

## Policy Department External Policies

# HUMAN RIGHTS AND DEMOCRACY CLAUSES IN THE EU'S INTERNATIONAL AGREEMENTS (LONG VERSION)

HUMAN RIGHTS



EUROPEAN PARLIAMENT

**DIRECTORATE-GENERAL FOR EXTERNAL POLICIES OF THE UNION**

**DIRECTORATE B  
- POLICY DEPARTMENT -**

**Human Rights and Democracy Clauses  
in the EU's International Agreements  
(Long version)**

**Abstract:**

This study examines the evolution and current status of the EU's policy of including human rights and democracy clauses in its international agreements. Based on a close reading of their texts, this study describes the range of ways in which the implementation of these clauses might be improved. In this regard, the emphasis is on the potential use of these clauses within the institutional framework established by the international agreements in which they are contained.

This study was requested by the European Parliament's Subcommittee on Human Rights

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## EXECUTIVE SUMMARY

### INTRODUCTION

This study examines the evolution and current status of the EU's policy of including human rights and democracy clauses in its international agreements. Based on a close reading of their texts, this study describes the range of ways in which the implementation of these clauses might be improved. In this regard, the emphasis is on the potential use of these clauses within the institutional framework established by the international agreements in which they are contained.

The study proposes that human rights and democracy clauses are useful in the following ways:

- as a basis for political dialogue between the parties concerning compliance with human rights and democratic principles
- as the basis for establishing working groups, possibly including non-executive actors such as representatives of parliaments, regional organizations and civil society, to establish benchmarks and monitor compliance with these norms
- as the basis for a consultation procedure in the event of non-compliance with these norms
- to enable a party to take unilateral measures in the event that the other party fails to comply with these norms
- to enable a party to suspend any cooperation which violates that same party's own obligations with respect to human rights and democratic principles
- to preclude a party to an agreement from objecting to the involvement of the other party in activities for the promotion and protection of human rights in its territory

This study also makes a number of specific criticisms concerning the wording of human rights and democracy clauses, and of the possibility and desirability of using human rights and democracy clauses as the basis for funding initiatives to promote and protect human rights and democracy in third countries when more appropriate instruments exist for this purpose.

## SUMMARY OF THE STUDY

The study is in five parts. Part 1 describes the evolution and current status of the EU's policy on human right and democracy clauses. Part 2 analyses the operation of the existing clauses, with particular reference to the institutional powers of the bodies established under the EU's trade and cooperation agreements. Part 3 compares the EU's policy on human rights and democracy clauses to its other policies for the promotion of human rights and democracy in third countries. Part 4 discusses the role of the European Parliament. Part 5 (replicated in this summary) sets out proposals for reform. It consists of 15 recommendations for reform of the EU's policy on human rights clauses and a model draft for a new human rights and democracy clause.

### PART 1 – Description of human rights and democracy clauses

This part describes the evolution and current status of the EU's policy of including human rights and democracy clauses in its international agreements, the network of agreements containing human rights and democracy clauses, and structural and textual variations in existing clauses.

**Section 1** describes the **key dates** in the evolution of the policy:

- 1977** The EEC first applies a **conditionality policy** when it *de facto* suspends aid allocated under the Lomé I Convention to Uganda following a massacre.
- 1989** The Lomé IV Convention contains a clause providing that **financial resources** could be allocated to the promotion of human rights in the ACP States with their agreement.
- 1990** At its request, a cooperation agreement with Argentina contains a **basis clause** stating that the agreement was based on respect for human rights and democratic principles.
- 1992** Agreements with the three Baltic countries and Albania contain an **essential elements clause** stating that respect for human rights and democratic principles is an essential element of the agreement and a **suspension clause** giving the parties the right to suspend the agreement without notice if there is a violation of its essential elements.
- 1993** Agreements with Romania and Bulgaria replace the suspension clause with a **non execution clause** (which dates from 1978 in the context of trade remedies) that provides that the parties may take appropriate measures in the event that the other party fails to comply with an obligation. In the selection of measures, priority must be given to those which least disturb the functioning of the agreement. Except in cases of special urgency, the joint council under the agreement must first examine the matter.
- 1993** Agreements with the Czech and Slovak Republics include a Joint Declaration providing that **cases of special urgency** 'means a case of the material breach of the Agreement' including violation of the essential elements clause
- 1994** An agreement with Russia provides that 'appropriate measures' are measures taken **in accordance with international law** and that the other party may resort to dispute settlement (non-binding in this case).
- 1995** The **EU Council approves a 'suspension mechanism'** in Community agreements with third countries to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights.
- 1995** The Lomé IVbis Convention refines the non-execution procedure including a **detailed consultation procedure** prior to the taking of 'appropriate measures'
- 1999** The EU Member States reach an **Internal Agreement** on the implementation of the non-execution procedure in the Lomé IVbis Convention. This leads to an increase in the use of this procedure.
- 2003** **Permanent subcommittees** are established under six agreements with a mandate to discuss human rights and democratic principles.

**2005** Revision to 2000 Cotonou Agreement provides that **intensified political dialogue** on human rights and democratic principles must precede and continue during the consultation procedure and the taking of any appropriate measures.

**Section 2** outlines **the coverage of human rights and democracy clauses** and the **major gaps** in the EU's policy. Either directly, or via agreements with regional organisations, it has concluded or is negotiating agreements containing human rights and democracy clauses with around 150 countries in virtually all parts of the world. There are however variations.

Agreements with basis or essential elements clauses but no non-execution clauses

The cooperation agreements with Argentina (signed 1990), Uruguay (1991), Macao (1992), and Paraguay (1992) contain 'basis' clauses, and the cooperation agreements with Brazil (1992), Mongolia (1992), India (1993), Sri Lanka (1994) and Vietnam (1995) contain only 'essential elements' clauses. These agreements do not contain non-execution clauses.

Agreements with both essential elements clauses and non-execution clauses

There are non-execution clauses in all other agreements containing essential elements clause: the two remaining Europe association agreements with Romania and Bulgaria (both signed 1993), the ten Euro-Mediterranean association agreements (1995-2004), the two stabilization and association agreements with Croatia and Fyrom (both 2001), the agreement with Mexico (1997), the association agreements with South Africa (1999) and Chile (2005), the twelve partnership and cooperation agreements with the countries of the former Soviet Union (1994-2004), the cooperation agreements with the Mercosur countries (1995), the Central American (1993; 2003) and Andean Pact countries (1993; 2003), and the Cotonou Agreement (2000). These are all 'mixed agreements' concluded by the Community and its Member States together. In addition, there are non-execution clauses in the 'pure' cooperation agreements with Albania ('Baltic' clause, 1992), Korea (1996), Cambodia (1997), Laos (1997), Yemen (1997), Nepal (1995), Bangladesh (2000) and Pakistan (2001).

Interpretative declarations

Of agreements containing non-execution clauses, there are Czech/Slovak Declarations, defining cases of 'special urgency', in all agreements except those with Romania and Bulgaria (both signed 1993), and Israel and Tunisia (both signed 1995). There are also Russian Declarations, stating that measures will be taken 'in accordance with international law' and referring to 'dispute settlement', in all agreements except these four and the agreements with Moldova and Ukraine (both signed 1994) and Kazakhstan and Kyrgyzstan (both signed 1995). In some cases, these declarations have found their way into the treaty text, but even where these are not formally part of the treaty text, these declarations have significant legal weight.

Application of dispute settlement to human rights and democracy clauses

The Europe and Euro-Mediterranean association agreements (except for Syria), the agreement with South Africa and the Cotonou Agreement all provide for binding dispute resolution of 'any dispute relating to the application or interpretation' of the agreement, which includes all matters concerning the implementation and interpretation of human rights and democracy clauses. The procedure is first to seek resolution within the joint council (eg Association Council) administering the agreement, but if that fails, to resort to binding arbitration. However, no other agreements, including the recent association agreements with Syria, Croatia, Fyrom, and Chile (and the agreement with Mexico), include such binding dispute resolution applicable to human rights and democracy clauses.

*Gaps*

There are no human rights and democracy clauses in any general cooperation agreements with any developed countries. Sometimes this is because these agreements predate the Community's policy concerning human rights and democracy clauses. But in some cases (the EEA Agreement, the San Marino customs union and the proposed Andorra cooperation agreement) the absence of a human rights and democracy clause is more blatant. The absence of contractual relations may also be the result of developed country reluctance to sign up to human rights and democracy clauses. Most notably, during 1996-97 Australia and New Zealand refused to agree to EU cooperation agreements specifically because of the EU's insistence that these agreements had to contain human rights and democracy clauses.

The 1964 association agreement with Turkey, and even the 1995 Association Council decision establishing a customs union with Turkey also failed to contain a human rights and democracy clause, though the question was hotly debated, and compliance with human rights norms has since become central to Turkey's application for EU membership. Further afield, the EU's relations with countries in South-Eastern Asia are only intermittently subject to human rights and democracy clauses. Bilateral trade with China (outside of the WTO) is regulated under a 1985 cooperation agreement with no human rights and democracy clause, and trade relations with six of the ten Association of South East Asian Nations (ASEAN) countries take place under a 1980 cooperation agreement which well predates the EU's policy. Cambodia, Laos and Vietnam have concluded bilateral agreements containing human rights and democracy clauses; in stark contrast, Myanmar is excluded from contractual relations because of its very poor human rights record. For the same reason, Cuba has been refused permission to join the Cotonou Agreement.

#### *Sectoral agreements*

Finally, the EU does not include human rights and democracy clauses in any sectoral trade agreements with third countries. This does not just apply to developed countries,<sup>1</sup> but also to sectoral agreements with all countries, including those that have a demonstrated difficulty in complying with human rights and democratic principles. For example, on 23 October 2003 the European Parliament passed a resolution on Turkmenistan which contained a litany of human rights abuses in that country (as well as others):<sup>2</sup> indeed, it is for this reason that a signed partnership and cooperation agreement with this country has not yet been ratified. And yet, two months later, on 24 December 2003, the EU Council decided on the provisional application of a textiles agreement with no human rights and democracy clause with Turkmenistan from 1 January 2004.<sup>3</sup> Similar comments could be made about the numerous fisheries agreements concluded with ACP countries that at the very least present a risk of continuing violations of human rights and democratic principles.<sup>4</sup>

**Section 3** discusses the EU's implementation of human rights and democracy clauses. This has so far taken two practical forms:

#### *Establishment of subcommittees with a mandate to discuss the promotion of human rights and democracy*

Subcommittees have been established under the association agreements with Morocco, Jordan and Tunisia, and **Subgroups** on human rights have also been established under the cooperation agreements with Bangladesh (Subgroup on Governance and Human Rights), Vietnam

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<sup>1</sup> Eg, with Australia, the EC has agreements on mutual recognition [1998] OJ L229/3; scientific and technical cooperation [1994] OJ L188/18 and trade in wine [1994] OJ L86/1.

<sup>2</sup> European Parliament resolution on Turkmenistan, including Central Asia [2004] OJ C82E/639.

<sup>3</sup> Council Decision of 17 December 2003 on the signing and provisional application of bilateral agreements between the European Community and certain third countries (Azerbaijan, Kazakhstan, Tajikistan and Turkmenistan) on trade in textile products [2003] OJ L340/54.

<sup>4</sup> Eg Guinea-Bissau fishing agreement [2004] OJ L127/27; Guinea fishing agreement [2004] OJ L99/11.

(Subgroup on Cooperation in Institution Building, Administrative Reform, Governance and Human Rights). More are foreseen, including with Laos and Pakistan.

*Consultations and adoption of appropriate measures following failure to respect human rights and democratic principles*

Consultations have been undertaken on 14 occasions for non-execution of an essential elements clause. Negative reactions under human rights and democracy clauses have been limited to the Cotonou Agreement and its predecessor, the Lomé IV Convention. Specifically, consultations under the non-execution clauses in these agreements have been held with Togo (flawed electoral process: 1998 and democracy, respect for human rights and fundamental freedoms: 2004), Niger (coup d'état: 1999), Guinea-Bissau (coup d'état: 1999 and 2004), Comoros (coup d'état: 1999), Cote d'Ivoire (coup d'état: 2000 and democratic failures: 2001), Haiti (flawed electoral process: 2000), Fiji (coup d'état: 2000), Liberia (violations of human rights, democratic principles, rule of law and serious corruption: 2001), Zimbabwe (violations of human rights, democratic principles, rule of law: 2002), Central African Republic (coup d'état: 2003), and Guinea (deterioration of democracy and the rule of law, failure to respect human rights and fundamental freedoms and the lack of good economic governance: 2004). Appropriate measures have been adopted with respect to Togo (sanctions since 1993), Haiti (since 2001), Liberia (since 2001), Zimbabwe (since 2002), and Guinea (since 2005).

In addition to these 14 instances of consultations, from 1989-98 the EU suspended development aid without reference to a human rights and democracy clause in these cases: Burundi (1993 and 1997), Central African Republic (1991), Congo (1997), Djibouti (1991), Equatorial Guinea (1992 and 1994), Gambia (1994), Guinea-Bissau (1998), Haiti (1991), Kenya (1991), Liberia (1990), Niger (1996), Rwanda (1994), Sudan (1990), and Togo (1992). The reason for the increased use of the non-execution clauses after 1999 is likely to be that it was only in that year that the Community managed to adopt a decision setting out the procedure for deciding on the implementation of Article 366a of the Lomé Convention.

## **PART 2 – Analysis of existing human rights and democracy clauses**

This part provides a detailed legal analysis of the interpretation and application of existing human rights and democracy clauses.

**Section 4** discusses the **interpretation** of existing clauses with particular reference to mischaracterisations of the clauses in the past. Its central points are:

*Drafting deficiencies*

Human rights and democracy clauses poorly drafted. A large number of the agreements containing human rights and democracy clauses do not have the objective of promoting or protecting human rights and democratic principles, with effects for the powers of the joint councils established under the agreements (see next section). It is also questionable whether they impose any obligation to comply with human rights and democratic principles or whether they merely establish the conditions on which the agreement is based. This affects the legal avenues available in the event of non-compliance.

*International human rights standards*

To the extent that they incorporate non-binding norms (such as the entire Universal Declaration on Human Rights), existing human rights and democracy clauses impose higher standards and more effective enforcement of the protection of human rights and democratic principles than under customary international law.

*Extraterritorial obligations*

The parties to a human rights and democracy clause are under an obligation not to contribute to violations in third countries, including the territory of the other party. The EU is under an additional obligation under EU law not to contribute to such violations. In the event of a

complaint against the institutions on this basis, a human rights and democracy clause operates as an instrument at an international level to enable the EU to comply with its domestic obligations.

**Section 5** discusses the actual and potential **application** of the existing clauses:

#### *Joint Council decisions*

The joint councils established under agreements usually have the following powers to adopt decisions or non-binding recommendations:

- a general power to achieve the objectives of the agreement (which only rarely include express mention of human rights and democratic principles),
- specific powers to **establish subgroups** to assist in the implementation of the agreement, and (in some cases) to resolve disputes concerning the interpretation and application of the agreement

These subgroups could be established to draw up benchmarks for the implementation of and to monitor compliance with these norms. They could include non-executive actors, including representatives of parliaments, regional organizations and civil society.

#### *Political dialogue*

Essential elements clauses may be used to establish normative standards for political dialogue. They may also have the effect of *deeming* human rights and democratic principles to be a topic of common interest. Finally, they may be useful to the extent that political dialogue is conducted via subgroups established by decision of the joint council (see previous point).

#### *Funded initiatives*

Human rights and democracy clauses (essential elements and non-execution clauses) are of limited relevance as a basis for funded initiatives to promote and protect human rights and democratisation in third countries.

- Appropriate measures are an inappropriate basis for funding activities, as these depend on a determination that the other party has failed to fulfil an obligation. This is diplomatically undesirable and raises legal difficulties concerning the ‘appropriateness’ of the measure to the ‘failure to fulfil obligations’.
- But **essential elements clauses will preclude a party from objecting to funded activities** taking place on its territory.

#### *Negative measures*

Negative measures take the form of suspending any benefits under an agreement in response to non-compliance with the norms in an essential elements clause. Where there is no non-execution clause, the justification is an implied repudiation under Article 60(3)(a) of the Vienna Convention on the Law of Treaties (not Article 60(3)(b)). Where there is a non-execution clause, negative measures takes the form of **appropriate measures** under that clause. Appropriate measures must be proportional to the violation and must not themselves violate human rights. They may also be subject to binding or non-binding **dispute settlement**.

### **PART 3 – Human rights and democracy clauses and EU human rights policies**

**Section 6** compares human rights and democracy clauses with other EU instruments that are available for the promotion and protection of human rights and democratic principles. The key points are:

- **Political dialogue** on human rights and democratic principles does not depend on the clauses but these may be a useful way of institutionalising the dialogue
- **Monitoring of compliance** can take place by way of a subgroup established under an agreement or (in most cases) by reference to the proposed Fundamental Rights Agency.

- **Funding of initiatives** does not depend on human rights and democracy clauses and these clauses add little to the EU's policy in this regard. There is one exception: essential elements clauses operate to **preclude the other party from objecting to these initiatives**.
- **Other EU conditionality clauses.** There is an urgent need for coordination between human rights and democracy clauses and the standards and suspension mechanisms in the EU's other conditionality clauses (eg in its enlargement policies, and the autonomous instruments providing for financial and technical aid and for trade preferences).
- **CFSP.** There is a need for coordination between economic measures taken in the context of the CFSP and under human rights and democracy clauses.

**Section 7** sets out the views of NGOS, which are generally positive of the EU's stated policy but critical of its implementation.

## PART 4 – Role of the European Parliament

**Part 4** discusses the role of the European Parliament in the implementation of human rights and democracy clauses, in particular concerning its powers under Article 300 of the EC Treaty and suggests reforms to this process.

**Section 8 discusses the powers of the European Parliament** with respect to human rights and democracy clauses. Article 300(3) subparagraph 2 of the EC Treaty provides that the Parliament must give its assent to association agreements, as well as other significant agreements. In addition, the Parliament has the right to be consulted on all other agreements, except for trade agreements concluded on the basis of Article 133(3). Any extension of these rights to other agreements would increase the Parliament's influence over this aspect of the agreements.

Articles 300(2) subparagraphs 2 and 3 of the EC Treaty expressly restrict the Parliament's role in two cases of relevance to human rights and democracy clauses. These provisions state as follows:

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

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

Both of the decisions mentioned in subparagraph 2 above are of direct relevance to human rights and democracy clauses. A decision to suspend an agreement includes all cases of suspending an agreement on the basis of an essential elements clause (via Article 60 VCLT) or on the basis of an applicable and operative non-execution clause. The establishment of a position concerning decisions of a body established under an agreement necessarily includes all cases concerning the range of measures discussed in this study, in particular:

- Joint Council decisions to establish subgroups for the purpose of conducting political dialogue and monitoring compliance with human rights and democratic principles;
- Joint Council decisions following the invocation of the consultation procedure foreseen in the non-execution clauses; and
- Joint Council decisions resolving a dispute under relevant dispute settlement procedures.

In summary, Article 300(2) subparagraphs 2 and 3 concern the very essence of the practical implementation of human rights and democracy clauses. It is therefore recommended that the

European Parliament make it a priority to revoke the carve-out of its ordinary powers established in these subparagraphs.

### ***Informal EU policies***

Even in the absence of reform to Article 300(2) EC, the European Parliament should be able to press for informal involvement in the EU's decisionmaking process on matters concerning human rights and democracy clauses. First, the Parliament can press for involvement in the formation of any positions to be taken in the joint councils that relate to human rights and democratic principles. Second the Parliament can press for formal involvement in the meetings of these councils. Third, the Parliament can press for the establishment of subcommittees under these agreements with a human rights and democracy mandate and for a formal role in these subcommittees. The Parliament can also work towards having human rights and democratic principles as a standing agenda item on the meetings of the joint council.

## **PART 5 and Annex (model human rights and democracy clause)**

**Part 5** sets out **15 concrete recommendations**, targeted at the European Parliament, to strengthen the EU's policy on human rights and democracy clause.

### **Recommendations**

#### **1. New agreements**

A striking anomaly in the EU's policy concerning human rights and democracy clauses is the fact that they are not included in sectoral agreements (eg fisheries, steel, and textiles) often concluded with third countries with less than perfect records in the area of human rights and democratic principles. This should be remedied. In the longer term, it would also be desirable to ensure a uniform application of human rights and democracy clauses in all agreements with all third countries, especially developed countries. However, this depends on the consent of those countries, which, as history has demonstrated, cannot be guaranteed.

*Recommendation 1: The European Parliament should call for all new agreements to contain human rights and democracy clauses, in particular sectoral agreements.*

#### **2. Implementation of existing clauses**

Without a doubt, the single most important failure of the EU's policy on human rights and democracy clauses is the failure to invoke them in cases in which they are obviously relevant. The European Parliament also has a tendency to criticise violations while not calling for any measures,<sup>5</sup> or to fail to cite applicable human rights and democracy clauses when calling for measures.<sup>6</sup> This practice undermines the coherence and credibility of a uniform EU external human rights policy.

*Recommendation 2: The European Parliament should systematically refer to applicable human rights and democracy clauses when referring to violations of relevant norms in third countries and should recommend appropriate measures to be taken.*

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<sup>5</sup> See, eg, European Parliament resolution on the human rights situation in Ethiopia, P6\_TA-PROV(2005)0305, 7 July 2005, which failed to recommend any measures.

