the Court of Justice under the EC Treaty to this new Title and related protocols
3. [Member States should withdraw] from the European Convention in accordance with Article 65 thereof²⁰¹

There is a fundamental practical problem with this. From a purely Union perspective Toth has not explained how agreement should be reached to achieve the necessary amendment of the Treaty. Given the existing lack of consensus on the approach the Community should take to protection of human rights in a Union of 15 states, it would be no small matter to achieve such consensus in an enlarged Union of 26 states. The assumption that this will simply happen thus appears overly optimistic.

²⁰⁰ AG Toth, “*The European Union and Human Rights: The way forward*” 34 CMLRev (1997) 491-529.

²⁰¹ *Supra* note 199 at p.512.

A further problem relates to the protection of human rights in Europe, but not necessarily within the Union. The Council of Europe has forty members at present. The Court of Human Rights has little in the way of sanctions that can be brought to bear upon members who breach their obligations under the Convention. The press and public opinion are vital tools of pressure. The question that Toth fails to address, is how to protect human rights in the states which do not accede to the Union. In the case of, for example, Iceland, the shrinking of the Council of Europe may not pose great risks to future adherence to European, and International, human rights standards. In less stable democracies, however, any pressure that can be wielded is of importance. Currently, adherence to the Convention on Human Rights is a condition of accession to the Union: this condition would no longer be possible to demand in the event that the members of the Community withdrew from the Council of Europe. It might very well still be possible to demand adherence to universal standards; however, the little control and inspection previously exercised by the European Commission of Human Rights, (now the Court of Human Rights alone) an independent investigator, would be lost. It may be asked of what relevance this is to the Union if the protection of rights internally is more firmly established. To answer that demands recollection of why the ECHR was created, and the objective of the Council of Europe: to maintain stability in Europe. Toth's proposal may seek to establish a clearer basis for fundamental rights protection within the Union, but the consequent loss of control or pressure in the rest of Europe could lead to a reduction in the protection of human rights in Europe, and a loss of stability in Europe. That this is not mere speculation can be seen in the attitude of certain states who have adhered to the ECHR, but very likely only as a step to joining the Union, for example Turkey. Without the incentive of Union accession they might be unlikely to respect the standards of the ECHR to even the extent they do currently. More fundamentally, the Community is clearly now undertaking a more active role in the protection of human rights internationally. The evidence for this is clear in its inclusion of the human rights and democracy clause in its agreements with third states. Withdrawal from the Council of Europe, with its consequent upheaval in the protection of human rights in Europe, and weakening of the protection of human rights in the parts of Europe where they are at their most vulnerable, could hardly be seen to be consistent with this new international role. If

the Community is to appear sincere in its commitment to this field then it must not do anything that will weaken the existing framework for the protection of human rights.

In all likelihood Toth's "solution" will remain only a proposal. It does, however, raise questions about the long term future and stability of Europe, and serves as a reminder that the wider implications of any proposals to address the existent problems in human rights protection in Europe should be examined.

Having considered the three proposals, it is clear that, unless some system of preliminary ruling can be established, whereby the ECJ could request an interpretation of a specific provision from the Strasbourg Court, without being formally bound, the problem of conflicting interpretations between the two jurisdictions will continue. Even this, however, would require amendment of the Treaty, so any solution to the problem of dual jurisdiction clearly requires that the Member States find a consensus on how they want the Union to approach fundamental rights in the future.

In this debate it is surprising that the question of "prior obligation" has not been raised. If the reasoning applied in *Centro-Com*²⁰² to the relationship of the Community with the UN Charter were to be applied also to the Community's relationship with the ECHR, the Convention would clearly take precedence. If the Community is bound by virtue of the prior obligation, it is arguable that the Community institutions, including the Court would also be bound. This, however, would still be insufficient to give the Community competence to take an active role in this sphere.

As it stands the Court is doing as it has done in other fields, where it has adopted as Community law obligations entered into by the Member States at international level.²⁰³ In such cases, however, the Court is competent to rule on the agreement with a non-member state only in relation to its internal effect. It has no jurisdiction over the partner state.

²⁰² Case C-124/95 *R. v. HM Treasury and the Bank of England ex parte Centro-Com Srl* [1997] ECR I-81, [1997] 1 CMLR 555.

²⁰³ See Chapter 2.

Chapter 5: The Protection of Human Rights Offered Within and By the Community: an Analysis

As has been seen above, the Court of Justice systematically developed the protection of fundamental rights as a matter of Community competence and concern. The other institutions were, however, by no means silent on the matter. Broadly, they supported the activity of the ECJ, as is particularly clear from the Joint declaration of 1977.²⁰⁴

The European Parliament (Parliament) in particular has always been a strong advocate of fundamental rights protection at Community level. In its Round Table Proceedings as early as 1978 the suggestion was made that Community concern in this field should be extended to its dealings with third states. Although the suggestion was rejected at this early stage, Parliament has, since 1983, produced 2-yearly reports on the world-wide human rights situation and EU human rights policy. Albeit these have had limited influence on the substance of foreign policy, they are important in the heightened profile they have given to this issue. Similarly, although parliamentary resolutions²⁰⁵ are not recognised to influence the Union's foreign policy actions, they can exploit Parliament's Community powers.²⁰⁶ The Parliamentary Working Group on human rights was replaced in 1984 with a sub-committee. The sub-committees on "External Economic Relations" and "Development and Cooperation" play an additional role in this field. A further weapon of the Parliament has been its ability to take unilateral action, such as inter-parliamentary meetings with third states, and political dialogue.

Thus although *prima facie* the Parliament's power is limited, it has a history of support for this issue both as an internal and an external concern. There may not be results directly attributable to its activity, but the underlying effects of its interest should not be

²⁰⁴ Joint Declaration, *Supra* note 129.

²⁰⁵ For example *Resolution on the Human Rights Situation in the European Union*, 17 February 1998 Europe Documents No. 2074/75 26 February 1998.

²⁰⁶ For example the threat to withdraw approval for the Customs Union Agreement with Turkey if the Turkish human rights situation did not improve. See Fouwels, Martine "The European Union's Common Foreign and Security Policy and Human Rights" (1997) NQHR 15/3, 291.

underestimated. Of practical importance was Parliament's initiative to put together, as a distinct chapter, the budget headings relating specifically to the promotion of human rights.²⁰⁷ In December 1997 Parliament issued a report on "setting up a single coordinating structure within the Commission responsible for human rights and democratisation"²⁰⁸ focussing strongly on the need for consistency in the approach and action of the Community.

The Council also was vocal in its promotion of human rights throughout this period. In addition to its part in the joint declaration, its (unilateral) Declaration on Democracy of 1978 states that; "respect for and maintenance of representative democracy and human rights in each member state are essential elements of membership of the European Communities". The Council since then has consistently upheld its commitment to the protection of human rights and democracy,²⁰⁹ even going beyond declarations of commitment with undertakings to pursue the protection of human rights through the international action of the Community.²¹⁰ In 1987 the Council established a Working Group on human rights, which, however, considers matters only after they have been discussed in regional *fora*, the OSCE or UN working groups, and will not override the decisions of such groups.

The European Commission (Commission) adopted an early position in favour of the protection of human rights within the Community, submitting consistently before the ECJ that the Community is bound by the ECHR. There has been a Commission unit on Human Rights and democratisation within DG 1A since 1988, prior to which there was a Secretariat General.

²⁰⁷ Chapter B7/70 "European Initiative for Democracy and the Protection of Human Rights".

²⁰⁸ Lenz Report, PE 220.735/fin.

²⁰⁹ See for example Statement on Human Rights: Foreign Ministers meeting in the Framework of European political framework and Council, 21 July 1986, Reproduced in "*The European Community and human rights*" Christine Duparc, Commission of the European Communities, October 1992, Council Declaration (on Human Rights) of 29 June 1991 (on human rights democracy and development).

²¹⁰ Council Declaration of 29/06/91 *ibid*.

In relation to developing countries the Commission stated in 1991 that

“the time has come ... to feature human rights and democracy more prominently in cooperation policy guidelines and at the same time to ensure that political reactions to situations where questions of human rights or democracy are at stake take due account of the aims and specific concerns of development cooperation....
... the Community will give priority to fundamental human rights, since these are universal and completely independent of any particular type of society”²¹¹

This is consistent with earlier attempts to include a “human rights clause” in Lomé. It is significant, however, that the Commission was silent as regards the Community’s external policy on human rights in the wider context until 1995, when it issued two communications on the subject.²¹²

More recently, the Commission presented a proposal for a Council Regulation on the Development and Consolidation of Democracy and the Rule of Law and Respect for Human Rights and Fundamental Freedoms.²¹³ This proposal, which elucidates the approach of the Commission, is discussed below.

Without comparing the approaches of the different institutions, which do have distinctions, there are certain observations that can be made. First, all the institutions advocate that the Community has a role to play, and that the protection of human rights internationally should be, and is, one of its concerns. Second, this is often couched in terms of a “duty” of the Community. Thirdly, there is a recognised need for the Community to adopt a consistent stance on this issue in its dealings with third states.

²¹¹ Commission Communication to Council and Parliament *on Human Rights, Democracy and Development Co-operation Policy: 19/3/91* (Information Memo 91/20).

²¹² “On the Inclusion of respect for democratic principles and human rights in agreements between the Community and third countries”, and “The European Union and the External dimension of human rights policy”.

²¹³ COM (97) 357 final.

Inherent within this is a requirement that the institutions co-ordinate their approaches to individual third states, such as China, as well as that there should be some consistency in the treatment different states receive for similar violations of human rights standards. This raises the question of what the Community intends by its commitment to protect human rights internationally.

Whether they are Parliamentary Reports, proposals for legislation or communications the publications of the institutions all refer to the Community's external human rights policy and commitment in terms of international, universal standards.²¹⁴ It is interesting then to consider what falls within the scope of these standards. Despite the Community's commitment to the promotion of economic, social and cultural rights expressed in international conventions (the Commission has recognised the importance of this, although it accepts the difficulties for Courts in monitoring these),²¹⁵ only an examination of its practice will reveal whether the Community's external commitment is indeed as wide as its internal "competence."