<sup>6</sup> See, eg, European Parliament resolution on Zimbabwe, P6\_TA-PROV(2005)0303, para 11, 7 July 2005, which failed to mention an applicable human rights clause.

### **3. Normative standards**

There is no escaping the impression that human rights and democracy clauses are very poorly drafted. There is a fundamental lack of clarity on the normative value of the essential elements clause, and consequently on the applicability (if any) of the non-execution clause. This has not been helped by various statements by the European Commission on the legal effect of these clauses. The following delineates the most important areas in which greater clarity would be desirable.

#### **a. Clarity on applicable standards**

The norms and principles in existing essential elements clauses are sufficiently general to cover all civil and political, as well as economic, social and cultural rights, and in addition democratic principles, sometimes even beyond the standard applicable under customary international law. They also cover women's rights and workers' rights. It is not necessary to add to the palette of individual rights, which is better achieved in the day-to-day work of political dialogue and, where necessary, consultations under a non-execution clause.

The standards in human rights and democracy clauses should also be coordinated with other standards applicable between the parties under international law. The current practice of incorporating by reference norms in instruments that are either wholly or partly non-binding under customary international law (eg the OSCE instruments or the Universal Declaration on Human Rights) should be continued only on the basis of a proper understanding of its true legal effects. An effort should be made to ensure that the standards set out in essential elements clauses do not unknowingly rise above the standards applicable under customary international law.

*Recommendation 3: The European Parliament should work for the inclusion of the model Article B in new agreements. It should also refrain from calling for additional clauses, such as on women's rights and labour standards.*

#### **b. Benchmarking of applicable standards**

Further clarity can be brought to the manner in which these standards can be implemented in the context of any given country. In this respect, the new reference in the Cotonou Agreement to benchmarking is to be welcomed. However, benchmarking should not be limited to the context of political dialogue (as it is in that Agreement), but should also apply to consultation procedures in the event of non-compliance.

*See Recommendations 7 and 10.*

#### **c. Normative status of the essential elements clause**

It cannot be assumed that existing essential elements clauses contain an obligation to comply with the norms made an 'essential element' of the agreement. This should be clarified.

*Recommendation 4: The European Parliament should work for the inclusion of model Article B in new agreements. In the case of existing agreements, the Parliament should work towards a statement affirming that the parties are under an obligation to comply with the norms in the essential elements clause. This statement could take the form of a decision of the relevant joint council or, if necessary, a joint declaration by the parties.*

However, it is necessary to ensure that the EU does not exceed its competence under the EC Treaty to enter into obligations in the field of human rights. In the case of mixed agreements, a

clause defining the ‘parties’ in terms of their respective powers almost certainly removes this danger. In pure agreements it must be ensured that the EU does not exceed its competence.<sup>7</sup>

*Recommendation 5: The European Parliament should work for the inclusion of model clause E in new pure Community agreements.*

#### **d. Coherence in standards applicable to third countries**

The standards applicable in essential elements clauses should be coordinated with the standards applicable under other EU instruments. At present, some countries are subject to host of different standards including Article 6(1) EU; the Copenhagen criteria; special conditions applicable to the Western Balkan countries; essential elements clauses; and conditionality provisions in autonomous EU regulations on financing and trade preferences. As in the case of Slovakia in 1997, this can lead to the standard in the essential elements clause being ignored, in favour of a different (though equally applicable standard) in another instrument. This is unsatisfactory from an administrative perspective; it also weakens the claims of the EU to the coherence of its external human rights and democratisation policy.

*Recommendation 6: The European Parliament should ensure consistency among the normative standards applicable in conditionality clauses in autonomous EU instruments providing or financial and technical assistance and trade preferences (including in the EU’s enlargement policies), ensure consistency between these standards and those in the clauses and ensure consistency in the implementation of measures based on these standards.*

### **4. Improved procedures for implementing human rights and democracy clauses**

#### **a. Political dialogue**

Both the 2005 revision of the Cotonou Agreement, with its greater emphasis on political dialogue and the establishment of permanent subcommittees to discuss these matters in a variety of third country agreements have pointed the way to a greater institutionalisation of these issues in the ordinary conduct of the relationship between the EU and its partners. This is to be welcomed. Consideration should also be given to the involvement of representatives of the parliaments, regional organisations and civil society.

*Recommendation 7: The European Parliament should work for the inclusion of model Article C in new agreements and in agreements without any provision for political dialogue. In the case of existing agreements, the Parliament should work towards procedural rules to the same effect, by way of a decision of the relevant joint council.*

#### **b. Monitoring of compliance**

An important innovation waiting to be implemented is the establishment of formal arrangements to monitor compliance with the standards established in the essential elements clauses. There are two main options for such monitoring: the establishment of a working group under the agreement with competence to monitor compliance, and a reference to the proposed Fundamental Rights Agency. The advantage of the former option is that it is more truly bilateral, and may therefore more diplomatically acceptable, than the latter. There is also greater scope for the involvement in such a working group of non-executive actors. In both cases, a

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<sup>7</sup> The EU and its Member States are jointly responsible under the Cotonou Agreement. It is beyond the scope of this study to discuss the implications of this responsibility with respect to human rights and democratic principles.

system of annual reports, along the lines of the US State Department Country Reports on Human Rights Practices, may be desirable.<sup>8</sup>

*Recommendation 8: The European Parliament should call for the establishment of permanent subgroups or subcommittees under third country agreements with a mandate to review compliance with human rights and democratic principles. These groups should include, where appropriate, representatives of parliaments, relevant regional organizations, and civil society. The subgroup should prepare an annual report on compliance by the parties to the agreement.*

*Recommendation 9: The European Parliament should also give consideration to calling for a decision of the respective joint council to establish ongoing cooperation with the proposed Fundamental Rights Agency. The FRA should prepare an annual report on compliance by the parties to the agreement.*

### **c. Consultations under non-execution clauses**

With the exception of the Cotonou Agreement, the procedures for consulting the other party prior to the taking of ‘appropriate measures’ are very thinly described in the agreements. Nothing more is required than a notification to the joint council of the ‘matter’ and there is little requirement for a serious discussion of the matter before unilateral measures are taken. The Cotonou Agreement is much more detailed on this point, especially in linking intensive political dialogue with the invocation of consultations under the non-execution procedure. This model, or at least a simplified form, should be adopted in other agreements as well.

In addition, consideration should be given to broadening the range of actors involved in these consultations. At present, consultations take place in the context of the joint council established under the agreement. It may be appropriate to involve non-executive actors.

*Recommendation 10: The European Parliament should work for the inclusion of model Article D(1)-(5) in new agreements and in agreements without any provision for consultations. In the case of existing agreements, the Parliament should work towards procedural rules to the same effect, by way of a decision of the relevant joint council.*

### **d. Scope of appropriate measures**

There is a lack of clarity on whether appropriate measures are limited to the suspension of benefits under an agreement. It has been suggested in this study that there is little need or value added in the use of ‘appropriate measures’ to fund human rights and democratisation initiatives, given that a range of perfectly serviceable instruments already exist for this purpose, and given that it would be necessary to tie any such measures to a ‘failure to fulfil an obligation’.

*Recommendation 11: The European Parliament should refrain from implying that funding of human rights and democratization initiatives should take the form of ‘appropriate measures’ under a non-execution clause.*

### **e. Review of appropriate measures**

All non-execution clauses (except in the Cotonou Agreement) lack a mechanism for reviewing the continuing relevance of appropriate measures. There should be a built-in ‘sunset clause’ on all appropriate measures, which should in addition be reviewed in the same forum in which they were first discussed; usually in the joint council. This is all the more important for measures taken in a case of ‘special urgency’, as these can be taken without prior consultations.

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<sup>8</sup> Riedel and Will (1999) 749-51; cf also Clapham, 669-671.

*Recommendation 12: The European Parliament should work for the inclusion of model Article D(6) in new agreements and in agreements without any provision for political dialogue. In the case of existing agreements, the Parliament should work towards a decision of the relevant joint council to the same effect.*

#### **f. Clarity on cases of ‘special urgency’**

In most agreements, the definition of the cases of special urgency in which unilateral ‘appropriate measures’ may be taken without consultations is misconceived. Rather than being limited to cases of temporal urgency, the applicable definition speaks of ‘material breach’. This is problematic because (a) it implies that a serious breach renders consultations useless, and (b) it has the effect of rendering *every* violation of the norms in an essential elements clause a case of ‘special urgency’. The Cotonou Agreement, and Egypt and South Africa agreements provide for a more sensible definition of cases of ‘special urgency’ in terms of temporal urgency.

*Recommendation 13: The European Parliament should work for the inclusion of model Article D(7) in new agreements. In the case of existing agreements, the Parliament should work towards a statement specifying that cases of ‘special urgency’ are those in which there is a temporal urgency necessitating a quick response. This statement could take the form of a decision of the relevant joint council or, if necessary, a joint declaration by the parties.*

#### **g. Binding third party dispute settlement**

A commitment to the rule of law would support the notion of recourse to binding third party dispute settlement procedures in all cases involving appropriate measures under a non-execution clause. At present, such recourse is available under the Cotonou Agreement, the agreement with South Africa and the Europe and Euro-Mediterranean association agreements (except with Syria), and non-binding conciliation is available under the partnership and cooperation agreements. However, there is no possibility for any form of third party dispute resolution on these matters under the more recent Stabilization and Association Agreements, nor under the agreement with Mexico, nor the association agreement with Chile, nor any of the EU’s ‘pure’ cooperation agreements with third countries.

*Recommendation 14: The European Parliament should give consideration to the desirability to subjecting any appropriate measures to dispute settlement under an agreement.*

### **5. Role of the European Parliament**

At present, the role of the European Parliament in the drafting and implementation of human rights and democracy clauses is limited. This could be enhanced by involvement in political dialogue and consultations, as well as by involvement in any decisions to suspend agreements and the establishment of positions to be adopted by joint councils in international agreements. The former role has been addressed in Recommendations 6-9. In addition:

*Recommendation 15: The European Parliament should call for the revision of Article 300(2) to provide for its involvement in any decisions to suspend agreements and the establishment of positions to be adopted by joint councils in international agreements, and, prior to this, call for informal involvement in these procedures.*

## **ANNEX Model human rights and democracy clause**

An Annex sets out a model human rights and democracy clause for inclusion in new agreements.

### **[Article A] Objectives**

**The aims of this [agreement/association] are: [...] the promotion and protection of respect for human rights and democratic principles.**

#### *Comment*

This redrafted subclause makes it clear that the agreement has the twin objectives of promoting and protecting human rights and democratic principles. This is necessary to trigger the powers of the Joint Council to adopt decisions or non-binding recommendations to achieve these two aims of the agreement. The first objective (promotion) provides a basis for proactive decisions to encourage reform, while the second (protection) provides a basis for decisions to prevent regression; specifically, negative measures.

### **[Article B] Human rights and democratic principles**

**The parties shall respect legally binding democratic principles and human rights [as set out in [legal instrument]] in their internal and external policies.**

#### *Comment*

This redrafted clause establishes a clear obligation on the parties to comply with the stated norms, which is necessary for the proper application of the non-compliance clause. If the bracketed phrase is excluded, the principles and human rights that give content to the obligation will be those already binding on the parties under customary and conventional international law. If the bracketed phrase is included, the parties have the option of raising the applicable standard of human rights according to the nominated instrument. Article [E] below ensures that this obligation does not exceed the EU's competence under the EC Treaty.

### **[Article C] Political dialogue**

**1. Political dialogue shall cover all issues of common interest to the Parties, in particular [...] and the obligations of the parties set out in Article B. [The parties may develop and agree specific benchmarks or targets with regard to these obligations, taking into account the special circumstances of the party concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.]**

#### *Comment*

The first sentence of this clause is a slight modification to existing clauses on political dialogue to ensure that the parties routinely discuss their obligations to respect human rights and democratic principles in their political dialogue. The bracketed phrase is based on Article 2(2) of Annex VII of the Cotonou Agreement, where it also applies to political dialogue. It refers to the obligations of the parties in Article B rather than to 'internationally agreed standards and norms'. However, this sentence may not always be

appropriate, as it implies that the parties may have difficulties in implementing these obligations. This may be diplomatically insensitive.

**2. The European Parliament, the [national] parliament, and representatives from regional and sub-regional organizations and representatives of civil society shall be associated with this dialogue.**

*Comment*

This clause is based on Article 8(7) of the Cotonou Agreement. In addition, it specifies that the European Parliament and the national parliament are to be associated with the political dialogue.

#### **[Article D] Non-compliance with Article B**

*Comment*

This redrafted clause applies solely to violations of Article B. It is retitled ‘non-compliance’ to emphasise that Article B establishes an obligation with which the parties must comply.

**1. If either party considers that the other party has failed to comply with Article B, it shall, except in a case of special urgency, supply the [Joint Council] with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the parties. To this end, it shall invite the other party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.**

*Comment*

This clause is based on Article 96(2)(a)(1) of the Cotonou Agreement, except that, for the sake of brevity and to avoid the risk of setting a new standard, it uses the term ‘comply with Article B’ rather than the term used in that provision (‘failure to fulfil and obligation stemming from respect for human rights, democratic principles and rule of law referred to in paragraph 2 of Article 9’).

**2. The European Parliament, the [national] parliament, and representatives from regional and sub-regional organizations and representatives of civil society shall be associated with these consultations.**

*Comment*

This clause is based on Article 8(7) of the Cotonou Agreement, where it applies to political dialogue. In addition, it specifies that the European Parliament and the national parliament are to be involved in consultations.

**3. The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.**

**The consultations shall begin no later than [X] days after the invitation and shall continue for a period established by mutual agreement, depending on the nature**

**and gravity of the violation. In any case, the consultations shall last no longer than [Y] days.**

*Comment*

This clause reproduces Article 96(2)(a)(2) and (3) of the Cotonou Agreement except for optional variations in the time periods involved.

**4. During consultations, the parties shall develop and agree specific benchmarks or targets with regard to the obligations of the parties in Article B, taking into account special circumstances of the party concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.**

*Comment*

This clause is based on Article 2(2) of Annex VII of the Cotonou Agreement, where it applies to political dialogue. It refers to the obligations of the parties in Article B rather than to ‘internationally agreed standards and norms’.

**5. If the consultations do not lead to a solution acceptable to both parties, if consultation is refused or in cases of special urgency, appropriate measures may be taken. Appropriate measures must be proportional to the violation and comply with international law.**

*Comment*

The first sentence of this clause reproduces the first sentence of Article 96(2)(a)(4) of the Cotonou Agreement. The second sentence is a simplified version of the first sentence of Article 96(2)(c)(1) of the Cotonou Agreement’. There is no reference to ‘measures least disturbing the functioning of the agreement’, a phrase which was developed in the context of trade remedies and which is inappropriate in this context. There is no reference to ‘suspension being a last resort’, as this is implied in the existing qualifications in the second sentence.

**6. Appropriate measures must be reviewed in the [Joint Council] every [X] months. They shall be revoked as soon as the reasons for taking them no longer prevail.**

*Comment*

The first sentence of this clause is new. It is a sunset clause mandating periodic review. It also ensures that the decision to revoke the measures set out in the second sentence is not taken unilaterally. The second sentence reproduces the second sentence of Article 96(2)(a)(4) of the Cotonou Agreement.

**7. The term ‘cases of special urgency’ shall refer to exceptional cases of particularly serious and flagrant violation of Article B that require an immediate reaction. If measures are taken in cases of special urgency, they shall be immediately notified to the [Joint Council]. At the request of the party concerned, consultations may then be called in accordance with this Article.**

*Comment*

The first sentence of this clause is adapted from Article 96(2)(b)(1) of the Cotonou Agreement, except that, for the sake of brevity and to avoid the risk of setting new standards, it substitutes a reference to ‘Article B’ for the phrase ‘one of the essential elements referred to in paragraph 2 of Article 9. The second sentence is taken from the first sentence of Article 96(2)(c)(2) of the Cotonou Agreement. The third sentence is a simplified form of the second and third sentences of the same provision. To avoid redundancy, there is no obligation to notify the Joint Council of the fact that a party is resorting to the special urgency procedure’ in the absence of taking a measure (as in Article 96(2)(b)(2) of the Cotonou Agreement).

**In pure Community agreements  
[Article E] Parties to the agreement**

**For the purposes of this Agreement, ‘parties’ shall mean, on the one hand, the Community, in accordance with its powers, and, on the other hand, [the other party].**

*Comment*

This clause is adapted from the ‘parties’ clauses of mixed agreements. It has the advantage of minimising the danger that the Community will be responsible for the performance of any obligations under human rights and democracy clauses for which it lacks competence.

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## INTRODUCTION

This study examines the evolution and current status of the EU's policy of including human rights and democracy clauses in its international agreements. Based on a close reading of their texts, this study describes the range of ways in which the implementation of these clauses might be improved. In this regard, the emphasis is on the potential use of these clauses within the institutional framework established by the international agreements in which they are contained. The study proposes that human rights and democracy clauses are useful in the following ways:

- as a basis for political dialogue between the parties concerning compliance with human rights and democratic principles
- as the basis for establishing working groups, possibly including non-executive actors such as representatives of parliaments, regional organizations and civil society, to establish benchmarks and monitor compliance with these norms
- as the basis for a consultation procedure in the event of non-compliance with these norms
- to enable a party to take unilateral measures in the event that the other party fails to comply with these norms
- to enable a party to suspend any cooperation which violates that same party's own obligations with respect to human rights and democratic principles
- to preclude a party to an agreement from objecting to the involvement of the other party in activities for the promotion and protection of human rights in its territory

This study also makes a number of specific criticisms concerning the wording of human rights and democracy clauses, and of the possibility and desirability of using human rights and democracy clauses as the basis for funding initiatives to promote and protect human rights and democracy in third countries when more appropriate instruments exist for this purpose.

The study is in five parts. Part 1 describes the evolution and current status of the EU's policy on human right and democracy clauses. Part 2 analyses the operation of the existing clauses, with particular reference to the institutional powers of the bodies established under the EU's trade and cooperation agreements. Part 3 compares the EU's policy on human rights and democracy clauses to its other policies for the promotion of human rights and democracy in third countries. Part 4 discusses the role of the European Parliament. Part 5 sets out proposals for reform. It consists of 15 recommendations for reform of the EU's policy on human rights clauses and a model draft for a new human rights and democracy clause.

An Annex sets out a model human rights and democracy clause for inclusion in new agreements.

## 1. The historical and legal background of human rights and democracy clauses

### 1.1. The 1977 'Uganda guidelines'

The EU's policy of linking development aid with human rights conditions is relatively recent. Until the mid-1970s, in line with prevailing international opinion,<sup>9</sup> the Community took the view that development was a precondition of respect for human rights, rather than *vice versa*. During the first round of negotiations for the Lomé Convention in 1973, the Commission said:

The conclusions [sic] with the Community of an agreement on cooperation entails for the Community's partners no limitation on their sovereignty, either internal or external, nor on their freedom of choice of objectives or means for their development policy.<sup>10</sup>

This approach was abandoned following a massacre in Uganda in 1977. Uganda was one of the 46 African, Caribbean and Pacific (ACP) countries which benefited from aid under the Lomé Convention in the form of payments for the stabilization of export earnings (STABEX) as well as financial grants and loans. STABEX payments were automatic, and nothing was or could legally be done to stop these payments flowing to Uganda.<sup>11</sup> However, financial aid under the Convention was allocated on the basis of mutual agreement between the recipients and the Community<sup>12</sup> and following the massacre the Commission suspended almost all of the financial aid allocated to Uganda.<sup>13</sup> In June 1977, the EEC Council partly formalised this practice, in the so-called 'Uganda Guidelines', when it said that:

The Council agrees to take steps within the framework of its relationship with Uganda under the Lomé Convention to ensure that any assistance given by the Community to Uganda does not in any way have as its effect a reinforcement or prolongation of the denial of basic human rights to its people.<sup>14</sup>

Over the next few years, the Community applied an equivalent policy to other African countries, withdrawing aid from Guinea (1978), Equatorial Guinea (1979) and the Central African Empire (1979). On the other hand, it did nothing in response to human rights violations in Ethiopia (1977), Sierra Leone (1977) or Zaire (1979).<sup>15</sup>

### 1.2. Development of a policy on human rights and democracy clauses

On 24 July 1978, negotiations began for the Lomé II Convention. The Commission proposed the inclusion in the Convention of a reference to Articles 3 and 5 of the Universal Declaration on Human Rights, which secure a right to life, liberty and security and provide that no one shall be

<sup>9</sup> Donnelly (1984); King (1997), 53-55 also notes the politicization of human rights dialogue as an instrument of the Cold War, and the desire of the EEC to appear independent from this conflict.

<sup>10</sup> Bull EC Supp 1/73, 6-7.

<sup>11</sup> ACP countries were entitled as of right to request such transfers if their actual earnings were at least a certain percentage below a predefined reference level: Art 19(2) of the Lomé I Convention. Uganda benefited from 13.7m EUA in STABEX payments from 1975-1978: see Oestreich (1990), 307.

<sup>12</sup> Art 51(3) of the Lomé I Convention.

<sup>13</sup> Only around 5% (3m EUA) of the funds allocated to Uganda (75m EUA) were actually disbursed from the entry into force of the Lomé Convention until the fall of Idi Amin in April 1979: See Oestreich (1990), 306.

<sup>14</sup> Council Declaration on the situation in Uganda, adopted 21 June 1977, in Bull EC 6-1977, para 2.2.59. The same sentiment was reflected in Commission Memorandum on the Linking of Economic Aid and Human Rights, 16 Feb 1978, COM (78) 47, cited in King, 56 n 12.

<sup>15</sup> Oestreich (1990).

subjected to torture or to cruel, inhuman or degrading treatment of punishment.<sup>16</sup> However divisions among the Member States, together with strong opposition by a number of ACP States, meant that the final text of the Lomé II Convention contained no reference to human rights at all.<sup>17</sup> Later, an (unpublished) internal decision was adopted by the Council on 20 November 1979 generalizing the principles of the Uganda Guidelines.<sup>18</sup>

Slightly more was achieved during the negotiations for the Lomé III Convention, which commenced in October 1983. By now, the political climate was distinctly more favourable to the introduction of a human rights clause into the Convention. The European Parliament, directly elected since 1979, was taking an increasingly active role in the promotion of human rights in the world, justified on the basis that public opinion had entrusted it with this task.<sup>19</sup> Nor were the ACP countries so longer entirely opposed to the notion of human rights. The African Charter of Human and People's Rights had been adopted in 1981<sup>20</sup> and the concept of the 'human right' to development was beginning to gain currency.<sup>21</sup> The ACP countries were also using the language of human rights to condemn apartheid South Africa (indeed they insisted that they would only agree to discuss human rights in the context of the Lomé III Convention if the EEC would enter into a dialogue on this issue).<sup>22</sup> In the end, the Lomé III Convention contained several provisions mentioning human rights but these were not operative.<sup>23</sup>

The conclusion of the Lomé IV Convention in 1989 marked a further step in the evolution of human rights clauses. For the first time, this Convention included a reference to respect for human rights in the body of the agreement. Article 5 referred to human rights a number of times, and contained an operative paragraph 3, which provided that:

At the request of the ACP States, financial resources may be allocated, in accordance with the rules governing development finance cooperation, to the promotion of human rights in the ACP States through specific schemes ... [and] [r]esources may also be given to support the establishment of structures to promote human rights.

There was however still no clause making human rights an essential element of the Convention, nor one providing for its suspension in the event of human rights violations.<sup>24</sup> Other than as a basis for funding – and this at the request of the ACP States – it is not entirely clear that Article 5 of the Lomé IV Convention would have had any operative effect.

A number of reasons have been suggested as to why the ACP countries agreed to this clause.<sup>25</sup> By now, the economic situation of the ACP countries had significantly worsened, and they were in a weak bargaining position. Politically, the ACP countries were also becoming increasingly comfortable with the human rights in general, having been involved in various human rights declarations during the previous few years. And, interestingly, the reference to human dignity in

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<sup>16</sup> Recommandation de décision du Conseil, COM (78) 252 final; cited in Oestreich (1990) 67 nn 177 and 178, and discussed at 67-68; also Fierro (2003) 48.

<sup>17</sup> For the history of the negotiations, see Fierro (2003) 47-55, Smits (1980) 50-54, Oestreich (1990) 67-8 and Young-Anawaty (1980) 93-94.

<sup>18</sup> *European Report* (No 639) 8-9 (21 Nov 1979), cited in Young-Anawaty (1980), 94.

<sup>19</sup> European Parliament Resolution on human rights in the world [1983] OJ C161/58, recital E. With this resolution, the Parliament commenced its practice of adopting (almost) annual reports and resolutions on human rights in the world: see [1983] OJ C161/58; [1984] OJ C172/36; [1985] OJ C343/29; [1987] OJ C99/157; [1989] OJ C47/61; [1991] OJ C267/165; [1993] OJ C115/214; [1995] OJ C126/15; [1997] OJ C20/94; [1999] OJ C98/267 and 270; [2000] OJ C377/336; [2003] OJ C131E/138.

<sup>20</sup> African Charter on Human and Peoples' Rights (1982) 21 ILM 58. For a full discussion, see Oestreich (1990), 127-204.

<sup>21</sup> UN General Assembly Declaration on the Right to Development, UNGA Res 41/128, Annex, 4 Dec 1986.

<sup>22</sup> For discussion of the negotiations, see Oestreich (1990), 252-282 and Fierro (2003), 55-59.

<sup>23</sup> Preamble; also Art 4 Lomé III Convention and Joint Declaration on Art 4.

<sup>24</sup> Marantis (1994), 9, criticises Lomé IV as a whole for paying 'scant attention to civil and political rights' but this criticism should not apply to Art 5, which does not distinguish between these rights and social, economic and cultural rights.

<sup>25</sup> See Fierro (2003), 66-70.

Lomé III encouraged the belief that somehow the parties were already committed to respect human rights, so the debate centred rather on the form and content that such a clause should take.

### 1.3. Basis clause and further policy developments

The first legally effective human rights and democracy clause was included in an agreement signed with Argentina in April 1990 (interestingly, at Argentina's instigation)<sup>26</sup> and in a number of other agreements between then and June 1992.<sup>27</sup> This 'basis' clause stated that:

Cooperation ties between the Community and Argentina and this agreement in its entirety are based on the respect for democratic principles and human rights which inspire the domestic and external policies of both the Community and Argentina.<sup>28</sup>

Most likely, a failure to comply with democratic principles and human rights, as stated in this clause, could be treated as an implied repudiation of the treaty in accordance with Article 60(3)(a) of the Vienna Convention on the Law of Treaties.<sup>29</sup>

In March 1991 the Commission issued a Communication on Human Rights, Democracy and Development Cooperation Policy.<sup>30</sup> This Communication noted that 'the Community can choose active promotion of human rights or a negative response to serious and systematic violations,' although it 'will wherever possible give preference to the positive approach of support and encouragement'.<sup>31</sup> Negative reactions were to be applied according to the principles of consistency and proportionality, and humanitarian aid and local development aid would be continued, possibly delivered through unofficial channels.<sup>32</sup> However, the Commission remained of the view that a human rights and democracy clause, though helpful, was not essential to this policy. Similarly, the June 1991 Luxembourg European Council Declaration Concerning Human Rights<sup>33</sup> said very little of relevance to human rights and democracy clauses.<sup>34</sup>

On 28 November 1991, the Council and its Member States adopted a 'Resolution on Human Rights, Democracy and Development'.<sup>35</sup> This Resolution accepted the broad thrust of the Communication's March 1991 proposal, in particular concerning the preference for a positive approach. Positive measures were to include dialogue, as well as 'active support' for various initiatives enhancing respect for human rights, democracy and the rule of law. However, the Communication reserved the option of taking negative measures 'in the event of grave and persistent human rights violations or the serious interruption of democratic processes'.<sup>36</sup> These were to be 'graduated according to the gravity of each case' and were to include 'confidential or public *démarches* as well as changes in the content or channels of cooperation programmes and the deferment of necessary signatures or decisions in the cooperation process or, when

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<sup>26</sup> Commission Answer to Written Question No 617/93 [1993] OJ C264/42.

<sup>27</sup> Chile (signed 20 Dec 1990), Uruguay (4 Nov 1991), and Paraguay (3 Feb 1992). Similar clauses were included in trade and cooperation agreements with Macao (15 June 1992) and Mongolia (16 June 1992). Note however that the agreement with Mexico (26 April 1991) did not any references to human rights, despite the fact that Mexico was also a party to the Rome Declaration of 20 December 1990 (Bull EC 12-1990, para 2.4.1), which included a commitment to respecting human rights, democracy and the rule of law.

<sup>28</sup> Agreement with Argentina (signed 2 April 1990).

<sup>29</sup> See below at section 5.4.1, where it is explained why this clause would not trigger Article 60(3)(b) VCLT, as is commonly assumed.

<sup>30</sup> Commission Communication on human rights, democracy and development cooperation policy, SEC (91)61, 6.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid, 7.

<sup>33</sup> Luxembourg European Council, Declaration concerning human rights, 28-29 Jun 1991.

<sup>34</sup> Ibid.

<sup>35</sup> Resolution on human rights, democracy and development, 28 Nov 1991, Bull EC 11-1991, 122.

<sup>36</sup> Ibid. Fouwels (1997), 315, notes that the Council was composed not of foreign ministers but of development cooperation ministers, who could be expected to adopt a position closer to that of the Commission.

necessary, the suspension of cooperation with the States concerned.’<sup>37</sup> The Resolution stressed that ‘[t]he Community’s response to violations of human rights will avoid penalising the population for governmental actions’.<sup>38</sup>

With its dual emphasis on positive and negative measures, this Resolution has formed the basis of the EU’s external human rights to the present. However, the role of human rights clauses in achieving these policy aims was again still very much understated. In particular, no express link was drawn between these clauses and the need for suspending benefits under agreements.<sup>39</sup>

#### 1.4. Human rights and democracy clauses in their modern form

The next major step was taken in four trade and cooperation agreements signed with Latvia, Lithuania, Estonia and Albania on 11 May 1992. The human rights and democracy clauses in these four agreements were notable for two main reasons. First, where, in the previous version of the clause, respect for human rights and democratic principles had been the ‘basis’ of the agreement; now it was an ‘essential element’:

Respect for the democratic principles and human rights established by the Helsinki Final Act and the Charter of Paris for a new Europe inspires the domestic and external policies of the Community and Albania and constitutes an essential element of the present agreement.

Second, the ‘essential elements’ clause functioned as a trigger for the application of a brand new ‘Baltic’ suspension clause, which stated that:

The parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious violation occurs of the essential provisions of the present agreement.

The Community also indicated that it wanted to broaden this policy to other countries. On the very same day, 11 May 1992, the Council mandated the Commission to include clauses in the agreements being negotiated with CSCE (now OSCE) countries that was ‘operational in emergencies, including provisions relating to non-fulfilment of obligations’<sup>40</sup> and authorized the Commission to open negotiations on Europe agreements with two of these countries, Romania and Bulgaria.<sup>41</sup>

The two Europe agreements with Romania and Bulgaria signed in early 1993, replaced the Baltic suspension clause with a new ‘non-execution’ clause, which has been included in most (though not all) agreements concluded since then.<sup>42</sup> This clause, known as the ‘Bulgarian’ clause,<sup>43</sup> provides for a mechanism for consultations prior to the suspension of the agreement. It states as follows:

1. The Parties shall take any general or specific measures required to fulfil their obligations under the Agreement. They shall see to it that the objectives set out in the Agreement are attained.
2. If either Party considers that the other Party has failed to fulfil an obligation under the Agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a 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 the Agreement. These measures shall be notified immediately to the

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<sup>37</sup> Resolution, above at n 35, para 6.

<sup>38</sup> Ibid, para 7.

<sup>39</sup> Ibid, para 10.

<sup>40</sup> Bull EC 5-1992, point 1.2.13.

<sup>41</sup> Ibid, point 1.2.12.

<sup>42</sup> The first three ‘Europe’ association agreements with Hungary, Poland and Czechoslovakia (signed 16 December 1991) contained no such clauses. Following the 1993 ‘velvet divorce’ of the Czech and Slovak Republics, new agreements were signed that did include human rights clauses: see n 44 below.

<sup>43</sup> The name derives from the Bulgaria agreement (signed 8 Mar 1993), although technically it first appeared in this context in the Romania agreement (signed on 1 Feb 1993).

Association Council and shall be the subject of consultations within the Association Council if the other Party so requests.

A further step was taken in the 'Europe' association agreements concluded with the Slovak and Czech Republics on 4 October 1993,<sup>44</sup> which contained a Joint Declaration on the meaning of the term 'special urgency' in the non-execution clause. Inspired by Article 60(3) of the Vienna Convention on the Law of Treaties, this Joint Declaration stated that:

The Parties to the Agreement, for the purpose of its correct interpretation and its practical application, agree that the term 'cases of special urgency' included in [the non-execution clause] means a case of the material breach of the Agreement by one of the Parties. A material breach of the Agreement consists in:

- (a) repudiation of the Agreement not sanctioned by the general rules of international law; or
- (b) violation of essential elements of the Agreement, namely its [essential elements clause].

In the partnership and cooperation agreement concluded with Russia on 24 June 1994 a further Joint Declaration was included in the following terms:

The Parties agree that the 'appropriate measures' referred to in [the non-execution clause] are measures taken in accordance with international law.

If a Party takes a measure in a case of 'special urgency' as provided for pursuant to [the non-execution clause], the other Party may avail itself of the procedures provided for in [the clause on disputes].<sup>45</sup>

A policy of including human rights and democracy clauses in agreements with all third countries was proposed by the Council in a Communication of 23 May 1995,<sup>46</sup> which also set out a range of model clauses to be included in future agreements, including the essential elements clause, the 'Bulgarian' non-execution clause, and the Czech/Slovak and Russian Declarations. Six days later the Council approved 'a suspension mechanism which should be included in Community agreements with third countries to enable the Community to react immediately in the event of violation of essential aspects of those agreements, particularly human rights.'<sup>47</sup>

Despite this policy, but human rights and democracy clauses are not all uniform, either in their coverage, their wording or in their overall structure, in particular concerning the inclusion of non-execution clauses and Czech/Slovak and Russian Declarations. The next section contains a typology of agreements containing human rights and democracy clauses.

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<sup>44</sup> Agreements with the Slovak and Czech Republics (signed 4 Oct 1993).

<sup>45</sup> Joint Declaration on Art 107(2) of the agreement with Russia.

<sup>46</sup> Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, 23 May 1995, COM (95) 216

<sup>47</sup> Council Conclusions of 29 May 1995.

## 2. Typology of agreements containing human rights and democracy clauses

### 2.1. Coverage of human rights and democracy clauses

The EU's policy of including human rights and democracy clauses in its agreements has been pursued with impressive consistency. Either directly, or via agreements with regional organisations, it has concluded or is negotiating agreements containing human rights and democracy clauses with around 150 countries in virtually all parts of the world.

#### 2.1.1. Agreements with human rights and democracy clauses

There are human rights and democracy clauses in the two remaining Europe association agreements with Romania and Bulgaria,<sup>48</sup> in the ten Euro-Mediterranean association agreements signed with the countries involved in the Barcelona Process,<sup>49</sup> in the stabilisation and association agreements foreseen and partly concluded with the five Western Balkan countries involved in the Stabilisation and Association Process (as well as in an earlier agreement with Albania),<sup>50</sup> in the twelve partnership and cooperation agreements signed with countries of the former Soviet Union,<sup>51</sup> in cooperation agreements and association agreements concluded with seventeen Latin American countries,<sup>52</sup> in cooperation agreements with ten Asian countries,<sup>53</sup> in a cooperation agreement currently being negotiated with the Gulf States,<sup>54</sup> in an agreement with South Africa and – most importantly from a practical perspective – in the Cotonou Agreement concluded with seventy-nine African, Caribbean and Pacific (ACP) countries.

Of these, the Europe association agreements, the Euro-Mediterranean association agreements (except for the interim agreement with the Palestinian Authority), the stabilisation and association agreements, the partnership and cooperation agreements, the association agreement with Chile, the agreements with South Africa and Mexico, and the Cotonou Agreement are *mixed agreements* concluded jointly by the EU and the Member States; the others are *pure agreements* concluded by the Community alone. It has also been the practice to conclude *pure interim agreements* implementing the trade aspects of mixed agreements prior to their ratification by the Member States, although more recently this implementation occurs by way of provisional application foreseen in the agreement itself.<sup>55</sup> The mixed or pure nature of these agreements is of central importance to the exercise of rights and performance of obligations under an agreement.

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<sup>48</sup> There were also human rights clauses in the now defunct Europe association agreements with Latvia, Lithuania, Estonia, Czech Republic, Slovak Republic and Slovenia, but not in those with Hungary, Poland or (previously) Czechoslovakia, nor those with Malta or Cyprus.

<sup>49</sup> Egypt, Israel, Jordan, Morocco, Tunisia, Lebanon, Lebanon; Palestinian interim agreement (IA), Algeria, Syria (initialled 2004).

<sup>50</sup> Croatia, FYROM, Albania (SAA in negotiation; EC-Albania trade and cooperation in force), Bosnia Herzegovina (opening of negotiations recommended by Commission).

<sup>51</sup> Agreements signed with Belarus and Turkmenistan have not been ratified due to concerns regarding human rights and democracy.

<sup>52</sup> Mexico, Chile, Mercosur (Argentina, Brazil, Uruguay and Paraguay) (framework cooperation agreement in force; association agreement in negotiation), Andean Community (Venezuela, Colombia, Ecuador, Peru and Bolivia) and Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama (framework cooperation agreement in force; political dialogue and cooperation agreement signed).

<sup>53</sup> India, Nepal, Cambodia, Vietnam, Sri Lanka, Macao, Korea, Bangladesh, Laos, and Pakistan.

<sup>54</sup> The Gulf States comprise the United Arab Emirates, Bahrain, Saudi Arabia, Oman, Qatar, and Kuwait.

<sup>55</sup> Presently interim agreements are in force with Lebanon, pending ratification of an association agreement, and the Palestinian Authority, though here no main agreement has been negotiated.

### 2.1.2. Gaps in coverage

There are no human rights and democracy clauses in any general cooperation agreements with any developed countries.<sup>56</sup> Sometimes this is because these agreements predate the Community's policy concerning human rights and democracy clauses. But in some cases (the EEA Agreement, the San Marino customs union and the proposed Andorra cooperation agreement) the absence of a human rights and democracy clause is more blatant.<sup>57</sup> The absence of contractual relations may also be the result of developed country reluctance to sign up to human rights and democracy clauses. Most notably, during 1996-97 Australia and New Zealand refused to agree to EU cooperation agreements specifically because of the EU's insistence that these agreements had to contain human rights and democracy clauses.<sup>58</sup>

The 1964 association agreement with Turkey,<sup>59</sup> and even the 1995 Association Council decision establishing a customs union with Turkey also failed to contain a human rights and democracy clause, though the question was hotly debated,<sup>60</sup> and compliance with human rights norms has since become central to Turkey's application for EU membership.<sup>61</sup> Further afield, the EU's relations with countries in South-Eastern Asia are only intermittently subject to human rights and democracy clauses. Bilateral trade with China (outside of the WTO) is regulated under a 1985 cooperation agreement with no human rights and democracy clause,<sup>62</sup> and trade relations with six of the ten Association of South East Asian Nations (ASEAN) countries take place under a 1980 cooperation agreement which well predates the EU's policy.<sup>63</sup> Cambodia, Laos and Vietnam have concluded bilateral agreements containing human rights and democracy clauses;<sup>64</sup> in stark contrast, Myanmar is excluded from contractual relations because of its very poor human rights record.<sup>65</sup> For the same reason, Cuba has been refused permission to join the Cotonou Agreement.<sup>66</sup>

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<sup>56</sup> Of the 30 OECD countries the EU only has agreements with Korea and Mexico containing human rights clauses. Both of these countries claim developing country status in the WTO.

<sup>57</sup> Note also the absence of a human rights clause in Council Regulation 382/2001 concerning the implementation of projects promoting cooperation and commercial relations between the European Union and the industrialised countries of North America, the Far East and Australasia [2001] OJ L57/10.

<sup>58</sup> Mexico also resisted but was won over in the end. These instances are all discussed in Fierro (2003), 287-308. Youngs (2001), 361, notes that some Arab states were similarly recalcitrant.

<sup>59</sup> EEC-Turkey association agreement [1972] OJ C113/1 (English edition).

<sup>60</sup> See Krauss (2000).

<sup>61</sup> On 17 December 2004 the European Council decided that Turkey sufficiently fulfils the Copenhagen political criteria to open accession negotiations on 3 October 2005: Brussels European Council, Conclusions, 17 Dec 2004, EU Doc 16238/1/04, para 22, available at [http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/83201.pdf](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf).

<sup>62</sup> EEC-China agreement [1985] OJ L250/2.

<sup>63</sup> The EEC-ASEAN cooperation agreement [1980] OJ L144/2 now applies to all ASEAN countries (Indonesia, Malaysia, the Philippines, Singapore, Thailand, Brunei, Indonesia, Malaysia, Philippines, Laos, Vietnam, Cambodia) except Myanmar. The Foreign Affairs Committee of the European Parliament has called for the 1980 agreement to be renegotiated with a human rights clause: see European Parliament Report, A4-0195/97, 9.

<sup>64</sup> Due to protocols on the subsequent extension of the EEC-ASEAN cooperation agreement to these countries, these agreements, including their human rights clauses, are unaffected by ASEAN accession. The Commission has proposed that future agreements with Asian countries should include a human rights clause: Communication on a new partnership with South East Asia, COM (2003) 399, 14-15.

<sup>65</sup> See [http://europa.eu.int/comm/external\\_relations/asean/intro/index.htm](http://europa.eu.int/comm/external_relations/asean/intro/index.htm).

<sup>66</sup> This occurred in 2000 and again in 2003. Following the withdrawal of its first application to join the Cotonou Agreement, Cuba joined the ACP group of countries on 14 December 2000, making Cuba the only ACP country not also party to the Cotonou Agreement. Cuba again applied to join the Cotonou Agreement on 8 January 2003, but on 30 April 2003 the Commission deferred examination of the request following a crackdown on dissidents and, in response, Cuba withdrew its application on 16 May 2003 and announced its rejection of direct EU aid on 26 July 2003. See Roy (2003).