The internal competence remains well within the Community's conferred powers and in *Kremzow* the Court indicated that it has no intention of extending this further. This means that rights protected still relate primarily to economic issues. Therefore the Community is apparently accepting limits upon its internal competence. Externally, the Community is acting essentially as a concerned international actor. However, as has been seen, there is little to support its assumption of competence in this field, other than in relation to development cooperation. A further problem arises here: the Community is acting to promote universal human rights standards as expressed in international treaties, yet how should these be enforced? It would be possible to use the enforcement mechanism provided against an individual state which is party to the relevant convention. The Member States of the Community could collectively choose to do so. Yet surely such action would normally come within the remit of the CFSP, and therefore the Union,

²¹⁴ See examples in Appendix D.

²¹⁵ Memo 91/20 at p.2.

particularly if decided upon inter-governmentally. It is only the existence of the Community agreement that gives the Community competence, but this is only as legitimate as the inclusion of this clause in the first place. Finally, how would it be possible to enforce such standards against the Community, which is not a party to these conventions?

The question, which must now be addressed, is how the human rights and democracy clause, in the general trade context, fits into the Community's competence? Is its inclusion a legitimate exercise of parallel powers? This is of course dependent on the extent of the Community's internal power, and has been referred to briefly above. The internal competence of the Community in this field is restricted: first to matters falling within its competence under the treaty, as has been seen most recently in *Konstantinidis*; secondly, to the enforcement of member states' human rights obligations, by which all the states are bound alongside their Community obligations. This can be distinguished from the Community-third state relationship, by virtue of the acceptance by Community member states of the jurisdiction of the ECJ, and the unique nature of the legal system created by the Community. Thus the Community's internal power does not extend to the creation and enforcement of new human rights obligations; rather it respects certain standards, originating in the Member States, in the exercise of its powers. This is consistent with the fact that Community competence is only that which is attributed to it by the Member States, all of whom were already signatories of ECHR when competence was transferred. It can be argued that they could only transfer competence insofar as it would not conflict with existing obligations in another field.

In relation to the Community-third-state relationship the third state may also be a party to the same international human rights conventions, however, the Community itself is not a party to these treaties, therefore it has no responsibility to *enforce* these standards in other states, nor has it any jurisdiction to do so. Nor do these treaties constitute the creation of a new legal system. Therefore, the existent basis for Community competence in relation to human rights internally is absent in the external context.

A further requirement of parallel powers is that the action be necessary for the achievement of an objective of the Community. The TEU placed human rights within the *Union*, and the ECJ in Opinion 2/94 was explicit that they are not within the Community's competence. Although Art. 130 EC refers to the Community's "general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms" there are two factors which suggest that the Community does not have a general power in this area. The first is that Art. 130u specifies "Community policy *in this area* shall contribute to ..." ²¹⁶ so suggesting that this requirement of Community policy is not universal. The second is, it is submitted, that the Community's power to uphold human rights comes from the shared traditions of the Member States, and a need to prevent the Member States from avoiding their "constitutional" obligations through transfer of powers. Thus it is not as such a general *objective* of the Community itself. Parallel powers can only arise in relation to specific objectives to be pursued by the Community *per se*. This distinction could prevent the internal power of the Community (to uphold human rights) from giving rise to a parallel external power.

Will the introduction of the Amsterdam Treaty (ToA) change this conclusion? It is possible that the substantiation of the commitment to human rights in the Community would be such as to give rise to a parallel power. If this were the case there could be no argument about the legitimacy of the human rights clause in international agreements concluded after the ToA enters into force. This would still leave something of a void, however, in relation to the treaties already concluded.

²¹⁶ Emphasis added.

Conclusions To Part II

Despite the absence of an express power to act in relation to human rights protection the Community has consistently developed its competence in this field. This development was achieved initially by the Court through its determination to give effect to Community law and the rights derived from it. Notwithstanding the early belief that there was no overlap with human rights considerations in the EEC, nor indeed of any other rights than those set out in the Treaty, the Court gradually established means by which the obligations of the Treaty could be enforced, and rights arising from these to be protected. From consideration of the (economic) rights included in the Treaty, the Court moved on to include rights deriving from shared principles of the Member States. Later, the ECHR was accepted as guidance in the identification of shared principles. The terminology used by the Court remained static: rights to be protected are still described as “fundamental” although this now includes the human rights initially not perceived to come within this categorisation. Furthermore, “human rights” also now include the economic and social rights not initially perceived as being within that categorisation. This wide definition (or lack of it) has become part of the Community legal order. Although this demonstrates that human rights should always be determined according to context, it has not led to clarity in the understanding of fundamental or, specifically, human rights in the Community.

The dual jurisdiction of the ECJ and ECHR was unforeseeable when the Community was founded and the problems arising from it have yet to be resolved. The Court has shown itself to be willing to ensure that the Member States enforce their international obligations, in this as in other areas, but that it will not permit misuse of these fundamental rights standards for ulterior motives. While this reassurance was necessary, there is also perhaps a need that a genuine rights issue should not necessarily be interpreted from an economic perspective. Yet this is inevitable as long as the Community’s primary objectives remain economic and such issues are not the subject of an objective arbiter.

This is not a problem which will be easy to overcome. It is unlikely that it would be politically acceptable to the Member States (and institutions) of the Union to hand over jurisdiction to the European Court of Human Rights in these fields. Such handover would indicate that human rights take precedence, even within the framework of a fundamentally economic organisation. It may be paradoxical that the EU has been unable to do so given that all the Member States of the EU are bound individually. Even if the Community itself is bound by the ECHR by virtue of its conferred powers this does not eliminate the problem of divergent interpretations, or of the inability to enforce the ECHR as against the Community.

It is submitted that in the resolution of this problem the Community must consider the wider perspective, and the international role which it purports to fulfil in the protection of human rights. The fulfilment of this role will require credibility in the field: such credibility can only be attained through consistent action, which must begin within Europe. This requirement does not only relate to ruling out proposals such as Toth's. Consistency of approach must also be achieved, including in the approach of the different Community institutions, as well as the establishment of transparency in the Community's external relations.

However the general competence established by the ECJ belies the distinction between internal and external protection. Internally, the Community now guarantees the rights, including economic and social, laid down in the ECHR, and arising from the shared constitutional provisions of the Member States. It is unlikely that the doctrine of parallelism could be applied in these circumstances. Externally, the Community appears to be concerned only with gross violations of human rights, affecting the physical integrity of the individual and violations of democratic procedure. There is no shame in this distinction *per se*; in pragmatic terms it may even be inevitable. The Community lays itself open to criticism, however, in the fact that this distinction is reflected in neither the terminology used, nor uniformly in the approach adopted by the Community to its negotiations.

To be effective in its external action the Community must demonstrate two things: that it is clear which rights it intends to protect and that it is consistent in its approach to third states. The achievement of the first will assist in the achievement of the second.

Part III: The Human Rights and Democracy Clause: The Practical Experience

Chapter 6: The Legal Basis - A Challenge of Form not Substance

Case C-268/94 Portugal v. Council and Commission of the European Union

It has been established that the European Community (EC or Community), possessing full legal personality, has a role in international relations. It has also been established that states (and legal persons such as the Community) have the power to take action against other states on grounds of violation of universal human rights. Therefore, under international law, the Community is in a position to act for the protection of human rights in other states. The international law position is irrelevant without internal community competence. It has been established, however, that the Community is competent to act internally to uphold human rights, and that in relation to development cooperation this competence extends externally.

The correct legal basis for this, in the context of development cooperation agreements, was tested in *Portugal v. Council*²¹⁷ where the Portuguese Government contested the use of Articles 113, 130y and 228 EC as bases for a development cooperation agreement. Portugal challenged the legal basis used on several counts, but particularly regarding the human rights clause. The first Article of the contested agreement provides:

“Respect for human rights and democratic principles is the basis of cooperation between the Contracting Parties and for the provisions of this Agreement, and it constitutes an essential element of the Agreement.”²¹⁸

²¹⁷Case 268/94, *Portugal v. Council and Commission* [1996] ECR 6177, [1997] 3 CMLR 331.

²¹⁸ Article 1(1), Co-operation Agreement between the European Community and the Republic of India on Partnership and Development. OJ 1994 L 223/23.

Article 1(2) continues that “the principle objective of the agreement is to enhance and develop, through dialogue and partnership, the various aspects of cooperation between the Contracting Parties” Article 130u EC provides in the second paragraph that:

“Community policy in this area [development cooperation] shall contribute to the general objective of developing and supporting democracy and the rule of law, and to that of respecting human rights and fundamental freedoms”.

Article 130y gives the Community (and Member States) the competence to conclude agreements with third states in this sphere.

Significantly, Portugal at no time challenged the insertion of this clause itself: issue was taken only with the legal basis upon which this was done. The Portuguese view was that Article 130y is a fitting legal basis on which to conclude a cooperation agreement, in which respect for human rights is prescribed merely as a general objective. However the agreement with India goes further: respect for human rights constitutes an essential element of the agreement. The consequences of that particular characterisation are not stated, therefore the implication must be that the Community may resort to certain means of action which normally can be based solely on Article 235.

Portugal argued that because the agreement permits action normally only possible after unanimous consent has been given, it should be concluded on the basis of Article 235.²¹⁹

The Council, in its submissions, disputed Portugal’s argument, arguing that the definition of respect for human rights as an essential element of the agreement is based directly on Article 130u, as it allows the Community to terminate or suspend the cooperation agreement in the event of a gross violation of the rights the Community is seeking to protect. Additionally, it argued that the Portuguese Government’s distinction between Article 130u and 130y and 130w is artificial and that the result of this distinction is paradoxical because it implies that any action of which the objective is to protect human rights, consistent with Article 130u, must be carried out on the basis of Article 235. Both

²¹⁹ In contrast the Danish Government proposed that Art. 235 would be appropriate only if the main purpose of the Agreement was to safeguard human rights, which is not the case here.

the Commission and Denmark agreed with the Council, that Article 1 is entirely legitimate. The Advocate-General, recalling the case law of the Court concerning the protection of human rights, as well as Art F(2), stated that, for consistency, the same approach should be applied to development cooperation:

“Policy in this sector is to ‘contribute’ to the general objective ... of respecting human rights and fundamental freedoms. In other words, cooperation requires the observance of democratic principles and the guarantee of the rights that apply in the State co-operating with the Community.”²²⁰

Having reviewed the relationship between the protection of human rights and development cooperation, the Advocate-General moved on to discuss whether the human rights clause

“as formulated in Article 1 of the Agreement, may form part of an agreement concluded in accordance with Article 130y.... The inclusion of a clause of that nature is specifically intended to adjust cooperation policy in line with respect for human rights, in accordance with Treaty guidelines...and it is designed to allow the Community to exercise the right to terminate the Agreement, in accordance with Article 60 of the Vienna Convention ...”²²¹

He then continued that if proper account is to be taken of the importance the Community attaches to human rights in the field of development cooperation, the democracy clause “must indeed be deemed *necessary* if development cooperation policy is to be lawfully pursued.”²²² The Court in its Judgment is equally clear;

²²⁰ Para. 26 of the Opinion.