### 2.1.3. Sectoral agreements

Finally, the EU does not include human rights and democracy clauses in any sectoral trade agreements with third countries. This does not just apply to developed countries,<sup>67</sup> but also to sectoral agreements with all countries, including those that have a demonstrated difficulty in complying with human rights and democratic principles. For example, on 23 October 2003 the European Parliament passed a resolution on Turkmenistan which contained a litany of human rights abuses in that country (as well as others):<sup>68</sup> indeed, it is for this reason that a signed partnership and cooperation agreement with this country has not yet been ratified. And yet, two months later, on 24 December 2003, the EU Council decided on the provisional application of a textiles agreement with no human rights and democracy clause with Turkmenistan from 1 January 2004.<sup>69</sup> Similar comments could be made about the numerous fisheries agreements concluded with ACP countries that at the very least present a risk of continuing violations of human rights and democratic principles.<sup>70</sup>

## 2.2. Agreements with human rights and democracy clauses

### 2.2.1. Structure

#### 2.2.1.1. Agreements with basis or essential elements clauses but no non-execution clauses

The cooperation agreements with Argentina (signed 1990), Uruguay (1991), Macao (1992), and Paraguay (1992) contain ‘basis’ clauses, and the cooperation agreements with Brazil (1992), Mongolia (1992), India (1993), Sri Lanka (1994) and Vietnam (1995) contain only ‘essential elements’ clauses. These agreements do not contain non-execution clauses.

#### 2.2.1.2. Agreements with both essential elements clauses and non-execution clauses

There are non-execution clauses in all other agreements containing essential elements clause: the two remaining Europe association agreements with Romania and Bulgaria (both signed 1993), the ten Euro-Mediterranean association agreements (1995-2004), the two stabilization and association agreements with Croatia and Fyrom (both 2001), the agreement with Mexico (1997), the association agreements with South Africa (1999) and Chile (2005), the twelve partnership and cooperation agreements with the countries of the former Soviet Union (1994-2004), the cooperation agreements with the Mercosur countries (1995), the Central American (1993; 2003) and Andean Pact countries (1993; 2003), and the Cotonou Agreement (2000). These are all ‘mixed agreements’ concluded by the Community and its Member States together. In addition, there are non-execution clauses in the ‘pure’ cooperation agreements with Albania (‘Baltic’ clause, 1992), Korea (1996), Cambodia (1997), Laos (1997), Yemen (1997), Nepal (1995), Bangladesh (2000) and Pakistan (2001).

#### 2.2.1.3. Interpretative declarations

Of agreements containing non-execution clauses, there are Czech/Slovak Declarations, defining cases of ‘special urgency’, in all agreements except those with Romania and Bulgaria (both signed 1993), and Israel and Tunisia (both signed 1995). There are also Russian Declarations, stating that measures will be taken ‘in accordance with international law’ and referring to

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<sup>67</sup> Eg, with Australia, the EC has agreements on mutual recognition [1998] OJ L229/3; scientific and technical cooperation [1994] OJ L188/18 and trade in wine [1994] OJ L86/1.

<sup>68</sup> European Parliament resolution on Turkmenistan, including Central Asia [2004] OJ C82E/639.

<sup>69</sup> Council Decision of 17 December 2003 on the signing and provisional application of bilateral agreements between the European Community and certain third countries (Azerbaijan, Kazakhstan, Tajikistan and Turkmenistan) on trade in textile products [2003] OJ L340/54.

<sup>70</sup> Eg Guinea-Bissau fishing agreement [2004] OJ L127/27; Guinea fishing agreement [2004] OJ L99/11.

‘dispute settlement’, in all agreements except these four and the agreements with Moldova and Ukraine (both signed 1994) and Kazakhstan and Kyrgyzstan (both signed 1995). In some cases, these declarations have found their way into the treaty text,<sup>71</sup> but even where these are not formally part of the treaty text, these declarations have significant legal weight.<sup>72</sup>

#### 2.2.1.4. Dispute settlement

The Europe and Euro-Mediterranean association agreements (except for Syria), the agreement with South Africa and the Cotonou Agreement all provide for binding dispute resolution of ‘any dispute relating to the application or interpretation’ of the agreement, which includes all matters concerning the implementation and interpretation of human rights and democracy clauses. The procedure is first to seek resolution within the joint council (eg Association Council) administering the agreement, but if that fails, to resort to binding arbitration. However, no other agreements, including the recent association agreements with Syria, Croatia, Fyrom, and Chile (and the agreement with Mexico), include such binding dispute resolution applicable to human rights and democracy clauses.

#### 2.2.2. Wording of clauses

##### 2.2.2.1. Norms in essential elements clause

All essential elements clauses refer to respect for human rights and democratic principles. These principles are extremely broad, and quite capable of covering, in particular, social, economic and cultural rights as well as political rights. This also means that there is no value to adding additional ‘essential elements’ clauses on the topic of women’s rights and child labour, as has sometimes been suggested.<sup>73</sup> It is difficult to see what would be gained by this, given that these norms are well within the scope of the existing clauses.

In the case of OSCE countries, the ‘principles of market economy’ are usually (though not always) made an essential element of the agreement. There are also certain further norms that have been made part of essential elements clauses. Some follow the example of the 1995 redraft of Article 5 of the Lomé IV Convention and include a reference to ‘respect for the rule of law’.<sup>74</sup> In addition, the 1999 South Africa agreement contained a non-binding reference to ‘good governance’,<sup>75</sup> and in the 2000 Cotonou Agreement this is made the subject of a separate ‘essential element’ of the agreement with its own non-execution clause, applicable in cases of serious corruption in relation to projects in which the Community is financially involved.<sup>76</sup>

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<sup>71</sup> In agreements with Lebanon, Egypt, Mercosur, Mexico, South Africa, Chile and the Cotonou Agreement.

<sup>72</sup> Draft Guideline 1.5.3 of the International Law Commission’s Draft Guidelines on Reservations to Treaties, UN Doc A/59/10. This is further strengthened by the practice of the EU in expressly recognizing these declarations in the Council Decision approving the conclusion of the agreement, eg Art 1 of Council Decision 635/2004 approving the conclusion of the Euro-Mediterranean agreement with Egypt [2004] OJ L304/38.

<sup>73</sup> European Parliament resolution on the exploitation of children in developing countries, with a special focus on child labour, P6\_TA-PROV(2005)0272, adopted 5 July 2005, para 8; Resolution on EU policy towards Mediterranean partner countries in relation to the promotion of women’s rights and equal opportunities in these countries [2002] OJ C284E/337 and Resolution on violation of women’s rights and EU international relations [2004] OJ C87E/145.

<sup>74</sup> Art 5(1) third subparagraph Lomé IV, now superseded by an equivalent reference in Art 9(2) Cotonou; The agreement with South Africa refers to the ‘principles of the rule of law’; while the agreements with Chile, the Andean Community and the Central American States refer to the ‘principle of the rule of law’.

<sup>75</sup> This provision is subject to unilateral interpretative declarations by the Community and South Africa, though not the EC Member States.

<sup>76</sup> Arts 9(3)(2) and 97 of the Cotonou Agreement.

#### 2.2.2.2. Instruments in essential elements clause

Clauses in agreements dating from 1992 to 1995 simply refer to respect for human rights and democratic principles in the abstract. Later clauses define these norms in terms of other international instruments, mostly the Universal Declaration on Human Rights. Agreements with OSCE members generally make reference to the important instruments of that organisation, the Helsinki Final Act and the Charter of Paris for a New Europe, and, in recent agreements, also to the UN Charter. With some exceptions, these agreements also refer to the Document of the CSCE Bonn Conference on Economic Cooperation. It is worth noting that sometimes OSCE documents are included even when the other contracting party has not acceded to the particular instrument concerned.<sup>77</sup>

#### 2.2.2.3. Wording of non-execution clauses

Unlike the wording of the essential elements clauses, which varies substantially, the non-execution clauses and, where they exist, the Czech/Slovak and Russian Declarations, are virtually all identical. The Cotonou Agreement and certain other agreements (with South Africa, Chile, Mexico, Andean Pact, and the Central American countries) are more elaborate in terms of the consultation procedure, and in addition the Cotonou Agreement, as amended in 2005, specifies that ‘exhaustive political dialogue’ must precede consultations except in cases of special urgency and must continue during the application of any appropriate measures under the non-execution clause in that agreement. The details of this procedure are discussed below.

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<sup>77</sup> Eg the agreements with Bosnia and Croatia (which have not signed the Charter of Paris) and with FYROM (which has not signed the Helsinki Final Act or the Charter of Paris). See OSCE list of participating States at [www.osce.org/general/participating\\_states/](http://www.osce.org/general/participating_states/).

### 3. EU practice in implementing human rights and democracy clauses

Compared to the range of possible scenarios in which human rights and democracy clauses might be applied, their actual impact on the EU's external human rights policies has been relatively modest. Essentially the actions so far taken fall into two categories: establishment of certain subcommittees under agreements with a mandate to discuss matters concerning human rights and democratic principles and the taking of 'appropriate measures' under Article 96 of the Cotonou Agreement (and its predecessor Article 366a of the Lomé IV Convention). These instances are outlined here, while a more detailed analysis of the scope of human rights and democracy clauses is provided below.

#### 3.1. Establishment of subcommittees

Subcommittees have been established under the association agreements with Morocco, Jordan and Tunisia with a subsidiary mandate to discuss human rights and democratic principles. The Decisions establishing these subcommittees state that

In view of their importance as an essential part of the Association Agreement, matters relating to democratic principles and human rights will be discussed with due attention in the various bodies set up under the Agreement. If the parties so decide and in the framework of their enhanced cooperation, they will also be discussed within a subcommittee of the Association Committee or within a specific working party.<sup>78</sup>

Subgroups on human rights have also been established under the cooperation agreements with Bangladesh (Subgroup on Governance and Human Rights), Vietnam (Subgroup on Cooperation in Institution Building, Administrative Reform, Governance and Human Rights), soon Laos and perhaps Pakistan.<sup>79</sup>

#### 3.2. Consultations and appropriate measures under Article 96 Cotonou

##### 3.2.1. Target countries

Negative reactions under human rights and democracy clauses have been limited to the Cotonou Agreement and its predecessor, the Lomé IV Convention. Specifically, consultations under the non-execution clauses in these agreements have been held with Togo (flawed electoral process: 1998 and democracy, respect for human rights and fundamental freedoms: 2004), Niger (coup d'état: 1999), Guinea-Bissau (coup d'état: 1999 and 2004), Comoros (coup d'état: 1999), Cote d'Ivoire (coup d'état: 2000 and democratic failures: 2001), Haiti (flawed electoral process: 2000), Fiji (coup d'état: 2000), Liberia (violations of human rights, democratic principles, rule of law and serious corruption: 2001), Zimbabwe (violations of human rights, democratic principles, rule of law: 2002), Central African Republic (coup d'état: 2003), and Guinea (deterioration of democracy and the rule of law, failure to respect human rights and fundamental freedoms and the lack of good economic governance: 2004). Appropriate measures have been adopted with respect to Togo (sanctions since 1993), Haiti (since 2001), Liberia (since 2001), Zimbabwe (since 2002), and Guinea (since 2005).

In addition to these 14 instances of consultations, from 1989-98 the EU suspended development aid without reference to a human rights and democracy clause in the following cases: Burundi (1993 and 1997), Central African Republic (1991), Congo (1997), Djibouti (1991), Equatorial Guinea (1992 and 1994), Gambia (1994), Guinea-Bissau (1998), Haiti (1991), Kenya (1991), Liberia (1990), Niger (1996), Rwanda (1994), Sudan (1990), and Togo (1992). The reason for

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<sup>78</sup> EU-Morocco Association Council Decision No 1/2003 [2003] OJ L79/14, Annex 1; EU-Jordan Association Council Decision No 1/2003 [2003] OJ L215/91 and EU-Tunisia Association Council Decision No 1/2003 [2003] OJ L311/14. A similar Decision is proposed for the EU-Israel Association Council, COM (2003) 693.

<sup>79</sup> EU 2004 Annual Report on Human Rights, 49.

the increased use of the non-execution clauses after 1999 is likely to be that it was only in that year that the Community managed to adopt a decision setting out the procedure for deciding on the implementation of Article 366a of the Lomé Convention.<sup>80</sup>

Calls have been made for the suspension of other agreements, but without result. The European Parliament has called for the suspension of the EU-Israel Association Agreement in reaction to Israel's activities in the Occupied Territories,<sup>81</sup> and this has been echoed by non-EU institutions.<sup>82</sup> The response of the Council has been consistently negative.<sup>83</sup> NGOs and other private persons have also called, so far unsuccessfully, for the suspension of other agreements, including with Algeria and Vietnam (the subject of a 2005 Ombudsman decision).<sup>84</sup>

#### Comment

It is undeniable that, on a global level, the EU has not applied existing human rights and democracy clauses in an even-handed fashion, as the European Parliament has recognized on a number of occasions.<sup>85</sup> Commissioner Chris Patten has defended the EU's approach on the basis that '[s]tructured exchanges on the basis of the clause with third countries offer a more realistic way of realising the goals of the human rights' clause than the application of rigid criteria for the suspension of parts of an agreement.'<sup>86</sup> But the *degree* of discrepancy in the EU's implementation of human rights and democracy clauses is still striking.

#### 3.2.2. Types of violations

As noted above, Article 96 of the Cotonou Agreement has usually been invoked in response to overarching political failures, in the form of coups d'état and flawed electoral processes, and massive human rights violations. On one occasion, Article 96 was applied to a situation in which the target country was considered to be implicated in human rights violations in another country.<sup>87</sup>

#### Comment

As with the selective character of the countries targeted by appropriate measures, the types of violations producing this reaction are also very limited. In particular, the application of the non-execution clause contrasts with the frequent invocation of human rights within the European

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<sup>80</sup> Council Decision 214/1999 [1999] OJ L75/32; now see Internal Agreement between the representatives of the governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement [2000] OJ L317/376. For this explanation, see Hazelzet (2005), 3.

<sup>81</sup> European Parliament Resolution P5\_TAPROV(2002)0173, recital 8; Written Questions [2002] OJ C52E/39 and [2002] OJ C309E/84.

<sup>82</sup> Parliamentary Assembly of the Council of Europe, Resolution 1281 (2002) on the situation in the Middle East, available at <http://assembly.coe.int>, para 33; House of Commons International Development Committee, *Development Assistance and the Occupied Palestinian Territories, Second Report of Session 2003-04*, Vol I (London: Stationery Office, 2004) para 88. Controversially, a similar call was made by UN Human Rights Rapporteur Jean Ziegler on 14 October 2004.

<sup>83</sup> Council Answers to Written Questions, above at n 81.

<sup>84</sup> European Ombudsman Decision on complaint 933/2004/JMA against the European Commission, 28 June 2005.

<sup>85</sup> For criticism along these lines, see the EU Parliament Interim Report on the proposal for a Council Decision on a framework procedure for implementing Article 366a of the Fourth Lomé Convention (COM (96) 69), A4-0175/97, 10, and the European Parliament Resolutions on human rights in the world in 1997 and 1998 and European Union human rights policy [1999] OJ C98/270, para 3, Resolution on human rights in the world in 2002 and the European Union's policy, [2003] OJ C76E/386, paras 5-20; and Resolution on human rights in the world in 2003 and the European Union's policy on the matter [2004] OJ C103E/1048, para 29.

<sup>86</sup> Commission Answer [2004] OJ C78E/442.

<sup>87</sup> Council Decision 274/2002 [2002] OJ L96/23.

Parliament in other, more specific, contexts. These include violations of minority rights,<sup>88</sup> women's rights<sup>89</sup> gay rights,<sup>90</sup> aboriginal land rights,<sup>91</sup> indigenous rights,<sup>92</sup> the right to travel, freedom of speech and to be politically active,<sup>93</sup> as well as child sex tourism,<sup>94</sup> trafficking in women,<sup>95</sup> violations of impunity from prosecution for human rights violations,<sup>96</sup> the treatment of detainees<sup>97</sup> and dissidents,<sup>98</sup> and (now covering also economic rights) core labour standards.<sup>99</sup>

### 3.2.3. Measures taken

The 'appropriate measures' that have been taken to date, again exclusively under Article 96 of the Cotonou Agreement, have primarily involved financial aid and other forms of cooperation. Article 96 has much more rarely been used to suspend obligations other than those concerning developing aid. One example is the suspension of the EU's obligation to impose no restrictions on any payments between residents of the Community and Zimbabwe in order to allow for a freezing of funds of certain listed members of the Zimbabwe government.<sup>100</sup> With this exception, the EU has not used human rights and democracy clauses as a basis for imposing trade sanctions of any type.

It is worth noting that the appropriate measures adopted under Article 96 occasionally include a package of funding that could be characterised as partly 'positive'. For example, the appropriate measures adopted on 14 April 2005 with respect to Guinea are as follows:

1. Cooperation financed from the unexpended balances of the sixth, seventh and eighth European Development Funds will continue for implementation of the undertakings given by Guinea in the context of these consultations, in particular decentralisation, liberalisation of the media and good economic governance.
2. Cooperation financed from Envelope B of the ninth European Development Fund will also continue for implementation of the programmes directly aimed at improving the living conditions of the most disadvantaged sections of the population or victims of the subregional political crisis.
3. Programmes to strengthen civil society (including non-organised forms), respect for and reinforcement of democracy, human rights and good governance and the emergence or consolidation of free media may also be supported.
4. Contributions to regional projects will be considered on a case-by-case basis.
5. Humanitarian operations, trade cooperation and trade-linked preferences will be continued.
6. Support will be provided for preparation of the elections, either from the unexpended balances of the sixth, seventh and eighth European Development Funds or from Envelope B of the ninth

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<sup>88</sup> European Parliament Resolutions [1995] OJ C43/80 and [1995] OJ C339/49.

<sup>89</sup> European Parliament Resolution [2002] OJ C284E/337 and P5\_TA(2003)0497; Council Answer [2003] OJ C280E/62.

<sup>90</sup> Council Joint Answer [2004] OJ C51E/78.

<sup>91</sup> European Parliament Resolution [1998] OJ C34/167.

<sup>92</sup> Commission Answer [2003] OJ C137E/233.

<sup>93</sup> Council Answer [1999] OJ C135/74.

<sup>94</sup> Commission Communication on the implementation of measures to combat child sex tourism, COM (1999) 262.

<sup>95</sup> European Parliament Report on the Communication on 'The European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond' (COM (95) 567), A4-0409/98.

<sup>96</sup> European Parliament Resolution (COM (95) 600) [1997] OJ C33/91.

<sup>97</sup> Commission Answers [1998] OJ C96/12.

<sup>98</sup> Council Answer [1999] OJ C142/35.

<sup>99</sup> Commission Communication on Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM (2001) 416, 12; also Commission Communication on the Trading System and Internationally Recognized Labour Standards, COM (96) 402.

<sup>100</sup> Council Decision 148/2002 concluding consultations with Zimbabwe [2002] OJ L50/64, inter alia suspending Art 12 of Annex II of the Cotonou Agreement; necessary for the application of Council Regulation 310/2002 [2002] OJ L50/4, itself implementing Common Position 145/2002 [2002] OJ L50/1.

European Development Fund once electoral arrangements guaranteeing a transparent and democratic electoral process based on the Declaration on the Principles Governing Democratic Elections in Africa have been established.

7. Envelope A of the ninth EDF, has been reduced by EUR 65 million in line with the decision taken by the European Commission in the context of the mid-term reviews. The Cooperation Strategy and National Indicative Programme will be finalised with due regard for the situation in the country and these new financial perspectives. These documents will be signed and implemented once sufficient progress has been noted in the implementation of the undertakings given by Guinea, in particular as regards the preparation and holding of free and transparent local and parliamentary elections. The European Union will base its assessment on the following criteria in particular:

- (a) whether free and transparent local elections have been held and duly elected local authority executives have taken office;
- (b) whether electoral arrangements and operational requirements for parliamentary elections (including the date of the elections), based on the Declaration on the Principles Governing Democratic Elections in Africa have been established within the framework of political dialogue with the opposition forces.

Regular reviews will have to be conducted by the Presidency of the European Union and the European Commission, the first to be held within the next six months.

The European Union will continue monitoring the situation in Guinea closely for a period of 36 months. An enhanced political dialogue within the framework of Article 8 of the Cotonou Agreement will be conducted with your government with a view to consolidating democracy and the rule of law in particular through the holding of parliamentary elections as well as respect for human rights and fundamental freedoms.

The European Union reserves the right to amend the appropriate measures should the undertakings given by the Guinean authorities increase in pace or, alternatively, break down.

## Comment

These measures may be divided into positive and negative. A distinction may be drawn in this regard between measures taking the form of a threatened non-continuance of financial aid (points 4 and 7), measures reiterating that allocated funding will continue regardless (points 1, 2 and 5), and measures providing for new or diverted financial aid (points 3 and 6). Of these, only these last (points 3 and 6) should truly be seen as positive measures based on Article 96. In any case, arguably the legal authority for these positive measures is not Article 96, but the provisions under which the EDF is administered.