²²¹ Para. 28 of the Opinion.

²²² Para. 29 of the Opinion.

“to adapt cooperation policy to respect for human rights necessarily entails establishing a certain connection between those matters whereby one of them is made subordinate to the other.”²²³

Peers disagrees with the Court in this assessment, arguing that:

“there are strong policy arguments for making development policy subordinate to human rights, and the Member States and the Community may well wish to accept such arguments; but it does not follow that the *Treaty* makes development policy subject to human rights.”²²⁴

He does acknowledge that the practical effect of this is limited, given its conformity with existing practice but finds that, as a result of the Court’s ‘judicial creativity’:

“Effectively the *Portugal* judgment inserts an essential elements clause into the EC Treaty. Thus, while development policy agreements will no longer be subject to the unanimous view of Member States that a particular state has an acceptable human rights policy, the agreements will remain subject to the requirement that the Community’s policy protect human rights.”²²⁵

Thus now, whereas it is legitimate for the Community to conclude a development agreement without unanimity, it is possible that if the proposed partner state has a questionable record on human rights, it will be impossible to conclude such an agreement.

The question left unanswered is whether the implications of this judgment can have a positive or negative effect upon the protection of human rights in third states. Where a development agreement is concluded, the Community acquires a stick with which to beat

²²³ Para 26 of the Judgment.

²²⁴ *Portugal v. Commission*, Case Note [1998] 35 CMLRev 539-555, at p.550.

²²⁵ *Supra* note 224 at p.554.

its partner state should the need arise: there are *tangible benefits* the partner state would lose if the agreement were suspended in accordance with the essential elements clause. On the other hand, if no agreement has been concluded, the third state will have nothing to lose if it violates human rights, unless it values the importance of *potential* benefits such as might accrue under a development agreement. Which, if either of these, is the greater incentive, remains to be seen.

It is crucial to note however, that these powers are limited to the context of development cooperation and at no point in this judgment does the Court suggest there is a wider power here for the Community. It is possible that the Court's reluctance to develop this as a wider power, reflects different factors. Principally, the Court is an institution of the Community and has no jurisdiction over the Common Foreign Policy.²²⁶ The Member States' decision to maintain the development of Foreign Policy as an inter-governmental matter, outside the Community, appears to be deliberate. Politically therefore, it seems likely that the Court does not at this point consider it appropriate to go further. Significantly, it was not necessary that the Court address the question of a wider Community power to resolve the particular case. The basis of Community competence to include this clause in the context of *trade* agreements is not addressed. The Community may claim it to be in the interests of consistency, but if this is the sole basis of inclusion, it is certainly acting *ultra vires* and infringing upon the competence of the Union.

The ECJ has been vital in establishing the competency of the Community in this sphere: first, the extent of Community powers to conclude international agreements generally; secondly, the proper legal basis upon which to conclude an international agreement within this sphere; and thirdly, the importance of human rights within the Community. These alone could give rise to questions relating to the jurisdiction of the Court to rule on this matter.

²²⁶ Article L, TEU.

Chapter 7: Opposition from the Partner State - The External Challenge

Following the defeat of the internal challenge to the legal basis for the inclusion of the human rights and democracy clause in international development cooperation agreements, the Community has successfully negotiated agreements with many countries.²²⁷ In these, not all of which relate to development cooperation, respect for human rights and democracy constitutes an essential element. The success of this policy has not been unmitigated however, and during the period 1996-97 two series of negotiations were particularly striking. Both Australia and Mexico initially opposed the insertion of a human rights and democracy clause, objecting in particular to the non-execution clause. Both states felt that such provisions had no place in a framework cooperation agreement.

Australia

The negotiations with Australia commenced in January 1996 with the Commission proposal for a new framework agreement with Australia. It was envisaged that alongside the trade and cooperation agreement, the framework agreement could also handle the political aspects of EU-Australia relations, in a separate joint declaration.²²⁸ However, eighteen months later, Australia and the EU concluded a Joint Declaration,²²⁹ not a binding framework cooperation agreement. The speeches of the signatories relating to the Declaration give some insight into the issues which played a part in the negotiations:

“The EU and Australia are close partners culturally, economically and politically. The EU is Australia’s biggest trading partner and for its part Australia is seen increasingly as a vital bridgehead into the Asian market for European Companies.

²²⁷ For example Vietnam, OJ 1996 L136/28; Mercosur, OJ 1996 L69/1; Korea, OJ 1996 C188; Nepal OJ 1996 L137/96.

²²⁸ IP/96/100, of 31/01/96.

²²⁹ Joint declaration on relations between the EU and Australia OJ [1997] C97/213. See IP/97/572 “EU and Australia sign declaration on closer ties”.

Australia plays a unique role in the Asia-Pacific region, which makes it all the more important to maintain and further develop its relations with Australia in the coming years.”²³⁰

References to human rights and democracy are not lacking in the Joint Declaration. The Preamble refers to the parties “shared commitments to the respect and promotion of human rights, fundamental freedoms, democracy and the rule of law which underpin our internal and international policies”, the Common Goals include the “determination to build upon our partnership in order to: support democracy, the rule of law and respect for human rights and fundamental freedoms...” and to further these goals we will:

“enhance our dialogue, both bilaterally and in the relevant international fora, in particular on the following areas: the protection and promotion of human rights and fundamental freedoms. In this respect we will consult bilaterally and within the framework of the relevant bodies of the UN, especially the UNCHR, on Human rights issues in general and, in particular on how to advance our shared objectives of promoting human rights internationally.”

Such is the commitment of the parties to human rights and democracy. Therefore why were these commitments given in a declaration which is, fundamentally, non-binding, rather than in the framework of a legally binding agreement including an essential elements clause, which would accord with normal Community practice?

This question may only be answered by examining statements made by the negotiating parties and other interested groups over the eighteen months. The Australian Government was consistently opposed to the inclusion of the human rights and democracy clause, and justified its attitude early in 1997:

“The existence of operative human rights and non-fulfilment provisions as proposed by the Community remains in Australia’s view inappropriate in an

²³⁰ Sir Leon Brittan, quoted in IP/97/572.

agreement on trade and cooperation no other industrialised country, including the US, Japan, Canada or New Zealand could accept the inclusion of operative human rights provisions of the type proposed by the Community in a framework cooperation agreement.”²³¹

The Ambassador continued, that despite understanding that the Commission is bound to include a standard formulation in its agreements with third countries, the Australians had “recently been given to understand that it was not envisaged at that time that the Agreement would apply to countries such as Australia with which the EU and Member States share values and approaches.” The Australians therefore suggested two alternatives to the framework cooperation agreement: the first being the conclusion of a less formal accord and a separate joint political statement, and the second being the return to Australia’s original proposal, namely the conclusion of a joint declaration on political, trade and cooperation issues (based on the US and Canadian Trans-Atlantic dialogue model).

The situation was further complicated by the indication of the European Parliament Committee on Human Rights, in the face of the continued failure to reach agreement on the human rights clause, that it would recommend that Parliament refuse to ratify the agreement if the clause were not included.²³²

Pressure on the Community to insist upon the inclusion of the clause also came from external sources during the negotiations, the General Secretary to the International Confederation of Free Trade Unions speculated, “on the Australian Government’s motivation in seeking to downgrade human rights in this way.”²³³ In addition, Aboriginal representatives voiced their concern, stating that “Australia should welcome with open arms such a clause rather than reject it.” They challenged the Government’s argument

²³¹ Australian Ambassador in Brussels to the Member States, See Europe No 6901, of 27-28 January 1997, p.10.

²³² Europe No. 6903, of 30/01/97, pp.8-9.

²³³ Press release, see Europe no .6898 Of 23/01/97, p.4bis.



that this matter should not be part of a trade agreement with reference to Australia's support for economic and trade sanctions against South Africa. At the heart of the matter was the Aboriginal groups concern for the rights of Australian indigenous people, particularly the growing controversy over the Government's plan to change the law relating to the right to claim native title.²³⁴

In June 1997, notwithstanding the realisation of fears relating to the Government's plans to amend native title law with the publication of the "ten point plan" in April 1997, the Council approved the draft Joint Declaration, to be concluded instead of a framework cooperation agreement.²³⁵ Despite criticism from some MEPs of what they viewed as an "à la carte" human rights policy, the joint declaration was accepted. Although Australia did not acquire all the trade concessions it was seeking, it is unlikely that the human rights clause negotiations had an impact upon that. Significantly, Hans Van Mierlo was explicit that "the decision to drop the human rights clause, would not serve as a precedent for ASEAN countries".²³⁶

Mexico

The outcome did not serve as a precedent for relations with Mexico, who also initially resisted the inclusion of the human rights and democracy clause in the framework cooperation agreement negotiated during 1996-97. Mexico had refused to allow the inclusion of the human rights and democracy clause in the previous framework agreement²³⁷ concluded in 1991, before the inclusion of the human rights clause had become mandatory.

²³⁴ Europe No. 6905, 01/02/97, p.8. See Mick Dodson, "Linking Aboriginal Standards with contemporary concerns of Aboriginal and Torres Strait Islander Peoples", Sarah Pritchard 1998, for further details of concerns of these peoples

²³⁵ Europe No. 6986, 02-03/06/97, p.12.

²³⁶ *Financial Times* 27/06/97.

²³⁷ OJ L340/91.

In November 1996 Mexico proposed a two-stage approach to negotiations for a new agreement. The first stage would involve the negotiation of a Memorandum of Understanding setting the goals and fields of negotiations for a future trade agreement. Notably, this would not require a new agreement over trade and economic cooperation; instead, it would use the “future developments” clause of the 1991 Agreement. In practical terms this would have delayed negotiation of the human rights clause until the second stage, which would involve trade and political negotiations in the framework of the joint committee, set up under stage one. A global political, trade and cooperation agreement would be signed at the end of this second stage.²³⁸

In March 1997 the European Commission informally responded to the Mexican proposal, proposing in turn a negotiating line for the cooperation and trade liberalisation agreement.²³⁹ This confirmed that the goal of the negotiations was to reach accord on a global agreement encompassing liberalisation of trade in goods and services as well as economic and political cooperation. To this end it proposed an interim agreement setting up a joint committee to negotiate matters falling within Community, as opposed to Member State, competence. This interim agreement would therefore require ratification only by the Mexican and European Parliaments, not by that of each Member State. Second, the EC, the Member States and Mexico would all sign a joint declaration undertaking to conduct trade negotiations on goods and services in the global context. Thirdly, liberalisation of trade in goods would only occur once the Council had decided the results of negotiations for these sectors. Although this proposal permitted a breakthrough in that less than three weeks later the Council agreed to the resumption of negotiations on this basis,²⁴⁰ it left several questions unanswered in relation to the human rights clause, including, notably, whether it would be included in both or only the final, global agreement. The Mexican Ambassador to the EU, Manuel Armandariz, recognised however, that whatever the intention in relation to this question, the Community was bound to include the clause in all such agreements stating:

²³⁸ Europe No. 6859, 23/11/96, pp.8-9.

²³⁹ Europe No. 6944, 28/03/97, p.7.

²⁴⁰ Europe No. 6955, 16/04/97 p.5.

“I believe we could make good and fast progress, as after six months of semi-official discussions we already know our respective positions well and we know where the difficulties lie.”²⁴¹

This was almost undoubtedly a reference to the terms of the inclusion of the human rights and democracy clause. However, notwithstanding that at one stage Mexico desired that it be included only in the global and not in the interim agreement, the difficulties encountered ultimately related not to the *inclusion* of the clause *per se*, but to its *content*.

An agreement was reached in June 1997 which proposed to include the suspension mechanism in the Interim as well as the global agreement. This, however, was unacceptable to several Member States because the text of the standard clause was modified, allowing the annexation to the agreement of a declaration referring to the constitutional traditions of Mexican foreign policy. The concern voiced by Member States was that this did not refer to internal human rights protection. In the face of this protest the Mexican Government hastened to clarify its position through a statement by their Foreign Minister Jose Angel Gurria:

“It is totally false that Mexico had wanted to avoid reference to “internal policies” in the democratic and human rights clause negotiated last week with the European Commission.”

He explained that Mexico had wanted the eight constitutional principles of its international policy to appear in the clause, but the Commission had refused that on legal grounds. Consequently any reference to internal and external policies had been erased. Notably three Member States as well as the Commission itself were satisfied that the contested clause was consistent with the spirit of the standard clause, comprising as it did both reference to the Universal Declaration on Human Rights and a suspension

²⁴¹ Europe No. 6977, 20-21/05/97, pp.9-10.

mechanism in case of serious breach.²⁴² Following Mexico's confirmation that the human rights clause applies also to internal policy, and acceptance of the terms of standard clause, both the Interim and Global agreements were finally initialled, with a declaration annexed to Article 1 of the agreements by Mexico referring to the constitutional principles of its international policy.

Despite the agreement reached, further protest ensued from various human rights organisations, including Reporters sans Frontières, Amnesty International, the Fédération Internationale des Droits de l'Homme (FIDH) and Action des Chrétiens pour l'abolition de la torture. These organisations desired tangible evidence of progress in the protection of human rights in Mexico, and that the EU should not be satisfied with Mexican rhetoric. Zedillo responded by accepting the existence of human rights violations in Mexico, but emphasised the importance of the progress which had been made and that such matters cannot be settled overnight.²⁴³ Both the interim and framework agreements were finally signed in December 1997,²⁴⁴ each including respect for democratic principles and fundamental human rights as an essential element.

Comparisons Between the Australian and Mexican Negotiations

It is interesting to make some comparisons between the series of negotiations described above. In order to do so however it is necessary to be aware of the internal background to the negotiations, particularly in Australia where the problem focuses upon that of Native Title.²⁴⁵

²⁴² Europe No. 7000, 21/06/97, p.7b.

²⁴³ Europe No. 7075, 09/10/97, p.2.

²⁴⁴ IP/97/1086, 1997-12-08. For texts of the agreements see OJ 1997 C356 and C350.

²⁴⁵ This is discussed in considerable detail, both because of its interest, and because it demonstrates the complexities in attempting to draw lines between different categories of rights and our understanding of states which uphold human rights standards. It also demonstrates the process by which international law develops, encompassing different rights within its understanding of standards to be protected.

This problem arose from the theory accepted by Australian Courts until 1992, that because it was “relevantly unoccupied”, the Crown acquired a complete legal and equitable title to all lands in the colony when New South Wales was established.²⁴⁶ This assumption obviously denied the possibility of the existence of Native Title of the aboriginal people. However this theory was overturned in *Mabo v. Queensland (No. 2)*²⁴⁷, in which the High Court held that the Crown’s title was subject to native title which existed at the time of colonisation.

Justice Brennan stated:

“If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today’s world that the common law should neither be, nor be seen to be, frozen in an age of racial discrimination. The fiction by which the rights and interests in land of indigenous inhabitants were treated as non-existent was justified by a policy which has no place in the contemporary law of this country...”

The High Court ruled that native title, as in full ownership, did not survive on any land held by freehold title but existed only on unalienated (Crown) land. This ruling led to both federal and State legislative action, resulting not unpredictably in incompatibilities between the two. This in turn led to further (High) Court action. In *Western Australia v. Commonwealth*²⁴⁸ the Court held that the Western Australian act, which had weakened the protection of Native Title and was in contravention of the Racial Discrimination Act, was invalid. However, following these two cases certain questions relating to Native Title remained unanswered. Of particular importance was the question of whether the existence of a pastoral lease would extinguish Native Title. This was the question before the High Court in *Wik Peoples v. Queensland*.²⁴⁹ It was widely assumed that although

²⁴⁶ For a full discussion of this problem see Mason: “*The Rights of Indigenous Peoples in Lands once part of the Dominions of the Crown*” ICLQ 46 (1997) 812.

²⁴⁷ *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.

²⁴⁸ *Western Australia v. Commonwealth* (1995) 183 CLR 373.

²⁴⁹ *Wik Peoples v. Queensland* (1996) 141 ALR 129.

such a lease does not necessarily give the right to exclusive possession, it does contain the right to make improvements to property, and that the existence of such a lease would extinguish Native Title. The Court in *Wik*, however, confounded expectations by holding that Native Title could co-exist with a pastoral lease although it did emphasise that in the event of any conflict between the two, the pastoralist's (leaseholder's) right would prevail.

Following the ruling in *Western Australia*, but before *Wik* had been decided, the (newly elected) Government undertook to reform certain elements of the Native Title Act, in particular reducing the right of indigenous peoples to negotiate on renewals or granting of certain kinds of lease, or development proposals. The proposals developed were to become known as the "Ten Point Plan". Although Aboriginal representatives as well as State Governments were to be consulted as the legislation was drawn up, there were certain legal considerations that could not be ignored. Fundamentally, Native Title is considered as a property right the extinction of which could constitute expropriation. This, being something which can only affect Aborigines, would constitute discrimination. Such discrimination would contravene Section 10(1) of the Racial Discrimination Act.²⁵⁰

Passions run high about native title. There are considerable interests at stake. While *Pastoralists* want native title to be extinguished, the *Aborigines* argue that the best way to treat native title is to negotiate regional agreements that recognise and guarantee the rights of both groups. The *Miners* however adopted a pragmatic stance, seeking access to the land to explore for (and extract) minerals without endangering improvements in relations with Aborigines which have been achieved. The Government described the Ten Point Plan: as a "Compromise when dealing with the competing interests of pastoralists, Aborigines and miners".²⁵¹ The *Ten Point Plan/Wik Amendments* do not explicitly extinguish all native title but that is the effect in many cases. It makes it harder for Aborigines to claim their rights and in addition lays down a list of land titles which

²⁵⁰ Section 10(1) confers on holders of traditional native title who are of a native ethnic group immunity from legislative interference with their enjoyment of their human right to own and inherit property.

²⁵¹ James Woodford, *Sydney Morning Herald*, 21/11/97.

automatically extinguish native title. The *Wik Amendments* remove any obstacles to governments who wish to provide, regulate and manage services, and permit the State Governments to extinguish native title on all the different types of leases that were granted with the intention of giving their owners exclusive possession of the land. This includes leases which were never taken up or have been abandoned or forfeited.

The Federal Government was warned by its Chief General Counsel Henry Burmester in July 1997 that the Ten Point Plan may be racist, contravening the RDA on at least three grounds²⁵² and potentially also breaching Australia's international obligations, notably the Convention on the Elimination of all forms of Racial Discrimination.²⁵³ It was also alleged to be unconstitutional because it was detrimental, rather than beneficial to Aborigines as required under the Constitution's races power. The Australian Law Reform Commission, in August, also advised that the plan was racist: describing it as "extraordinary, singular and discriminatory". This advice was consolidated in October 1997 with the legal advice to Senate being almost unanimous (9/11) that the Wik Bill breaches RDA and international human rights obligations. Internationally, the perception was little different: the shock of a South African all-party delegation to Canberra is summed up by the words of Wilem Odendall (National Party):

"Mr Howard must seriously consider speaking to the indigenous people as an equal partner.....the Aborigines have the high ground all the way, and the Government can only lose, because Aboriginal rights are being taken away from them. He continued that whatever the Government's motives may be for the Wik Bill "it's already being perceived over the world as racist, because Aboriginal people's rights have been taken away".²⁵⁴

²⁵² The three grounds being: the permanent extinction of native title on those leases granted with the intention of providing exclusive possession; the validation of leases granted after the enactment of the Native Title Act on the incorrect assumption that the granting of a pastoral lease extinguished native title; an increase in the rights of the pastoralist at the expense of native title holders.