#### 4. The interpretation of existing human rights and democracy clauses

This section analyses the implementation of existing human rights and democracy clauses from a legal perspective. It begins with a discussion of the institutional structure of the agreements in which these clauses are contained, before moving to an analysis of the relevance of these clauses to action taken under these agreements. In particular, these are of three types:

- As the basis for a joint council to adopt decisions on human rights and democratic principles
- As the basis for the establishment of subcommittees to aid the joint council in this task, including for the purpose of monitoring compliance;
- As the basis for political dialogue on these themes; and
- As the basis for funding initiatives taking place on the territory of the third country in the form of ‘appropriate measures’ or otherwise.

It begins however by clarifying a number of important points concerning human rights and democracy clauses, some of which have been overlooked in the academic literature on these clauses and in the official EU documentation concerning their interpretation and application.

##### 4.1. Human rights and democracy clauses and customary international law

In a number of important respects, human rights and democracy clauses contain rights and obligations which diverge from the position under customary international law. It is *wrong* to claim that:

The human rights clause ... simply constitutes a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation under the agreements, and expressly allows for and regulates suspension in cases of non-compliance with these values. Such a clause thus does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all States as well as the EC in its capacity as a subject of international law.<sup>101</sup>

This is mistaken for a number of reasons. First, in many (if not all) cases the essential elements clauses incorporate by reference all of the norms set out in instruments such as the Universal Declaration of Human Rights or the various OSCE instruments, which do not represent binding obligations under customary international law. This applies in particular to the ‘obligation’ to respect democratic principles and, for that matter, the obligation to respect the principles of market economy found in the essential elements clauses with most OSCE countries.

Second, the possibility of suspending an agreement for violations of human rights or democratic principles (whether under Article 60(3)(a) VCLT or under an operative non-execution clause) exceeds the ordinary rights of a state or international organization under international law. According to the rules on countermeasures set out in Articles on State Responsibility adopted by the International Law Commission in 2001, at most only very serious human rights violations will justify states in adopting unilateral countermeasures against a country. This gives the EU a quite expanded range of action in the field of human rights. As a corollary, the EU is now equally subject to retaliation by third countries, in excess of its liability to such measures under

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<sup>101</sup> EU Annual Report on Human Rights 1999, 21; EU Annual Report on Human Rights 2000, 30. Cf also Brandtner and Rosas (1998), 474-5.

customary international law. This is true even in the case of essential elements clauses that do not establish set a higher standard than the relevant standard under customary international law. In summary, the primary norms established in an essential elements clause exceed those applicable under customary international law; the secondary retaliation rights available in the event that those norms are not complied with exceed the equivalent rights available under customary international law, and (consequently) the secondary liability of the EU is also in excess of its liability under customary international law.<sup>102</sup>

#### 4.2. Objectives of agreements containing human rights and democracy clauses

It is commonly assumed that the agreements containing human rights and democracy clauses have the objective of protecting and promoting human rights and democratic principles. It needs therefore to be noted that, with some exceptions, this is not the case. The principal objectives of the vast majority of these agreements are economic and political, and refer to human rights at most in the context of economic development. The objectives clause (Article 2) of the EC-Vietnam cooperation agreement is illustrative:

The principal objectives of this Agreement are:

1. to secure the conditions and to promote the increase and development of bilateral trade and investment between the two parties in their mutual interest taking into account their respective economic situations;
2. to support the sustainable economic development of Vietnam and the improvement of living conditions of the poorer sections of the population;
3. to enhance economic cooperation in the mutual interest of the parties, including support to the Government of Vietnam's ongoing efforts to restructure its economy and to move towards a market economy;
4. to support environmental protection and the sustainable management of natural resources.

This is a point of some significance, because there are hard legal consequences to the proper identification of the objectives of an agreement. For example, it is only when a provision is 'essential to the accomplishment of the object or purpose of the treaty' that its breach will be considered 'material' within the meaning of Article 60(3)(b) of the Vienna Convention on the Law of Treaties. Furthermore, the powers of the joint councils established to administer the agreements containing human rights and democracy clauses are often defined in terms of the aims (a synonym for objectives) of these agreements. Consequently, if it is *not* an objective of these agreements to ensure respect for human rights and democratic principles, it may be difficult to trigger these provisions.

It might be thought that the inclusion of an essential elements clause making respect for human rights and democratic principles an 'essential element' of an agreement has the effect of making respect for these norms an 'objective' of these agreements. However, there is a difference between *assumptions* on which an agreement is predicated (ie a *condition*) and the *objectives* which an agreement is designed to attain.<sup>103</sup> Indeed, this is acknowledged by the EU Council, which has said that '[t]he human rights clause does not transform the basic nature of agreements which are otherwise concerned with matters not directly related to the promotion of human rights'.<sup>104</sup> There are however some exceptions to this general rule:

- *Agreements with express human rights/democracy objectives*

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<sup>102</sup> This has implications for the EU's competence to include such clauses in its agreements, at least in 'pure' Community agreements to which the Member States are not a party, and in the Cotonou Agreement, for the performance of which the Community and the Member States are jointly responsible.

<sup>103</sup> Cf *Rights of Nationals of the United States of America in Morocco (France/USA)* [1952] ICJ Rep 176, at 196. The same dichotomy can be seen in the difference between fundamental rights as a *condition* of Community acts, and fundamental rights as an *objective* of Community acts.

<sup>104</sup> EU Annual Report on Human Rights 1999, 21; EU Annual Report on Human Rights 2000, 30. The phrase originates in Brandtner and Rosas (1998), 474.

The agreement with Romania has the objective of ‘support[ing] Romania’s efforts to develop its economy and to complete the conversion into a market economy, and consolidate its democracy’. The objectives clauses of all of the partnership and cooperation agreements state that ‘[t]he objectives of this partnership are ...to support [the country’s] efforts to consolidate its democracy and to develop its economy and to complete the transition into a market economy’.<sup>105</sup> Another important example is the Cotonou Agreement. While the express objectives clause of this agreement (in Art 1) is focused solely on development, its essential elements clause (Art 9(4)) specifically says that ‘[t]he Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance’.

- *Agreements with objectives of ‘establishing a framework for political dialogue’*

All of the association agreements and partnership and cooperation agreements contain clauses to the effect that ‘[t]he aims of this Agreement are to: ...provide an appropriate framework for political dialogue between the Parties, allowing the development of close relations and cooperation in all areas they consider relevant to such dialogue’. As political dialogue includes the subject matter of respect for human rights and democratic principles, this could be taken as meaning that the agreement has the objective of promoting cooperation on this matter

- *Agreements with subsidiary objectives of particular policies*

It is common for agreements to make references to human rights and democracy in the context of particular policies, such as political dialogue or development cooperation. For example, the agreements with Armenia, Azerbaijan, Georgia, Tajikistan and Uzbekistan state that the parties will cooperate on matters relating to democracy and human rights, and the agreements with the Palestinian Authority and South Africa contain clauses stating that the objectives of development cooperation include the promotion of respect for human rights and democracy. Even if these subsidiary objectives are not included among the ‘principal objectives’ of the agreement, they can be considered as being among the objectives of the agreement.

It is possible to consider the objectives of these agreements as including the promotion (and possibly protection) of respect for human rights and democratic principles, though the extent of these objectives depend in each case on the particular wording of the clauses at issue.

#### 4.3. Origins of the ‘non-execution clause’

It is frequently thought that the non-execution clause was designed specifically as a means of executing the essential elements clause. This is reinforced by the common description of the non-execution clause as the ‘Bulgarian’ clause, after the first agreement in which the non-execution clause was first linked to an essential elements clause.<sup>106</sup> In fact, the clause itself dates from the mid-1970s, when it was developed as a means of allowing trade remedies (safeguards, antidumping and countervailing duties) in trade agreements.<sup>107</sup> This mischaracterisation of the origins of the non-execution clause has contributed to misunderstandings as to its effects. First, it is sometimes assumed that non-execution clauses only apply to violations of essential elements clause. In fact, except for the clause in the Cotonou Agreement, non-execution clauses

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<sup>105</sup> The agreement with Uzbekistan includes the additional objective of ‘assist[ing] in the construction of a civil society in Uzbekistan based upon the rule of law’.

<sup>106</sup> COM (95) 216, at p 3. In fact, the agreement with Romania was signed slightly earlier.

<sup>107</sup> Art 49 EEC-Algeria [1978] OJ L263/2; Art 51 ECSC(MS)-Tunisia [1978] OJ L265/119; Art 50 EEC-Tunisia [1978] OJ L265/2; Art 43 EEC-Egypt [1978] OJ L26/2; Art 41 EEC-Lebanon [1978] OJ L267/2; Art 40 EEC-Jordan [1978] OJ L268/2; Art 41 EEC-Syria [1978] OJ L269/2.

apply to *all* obligations in the agreements in which they are contained.<sup>108</sup> It is also frequently forgotten that all non-execution clauses contain a first paragraph stating that:

The Parties shall take any general or specific measures required to fulfil their obligations under the Agreement. They shall see to it that the objectives set out in the Agreement are attained.

This most likely has the effect of imposing *positive obligations* on the parties to comply with the terms of the essential elements clause. In light of *Opinion 2/94*, in which the ECJ held that the Community had no general power to enact legislation or conclude conventions in the field of human rights,<sup>109</sup> this raises a further question as to the competence of the EU with respect to human rights and democracy clauses. In this respect, it should be noted that *Portugal v Council*, in which the Court held that the Community had the competence to include a human rights and democracy clause in the agreement on the basis of Article 177 and 181 EC, involved a clause without a non-execution clause.<sup>110</sup> This case does not therefore have much to say about more developed human rights and democracy clauses including a non-execution clause.

#### 4.4. Relevance of Article 60 of the Vienna Convention on the Law of Treaties

It is commonly thought that human rights and democracy clauses operate as a trigger for the application of Article 60 of the Vienna Convention on the Law of Treaties, which sets out default rules concerning the material breach of a treaty. It is likely that the rules set out in this provision apply to agreements containing a basis clause or an essential elements clause.<sup>111</sup> However, Article 60(3) does not apply where there is an operative non-execution clause. This follows from Article 60(4) VCLT, which states that '[t]he foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.' Somewhat remarkably, this is frequently overlooked in the academic literature on human rights and democracy clauses.<sup>112</sup>

#### 4.5. Human rights and democracy clauses as a basis for 'positive measures'

Increasingly, the EU organs have taken to describing human rights and democracy clauses *primarily* as a means of supporting 'positive' measures in the territories of third countries in the form of political dialogue, or financial assistance for activities on the territory of the third country. In its 2004 EU Report on Human Rights, for example, the EU Council said that:

In the event that those [human rights and democratic] principles are breached, the EU may impose certain negative measures, with the ultimate possibility of suspending the agreement. However, the *principal rationale* for the clause is to form a positive basis for advancing human rights in third countries through dialogue and persuasion.<sup>113</sup>

This emphasis is not entirely accurate, either historically or textually. It is true that the sole operation of Art 5 of Lomé IV (in paragraph 3) was to allocate financial resources to the promotion of human rights in the ACP States through specific schemes. But both the wording of the non-execution clause (designed to allow for trade restrictions) and its introduction into the modern form of the human rights and democracy clause was specifically to permit *negative* measures. This is reflected in the fact that the policy of including human rights and democracy clauses in third country agreements approved by the Council on 29 May 1995 was expressly described in terms of 'a suspension mechanism'. Of course, this does not necessarily preclude

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<sup>108</sup> The Community has applied non-execution clauses in agreements containing essential elements clauses to raise trade barriers in retaliation for perceived violations of the *trade* provisions of an agreement: COM (2000) 255, COM (2000) 129 and COM (2000) 616.

<sup>109</sup> *Opinion 2/94* [1996] ECR I-1759, para 27.

<sup>110</sup> Case C-268/94, *Portugal v Council* [1996] ECR I-6177.

<sup>111</sup> See below at section 5.4.1.

<sup>112</sup> An exception is Hoffmeister (1998) 255-6.

<sup>113</sup> EU Annual Report on Human Rights 2004, 49.

the use of human rights and democracy clauses to support certain positive measures; any such use, however, depends upon careful analysis of the particular wording of the clauses at issue.

#### 4.6. Obligations to prevent violations in third countries

To some extent, a party to a human rights and democracy clause may have an obligation to take action in respect of the human rights situation in a third country, including the partner country.

The essential elements clauses all require the parties to respect human rights in their *external* policies. This aspect of the clause has been applied once, in the case of the appropriate measures adopted in the case of Liberia in 2002. Liberia was a supporter of the RUF, involved in a conflict in neighbouring Sierra Leone. In its letter setting out appropriate measures under Article 96, along with a variety of other demands, the EU stated as follows:

It is also expected that Liberia will soon be in a position to be considered as having complied with the requests of the UN Security Council in relation to the situation in Sierra Leone.<sup>114</sup>

In this case, the relevant country (Liberia) was considered responsible for those violations, by virtue of its external acts with respect to Sierra Leone. While there is generally no obligation under customary international law to *prevent* human rights violations in third countries, and the terms of the essential elements clause do not change this, States may be under an obligation not to *commit* or *contribute* to such violations. Under the European Convention on Human Rights, according to the most recent jurisprudence of the European Court of Human Rights, a State has a positive obligation to take measures, even outside of its *territorial* jurisdiction, both when it exercises effective control over that territory and also, even in the absence of effective control, when it has the power to take such measures.<sup>115</sup>

This has implications for the EU. Just as with Liberia, human rights and democracy clauses require the EU not to *contribute to* any violations of human rights and democratic principles in third countries. Some examples of this type of involvement have been alleged by NGOs: the EU's acquiescence in Israel's application of its association agreement to goods produced in the Occupied Territories, in violation of the Fourth Geneva Convention of 1949, the participation of illegal settlements in EU Framework Programme for Research, Technical Development and Demonstration Activities, and the provision of EU development assistance to Israeli enterprises in the Occupied Territories.<sup>116</sup>

Such complaints are unlikely to be made by the country in which the violations are taking place, as this would usually also implicate that country. But they could be made by another country bound to the EU by a human rights and democracy clause. There is nothing to stop a sympathetic country invoking a human rights and democracy clause in its own agreement with the EU in respect of such allegations. Furthermore, in such circumstances a case could be brought against the EU institutions under *EU law*, which also conditions the EU's external policies on compliance with fundamental rights norms. The relevance of the human rights and democracy clause in this context is that the EU would be able to resort to this clause in order to terminate its own involvement in any violation of human rights and democratic principles in a third country, to the extent that this involvement is secured under the international agreement.

There is one foreseeable circumstance in which the affected country might itself invoke a human rights and democracy clause without implicating itself in human rights violations taking place in its territory. It might be possible for such a country to allege that economic, social and cultural rights are being violated by the *trade* policies of the EU, especially those being implemented in the trade agreement in which the clause is contained. Such violations might be alleged as the result of an overly hasty liberalization of trade in certain sectors, causing undue hardship to a

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<sup>114</sup> Council Decision (25 March 2002) concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement (2002/274/EC) [2002] OJ L96/23.

<sup>115</sup> *Ilaşcu v Moldova and Russia*, Application No 48787/99 (8 July 2004), para 331.

<sup>116</sup> Euro-Mediterranean Human Rights Network (2004), 27-34.

local population, or, for example, as the result of the enforcement of a strict intellectual property regime, causing the prices of basic medicines to rise.

All of these situations pose a potential problem for the EU in its external policies. However, they all presuppose the actual involvement of the EU in violations of human rights and democratic principles in a third country. In the absence of such involvement, there is no obligation either under customary international law or under a human rights and democracy clause to enforce the human rights obligations of another country. This was the central error of the recent complaint to the Ombudsman alleging that the EU had the obligation to enforce the human rights and democracy clause in the agreement with Vietnam.<sup>117</sup> The EU may well have had the *right* to enforce such obligations under the applicable human rights and democracy clause (in this case by virtue of Article 60(3)(a) VCLT), but it had no *obligation* to do so.

## 5. Application of human rights and democracy clauses

### 5.1. Human rights and democracy clauses in their institutional context

This section discusses the value of human rights and democracy clauses as the basis for decisions adopted by the joint councils established under the EU's international agreements.

#### 5.1.1. Decision-making by the Joint Councils

All of the agreements containing human rights and democracy clauses are administered by joint bodies comprising equally the EC and the other party. These bodies go by a variety of names, depending on the agreement, but for convenience they will be referred to collectively as 'joint councils'.

##### 5.1.1.1. Composition and EU positions

With very isolated exceptions, the composition of the joint councils is stated to be members of the EU Council and members of the Commission, on the one hand, and members of the government of the other party, on the other.<sup>118</sup> From the EU side, this means that the Community takes decisions alone both in the 'pure' agreements concluded by the Community alone, and in the mixed agreements concluded (on the one side) by the Community and its Member States. The first of these situations is reasonably straightforward, but it is not entirely clear on what basis the Community is representing the Member States in the second situation.<sup>119</sup> In the case of the Cotonou Agreement, an Internal Agreement between the Member States authorises the Community to act on their behalf, but there is no equivalent for the other mixed agreements.<sup>120</sup>

##### 5.1.1.2. Powers

The powers of the joint councils vary between association agreements and cooperation agreements. Typically, association agreements grant the joint council the power to make

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<sup>117</sup> European Ombudsman Decision on complaint 933/2004/JMA against the European Commission, 28 June 2005.

<sup>118</sup> For the South Africa agreement this is implemented by Decision No 1/2001 of the EC-South Africa Council [2001] OJ L221/37). The Chile agreement and the Cotonou Agreement are much more elaborate.

<sup>119</sup> Heliskoski (2001) 103 proposes that in mixed agreements the EU Council is to be taken as representing the Member States.

<sup>120</sup> Internal Agreement between the representatives of the governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement [2000] OJ L317/376. Similar agreements might be considered for other mixed agreements.

decisions binding on the parties, while cooperation agreements grant the joint council merely recommendatory powers.<sup>121</sup> These powers typically fall into three categories:

- a general power to adopt decisions (or non-binding recommendations) to achieve the objectives of the agreement
- a specific power to establish a subgroup necessary for the implementation of the agreement
- a specific power to resolve disputes. The joint councils in association agreements and in partnership and cooperation agreements have a power to decide on disputes. However, in the more recent agreements (eg Mexico, Chile, and Syria) this power is limited to trade disputes, and in the partnership and cooperation agreements this power is only recommendatory.

The following will analyse the possibility of adopting decisions (or non-binding recommendations) on the issues covered in essential elements clauses under this provisions.

#### 1. General power to adopt decisions (or non-binding recommendations)

All of the Association Councils under association agreements have a general power in the following terms:

The Association Council shall, for the purpose of attaining the objectives of the Agreement, have the power to take decisions in the cases provided for therein.

These decisions shall be binding on the Parties which shall take the measures necessary to implement the decisions taken. The Association Council may also make appropriate recommendations.

It shall draw up its decisions and recommendations by agreement between the Parties.

Here it is relevant that the decision-making powers of the Association Councils are limited to the attainment of the *objectives* of the respective agreement. As mentioned above, while the objectives of association agreements do not unambiguously include the promotion of human rights and democratic principles,<sup>122</sup> they do provide for the possibility of cooperation on the promotion of human rights and democracy principles.<sup>123</sup> Furthermore, even if the decision-making powers of the Association Council are limited under this provision, the scope of such (non-binding) recommendations seems to be unlimited might be as easily be argued that the scope of such recommendations is entirely unlimited.

By contrast, the power of the joint councils in cooperation agreements (which is non-binding) tends to be described not in terms of the *objectives* of the agreement but rather in terms of the *proper functioning* of the agreement. For example, Article 14(1) of the EC-Vietnam cooperation agreement establishes a Joint Commission with the following tasks:

- (a) [to] ensure the proper functioning and implementation of the Agreement and the dialogue between the two Parties;
- (b) [to] make suitable recommendations for promoting the objectives of the Agreement;
- (c) [to] establish priorities in relation to the possible actions necessary to achieve the aims of the Agreement

In the case of this agreement, the promotion of human rights and democratic principles is not among the stated objectives of the agreement. It is therefore not likely that the Joint Commission

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<sup>121</sup> Decisions and non-binding recommendations are both capable of granting rights to individuals under Community law, under the doctrine of direct effect.

<sup>122</sup> Except for the agreements with Romania, South Africa and the Palestinian Authority.

<sup>123</sup> This would therefore allow for a decision of an Association Council to participate in the work of the Fundamental Rights Agency, as proposed in Art 27 of the draft Council Regulation establishing a European Union Agency for Fundamental Rights, COM (2005). See below at Section 6.2.

has the power to ‘make recommendations’ or ‘establish priorities’ in the area of human rights and democratic principles under paragraphs (b) or (c) respectively. However, it can be argued that the absence of an ‘essential element’ of the agreement will affect the ‘proper functioning and implementation of the agreement’ under paragraph (a). If so, the Joint Commission would have the power (by way of non-binding recommendation) to ‘ensure’ that human rights and democratic principles are implemented, in order that the agreement remains on foot.

## 2. Specific power to establish subcommittees

Both association agreements and cooperation agreements empower their respective joint councils to establish subgroups to discuss matters related to the implementation of the agreement. Association agreements typically contain a provision in these terms:

The Association Council may decide to set up any working group or body necessary for the implementation of the Agreement.