²⁵³ *Sydney Morning Herald*, 21/11/97.

²⁵⁴ *Sydney Morning Herald* 21/12/97, reported by Margo Kingston.

As Mason observes:

“Native land claims require a fair and principled resolution if justice is to be done and racial harmony and co-operative co-existence between races are to be ensured. That is why it is essential that the task of resolving these claims justly must be undertaken in a spirit of goodwill and understanding.”²⁵⁵

Whatever the international perception, and regardless of the internal or international legality, the Australian Senate, having opposed the Amended Native Title Bill three times, finally passed the legislation, under Howard’s threat to dissolve both houses of parliament.²⁵⁶ A hypothetical question, the answer to which can only be speculation, is whether the results of the negotiation with Australia would have been the same now, little more than a year on? The EC would have been dealing with a state which has legislation whose passage through Senate was dogged by allegations of racism, a perception shared by international opinion. Compounding the ethical questions that this would raise has been the economic collapse in Asia which can only have reduced Australia’s strategic importance, which was certainly relevant to the negotiations. Legal challenges to the Act are sure to ensue, and indeed have already been threatened by Aboriginal representatives. It is significant, however, that the membership of the High Court has changed radically since *Mabo (No.2)*²⁵⁷ and *Wik*²⁵⁸, therefore no assumptions can be made about the outcome of such a challenge.

Of course, it may be argued that such violations are not those that the Community has in mind in including the human rights clause in every agreement. The Australian Prime Minister certainly stated that for their part “the disagreement about the clause was not related to the *Wik* decision”.²⁵⁹ It is likely that the Community intends only to be

²⁵⁵ Mason, *supra* note 246 p.812.

²⁵⁶ *Financial Times*, 09/07/98.

²⁵⁷ *Supra* note 247.

²⁵⁸ *Supra* note 249.

²⁵⁹ Mason, *supra* note 246 at 827.

involved in cases where bodily integrity is at stake, but this is not clear from the terms of the standard clause in which reference is made to the UDHR. This distinction would also be difficult for the Community to sustain in view of statements it has made in relation to the protection of human rights. For example, in Com (97) 357 final,²⁶⁰ the Community states clearly in chapter one Article 2; “The Community shall in particular support operations aimed at:.....n) protecting indigenous people, their rights and cultures.”²⁶¹

Internationally, concern is also growing for the rights of indigenous peoples. The UN Commission on Human Rights in 1997 authorised the continuation of the Working Group on a draft declaration on rights of indigenous peoples,²⁶² and Erica-Irene Daes was named as a sub-commission special rapporteur on indigenous land rights and has been authorised to prepare a working paper on the subject.²⁶³ In view of this, if the Community does not wish to consider such rights in the negotiation of its trade agreements, it would perhaps be wise to narrow the terms of reference to something more focussed on its intentions.²⁶⁴

The human rights clause may, however, be of little practical importance: in July 1998 the ECJ ruled that a fundamental change arising between partner states may give rise to a right to suspend cooperation.²⁶⁵ The Court based this ruling upon, upon the applicability in the Community of International law, Article 62 of the Vienna Convention, and upon the text of the preamble to the Agreement. In the joint declaration with Australia it is clear that human rights, as set out in international conventions, are to be upheld by both sides, and that this, while not constituting a suspension clause in itself, is fundamental to

²⁶⁰ Proposed Regulation on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms.

²⁶¹ Chapter One deals with “Objectives and general principles of action to promote human rights and democratic principles.”

²⁶² CHR Res. 1997/31.

²⁶³ CHR Dec. 1997/114.

²⁶⁴ See also: COM (98) 146 final.

²⁶⁵ Case C-162/96, *Racke GmbH & Co. and Hauptzollamt Mainz*, Judgment of 16 June 1998.

the agreement reached. It is possible that the Australian legislation, if it is indeed found to flout Australia's international commitments, may be sufficient to demonstrate a "fundamental change". If this were found to be the case, and the Community can thus use international law to achieve its aims, it would be of little practical importance that the Community did not succeed in including an essential elements and suspension clause in the agreement.

It may be argued, however, that in any case, it would be the Community's decision whether or not to suspend the (hypothetical) agreement. In a system where human rights protection relies largely on international observation, it is unlikely that a decision not to act would go unnoticed, particularly as there is no mechanism for third party enforcement in the case of a violation of the clause. Thus the least damage that would have been done is that the EC's credibility in this field would have been undermined. This being purely hypothetical it would be unwise to overstate the importance of these questions in this context. They do however demonstrate the difficulties which may well lie ahead for the EC with regard to the enforcement of this clause, difficulties which may well be outside its intended scope.

Events following the conclusion of the Agreements with Mexico have raised different concerns. Just days after the agreements were signed 43 civilians were massacred in Acteal (Chiapas). This prompted an immediate statement of anger and of concern by the Luxembourg presidency.

"...The Presidency of the EU ... calls upon the Mexican authorities to take the necessary measures to ensure the security of the civilian population in the state of Chiapas. In this context it should be remembered that the European Union and the US of Mexico have just signed a cooperation agreement under which both parties agree to respect the principles of democracy and basic human rights as well as principles of the rule of law."²⁶⁶

²⁶⁶ Europe, No. 7129, 29-30/12/97, p.2. PESC/97/121, 13666/97 (Presse 409) of 1998/01/27.

The Presidency also demanded that the Mexican Government discover who was responsible and bring the perpetrators to justice. It did, however, note the (Mexican) President's undertakings to this effect.

In statements since then Mexican representatives have repeatedly reiterated their commitment to human rights and democracy²⁶⁷ and, significantly, progress has been made to resolve the long running conflict in Chiapas.²⁶⁸ This progress includes, paradoxically in the context of these two cases, a Bill to protect Indigenous Rights and Culture.²⁶⁹ This is not to say that Mexico is developing a spotless record on human rights. Forty NGOs (including again FIDH and Amnesty International) together addressed MEPs requesting that they insist on "an operational and not purely formal content to the democratic clause of the agreement". It is significant that the Mexican Government has consistently refused to countenance any kind of international mediation in the resolution of the Chiapas conflict. There is, as the Mexican Governmental representatives themselves have observed, a long road ahead. It is apparently a road on which Mexico will not be accompanied, along any step of the way, by international observers, mediators or human rights groups.

A potentially interesting development arising from the experience of these negotiations was the call by Belgium, and several other Member States, for a "general review of the human rights clause being included in EU cooperation agreements with third countries for the past several years, pointing out the difficulties encountered in this connection with Australia." It was suggested by Community sources that this review might take place during the Luxembourg Presidency.²⁷⁰

²⁶⁷ See for example C/98/32, PRES/98/32, of 17/02/98, on the occasion of the Ministerial Meeting between the EU and Mexico, statement by Rosario Green, Mexican Secretary for Foreign Affairs, see also "Diplomatic Bag" "The Transatlantic Partnership of the Future" Update Mexico 4 (2) and statement by Jorge Madrazo, Mexican Attorney General, to the UN Human Rights Committee, 19/03/98, concerning progress Mexico has made towards better protection of human rights and reference to road which lies ahead. (Update Mexico, Diplomatic Bag 4(3) p.3).

²⁶⁸ Europe No. 7193 02/04/98, p.10.

²⁶⁹ See Update Mexico 4 (3) for details.

²⁷⁰ Europe No. 6999, 20/06/97, p.7b An extensive search of European Documentation for results of this proposed review has revealed only COM (97) 357 final and COM (97) 537.

Chapter 8 : Implementation of the Clause: The Community's Approach to the Protection of Human Rights and Democratic Principles

It is outwith the scope of this work to assess the impact of the human rights and democracy clause in every agreement concluded or being negotiated by the EC and a third state. The outcome of negotiations involving the EC and two quite different states have been considered above. Perhaps the results were not entirely predictable. Possibly this is not of concern to the EC, as even the negotiations with Australia allowed a political statement to be made in support of these principles. However, political statement or not, these clauses have been used in recent years in the face of gross violations of human rights, to economic if not necessarily political effect.

The EC demonstrated its willingness to activate the non-execution clause with the suspension of development aid to Niger in 1996 as a response to the military coup which ousted the democratically elected President Ousmanem, replacing him with Colonel Mainassara. A more recent development relates to the presidential elections which took place in Togo in June 1998. Concerns regarding these elections reached such a level that the European Commission invited the Council to start proceedings which could lead to the suspension of the Lomé Convention (Lomé), in relation to Togo.²⁷¹ The Commission's action was based on Article 366a of the revised Lomé IV which lays down certain procedures to be followed and time limits to be adhered to, in response to a violation of the principles of Article 5 Lomé (namely respect of human rights, the principles of democracy and the rule of law). This is a classic invocation of the non-execution clause. Should the required consultations fail to reach a solution within one month, "appropriate measures" may be taken, including, as a last resort, the total or partial suspension of the agreement.²⁷² The activation of this provision against Togo is notable in that it is the first time the Commission has proposed to the Council that Art. 366a should be utilised. The Council is confirming that this provision is no empty

²⁷¹ Europe No. 7260, 10/07/98 p.8.

²⁷² Consultations took place on 30/07/98, see Europe 01/08/98.

rhetoric, but that the Community is standing by its commitment to human rights and democracy.

In relation to Article 366a, it is interesting to note that the European Parliament (Parliament) in June (1998) requested to be consulted before Article 366a results in a suspension (or resumption) of cooperation.²⁷³ Leon Brittan, although acknowledging that Parliament should be more involved, pointed out the impossibility of formalising this under the current procedural conditions of this provision. He did, however, give an undertaking that Parliament would be kept informed of relevant developments and that the Commission would consider its suggestions.²⁷⁴ This followed the proposal by Parliament to the Council for a procedure to adopt “appropriate measures” in relation to non-respect of the human rights clause in the MEDA regulation.²⁷⁵ Parliament advised that such a decision should be taken by qualified majority. Unanimity was favoured by some Member States because they viewed such action as being essentially a political matter, and of the Common Foreign and Security Policy (CFSP). As decisions relating to CFSP are taken by unanimity, certain member states thought action should be taken only under equivalent procedural conditions. This is analogous to the argument of the Portuguese Government in *Portugal v. Council*.²⁷⁶ Had the Council decided that action should be only under unanimity it would have been somewhat paradoxical in terms of the consistency of approach to the external protection of human rights and democracy, unless the Community wished to suggest that its basis for action in this field is less than secure. This would question the utility and even the legitimacy of the inclusion of the clause. Having followed Parliament’s advice on this question the Council, consistent with the procedure under Lomé, did not allow for Parliament to have even a consultative role in any action to be taken.