Cooperation agreements often contain a provision in these terms:

[the Joint Commission may] set up specialized sub-groups to assist in the performance of its tasks and to coordinate the formulation and implementation of projects and programmes within the framework of the Agreement.<sup>124</sup>

Here the question is whether, regardless of whether respect for human rights and democratic principles constitutes an objective of the agreement, it is necessary for the *implementation* of the agreement to establish subsidiary sub-groups or working parties to discuss matters covered in an essential elements clause. It is difficult to imagine that the ‘implementation’ of an agreement can extend beyond its objectives: this is reinforced by the use of the word ‘framework’ in the second of the quoted provisions. On the other hand, it could perhaps be argued that the ‘implementation’ of an agreement includes any action necessary to keep it operational. If this interpretation is adopted, it may be possible to conceive of an implementation power as extending to the matters covered in an essential elements clause, regardless of the objectives of the agreement. It should however be borne in mind that the powers of a subcommittee established for this purpose cannot extend to binding decision-making.

This raises the question as to the appropriateness of the recent establishment of subgroups with a mandate to discuss the implementation of human rights and democratic principles. In fact, in each case this can be justified. The establishment of the working groups in the association agreements with Morocco, Tunisia and Jordan can be justified on the grounds that one of the objectives of these agreements is to ‘provide an appropriate framework for political dialogue between the Parties, allowing the development of close relations in all areas they consider relevant to such dialogue.’ It is relevant that only the agreement with Jordan expressly lists human rights and democracy as a subject of political dialogue (Article 4), but this is in any case optional, as in none of the agreements is there any limit on the subjects that can be determined by the parties to be appropriate.<sup>125</sup> Consequently, the Association Councils under these agreements may also determine that the establishment of working groups with a human rights mandate is ‘necessary for the implementation of the implementation of the Agreement’. The establishment of subgroups in the cooperation agreements with Bangladesh, Vietnam (and soon Laos and Pakistan) can be justified on the different basis that in each case the Joint Commission (or Joint Committee) has the task of ensuring the proper functioning of the agreement.

A second question concerns the possibility of establishing a group involving parliamentary delegations and non-state actors, to monitor and report on the implementation of human rights and democratic principles. Such a suggestion was made in the European Parliament’s 2005 resolution on Algeria, in which the Parliament:

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<sup>124</sup> Article 14(3) of the Vietnam agreement.

<sup>125</sup> See below at section 5.2.

Call[ed] on the Council and the Commission to establish clear mechanisms for the regular monitoring of compliance with Article 2 by all parties to the Association Agreement, and the European Parliament, the National Popular Assembly and Algerian civil society, ...

An important question concerns the suggested composition of such a body; in particular, whether such a body may be composed of actors other than those representing the parties to the agreement. Article 98 (the power to establish working groups) says nothing on this issue. It is necessary to look to its context. Here it is at relevant that Article 99 states that:

The Association Council shall take all appropriate measures to facilitate cooperation and contacts between the European Parliament and the parliamentary institutions of Algeria, and between the Economic and Social Committee of the Community and its counterpart in Algeria.

Clearly these bodies (the respective Parliaments and the Economic and Social Committees) have an official role within the administration of the agreement. There should be no objection to including these bodies on a working group on human rights. On the other hand, there is no similar contextual argument for allowing private parties, such as ‘civil society’ to participate in such a working group. The silence of the agreement on this point could be read both ways: either as confirmation that private parties can have no role in any working group established under Article 98, or that there is no objection to such a role. The ambiguity cannot be resolved on the basis of the treaty text.

In summary, the European Parliament’s suggestion in its resolution on Algeria is legally possible under the terms of the association agreement. However, the body is established neither on the basis of the non-execution clause, nor in the context of political dialogue, but rather simply under the ordinary decision-making powers of the joint council.

### 3. Specific power to resolve disputes

The Association Councils in all association agreements (except with Chile and the agreement with Mexico), and the ACP Council of Ministers in the Cotonou Agreement, have the power to make binding decisions on ‘any dispute relating to the application and interpretation of the agreement’.<sup>126</sup> The Joint Councils in all partnership and cooperation agreements an equivalent power to make recommendations on these matters. In both cases, a failure to reach a decision by these bodies can trigger third party dispute settlement, or non-binding conciliation in the case of the partnership and cooperation agreements. This option is discussed below.<sup>127</sup>

The phrase ‘application or interpretation’ of the agreement includes matters coming within the essential elements clause, and also any matters related to the taking of appropriate measures under the agreement (see next section). In summary, then *at least when there is a dispute* in these cases the joint council has an express power to take decisions (or recommendations) on matters related to a party’s compliance with human rights and democratic principles.

#### 5.1.2. The non-execution clauses

The foregoing has considered the possibility of decisions taken jointly by the EU and the other party under the institutions established under agreements containing human rights and democracy clauses. This section will consider the procedures available under the non-execution clauses that exist in most of these agreements.

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<sup>126</sup> The agreement with Syria carves out trade matters, which are to be resolved in accordance with special procedures.

<sup>127</sup> See below at section 5.1.2.4.

#### 5.1.2.1. Preconditions: political dialogue, prior examination and consultations

Non-execution clauses establish a two-track procedure for the taking of appropriate measures. In ‘normal’ cases, the matter is in the first instance supposed to be resolved by the joint council established under the agreement, in which the parties have an equal number of votes. The second paragraph of the standard non-execution clause states that:

Before [taking appropriate measures], except in cases of special urgency, [a party] shall supply the [joint council] with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.

Usually, no further procedure or time period is specified for the form of this ‘examination’.

The Cotonou Agreement is much more detailed on the nature of this procedure. It provides that before the commencement of consultations under the non-execution clause (except in cases of bad faith or special urgency) the parties must engage in a ‘systematic and formal’<sup>128</sup> intensive political dialogue on human rights, democracy and the rule of law that ‘exhaust[s] all possible options’.<sup>129</sup> The content of this dialogue is discussed below.

If political dialogue fails, the party may invite the other party to hold consultations, and at the same time must supply that party and the ACP Council with relevant information.<sup>130</sup> These consultations may only commence after 30 days,<sup>131</sup> and this period is to be used for effective preparation, as well as for deeper consultations within the ACP Group and among the Community and its Member States.<sup>132</sup> The consultation period must terminate at the latest after 120 days.<sup>133</sup>

#### 5.1.2.2. Appropriate measures (procedure)

As mentioned, most agreements provide that ‘after’ supplying the joint council with all relevant information, a party may take ‘appropriate measures’. The nature of these measures will be discussed shortly. Again, the Cotonou Agreement is more specific on this point. Because of the long consultation period, it specifies that a party may take unilateral ‘appropriate measures’ if consultation is refused.<sup>134</sup> Furthermore, even when measures are taken, political dialogue is to be utilized between the parties to normalise the relationship.<sup>135</sup> This is useful, because it makes it clear that the matter is to be kept under review by *both* the parties. Previously, the non-execution clause in the Cotonou Agreement specified that any appropriate measures ‘shall be revoked as soon as the reasons for taking it have disappeared’<sup>136</sup> (which was more than the standard non-execution clause). This could be interpreted as leaving it up to the unilateral determination of one of the parties when the measures are no longer appropriate.

#### 5.1.2.3. Cases of ‘special urgency’

An important exception concerns cases of ‘special urgency’, which are usually defined (in a Czech/Slovak Declaration) as occurring when there has been a ‘repudiation of the agreement not sanctioned by the general rules of international law’ or a ‘violation of the essential elements of

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<sup>128</sup> Art 2(3) of Annex VII Cotonou.

<sup>129</sup> Art 8(6a); Art 96(1)(a) and 2(a); Art 1(1) of Annex VII Cotonou; Art 2(1)-(4) of Annex VII Cotonou. Note that the wording of Art 2(4) of Annex VII (probably erroneously) excludes cases of special urgency from the cases in which political dialogue is *not* necessary.

<sup>130</sup> Art 96(2)(a) Cotonou.

<sup>131</sup> Art 96(2)(a) Cotonou.

<sup>132</sup> Art 3(3) of Annex VII Cotonou.

<sup>133</sup> Arts 96(2)(a) Cotonou.

<sup>134</sup> Arts 96(2)(a) Cotonou.

<sup>135</sup> Art 2(5) of Annex VII Cotonou.

<sup>136</sup> Art 96(2)(c)(1); Art 96(2)(a)(iv) Cotonou.

the agreement'.<sup>137</sup> In these cases, a party may act unilaterally, though it must still notify the joint council of the measures taken and in some cases it is specified that dispute settlement procedures apply or that the other party may call for an 'urgent meeting'. Of the appropriate measures adopted by the EU to date, only one has been a case of special urgency, in the case of Liberia.<sup>138</sup>

#### 5.1.2.4. Third party dispute settlement

An important point is that in all the association agreements including the Cotonou Agreement, (but not those Chile, Syria, Croatia and Fyrom or the agreement with Mexico) there is the possibility of binding third party dispute settlement on all matters affecting the application and interpretation of the agreement, and in the partnership and cooperation agreements there is the possibility of non-binding conciliation. In both cases, this procedure applies to the taking of appropriate measures under a non-execution clause, and it is worth noting in this context that the jurisdiction of a tribunal established under this procedure would ordinarily extend to questions of reparation for wrongful acts.<sup>139</sup>

### 5.2. Political dialogue

#### 5.2.1. Relevance of human rights and democracy clauses

Human rights and democracy clauses are frequently mentioned in the context of political dialogue between the parties to an agreement, but their value in this regard must be closely examined. Certainly, they are not essential for political dialogue on human rights and democracy, as is demonstrated by the political dialogues with China and Iran.

Further, where agreements do contain provisions on political dialogue, the terms of the dialogue are wide enough to encompass human rights and democracy, regardless of the existence of a human rights and democracy clause. Sometimes human rights and democracy is even specified as a fit subject for discussion in this context.

Nonetheless, human rights and democracy clauses are relevant to political dialogue in two important senses. First, they provide a set of values for the parties in the conduct of a political dialogue. This is of more administrative than legal importance, but its political value is not to be underestimated. Second, an essential elements clause may be relevant when an agreement provides for political dialogue but not specifically on the topic of human rights and democracy, *and* where one of the parties refuses to discuss these issues. In these circumstances, an essential elements clause could have the effect of *deeming* these matters to be a topic of common interest to the parties and therefore a fit subject of political dialogue. However, it must be questioned whether this is of any real effect, given the likely fruitlessness of dialogue with an unwilling partner.

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<sup>137</sup> This phrasing, evidently adapted from Article 60 of the Vienna Convention on the Law of Treaties, has the perhaps unintended effect that *any* violation of the essential elements of the agreement is deemed to be a case of special urgency. More sensibly, the Cotonou Agreement, the Egypt association agreement and the South Africa agreement draw a distinction between ordinary violations and situations which involve either 'grave' violations or a situation of temporal urgency (in the case of the Cotonou Agreement it must be both).

<sup>138</sup> Council Decision 631/2003 of 25 August 2003 adopting measures concerning Liberia [2003] OJ L220/3. Note that it was taken no less than 17 months after the earlier Decision: Council Decision 274/2002 of 25 March 2002 [2002] OJ L96/23. Sixteen months later the Council extended the measures imposed in August 2003, this time not claiming a situation of 'special urgency': Council Decision 16/2005 of 22 December 2004 [2005] OJ L8/12.

<sup>139</sup> See *Appeal Relating to Jurisdiction of ICAO Council (India/Pakistan)* [1972] ICJ Rep 47, para 21; referring to *Chorzow Factory (Jurisdiction)* [1927] PCIJ, Series A, No 9, p 21.

### 5.2.2. Comparison between political dialogue and non-execution clauses

It remains to compare the provisions on political dialogue and non-execution clauses. In terms of substance, there is in virtually all cases no difference between political dialogue and non-execution clauses. The major exception is the Cotonou Agreement, in which the normative standards of dialogue on human rights, democratic principles and rule of law are better defined in the context of political dialogue than in the context of consultations. A new Annex VII provides that an intensified political dialogue is to be conducted within the parameters of the internationally recognised standards and norms referred to in the preamble<sup>140</sup> and that ‘the parties may jointly develop and agree specific benchmarks or targets within these parameters, taking into account special circumstances of the ACP State concerned’.<sup>141</sup> These benchmarks and targets also make an appearance in the context of consultations, though in a somewhat roundabout fashion. A new provision states that ‘[t]he Parties are committed to transparent interaction before, during and after the formal consultations, bearing in mind the specific benchmarks and targets referred to in ... this Annex.’<sup>142</sup> Given the strong link between political dialogue and these benchmarks and targets, it is not entirely clear why a similarly strong link is not replicated in the context of consultations under the non-execution clause.

The main differences are procedural. Political dialogue can be entered into at any time, while the examination by the joint council depends on a determination by a party that there has been a failure to fulfil an obligation under the agreement. Second, political dialogue (at least in the Cotonou Agreement) specifically involves ‘[r]egional and sub-regional organisations as well as representatives of civil society organisations’,<sup>143</sup> while there is presently no formal possibility of the involvement of other actors in the process under non-execution clauses. Third, the procedure under a non-execution clause is often a ‘one-off’, and (except in the Cotonou Agreement) there is no express requirement to ensure that any decision taken by the joint council or any appropriate measures adopted by one of the parties is kept under review. These procedural differences are not insubstantial. On the other hand, it must also be borne in mind that (leaving aside the taking of appropriate measures) both the subject matter of discussions and the results of any discussions may be essentially the same, regardless of whether this discussion goes by the name of ‘political dialogue’ or ‘consultation’ under a non-execution clause.

### 5.3. EU funded activities

Human rights and democracy clauses are frequently mentioned in the context of measures to fund activities to promote human rights and democracy in third countries. Here the question will be examined whether and how this might be possible, and whether this adds any value, given the fact that the EU already has an established (if not perfectly coordinated) system of funding human rights and democracy projects in third countries.

The EU’s policy of funding human rights and democratisation initiatives is primarily effected by means of the European Development Fund (EDF) under the Cotonou Agreement, a patchwork of geographical regulations (ALA, TACIS, MEDA, CARDS, OAD, as well as certain country-specific instruments) and other thematic instruments, including those supporting the European Initiative for Democracy and Human Rights (EIDHR). This system is presently under review, and the Commission has proposed replacing it with three new instruments:

- (1) an Instrument for Pre-Accession Assistance (IPA) for candidates and potential candidates,<sup>144</sup>

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<sup>140</sup> Art 2(1) of Annex VII Cotonou; Joint Declaration on Article 2 of Annex VII.

<sup>141</sup> Art 2(2) of Annex VII Cotonou.

<sup>142</sup> Art 3(2) of Annex VII Cotonou.

<sup>143</sup> Art 8(7) Cotonou.

<sup>144</sup> See Commission Proposal for a Council Regulation establishing an Instrument for Pre-Accession Assistance (IPA), COM (2004) 627.

- (2) a European Neighbourhood and Partnership Instrument (ENPI) to replace the MEDA, TACIS and Occupied Territories regulations,<sup>145</sup> and
- (3) a Development Regulation to replace the ALA regulation and the human rights regulation applicable to developing countries, along with other more specific programs, including the EDF.<sup>146</sup>

One of the major themes of this reworked policy is a much closer coordination between the administration of funding under these instruments and the political relationship developed in the context of third country agreements. And while the decision to provide EU funding is ultimately under the autonomous EU instruments, some of the third country agreements contain provisions that seem to guarantee that some form of EU financing will be made available, though not necessarily for the promotion of human rights and democratic principles. This is most evident in the Europe association agreements and the partnership and cooperation agreements (which provide that the third country ‘shall benefit from temporary financial assistance from the Community by way of technical assistance in the form of grants’) and the Euro-Mediterranean association agreements (which provide that ‘a financial co-operation package shall be made available to [the third country] in accordance with the appropriate procedures and the financial resources required’).

The following will discuss the relevance of human rights and democracy clauses to this system, both when the other partner is willing and when it is not willing to accept funded activities taking place in its territory.

### 5.3.1. When the partner is willing

When the other partner is willing to accept funded activities taking place in its territory, the main questions are administrative. First, can decisions on funding be made by the joint council under the agreement? As described above, Association Councils will generally have the power to take decisions (or at least non-binding recommendations) in the area of human rights and democratic principles, while joint councils established under cooperation agreements will be able to adopt non-binding recommendations in this area. However, whether these bodies do in fact have the power to take decisions to fund certain activities (assuming this is desirable) will depend on the wording of each individual agreement.

A related question is whether any of the parties to the agreement may adopt unilateral ‘appropriate measures’ in the form of the funding of human rights and democracy promotion projects. From the EU side, it is difficult to see what human rights and democracy clauses can add to the existing autonomous instruments. It is true that the human rights and democracy clause in Art 3(11) of the TACIS Regulation was once used to fund ‘positive measures’ in Belarus in 1996. However, this was in 1996, before the EIDHR was established.<sup>147</sup> And it is further true, as noted above, that some of the appropriate measures adopted under the Cotonou Agreement can be characterised as ‘positive’. However, as noted in that context, these measures are perhaps better seen as implicitly based on those provisions of the Cotonou Agreement under which the EDF is administered.

But even if it is possible to adopt ‘appropriate measures’ in the form of funding of initiatives, this is not necessarily a desirable course of action. First of all, appropriate measures may only be

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<sup>145</sup> Commission Proposal for a Council Regulation laying down general provisions establishing a European Neighbourhood and Partnership Instrument (ENPI), COM (2004) 628.

<sup>146</sup> Commission Proposal for a Council Regulation establishing a financing instrument for development cooperation and economic cooperation (the Development Regulation), COM (2004) 629.

<sup>147</sup> Amended proposal for a Council Decision on a Tacis civil society development programme for Belarus for 1997, COM (97) 602, Explanatory Memorandum, para 8 ([i]n certain cases, the appropriate measures of Article 3(11) may also mean positive incentive measures’). The actual measure was Council Decision 1/1998 on a TACIS Civil Society Development Programme for Belarus for 1997 [1998] OJ L1/6 (disbursing 5m ECU).

taken if the other party has ‘failed to fulfil an obligation’. Diplomatically, it is preferable to rely on existing instruments to fund activities, which do not depend on such a prior determination. In addition, the wording of this provision implies that the measures must be ‘appropriate’ to the violation. While in some cases, funded activities might indeed be appropriate to a violation (eg capacity building measures to respond to systemic failures), the types of serious violations that have so far triggered the application of Article 96 of the Cotonou Agreement (eg a coup d’état) may not always lend themselves to funded human rights and democracy promotion activities.

### 5.3.2. When partner is not willing

The situation is different when the partner country is unwilling to accept funded activities to promote human rights or democratic principles on its territory. There are examples of such resistance in the past, either in response to the funding of non-governmental groups,<sup>148</sup> or the monitoring of compliance with human rights and democratic principles.<sup>149</sup> Such resistance was even assumed by the old form of Article 58(2) of the Cotonou Agreement, which expressly required the consent of the ACP States before financial support may be granted to non-governmental bodies. In 2005, this provision was amended, and ‘non-State actors from ACP States and the Community which have a local character’ are now ‘eligible for financial support provided under this Agreement, according to the modalities agreed in the national and regional indicative programmes.’ But these still depend on the consent of the ACP country concerned.<sup>150</sup> The EU institutions have on occasion considered the possibility that funded activities will be resisted, and have mentioned the human rights and democracy clauses in this context. Thus, both the Commission and the Parliament have called for the application of funds under the EIDHR to be based on the human rights and democracy clause precisely to avoid the need for host country consent.<sup>151</sup> Similarly, the European Parliament’s Report on International Human Rights and European Union Human Rights Policy states that:

The existence of a human rights clause is an *implicit acceptance by both parties* of a “human rights *acquis*”, including freedom of expression for human rights associations, the possibility to fund non-governmental activities, and free access by international independent missions. The presence of the clause in an agreement *must be followed by a regular discussion on its implementation* by ensuing ministerial level meetings. Human rights should be a fixed point on the agenda of association councils, and the establishment of joint working groups on human rights should be considered.<sup>152</sup>

As these comments indicate, the existence of an essential elements clause may operate to preclude a host country government from objecting to such action (for instance on the basis of

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<sup>148</sup> In 1997, Mexico objected to EU funding of an NGO prior to a general election, with the result that the funding was withdrawn and in 1998 Algeria rejected an EU offer of humanitarian aid as well as an inquiry into human rights, humanitarian aid, and political dialogue regarding human rights violations: see Simma, 579 and n 60.

<sup>149</sup> EU, US and some South African election observers were banned from observing the March 2005 elections in Zimbabwe. See ‘Mostly peaceful, but hardly fair,’ *Economist*, 2 Apr 2005.

<sup>150</sup> Art 3 of Annex IV Cotonou.

<sup>151</sup> Commission Communication on the European Union’s role in promoting human rights and democratisation in third countries, COM (2001) 252, para 4.1; European Parliament Resolution on reinvigorating EU actions on human rights and democratisation with Mediterranean partners, P5\_TA(2004)0099, 12 February 2004, para L. The EIDHR primarily funds non-governmental organizations and international organizations, and is discussed further in Ch 2.