²⁷³ Following a parliamentary report on the draft Council Decision on the procedure for implementation of this Provision.

²⁷⁴ Europe No. 7244, 18/06/98 p.2.

²⁷⁵ Parliamentary Report PE 225.326 fin, of 09/02/98, A4-0055/98.

²⁷⁶ *Supra* note 216.

The developments in Togo come at a time when the Community is seeking to clarify both its action in relation to human rights and democracy violations in its partner states, and its approach to the protection of human rights and democracy in prospective partner states. This search for clarification has almost certainly been triggered in part by the problems encountered in negotiations with Australia and Mexico, and thereby responds to the Belgian call for a review of this policy.²⁷⁷

In July 1997 the Commission produced a proposal for a Council Regulation,²⁷⁸ the stated aim of which was:

“to guarantee the consistency of Community measures to promote human rights and democratic principles ensuring that action is better attuned to the needs of partners and better coordinated with Member States’ initiatives.”²⁷⁹

This Council Regulation, which would deal with procedures to implement aid and operations to promote human rights and democratic principles, has not yet come to fruition. It does however reflect a desire on the part of the Commission to consolidate its efforts in the external protection of human rights and democratic principles, and to bring an element of consistency and transparency to its action, which has until now been lacking.

This proposal was followed by a Commission Communication, directed specifically towards the ACP States.²⁸⁰ This seeks, in the first place, to clarify the Community interpretation of the provisions of Lomé IV relating to human rights and democracy. Secondly, it intends to raise consideration by these countries of the essential elements of the Lomé Convention in the development of their internal policies, and thirdly it aims to promote discussion both in the Council and in the ACP States on the future of ACP-EC

²⁷⁷ See text accompanying footnote 268.

²⁷⁸ COM (97) 357 final.

²⁷⁹ *Supra* note 277, at 6.

²⁸⁰ COM (98) 146 final.

relations. It is directed specifically towards the ACP countries because “the Lomé Convention was the first to refer to human rights. This places it in the vanguard of efforts to take account of these fundamental principles in cooperation with non-member countries.”²⁸¹

In particular the Commission is seeking to establish a consistent approach to its relations with developing countries. While doing this it places the emphasis on the need to consider the partner states’ “social, economic, political and cultural circumstances” thus ensuring the Community some discretion in its action. This is supported by the emphasis placed upon use of the words “democratic principles” in Article 5 Lomé, rather than democracy. Thus, the Community expressly does not require that all its partner states are already fully fledged democracies:

“The concept of democratic principles also serves to accentuate the dynamic process leading to democracy. Democratisation is a gradual and ongoing process which must take account of a country’s socio-economic and cultural context.”²⁸²

This Communication fulfils the intention of establishing a much needed framework of principles underpinning its action, while maintaining the discretion it realistically requires in order to be able to operate any kind of external policy in relation to human rights. However, the expression of the rights to be protected once again raises question marks over the consistency of the Community’s approach, particularly in relation to cooperation with developed nations, such as Australia. The General Affairs Council has recently approved a Common Position complementing this Communication, which expresses the EU’s “Will to work in partnership with civil society and African governments to promote respect for human rights, democratic principles, the Rule of Law and good governance in Africa.” Again this common position emphasises the need to take specific conditions of different countries into consideration.²⁸³ Subsequently, the

²⁸¹ *Supra* note 278, Summary.

²⁸² *Supra* note 279, p.5.

²⁸³ Europe No. 7229, 27/05/98 p.4.

Council has agreed a draft negotiating mandate for a replacement for Lomé IV, which will expire in February 2000. Although Cuba has been granted observer status for these negotiations, its accession to Lomé will be conditional upon “substantial progress” on human rights, good governance and political freedom.²⁸⁴

The Community is clearly seeking evidence from its partners that, if they are not already fully fledged democracies with clean human rights records, they are at least espousing principles which will bring them towards that condition. With this in mind the Community’s approach is to bring any state, however unsavoury its human rights record may be, into dialogue. To exclude a country from international discussion and cooperation will not serve these aims well. In this the Council is clearly conforming to the Commission’s approach. This policy has been clearly demonstrated in relation to China. In February 1998 the Council adopted a decision neither to sponsor nor co-sponsor a resolution on human rights in China at the UN Commission on Human Rights. Furthermore, in the event that another delegation introduced such a Resolution, the EU Member States would oppose it. The EU in this context clearly prefers the approach of establishing dialogue and cooperation on human rights and democratic issues rather than imposing international exclusion. China has demonstrated willingness to address its policies by undertaking to sign the UN Covenant on Civil and Political Rights, although a further commitment concerning ratification has not yet been made.

Human rights organisations are united in their criticism of this approach: Amnesty International’s China Specialist expressed disappointment with the decision not to table or support a Resolution on human rights in China at the UN Human Rights Commission, believing that “Trade trumped human rights.”²⁸⁵ Human Rights Watch has also expressly criticised this decision. The commitment to establishing and maintaining dialogue with China has led to criticisms of the EU and the suggestion that it is economic considerations rather than the desire to effectively address human rights abuses which

²⁸⁴ *Financial Times*, 30/06/98.

²⁸⁵ *Financial Times* 02/04/98.

have motivated this move.²⁸⁶ The result of the negotiations with Australia can only have encouraged such a belief.

Unlike the result of the Australian negotiations, however, it remains out of the question that the EC would conclude a formal agreement with China without the inclusion of the Human Rights clause. This notwithstanding, in March the Commission produced a Communication: “*Building a Comprehensive Partnership with China*”²⁸⁷ and considerable emphasis has been put upon cooperation aimed at bringing China into the WTO and the rest of the international community. This prospective integration is coupled with China’s development towards “an open society based on the rule of law and respect of human rights.” As Leon Britten emphasised in 1997 “Liberalisation of the economy deserves our support, but human rights also”²⁸⁸. He was speaking to the Parliament shortly after the EU failed to reach consensus on a Resolution on China at the UN Commission on Human Rights. He acknowledged that this failure was a weakness: the majority of states had been in favour of such a resolution at this stage.

The extent to which economic considerations may be a factor among international players is impossible to guess. However, until the EC succeeds in establishing a consistent framework for its actions it will be all too easy to condemn. It is telling that the conclusion to the Commission Communication on partnership with China, opens with reference to “China’s growing political and economic self-confidence .. as an incentive for the EU to engage the country more fully”.

The General Affairs Council adopted its conclusions to this Communication on 29 June 1998.²⁸⁹ The five main aims of the new partnership agreed upon were virtually unchanged from those of the Commission Communication, although more emphasis is put upon the need for concrete improvements in China’s human rights situation,

²⁸⁶ *Financial Times* 02/04/98.

²⁸⁷ COM (98) 181 final.

²⁸⁸ Europe No. 6955 p.8.

²⁸⁹ Europe Documents No. 2096, 02/07/98.

particularly with regard to Tibet. The EU Troika visited Tibet in Spring and returned disappointed at the levels of Chinese control over all their movements. This may have prompted the desire for concrete results.

Chapter 9: Conclusions

The Community has demonstrated that in the context of development cooperation at least it is willing to implement the human rights and democracy clause. There is little evidence as to its impact on states which may commit human rights violations, but its greatest message is that it will be invoked.

Outside the context of development cooperation the Community's competence to include the clause is less secure. Its enforcement would bring the economic interests of the Community into direct conflict with this admittedly political policy. The inclusion of the human rights and democracy clause certainly constitutes a common policy which in general terms does not come within the external competence of the Community. Although it is not within the commercial objectives of the Community, there has been too much economic emphasis in its implementation for it to be said to be strictly non-commercial. It has been admitted to be political in its aims. In view of these factors it certainly overlaps with EU competence. Unlike the use of sanctions, which would be its closest comparison, there has been no adoption of a common position or joint action on which the Community could base its action since the early decision of the European Council (other than in relation to Africa²⁹⁰) whose impact upon the Community was, at that time unclear. Certainly, if the Community was bound by that decision, it violated its spirit in concluding the joint declaration with Australia.

It is submitted however that human rights protection has always developed by attacking perceived ideas of jurisdiction and competence. If this had not happened international law would still be locked into ideas of state sovereignty and sovereign jurisdiction, to the detriment of individuals. It is part and parcel of the development of international law to have such conflicting interests at stake. The Union/Community should however be able to resolve this problem and quite possibly Amsterdam is a step on the way. The Community has been becoming more politicised since SEA, and it would do no harm to acknowledge this externally.

²⁹⁰ Common Position of 25 May 1998, OJ [1998] L158/1.

In the last year the Community has attempted to become more transparent and consistent in relation to this policy. Yet the root of the problem remains, both internally and externally, in the definition of human rights intended by the clause. It appears that the international human rights violations with which the Community is concerned relate to those rights not included in the Treaty of Rome, and not then considered as relevant to the operation of the Community. The development in understanding of human rights internally, and their extension to economic and social rights, has not been reflected by the Community externally. It is only natural that the Community be willing to protect different rights internally as opposed to externally. Not all human rights abuses can or should be treated in the same manner. Fundamentally they are not on the same scale, but this creates problems where the terminology used does not reflect these differences. There is a problem in using a wide legal mechanism in a universal manner to address human rights problems. The Community's search for transparency and consistency would be better served by initial clarity of definition. There are also political issues to be addressed: the resolution of human rights problems is not something that can be achieved instantly, or even with the same speed in every nation, this itself means that a uniform approach should not be taken. The key failing of the clause, is that it is too wide and too vague. It should be possible for the Community to achieve discretion and flexibility of approach, without leaving itself open to the criticisms arising from the current lack of clarity.