<sup>152</sup> European Parliament Annual Report on International Human Rights and European Union Human Rights Policy, 1999, A5-0060/2000, 22 (emphasis added). See also European Parliament, Resolution on human rights in the world in 2003 and the European Union’s policy on the matter [2004] OJ C103E/1048, para 8; European Parliament, Resolution on reinvigorating EU actions on human rights and democratisation with Mediterranean partners, B5-0049/2004, 12 February 2004, para 6; EU Parliament Report on the European Union’s Role in Promoting Human Rights and Democratisation in Third Countries (COM (2001) 252 final), A5-0084/2002, 17-18.

the prohibition in Article 2(7) of the UN Charter on intervention, or the agreement itself, as in the old version of Article 58(2) of the Cotonou Agreement). This may be useful where activities are not dependent on the actual consent of the other country, for example, such as the funding of non-governmental organisations in the territory of a non-consenting government or the establishment of mechanisms to monitor compliance with human rights and democratic norms. Thus, the European Parliament adopted a resolution on Uzbekistan on 9 June 2005, which '[stressed] that the Uzbek government, by continuing to refuse an international inquiry, is failing to meet even its most basic obligations under the PCA's human rights and democracy clause'.<sup>153</sup>

#### 5.4. Negative measures

Negative measures are intended primarily to take the form of appropriate measures under applicable non-execution clauses. However, for various historical and drafting reasons, the application of non-execution clauses to support negative measures is less clear than might appear. While it is unlikely that any challenge will be made to the actual intended operation of these clauses, a more rigorous analysis of their operation is set out here.

##### 5.4.1. Agreements not containing non-execution clauses

In the first instance, not all agreements containing a basis or essential elements clause also contain a non-execution clause. This raises a question as to the effect of the failure of a party to comply with the norms set out in the essential elements clauses in the agreement.

Usually it is assumed that Article 60(3)(b) of the Vienna Convention on the Law of Treaties (VCLT) applies. This provision permits a treaty party to suspend or terminate an agreement in the event of a material breach of a provision essential to the accomplishment of the object and purpose of the agreement. However, for two reasons it is doubtful whether this provision applies. First, it is not entirely certain that essential elements clauses establish normative obligations to comply with the norms which they set out. The wording of these clauses (eg 'respect for human rights and democratic principles *underpins* the policies of the parties ... and *constitutes* an essential element of the agreement') indicates that these clauses instead merely establish *assumptions* on which the agreement is predicated. Second, none of the agreements at issue (ie those not containing a non-execution clause) have the objective of promoting respect for human rights and democratic principles. Consequently, it is likely that a failure to comply with the norms set out in a basis clause or an essential elements clause will not trigger Article 60(3)(b).

This does not rob these basis and essential elements clauses of all legal effect. The consequence is most likely to be an implied repudiation of the agreement under the rule set out in Article 60(3)(a) VCLT. Repudiation does not require any formal act and may occur independently of a violation of any obligations under an agreement (similarly, a formal statement of denunciation also does not violate any obligations under the agreement). All that is required is that a party acts in a manner sufficient to demonstrate that *in fact* it considers itself no longer to be bound by the agreement. A failure to comply with the terms of an essential elements clause would most likely constitute such repudiation. Finally, it has on occasion been suggested that Article 62 VCLT (fundamental change of circumstance) can apply to essential elements clauses.<sup>154</sup> However, by its own terms this provision cannot apply to events that are foreseen in the treaty itself (including a failure to respect human rights or democracy principles).

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<sup>153</sup> European Parliament resolution on Uzbekistan, P6\_TA-PROV(2005)0239, adopted 9 June 2005, para 4.

<sup>154</sup> Arts (2000) 49. Cf Kuyper (1993), 420 stating that the clause 'is an attempt to inscribe explicitly one of the conditions of the *clausula rebus sic stantibus* into the treaty.'

## 5.4.2. Agreements containing non-execution clauses

### 5.4.2.1. Applicability of the non-execution clause

The situation is obviously different in the case of agreements containing non-execution clauses. For these agreements, the consequences of a failure to comply with the norms of the essential elements clauses of agreements containing a non-execution clause are set out in the non-execution clause itself (this also means that Article 60(3) VCLT is not applicable). However, there is a complication, in that the non-execution clause is only triggered on the violation of an *obligation*. If the essential elements clause does not establish such an obligation, as just suggested, the non-execution clause may lack its intended effect. Nonetheless, it is arguable that in two cases the essential elements clause does set out *obligations*, as such, thereby acting as a trigger for the operation of the non-execution clause: *where the context of the essential elements clause indicates that the clause sets out an obligation* and *where the agreement has the objective of promoting respect for human rights and democratic principles*.

(a) *Where the context of the essential elements clause indicates that the clause sets out an obligation*

In the Cotonou Agreement, there is such context in Article 9(2)(2), in which ‘[t]he Parties undertake to promote and protect all fundamental freedoms and human rights, be they civil and political, or economic, social and cultural’ and (though with a degree of circularity) in Article 96(2)(a), which triggers application of the clause when ‘a Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9’. It may be concluded therefore that the Cotonou Agreement does in fact establish obligations for the parties to respect human rights and democratic principles.

The situation is less clear in other agreements, but the same effect may arguably be derived from the Czech/Slovak Declaration, which states that there is a ‘material breach of the Agreement’ when there is a ‘violation of essential elements of the Agreement, namely its [essential elements clause]’. In stating that the essential elements clause can be *violated*, this implies that the clause does (contrary to its express wording) contain obligations as such. There are declarations to this effect in all agreements containing non-execution clauses *except those with Israel, Tunisia, Romania and Bulgaria*. In addition, the agreement with Albania contains a suspension clause referring to the ‘violation of the essential provisions of the agreement’ which has the same effect.

(b) *Where the agreement has the objective of promoting respect for human rights and democratic principles*

The first paragraph of the non-execution clause makes it an obligation to ‘see to it that the objectives set out in the Agreement are attained’.<sup>155</sup> However, as mentioned, only a few agreements containing human rights and democracy clauses actually make the achievement of respect for human rights and democratic principles an express objective of the agreement (and all of these agreements in any case contain Czech/Slovak Declarations).

(c) *Summary*

Putting this together, the result is that non-execution clauses will be operative in the case of a failure to comply with human rights and democratic principles, as set out in the relevant essential elements clause, in all agreements containing non-execution clauses except those with Israel, Tunisia, Albania, Bulgaria and Romania; and in the case of Romania, the clause may be effective in the event of a failure of Romania to meet the objective of ‘consolidating its democracy’. For these agreements (as with those containing no non-execution clause), Article 60(3)(a) VCLT will operate to permit the other party to suspend or terminate the agreement.

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<sup>155</sup> It is doubtful whether an assumption on which a treaty is predicated can extend its stated objective. See *Rights of Nationals of the United States of America in Morocco (France/USA)* [1952] ICJ Rep 176, 196.

#### 5.4.2.2. Scope of appropriate measures

As mentioned, the ‘Bulgarian clause’ originates in a series of trade and cooperation agreements with certain Mediterranean countries in 1978, where it was used as the basis for trade remedies in the event of trade distortions resulting from the implementation of the agreement. This has certain implications for its operation in the new context of human rights violations. First, it is obvious that its primary effect is to result in the suspension of rights under the agreement, specifically, in the form of increased trade barriers. To this extent, it follows that the natural purpose of the clause is essentially ‘negative’ (despite views to the contrary). Second, these origins explain the ‘defensive’ nature of the requirement that ‘[i]n the selection of measures, priority must be given to those which least disturb the functioning of the Agreement.’ This requirement makes little sense in the context of violations of human rights and democracy principles, where the purpose of ‘appropriate measures’ is precisely to disturb the ordinary functioning of the agreement.

Leaving this aside, however, it is evident that the non-execution clause allows at a minimum for the suspension of any benefits and rights granted under the agreement, including any political contacts, any financial aid provided under an agreement, or trade benefits, including not only preferences but also non-discrimination obligations. This means that human rights and democracy clauses might be used as a social clause, which would allow for discrimination against goods produced in manner that violates labour standards.<sup>156</sup> The EU maintains a social clause in its GSP regulation<sup>157</sup> and in the past the Commission has also indicated its support of social clauses<sup>158</sup> and at least one of the EU Member States has also recently adopted a scheme along these lines.<sup>159</sup> It must be acknowledged however that the EU’s stated policy is that it is ‘resolutely opposed to trade sanctions in the field of labour’.<sup>160</sup>

#### 5.4.2.3. Limitations on the use of appropriate measures

Any application of appropriate measures will be subject to conditions imposed under general international law. These conditions are primarily (a) proportionality to the violation, and (b) non-violation of human rights norms. This is important in the context of suspension of trade benefits, which could itself contribute to human rights violations.<sup>161</sup> Unusually, the Cotonou Agreement, and the agreements with Egypt and Lebanon specify that appropriate measures are measures taken in accordance with international law *and proportional to the violation*.<sup>162</sup> The South Africa agreement goes even further, noting in a Joint Declaration that ‘[i]n the selection and implementation of these measures, the Parties will pay particular attention to the circumstances of the most vulnerable groups of the population and will ensure that they are not

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<sup>156</sup> Riedel and Will (1999), 744-46. See the European Parliament Report on the introduction of a social clause in the unilateral and multilateral trading system, A3-0007/94, and note the Opinion of the Committee on External Economic Relations in the European Parliament Report on the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries (COM (95) 216), A4-0212/96.

<sup>157</sup> It also applies this clause to Myanmar (Council Regulation 552/1997 [1997] OJ L85/8), grandfathered in Recital 19 of Council Regulation 980/2005 [2005] OJ L169/1. Consultations with Pakistan in respect of child labour stopped short of the withdrawal of preferences: see Commission Answer [1998] OJ C21/148. For a contrast of these two examples, see Brandtner and Rosas (1999), 716

<sup>158</sup> See, eg, Commission Communication, COM (2001) 416, above at n 99, European Parliament Report on Fair Trade, A4-0198/98 and Commission Communication on ‘Fair Trade’, COM (1999) 619.

<sup>159</sup> *Promotion of Socially Responsible Production Act 2002* (Belgium) [2003] CLE 1. This law met with heated opposition within the WTO. See WTO Doc G/TBT/W/159, 28 May 2001; also WTO Doc G/TBT/M/23, 8 May 2001 and WTO Doc G/TBT/M/24, 14 Aug 2001.

<sup>160</sup> WTO Doc, WT/TPR/M/72, 26 Oct 2000, para 18; see also WTO Doc, WT/GC/W/391, 12 Nov 1999.

<sup>161</sup> Cf Bossuyt (2000) and de Wet (2001).

<sup>162</sup> Art 96(2)(c) Cotonou; Art 86(3)(1) Egypt association agreement; Art 86(3) Lebanon association agreement.

unduly penalised.<sup>163</sup> These refinements spell out the existing position under customary international law and, as such, are probably not strictly necessary.

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<sup>163</sup> Joint Declaration on non-execution, EC-South Africa.

## 6. Human rights and democracy clauses compared to other measures adopted for the promotion of human rights and democracy

This section evaluates the relevance of human rights and democracy clauses to other EU instruments and policies used to promote human rights and democratic principles.

### 6.1. Political dialogue/cooperation

Human rights and democracy clauses are not essential to political dialogue on the themes of human rights and democratic principles, as this can be done either outside of an agreement or according to the ordinary procedures for political dialogue within an agreement. However, an essential elements clause can provide a useful (though optional) set of standards, and can also justify the establishment of a subcommittee or working group in which this dialogue can take place. Such dialogue can also dovetail with consultations and the taking of appropriate measures under a non-execution clause, following the model of the Cotonou Agreement.

### 6.2. Monitoring of compliance (Fundamental Rights Agency)

The use of human rights and democracy clauses to support the establishment of working groups under agreements (including parliamentary delegations and civil society) to monitor human rights compliance has already been discussed. Additionally, these clauses have been mentioned in the context of the proposed Fundamental Rights Agency (FRA).<sup>164</sup> This agency is designed to assist EU institutions (including the Member States when implementing Community law) to respect human rights.<sup>165</sup> It is proposed, among other things, that the Commission may request the FRA to provide information and analysis on fundamental rights issues as regards third countries with which the Community has concluded (or is intending to conclude) association agreements or agreements containing provisions on respect of human rights.<sup>166</sup> In addition, it is proposed that candidate and potential candidate countries may voluntarily participate in the work of the FRA, following a decision of a relevant Association Council.<sup>167</sup>

Human rights and democracy clauses are relevant to both of these proposals. Concerning the first, while the Commission does not depend on such clauses to ask the FRA to report on human rights in third countries, any concrete action (ie appropriate measures) taken on the basis of a negative report would need to take place in the context of the agreement. It may also be convenient for political dialogue to take place in that context, though again, human rights and democracy clauses are not strictly necessary for dialogue on these matters. The second proposal assumes that Association Councils necessarily have the power to take decisions on matters concerning human rights and democratic principles. Some of the limits to this power have been

<sup>164</sup> Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, COM (2005) 280.

<sup>165</sup> In draft Article 3(2) of the proposed Regulation the scope of the FRA is described in terms of 'fundamental rights' as defined in Article 6(2) EU and 'as set out in particular in the Charter of Fundamental Rights'. Although these provisions include a number of human rights with a strong 'democracy' flavour, they do not refer expressly to 'democratic principles,' unlike Article 6(1) EU and the essential elements clauses. This raises the possibility that the FRA will have a mandate narrower than that which would be required for a full implementation of the 'democracy' (as well as rule of law) aspects of the essential elements clauses.

<sup>166</sup> Draft Art 3(4).

<sup>167</sup> Draft Art 27.

described above.<sup>168</sup> Following that analysis, it is likely that the Association Councils would be able to adopt a decision, or at least a non-binding recommendation, to refer matters to the FRA. One exception would be the EC-Turkey Association Council, which probably lacks the power to make decisions on human rights and democratic principles.<sup>169</sup>

### 6.3. Funding of human rights and democracy initiatives

As mentioned, funding of human rights and democracy projects takes place under a EU autonomous instruments. Where the agreement provides, at least to some extent, that the third country has an entitlement to such funding (as in the Europe, Euro-Mediterranean and partnership and cooperation agreements),<sup>170</sup> human rights and democracy clauses could perhaps be considered as a possible basis for such funding. However, even where this is the case, it is highly questionable whether human rights and democracy clauses add anything to the autonomous instruments that already exist for this purpose. This conclusion is however subject to one exception: when the third country resists the funding of human rights and democracy initiatives taking place on the territory. As mentioned, in this circumstance, human rights and democracy clauses may operate to preclude any formal objections by the third country concerned.<sup>171</sup>

### 6.4. Suspension of benefits under an agreement

Human rights and democracy clauses are very well suited to the suspension of any benefits provided under an agreement, including non-economic cooperation (eg political contacts), trade preferences and the suspension of economic aid (when this aid is linked to a provision in an agreement).<sup>172</sup> Even in respect of benefits not directly promised (or agreed) under a third country agreement, the institutions established under an agreement for the conduct of political dialogue may be utilised in the event that these benefits are threatened to be withdrawn.

In addition, there is a need for coordination between any decisions taken in the context of an agreement, and a decision taken in the context of an autonomous instrument under which benefits are also (or actually) granted. Presently, there is a risk that the different standards could apply under human rights and democracy clauses in third country agreements, on the one hand, and under autonomous regulations, on the other.<sup>173</sup> These include the EU's Generalized System of Preferences (GSP) program, under which trade preferences are granted to developing countries.<sup>174</sup>

### 6.5. Membership conditionality

There is a similarly a need for coordination between human rights and democracy clauses and other instruments setting conditions for EU candidates. Chief among these is Article 49 of the

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<sup>168</sup> See above at section 5.1.1.

<sup>169</sup> See Art 22(1) of the EEC-Turkey association agreement [1972] OJ C113/1 (English edition).

<sup>170</sup> See above at n 5.3.

<sup>171</sup> See above at section 5.3.2.

<sup>172</sup> See above at n 5.3.

<sup>173</sup> The human rights and democracy clauses in the Commission's proposed regulations suffer from drafting ambiguities. It is not apparent, for example, why the human rights and democracy clause in the ENPI and Development Regulations refer to 'partnership and cooperation agreements' nor why they are 'without prejudice to the provisions on suspension of aid' in those agreements.

<sup>174</sup> Council Regulation 980/2005 of 27 June 2005 applying a scheme of generalised tariff preferences [2005] L169/1. This scheme provides both for additional preferences for countries that ratify and implement a range of human rights and environmental agreements, and for the withdrawal of preferences from countries that fail to comply with similar norms. In *EC-Tariff Preferences*, WT/DS246/AB/R, adopted 20 April 2004, the WTO Appellate Body decision cast doubt on the legality of conditionality in GSP programs. This author has argued that in the event that these conditions are not permitted, the EU might yet be able to rely on human rights clauses in its international agreements. See Bartels (2002).

EU Treaty, combined with the standards set out in Article 6(1) of the same Treaty, and the ‘Copenhagen criteria’. In 1997, for example, Slovakia was found not to have met the Copenhagen criteria. But the Article 6(1) standard was not considered relevant, even though arguably this is the appropriate standard for the political dimension of accession. Nor was the applicable human rights and democracy clause in the Europe Agreement with Slovakia considered important.<sup>175</sup> This is an unsatisfactory situation.

#### 6.6. Common Foreign and Security Policy/informal measures

There is also a possibility of overlap between the CFSP and negative measures under human rights and democracy clauses. This is amply demonstrated in the practice under the Lomé Convention and Cotonou Agreements over the past decade. Even after the introduction of a fully effective human rights and democracy clause into the Lomé Convention in 1995, until 1999 (when an internal agreement was reached within the EU on how to implement this clause), most reactions to violations of human rights and democratic principles in ACP countries took the form of decisions under the CFSP and/or informal actions. This does nothing to contribute to the transparency of the processes of political dialogue or consultation, and the virtual abandonment of this method since 1999 is to be welcomed. More recently, CFSP decisions have been taken in tandem with decisions under the Cotonou Agreement (eg in the case of Zimbabwe).

#### 6.7. Summary

In conclusion, human rights and democracy clauses are most relevant in three situations: (a) to support the establishment of institutional structures in third country agreements for the conduct of political dialogue or monitoring of human rights compliance; (b) as a basis for suspending benefits under agreements; and (c) as a means of precluding a third country from objecting to human rights and democracy initiatives taking place on its territory.

However, human rights and democracy clauses add little of value to existing EU autonomous instruments for the promotion of human rights and democratic principles, except when the third country resists action under these instruments. To this extent, the tendency to describe human rights and democracy clauses as primarily geared towards ‘positive measures’ should be kept in check.

### 7. A summary of the views of NGOs

In the course of preparing this study, the views of over 100 NGOs working in the field of human rights were solicited. Of the comments that have been received, all have strongly supported the policy of including human rights and democracy clauses in international agreements. Specific comments are as follows:

- Importance of establishing specific benchmarks;<sup>176</sup> these to include the protection of human rights defenders, in accordance with EU Guidelines on Human Rights Defenders<sup>177</sup> and women’s rights.<sup>178</sup>
- Importance of monitoring compliance with human rights and democracy obligations by credible organisations (eg UN and credible NGOs)<sup>179</sup>
- Importance of using clauses as a basis for common programmes to improve compliance with human rights and democratic principles but not exclusively so.<sup>180</sup>

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<sup>175</sup> The case is discussed in Fierro (2003), 144-48. See also Pridham (2002) and Sadurski (2004).

<sup>176</sup> The International Foundation for the Protection of Human Rights Defenders (email 3 August 2005); Sisterhood is Global Institute (email 21 August 2005).

<sup>177</sup> The International Foundation for the Protection of Human Rights Defenders (email 3 August 2005).

<sup>178</sup> Sisterhood is Global Institute (email 21 August 2005).

<sup>179</sup> Greek Helsinki Monitor (email 26 July 2005); Amnesty International EU Office (email 4 August 2005)

- Recalibration of cooperation under particular agreements, pursuant to the EU's own human rights obligations<sup>181</sup>
- Suspension of particular agreements<sup>182</sup>

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<sup>180</sup> Amnesty International EU Office (email 4 August 2005); Euro-Mediterranean Human Rights Network (email 17 August 2005)

<sup>181</sup> Euro-Mediterranean Human Rights Network (2004), 27-34.

<sup>182</sup> Many groups advocate suspension of the association agreements with Israel, eg Palestinian Center for Human Rights (email 3 August 2005), Sisterhood is Global Institute (email 21 August 2005), Ireland Palestine Solidarity Campaign (email 3 August 2005) and some also advocate suspending other agreements, eg with Tunisia; eg Ireland Palestine Solidarity Campaign (email 3 August 2005) or negotiations, eg with Syria, Human Rights Watch (2002).

PART 4	HUMAN RIGHTS AND DEMOCRACY CLAUSES AND EU HUMAN RIGHTS POLICIES
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## 8. Legal powers of the European Parliament

The European Parliament possesses certain powers with respect to human rights and democracy clauses. Article 300(3) subparagraph 2 of the EC Treaty provides that the Parliament must give its assent to association agreements, as well as other significant agreements.<sup>183</sup> In practice, these other agreements have included the partnership and cooperation agreements with the ex-Soviet Union countries, and the agreement with Mexico. In addition, the Parliament has the right to be consulted on all other agreements, except for trade agreements concluded on the basis of Article 133(3). The implications of extending these rights to other agreements go far beyond the scope of this study. Suffice it to say that any such development would necessarily also increase the Parliament's influence over this aspect of the agreements.

Articles 300(2) subparagraphs 2 and 3 of the EC Treaty expressly restrict the Parliament's role in two cases of relevance to human rights and democracy clauses. These provisions state as follows:

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

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

Both of the decisions mentioned in subparagraph 2 above are of direct relevance to human rights and democracy clauses. A decision to suspend an agreement includes all cases of suspending an agreement on the basis of an essential elements clause (via Article 60 VCLT) or on the basis of an applicable and operative non-execution clause. The establishment of a position concerning decisions of a body established under an agreement necessarily includes all cases concerning the range of measures discussed in this study, in particular:

- Joint Council decisions to establish subgroups for the purpose of conducting political dialogue and monitoring compliance with human rights and democratic principles;
- Joint Council decisions following the invocation of the consultation procedure foreseen in the non-execution clauses; and
- Joint Council decisions resolving a dispute under relevant dispute settlement procedures.<sup>184</sup>

In summary, Article 300(2) subparagraphs 2 and 3 concern the very essence of the practical implementation of human rights and democracy clauses. It is therefore recommended that the European Parliament make it a priority to revoke the carve-out of its ordinary powers established in these subparagraphs.

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<sup>183</sup> These are other agreements establishing a specific institutional framework, agreements having important budgetary implications for the Community and agreements entailing amendment of an act adopted under the enhanced procedure referred to in Article 251.

<sup>184</sup> See section 5.1.1.2.

## 9. Informal EU policies

Even in the absence of reform to Article 300(2) EC, the European Parliament should be able to press for informal involvement in the EU's decisionmaking process on matters concerning human rights and democracy clauses. First, the Parliament can press for involvement in the formation of any positions to be taken in the joint councils that relate to human rights and democratic principles. Second the Parliament can press for formal involvement in the meetings of these councils. Third, the Parliament can press for the establishment of subcommittees under these agreements with a human rights and democracy mandate and for a formal role in these subcommittees. The Parliament can also work towards having human rights and democratic principles as a standing agenda item on the meetings of the joint council.

## 10. Other action

One of the significant powers of the European Parliament is the power to adopt the annual budget. In 2004 two MEPs sought to secure a promise by the Commission that it would produce a mandatory biannual report on the implementation of the human rights and democracy clause in the agreements with the Mediterranean countries by proposing that otherwise half of all appropriations under a number of budget lines in these chapters be placed in reserve.<sup>185</sup> The proposal was severely watered down by the Foreign Affairs Committee of the European Parliament, which in the end merely *called upon* the Commission to produce such a report.<sup>186</sup> Even this statement did not find its way into the European Parliament's final resolution on the adoption of the budget.<sup>187</sup> Clearly, the decision to hold the budget hostage on any policy, including a policy concerning human rights and democracy, is highly political and it is beyond the scope of this study to make any recommendations on this technique.

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<sup>185</sup> Draft Amendments 5110 and 5111, Foreign Affairs Committee (AFET) of the European Parliament, Budgetary Amendments, meeting of 13 Sep 2004.

<sup>186</sup> Opinion of the Committee on Foreign Affairs, contained in European Parliament Report on the draft general budget of the European Union for the financial year 2005, A6-0021/2004.

<sup>187</sup> European Parliament resolution on the draft general budget of the European Union for the financial year 2005, Section III – Commission, P6\_TA(2004)0038.

There are a number of ways in which the EU's policy concerning human rights and democracy clauses could be improved. This section provides fifteen recommendations for action that could be taken by the European Parliament.

### 1. New agreements

A striking anomaly in the EU's policy concerning human rights and democracy clauses is the fact that they are not included in sectoral agreements (eg fisheries, steel, and textiles) often concluded with third countries with less than perfect records in the area of human rights and democratic principles. This should be remedied. In the longer term, it would also be desirable to ensure a uniform application of human rights and democracy clauses in all agreements with all third countries, especially developed countries. However, this depends on the consent of those countries, which, as history has demonstrated, cannot be guaranteed.

*Recommendation 1: The European Parliament should call for all new agreements to contain human rights and democracy clauses, in particular sectoral agreements.*

### 2. Implementation of existing clauses

Without a doubt, the single most important failure of the EU's policy on human rights and democracy clauses is the failure to invoke them in cases in which they are obviously relevant. The European Parliament also has a tendency to criticise violations while not calling for any measures,<sup>188</sup> or to fail to cite applicable human rights and democracy clauses when calling for measures.<sup>189</sup> This practice undermines the coherence and credibility of a uniform EU external human rights policy.

*Recommendation 2: The European Parliament should systematically refer to applicable human rights and democracy clauses when referring to violations of relevant norms in third countries and should recommend appropriate measures to be taken.*

### 3. Normative standards

There is no escaping the impression that human rights and democracy clauses are very poorly drafted. There is a fundamental lack of clarity on the normative value of the essential elements clause, and consequently on the applicability (if any) of the non-execution clause. This has not been helped by various statements by the European Commission on the legal effect of these clauses. The following delineates the most important areas in which greater clarity would be desirable.

#### a. Clarity on applicable standards

The norms and principles in existing essential elements clauses are sufficiently general to cover all civil and political, as well as economic, social and cultural rights, and in addition democratic principles, sometimes even beyond the standard applicable under customary international law. They also cover women's rights and workers' rights. It is not necessary to add to the palette of

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<sup>188</sup> See, eg, European Parliament resolution on the human rights situation in Ethiopia, P6\_TA-PROV(2005)0305, 7 July 2005, which failed to recommend any measures.

<sup>189</sup> See, eg, European Parliament resolution on Zimbabwe, P6\_TA-PROV(2005)0303, para 11, 7 July 2005, which failed to mention an applicable human rights clause.

individual rights, which is better achieved in the day-to-day work of political dialogue and, where necessary, consultations under a non-execution clause.

The standards in human rights and democracy clauses should also be coordinated with other standards applicable between the parties under international law. The current practice of incorporating by reference norms in instruments that are either wholly or partly non-binding under customary international law (eg the OSCE instruments or the Universal Declaration on Human Rights) should be continued only on the basis of a proper understanding of its true legal effects. An effort should be made to ensure that the standards set out in essential elements clauses do not unknowingly rise above the standards applicable under customary international law.

*Recommendation 3: The European Parliament should work for the inclusion of the model Article B in new agreements. It should also refrain from calling for additional clauses, such as on women's rights and labour standards.*

#### b. Benchmarking of applicable standards

Further clarity can be brought to the manner in which these standards can be implemented in the context of any given country. In this respect, the new reference in the Cotonou Agreement to benchmarking is to be welcomed. However, benchmarking should not be limited to the context of political dialogue (as it is in that Agreement), but should also apply to consultation procedures in the event of non-compliance.

*See Recommendations 7 and 10.*

#### c. Normative status of the essential elements clause

It cannot be assumed that existing essential elements clauses contain an obligation to comply with the norms made an 'essential element' of the agreement. This should be clarified.

*Recommendation 4: The European Parliament should work for the inclusion of model Article B in new agreements. In the case of existing agreements, the Parliament should work towards a statement affirming that the parties are under an obligation to comply with the norms in the essential elements clause. This statement could take the form of a decision of the relevant joint council or, if necessary, a joint declaration by the parties.*

However, it is necessary to ensure that the EU does not exceed its competence under the EC Treaty to enter into obligations in the field of human rights. In the case of mixed agreements, a clause defining the 'parties' in terms of their respective powers almost certainly removes this danger. In pure agreements it must be ensured that the EU does not exceed its competence.<sup>190</sup>

*Recommendation 5: The European Parliament should work for the inclusion of model clause E in new pure Community agreements.*

#### d. Coherence in standards applicable to third countries

The standards applicable in essential elements clauses should be coordinated with the standards applicable under other EU instruments. At present, some countries are subject to host of different standards including Article 6(1) EU; the Copenhagen criteria; special conditions applicable to the Western Balkan countries; essential elements clauses; and conditionality provisions in autonomous EU regulations on financing and trade preferences. As in the case of Slovakia in 1997, this can lead to the standard in the essential elements clause being ignored, in favour of a different (though equally applicable standard) in another instrument. This is unsatisfactory from an administrative perspective; it also weakens the claims of the EU to the coherence of its external human rights and democratisation policy.

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<sup>190</sup> The EU and its Member States are jointly responsible under the Cotonou Agreement. It is beyond the scope of this study to discuss the implications of this responsibility with respect to human rights and democratic principles.

*Recommendation 6: The European Parliament should ensure consistency among the normative standards applicable in conditionality clauses in autonomous EU instruments providing or financial and technical assistance and trade preferences (including in the EU's enlargement policies), ensure consistency between these standards and those in the clauses and ensure consistency in the implementation of measures based on these standards.*

#### 4. Improved procedures for implementing human rights and democracy clauses

##### a. Political dialogue

Both the 2005 revision of the Cotonou Agreement, with its greater emphasis on political dialogue and the establishment of permanent subcommittees to discuss these matters in a variety of third country agreements have pointed the way to a greater institutionalisation of these issues in the ordinary conduct of the relationship between the EU and its partners. This is to be welcomed. Consideration should also be given to the involvement of representatives of the parliaments, regional organisations and civil society.

*Recommendation 7: The European Parliament should work for the inclusion of model Article C in new agreements and in agreements without any provision for political dialogue. In the case of existing agreements, the Parliament should work towards procedural rules to the same effect, by way of a decision of the relevant joint council.*

##### b. Monitoring of compliance

An important innovation waiting to be implemented is the establishment of formal arrangements to monitor compliance with the standards established in the essential elements clauses. There are two main options for such monitoring: the establishment of a working group under the agreement with competence to monitor compliance, and a reference to the proposed Fundamental Rights Agency. The advantage of the former option is that it is more truly bilateral, and may therefore more diplomatically acceptable, than the latter. There is also greater scope for the involvement in such a working group of non-executive actors. In both cases, a system of annual reports, along the lines of the US State Department Country Reports on Human Rights Practices, may be desirable.<sup>191</sup>

*Recommendation 8: The European Parliament should call for the establishment of permanent subgroups or subcommittees under third country agreements with a mandate to review compliance with human rights and democratic principles. These groups should include, where appropriate, representatives of parliaments, relevant regional organizations, and civil society. The subgroup should prepare an annual report on compliance by the parties to the agreement.*

*Recommendation 9: The European Parliament should also give consideration to calling for a decision of the respective joint council to establish ongoing cooperation with the proposed Fundamental Rights Agency. The FRA should prepare an annual report on compliance by the parties to the agreement.*

##### c. Consultations under non-execution clauses

With the exception of the Cotonou Agreement, the procedures for consulting the other party prior to the taking of 'appropriate measures' are very thinly described in the agreements. Nothing more is required than a notification to the joint council of the 'matter' and there is little requirement for a serious discussion of the matter before unilateral measures are taken. The Cotonou Agreement is much more detailed on this point, especially in linking intensive political dialogue with the invocation of consultations under the non-execution procedure. This model, or at least a simplified form, should be adopted in other agreements as well.

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<sup>191</sup> Riedel and Will (1999) 749-51; cf also Clapham, 669-671.

In addition, consideration should be given to broadening the range of actors involved in these consultations. At present, consultations take place in the context of the joint council established under the agreement. It may be appropriate to involve non-executive actors.

*Recommendation 10: The European Parliament should work for the inclusion of model Article D(1)-(5) in new agreements and in agreements without any provision for consultations. In the case of existing agreements, the Parliament should work towards procedural rules to the same effect, by way of a decision of the relevant joint council.*

d. Scope of appropriate measures

There is a lack of clarity on whether appropriate measures are limited to the suspension of benefits under an agreement. It has been suggested in this study that there is little need or value added in the use of ‘appropriate measures’ to fund human rights and democratisation initiatives, given that a range of perfectly serviceable instruments already exist for this purpose, and given that it would be necessary to tie any such measures to a ‘failure to fulfil an obligation’.

*Recommendation 11: The European Parliament should refrain from implying that funding of human rights and democratization initiatives should take the form of ‘appropriate measures’ under a non-execution clause.*

e. Review of appropriate measures

All non-execution clauses (except in the Cotonou Agreement) lack a mechanism for reviewing the continuing relevance of appropriate measures. There should be a built-in ‘sunset clause’ on all appropriate measures, which should in addition be reviewed in the same forum in which they were first discussed; usually in the joint council. This is all the more important for measures taken in a case of ‘special urgency’, as these can be taken without prior consultations.

*Recommendation 12: The European Parliament should work for the inclusion of model Article D(6) in new agreements and in agreements without any provision for political dialogue. In the case of existing agreements, the Parliament should work towards a decision of the relevant joint council to the same effect.*

f. Clarity on cases of ‘special urgency’

In most agreements, the definition of the cases of special urgency in which unilateral ‘appropriate measures’ may be taken without consultations is misconceived. Rather than being limited to cases of temporal urgency, the applicable definition speaks of ‘material breach’. This is problematic because (a) it implies that a serious breach renders consultations useless, and (b) it has the effect of rendering every violation of the norms in an essential elements clause a case of ‘special urgency’. The Cotonou Agreement, and Egypt and South Africa agreements provide for a more sensible definition of cases of ‘special urgency’ in terms of temporal urgency.

*Recommendation 13: The European Parliament should work for the inclusion of model Article D(7) in new agreements. In the case of existing agreements, the Parliament should work towards a statement specifying that cases of ‘special urgency’ are those in which there is a temporal urgency necessitating a quick response. This statement could take the form of a decision of the relevant joint council or, if necessary, a joint declaration by the parties.*

g. Binding third party dispute settlement

A commitment to the rule of law would support the notion of recourse to binding third party dispute settlement procedures in all cases involving appropriate measures under a non-execution clause. At present, such recourse is available under the Cotonou Agreement, the agreement with South Africa and the Europe and Euro-Mediterranean association agreements (except with Syria), and non-binding conciliation is available under the partnership and cooperation agreements. However, there is no possibility for any form of third party dispute resolution on these matters under the more recent Stabilization and Association Agreements, nor under the

agreement with Mexico, nor the association agreement with Chile, nor any of the EU's 'pure' cooperation agreements with third countries.

*Recommendation 14: The European Parliament should give consideration to the desirability to subjecting any appropriate measures to dispute settlement under an agreement.*

## 5. Role of the European Parliament

At present, the role of the European Parliament in the drafting and implementation of human rights and democracy clauses is limited. This could be enhanced by involvement in political dialogue and consultations, as well as by involvement in any decisions to suspend agreements and the establishment of positions to be adopted by joint councils in international agreements. The former role has been addressed in Recommendations 6-9. In addition:

*Recommendation 15: The European Parliament should call for the revision of Article 300(2) to provide for its involvement in any decisions to suspend agreements and the establishment of positions to be adopted by joint councils in international agreements, and, prior to this, call for informal involvement in these procedures.*

**[Article A] Objectives**

**The aims of this [agreement/association] are: [...] the promotion and protection of respect for human rights and democratic principles.**

*Comment*

This redrafted subclause makes it clear that the agreement has the twin objectives of promoting and protecting human rights and democratic principles. This is necessary to trigger the powers of the Joint Council to adopt decisions or non-binding recommendations to achieve these two aims of the agreement. The first objective (promotion) provides a basis for proactive decisions to encourage reform, while the second (protection) provides a basis for decisions to prevent regression; specifically, negative measures.

**[Article B] Human rights and democratic principles**

**The parties shall respect legally binding democratic principles and human rights [as set out in [legal instrument]] in their internal and external policies.**

*Comment*

This redrafted clause establishes a clear obligation on the parties to comply with the stated norms, which is necessary for the proper application of the non-compliance clause. If the bracketed phrase is excluded, the principles and human rights that give content to the obligation will be those already binding on the parties under customary and conventional international law. If the bracketed phrase is included, the parties have the option of raising the applicable standard of human rights according to the nominated instrument. Article [E] below ensures that this obligation does not exceed the EU's competence under the EC Treaty.

**[Article C] Political dialogue**

**3. Political dialogue shall cover all issues of common interest to the Parties, in particular [...] and the obligations of the parties set out in Article B. [The parties may develop and agree specific benchmarks or targets with regard to these obligations, taking into account the special circumstances of the party concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.]**

*Comment*

The first sentence of this clause is a slight modification to existing clauses on political dialogue to ensure that the parties routinely discuss their obligations to respect human rights and democratic principles in their political dialogue. The bracketed phrase is based on Article 2(2) of Annex VII of the Cotonou Agreement, where it also applies to political dialogue. It refers to the obligations of the parties in Article B rather than to 'internationally agreed standards and norms'. However, this sentence may not always be appropriate, as it implies that the parties may have difficulties in implementing these obligations. This may be diplomatically insensitive.

**4. The European Parliament, the [national] parliament, and representatives from regional and sub-regional organizations and representatives of civil society shall be associated with this dialogue.**

*Comment*

This clause is based on Article 8(7) of the Cotonou Agreement. In addition, it specifies that the European Parliament and the national parliament are to be associated with the political dialogue.

#### **[Article D] Non-compliance with Article B**

*Comment*

This redrafted clause applies solely to violations of Article B. It is retitled ‘non-compliance’ to emphasise that Article B establishes an obligation with which the parties must comply.

**8. If either party considers that the other party has failed to comply with Article B, it shall, except in a case of special urgency, supply the [Joint Council] with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the parties. To this end, it shall invite the other party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation.**

*Comment*

This clause is based on Article 96(2)(a)(1) of the Cotonou Agreement, except that, for the sake of brevity and to avoid the risk of setting a new standard, it uses the term ‘comply with Article B’ rather than the term used in that provision (‘failure to fulfil and obligation stemming from respect for human rights, democratic principles and rule of law referred to in paragraph 2 of Article 9’).

**9. The European Parliament, the [national] parliament, and representatives from regional and sub-regional organizations and representatives of civil society shall be associated with these consultations.**

*Comment*

This clause is based on Article 8(7) of the Cotonou Agreement, where it applies to political dialogue. In addition, it specifies that the European Parliament and the national parliament are to be involved in consultations.

**10. The consultations shall be conducted at the level and in the form considered most appropriate for finding a solution.**

**The consultations shall begin no later than [X] days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In any case, the consultations shall last no longer than [Y] days.**

*Comment*

This clause reproduces Article 96(2)(a)(2) and (3) of the Cotonou Agreement except for optional variations in the time periods involved.

**11. During consultations, the parties shall develop and agree specific benchmarks or targets with regard to the obligations of the parties in Article B, taking into account special circumstances of the party concerned. Benchmarks are mechanisms for reaching targets through the setting of intermediate objectives and timeframes for compliance.**

*Comment*

This clause is based on Article 2(2) of Annex VII of the Cotonou Agreement, where it applies to political dialogue. It refers to the obligations of the parties in Article B rather than to ‘internationally agreed standards and norms’.

**12. If the consultations do not lead to a solution acceptable to both parties, if consultation is refused or in cases of special urgency, appropriate measures may be taken. Appropriate measures must be proportional to the violation and comply with international law.**

*Comment*

The first sentence of this clause reproduces the first sentence of Article 96(2)(a)(4) of the Cotonou Agreement. The second sentence is a simplified version of the first sentence of Article 96(2)(c)(1) of the Cotonou Agreement’. There is no reference to ‘measures least disturbing the functioning of the agreement’, a phrase which was developed in the context of trade remedies and which is inappropriate in this context. There is no reference to ‘suspension being a last resort’, as this is implied in the existing qualifications in the second sentence.

**13. Appropriate measures must be reviewed in the [Joint Council] every [X] months. They shall be revoked as soon as the reasons for taking them no longer prevail.**

*Comment*

The first sentence of this clause is new. It is a sunset clause mandating periodic review. It also ensures that the decision to revoke the measures set out in the second sentence is not taken unilaterally. The second sentence reproduces the second sentence of Article 96(2)(a)(4) of the Cotonou Agreement.

**14. The term ‘cases of special urgency’ shall refer to exceptional cases of particularly serious and flagrant violation of Article B that require an immediate reaction. If measures are taken in cases of special urgency, they shall be immediately notified to the [Joint Council]. At the request of the party concerned, consultations may then be called in accordance with this Article.**

*Comment*

The first sentence of this clause is adapted from Article 96(2)(b)(1) of the Cotonou Agreement, except that, for the sake of brevity and to avoid the risk of setting new standards, it substitutes a reference to 'Article B' for the phrase 'one of the essential elements referred to in paragraph 2 of Article 9. The second sentence is taken from the first sentence of Article 96(2)(c)(2) of the Cotonou Agreement. The third sentence is a simplified form of the second and third sentences of the same provision. To avoid redundancy, there is no obligation to notify the Joint Council of the fact that a party is resorting to the special urgency procedure' in the absence of taking a measure (as in Article 96(2)(b)(2) of the Cotonou Agreement).

**In pure Community agreements  
[Article E] Parties to the agreement**

**For the purposes of this Agreement, 'parties' shall mean, on the one hand, the Community, in accordance with its powers, and, on the other hand, [the other party].**

*Comment*

This clause is adapted from the 'parties' clauses of mixed agreements. It has the advantage of minimising the danger that the Community will be responsible for the performance of any obligations under human rights and democracy clauses for which it lacks competence.

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