The Community should also address the question of enforcement. It is not sufficient to point to the mechanisms in place if there is no means by which the Community may be compelled to act. This lack assumes that the only relevant cases are those where the Community chooses to act. The Community may not choose to act in a case such as Australia, were the clause in place, yet a failure to act would be open to criticism. The fact that interested parties cannot bring an action is an unacceptable vacuum, notwithstanding the difficulties which would arise in defining such parties. To widen *locus standi* would heighten the need to define properly which rights are to be protected through the operation of this policy.

The Community may be quietly relieved that its cooperation with Australia cannot at this point be called into question in the way it might have been had Australia accepted the human rights clause, with its suspension mechanism. Australia has been vigorous in upholding human rights internationally, having been one of the nations who called for sanctions against South Africa. How it may feel, to be seen to be less ardent in dealing with its own internal human rights problems, may only be speculated upon. Howard stated that Australia's refusal to countenance the inclusion of this clause was not related to the Native Title problem. It is impossible to speculate, however, upon the effect on Australian Native Title Legislation had the clause been included, and the Community looked as if it might enforce it.

It is impossible to say what effect the pressure of the inclusion of this clause may have had on Mexico's policy in recent months. It was observed by Jorge Madrazo (Mexican Attorney General) in a statement to the UN Human Rights Committee that

“it is paradoxical that some states still protest over Human Rights violations which take place in other countries while their own governments are clearly impervious to the progress of international law on human rights the great challenge facing the body of international law on human rights is to stop the over-politicisation of the subject and stated the importance of making the transition from the empirical and political defence of human rights to their professional and technical protection.”²⁹¹

It appears that the outcome of the negotiations between the EC and Australia on the one hand and the EC and Mexico on the other, exemplify the truth of this statement. But whether either state, or the Community, will recognise it in their actions is another question.

The difficulties facing the Community in this policy are demonstrated by the question of the difference between the “Joint Declaration” between Australia and EU on the one hand and EU-China cooperation? The joint declaration approach was only accepted with

²⁹¹ Update Mexico, 4(3), p.3 “*Respect for Human Rights in Mexico*”.

Australia because human rights were not perceived to be an issue. Following the decision in *Portugal v. Council* it would be impossible to conclude a development cooperation agreement with China, were this to be the appropriate framework. If the Community develops its economic cooperation with China under circumstances in which it would be impossible to proceed under the development cooperation framework, it is laying itself open to allegations of hypocrisy. This returns to the Community's need to make this policy universal, and not limit it to development cooperation. However, it demonstrates equally the need for the Community to make its approach to different contexts transparent, or at least to clarify that different contexts will demand and receive different treatment, without abandoning the universality of its objectives. This need will become all the more acute, in relation to trade cooperation with nations with whom the basis of cooperation has not come up for renewal since the inclusion of these clauses became "mandatory". For such nations, with a questionable human rights or democracy record, it is crucial that the EC demonstrates that the inclusion of these clauses, is more than merely a political statement and that this commitment will be acted upon in certain, extreme, cases, and that there is a basic consistency in its approach. This may be difficult while the EC maintains its special relationship with Turkey. However, it is in cases such as these that the politics of reciprocity and strategic importance come particularly into their own. As long as the door of cooperation remains open in this case, there is the potential for progress on these fronts. If the door shuts there is a real danger of conflict in Europe. There will always be groups who point to "inconsistency" and therefore condemn the policy. If the policy can be seen to have some effect however, it must be worthy of more than outright condemnation.

The Community can certainly achieve more for human rights through economic than political pressure. It is possible however that the inclusion of the specific clause may be irrelevant. If a violation of human rights, in an agreement such as that with Australia which refers to both parties' commitment to human rights in its preamble, can be interpreted as constituting a "fundamental change", international law may suffice to suspend cooperation. The clause nevertheless still serves the purpose of heightening international awareness. The importance of these clauses, as currently formulated,

outside the development cooperation context, thus lies in the culture they represent more than in direct practical application, however beneficial the outcome of this may be.

Appendices

Appendix A: Standard texts of the human rights and democracy clause and suspension clause

Standard text of essential elements clause:

“[R]espect for the democratic principles and human rights established by [the Helsinki Act and the Charter of Paris for a new Europe] [as well as the principles of Market economy][as defined by the Bonn CSCE Conference] inspires the domestic and external policies of the Community and of [third country] and constitutes an essential element of this agreement.”

Complementary clause

(i) Explicit Suspension (“Baltic”) Clause

“[T]he parties reserve the right to suspend this agreement in whole or in part with immediate effect if a serious breach of its essential elements occurs”

(ii) General Non-execution (“Bulgarian”) clause

“[I]f either party considers that the other party has failed to fulfil an obligation under this agreement, it may take appropriate measures. Before doing so, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement. These measures shall be notified immediately to the Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.”

(Texts taken from COM 95(216) final)

Appendix B: Explanatory table showing definition of rights, with examples

Collective Term	Definition	Example of Right
Community nationals' rights	Given by treaty to Community nationals/citizens	Art. 48 EC: <i>Freedom of movement of workers</i>
Community rights	Given by the Treaty to all residents, regardless of nationality	Art. 119 EC: <i>Right to Equal pay for equal work</i>
Human rights	As recognised in international law	<i>Right to life</i> , as recognised in e.g.: Art. 3 Universal Declaration of Human Rights, Art. 2 European Convention on Human Rights
Fundamental rights	Any of these collectively/ where distinction not significant	<i>Right to enjoyment of property</i> : <i>Conventional</i> , recognised in Art. 17 Universal Declaration of Human Rights; Article 1, 1st Protocol of ECHR. Recognised in <i>constitutional principles of Member States</i> , e.g. German Grundgesetz Article 12 and 14 Also recognised by ECJ to be part of Community legal order e.g. Case 44/79 <i>Hauer v. Land Rheinland Pfalz</i> [1979] ECR 3727, [1980] 3 CMLR 42

Appendix C: Working Table showing breakdown of European Court of Justice fundamental rights jurisprudence, demonstrating how definitions arrived at.

Case and ref.	Juge rap	Advocate Gen	Issue	Court ref	AG ref.
Case 1/58 <u>Stork v. High Authority</u> [1959] ECR 17	Riese	Lagrange	Grundgesetz: Articles 2 and 12 Applicant states HA failed to respect certain fundamental rights which are protected under almost all the constitutions of the MS.	Principles of national constitutional law.	Not considered.
Joined Cases 36, 37 and 38/9 <u>President, Geitling and Mausegatt, Ruhrkohlen-Verkaufsgesellschaft v. High Authority</u> and Case 40/59 <u>Nold v. High Authority</u>	Delvaux and Catalano	Lagrange	Art. 14 German Grundgesetz Guarantees private property.	No competence to ensure respect of internal national rules of law.	Protection of the right to property including the remedies which must be available against any infringement of that right, such as expropriation, is a rule of law common to the six countries ... it is certain beyond doubt that the present case is not one of such a kind.
Case 6/60 <u>Jean E. Humblet v. Belgian State</u> [1960] ECR 559	Riese	Lagrange	Provisions guaranteeing the protection of rights.	Substantive right (has as its corollary that it provides the person in whose interest it operates with the means of enforcing it...) a provision establishing guarantees for the protection of rights cannot be interpreted in a restrictive manner to the detriment of the individual concerned. But that Court doesn't have power to annul a national administrative measure.	Provision of the protocol "creates a right".
Case <u>van Gend en Loos v. Nederlandse Administratie der belastingen</u>	Hammes	Roemer	Provisions creating direct effects, conferring individual rights.	...Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage..” (p. 12)	AG said no to direct effect.
Case 29/69 <u>Stauder v. Ulm</u> [1969] ECR 419	Wilmaris	Roemer	Fundamental human right Discrimination: Articles 1 and 3 of Grundgesetz.	Protection guaranteed by fundamental rights is, as regards Community law, guaranteed by various provisions in the Treaty supplemented in its turn by	fundamental rights.

				unwritten Community law, derived from the general principles of law in force in Member States (para 1) Also: "Interpreted in this way, the provision at issue contains nothing capable of prejudicing the <i>fundamental human rights</i> enshrined in the general principles of Community law and protected by the Court"	
Case 11/70 <u>Internationale Handelsgesellschaft v. Einfuhr und Vorratstelle für Getreide und Futtermittel</u>	Pescatore	A. Dutheillet de Lamothe	Fundamental rights: respect for such rights ensured by the Court in terms of the structure and objectives of the Community.	Avoids consideration in these terms: considers only application of Article 85	
Case 7/72 <u>Boehringer Mannheim GmbH v. Commission of the European Communities</u> [1972] ECR 1281	Trabucchi	Mayras	Non bis in Idem (prohibition of cumulation of penalties). Argument between Applicant and defendant as to whether constitutes fundamental rights	(At para 2) Rule is a fundamental rights in Germany but only where previous judgement is of national court. Considers Art. 6 of ECHR Convention qualifies principle of prohibition "no better proof that the non bis in idem rule has hitherto remained without any binding effect in international law" (p.1297) "no support for the proposition that this is a fundamental right".	
Case 17/74 <u>Transocean Marine Paint Association v. Commission of the European Communities</u> [1974] ECR 1063	J. Mertens de Wilmars	Warner	Audi Alterem Partem, "droits de la défense" (Right to make point of view known).	Deals with solely in procedural terms.	Akin to "les principes généraux du droit" "The right to be heard forms part of those rights which the law referred to in Art. 164 of the Treaty upholds, and of which, accordingly, it is the duty of this court to ensure the observance."
Case 41/74 <u>Yvonne van Duyn v. Home Office</u> [1974] ECR 1337	Sørensen	Mayras	Freedom of movement, derogation from fundamental principle of Community Law (on grounds of public policy).	Terms of relevant articles: public policy can override principle of freedom of movement. NB refers to international law as source of rights which the EC Treaty cannot be assumed to disregard.	Considers only interpretation of EC provisions. Takes as given, the international law right.

<p>Case 43/75 <u>Defrenne v. SABENA</u> (no.2) [1976] ECR 455</p>	<p>DK</p>	<p>Trabucchi</p>	<p>Equal pay: Right, enforceable by individuals in National courts.</p>	<p>Art. 119 is directly applicable and therefore gives rise to individual rights which the Court must protect (para.24).</p>	<p>Art. 119 is the "European translation" of Convention no. 100 of ILO. "Prohibition of all discrimination based on sex (particularly on the subject to pay) protects a right which must be regarded as fundamental in the Community legal order as it is elsewhere".</p>
<p>Case 149/77 <u>Defrenne v. SABENA</u> (no.3) [1978] ECR 1365</p>	<p>/</p>	<p>Capotorti</p>	<p>Whether Art. 119 permits the introduction of discriminatory conditions of employment as regards those workers, in particular where such conditions involve pecuniary consequences which are pecuniary</p>	<p>"The Court has repeatedly stated that respect for fundamental personal human rights is one of the general principles of Community law, the observance of which it has a duty to ensure" (para. 26) 27. "There can be no doubt that the elimination of discrimination based on sex forms part of those fundamental rights"</p>	<p>"The rule that there should be no discrimination is a general principle of the Community legal order.....It is a principle contained in the list of fundamental human rights recognised within the Member States and within the context of the European Convention on Human Rights and Fundamental Freedoms; consequently it forms part of Community Law and must be protected by the Court of Justice" at p. 1384-5. "However the significans of the protection of fundamental rights on a Community plane is not the same as on the plane of national law "the protection of such rights ...must be ensured within the framework of the structure and objectives of the Community" (nb Handelsgesellschaft. AG infers "the respect for fundamental rights is a limitation on all Community acts: Secondly where directly applicable Community measures exist (Treatie or secondary legislation) they must be interpreted in a manner which accords with the principle that human rights must be respected.</p>

<p>Case 36/75 <u>Rutili v. Minister for the Interior</u> [1975] ECR 1219</p>		<p>Mayras</p>	<p>Freedom of movement, equality of treatment.</p>	<p>"Concept of public policy must, in the Community context and where, in particular, it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community". (Para 27). "rights".</p>	<p>the personal rights of workers.</p>
<p>Case 48/75 <u>Jean Noel Royer</u></p>		<p>Mayras</p>	<p>Freedom of movement, residence (treaty)</p>		<p>Reference to European Convention, refers NB only to "rights".</p>
<p>Case 118/75 <u>Lynne Watson and Alessandro Belmann</u></p>		<p>Trabucchi</p>	<p>art 48-66 Treaty fundamental Principles confer Individual Rights right to privacy.</p>		<p>Refers to Rutili Limitation on powers of MS in respect of control of aliens by Council Directives.... states that these limitations are a specific manifestation of a more general principle enshrined in the ECHR. "no restriction in the interests of national security or public safety shall be placed on the rights secured thereunder other than those necessary in the interests of democratic society. In that judgement Court substantially reaffirmed the principle which had already emerged ... that the fundamental human rights recognized under the constitutions of member states are also an integral part of the Community legal order... Respect for fundamental principles governing the protection of the rights of man may also be of importance in determining the legality of a states' conduct in relation to a freedom which the treaty accords to individuals (from Rutili) Individual right to freedom. Interference in rights of an individual would be a fortiori illegal if the actio of the state were found to be in breach of a fundamental personal right. But the supervision of aliens: question of proportionality.</p>

<p>Case 44/79 <u>Lieselotte Hauer v. Rheinland Pfalz</u></p>	<p>Capotorti</p>	<p>Right to enjoyment of property. Right freely to pursue an economic activity.</p>	<p>Fundamental right, guaranteed by constitutions of Member States, also ranks as a constitutional rule in Community law. Right recognized in Community law.</p>	<p>At para 7: It is necessary to reject the idea that it is permissible to appeal to the highest national courts rather than to this court in order to secure the protection of fundamental community rights against the Communities... it is the exclusive task of the community Court to guarantee such protection, within the scope of its jurisdiction : the uniform application of Community law and its primacy over the legal orders of the member states must not be endangered by the intervention of national courts when it is a question of ascertaining whether or not Community provisions are in conformity with the principles concerning human rights. "fundamental rights"</p>
<p>Case 98/79 <u>Josette Pecaistaing v. Belgian State</u></p>	<p>Capotorti</p>	<p>Right of residence. FM. Right to a fair hearing. Right to same remedies as are available to nationals.</p>	<p>Fundamental right to a fair hearing: Application of Article 6 ECHR.</p>	<p>FM = right conferred by the treaty Fair Hearing: application of Article 6 ECHR</p>
<p>Case 136/79 <u>National Panasonic</u></p>	<p>Warner</p>	<p>Right to be heard (undertakings). Reg. 17/62.</p>	<p>Not infringed by Commission carrying out its duties under Reg. 17/62. NB Art 8(1) Carrying out duties under the law...</p>	
<p><u>Mervem Demirel v. Stadt Schwäbisch Gmünd</u></p>	<p>Darmon</p>	<p>Freedom of Movement (Turkey Agreement). Reunification of family (Right to family life, Art 8 ECHR).</p>	<p>Duty of the Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention Human Rights and Fundamental Freedoms of national legislation falling outside the scope of Community law.</p>	
<p>Joined Case 60 and 61/84</p>	<p>Sir Gordon</p>	<p>Freedom of Expression, Art</p>	<p>duty of the Court to ensure observance of</p>	<p>Not violated by provision:</p>

<p><u>Cinéthèque S.A. and Others v. Fédération nationale des cinémas français</u></p>	<p>Slynn</p>	<p>10 ECHR.</p>	<p>fundamental rights in the field of Community law, it has no power to examine the compatibility with the ECHR of national legislation which concerns an area within the remit of the national legislator.</p>	<p>protection of rights of others. National legislation....</p>
<p><u>Case 5/88 Hubert Wachauf v. Federal Republic of Germany</u></p>	<p>M. Zuleeg</p>	<p>Right to enjoyment of the fruits of one's labour.</p>	<p><i>Fundamental rights</i> recognised by the Court are not absolute, but must be considered in relation to their social function. Consequently restrictions may be placed upon the exercise of those rights, particularly in the context of a common organisation of a market, provided not... disproportionate. <i>Fundamental rights</i> in relation to enjoyment of fruits of labour.</p>	<p>Right to property: fundamental right.</p>
<p><u>Elliniki Radiophonia Tileorassi AE v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas</u></p>	<p>Kapteyn</p>	<p>Freedom of expression art. 10 of ECHR</p>	<p>where a Member State relies on the combined provisions of Articles 56 and 66 EC in order to justify, by reasons relating to public policy, public security and public health, rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of <i>fundamental rights</i>, the observance of which is ensured by the Court. Rules relating to television must be appraised in the light of freedom of expression, as embodied in Article 10 of the European Convention on Human Rights... Fundamental rights form an integral part of the general principles of law, the observance of which it ensures... constitutional traditions common to member states. guidelines supplied by international treaties on which the Member States have collaborated or are signatories. The ECHR has a special significance in that respect. Refers to Wachauf para. 19 "the Community cannot accept measures which are incompatible with observance of human rights thus recognized and guaranteed".</p>	<p>"right".</p>

<p><u>Christos Konstantinidis</u></p>	<p>Kapteyn</p>	<p>Jacobs</p>	<p>Free movement Freedom of Establishment Convention on the representation of names and surnames in registers of civil status, art. 2NB literal reproduction from one language to that in which to be represented</p>	<p><i>Doesn't deal with it in terms of rights: only under Treaty</i></p>	<p>Not strictly necessary to deal with the issue of fundamental rights (can be dealt with in terms of discrimination) Dignity of the individual is inviolable (Grundgesetz Art.1) ECHR art 5, 8..and FM Is treatment contrary to any of these? Individual's right to name and identity: not in ECHR BUT International Covenant on Civil and Political Rights...various MS constitutions: Possible to infer the existence of a principle according to which the State must respect not only the existence of a principle according to which the State must respect not only the physical well-being of an individual but also his dignity, moral integrity and sense of personal integrity: "moral rights" Person's right to his name is fundamental in every respect.. Should be possible to arrive here with broad interpretation of Art 8 ECHR</p>
<p>Joined Case 46/87 and 227/88 Hoechst v. <u>Commission</u></p>	<p>Rodriguez Iglesias</p>	<p>Mischo</p>	<p>Undertakings: fundamental right to inviolability of their premises: whether infringed by investigations carried out under Article 14 of Regulation 17 Right to the protection of the home</p>		<p>Fundamental right to protection of the home</p>

Appendix D: Table showing Rights referred to by the Community in the Context of its External Relations

Document	Title	Reference to
COM (95) 151 final	Report on the implementation of measures intended to promote observance of human rights and democratic principles	United Nations Charter Universal principles adopted by the international Community at various world conferences
Memo 91/20	Human Rights, Democracy and Development	fundamental rights (universal and completely independent of any type of society)
COM (95) 216 final	Communication on the inclusion of respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries	universal and regional instruments... To be included in all new draft negotiating directives, within body of agreement: "Respect for the democratic principles and fundamental human rights established by [the Universal Declaration on Human Rights]/[the Helsinki Final Act and the Charter of Paris for a new Europe] ..."
COM (96) 672 final	Report from the Commission on implementation.	EU action to defend and promote respect for human rights is taken in accordance with the UN Charter and the Universal Declaration of Human Rights supplemented by the two international pacts on civil and political rights and economic, social and cultural rights. It is also based on the requirements of the main international and regional instruments for the protection of human rights. The priorities espoused by the international Community in the final declaration and the action programme of the World Conference on Human Rights (Vienna June 1993) created a framework for action that is one of the European Union's main points of reference..." Universality, which implies that no provision of a national, cultural or religious nature can override the principles enshrined in the Universal Declaration on Human Rights
EP Report PE 220.735/fin A4-0393/97	Report on setting up a single co-ordinating structure within the European commission responsible for human rights and democratization	Preamble "having regard to the Universal Declaration of Humna Rights... basic principles of ECHR... CSCE Charter... UN Conference on Human Rights Vienna 1993..." and EC/EU provisions, declarations...
COM (97) 357 final	Proposal for a Council regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms	Preamble: Community action to promote human rights and democratic principles is guided by belief in the universality and indivisibility of human rights, principles that underpin the international system for the protection of human rights, Whereas Community action to promote human rights and democratic principles is rooted in the general principles established by the Universal Declaration of human rights...should be considered to encompass respect for international humanitarian law, also taking account of 1949 Geneva Conventions... and other acts of international treaty or customary law...

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