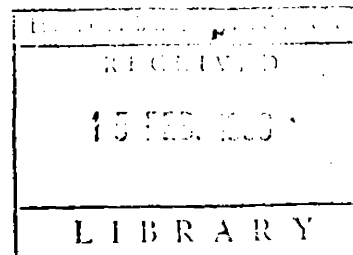


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**The European Union, Human Rights and China.
How China challenges the coherence and efficiency of the EU's
human rights policy in the framework of the CFSP.**

Disseration submitted in fulfilment of the
Master of Laws (LL.M) programme of the
European University Institute, Florence

by

Jo Beatrix Aschenbrenner
59.000 words

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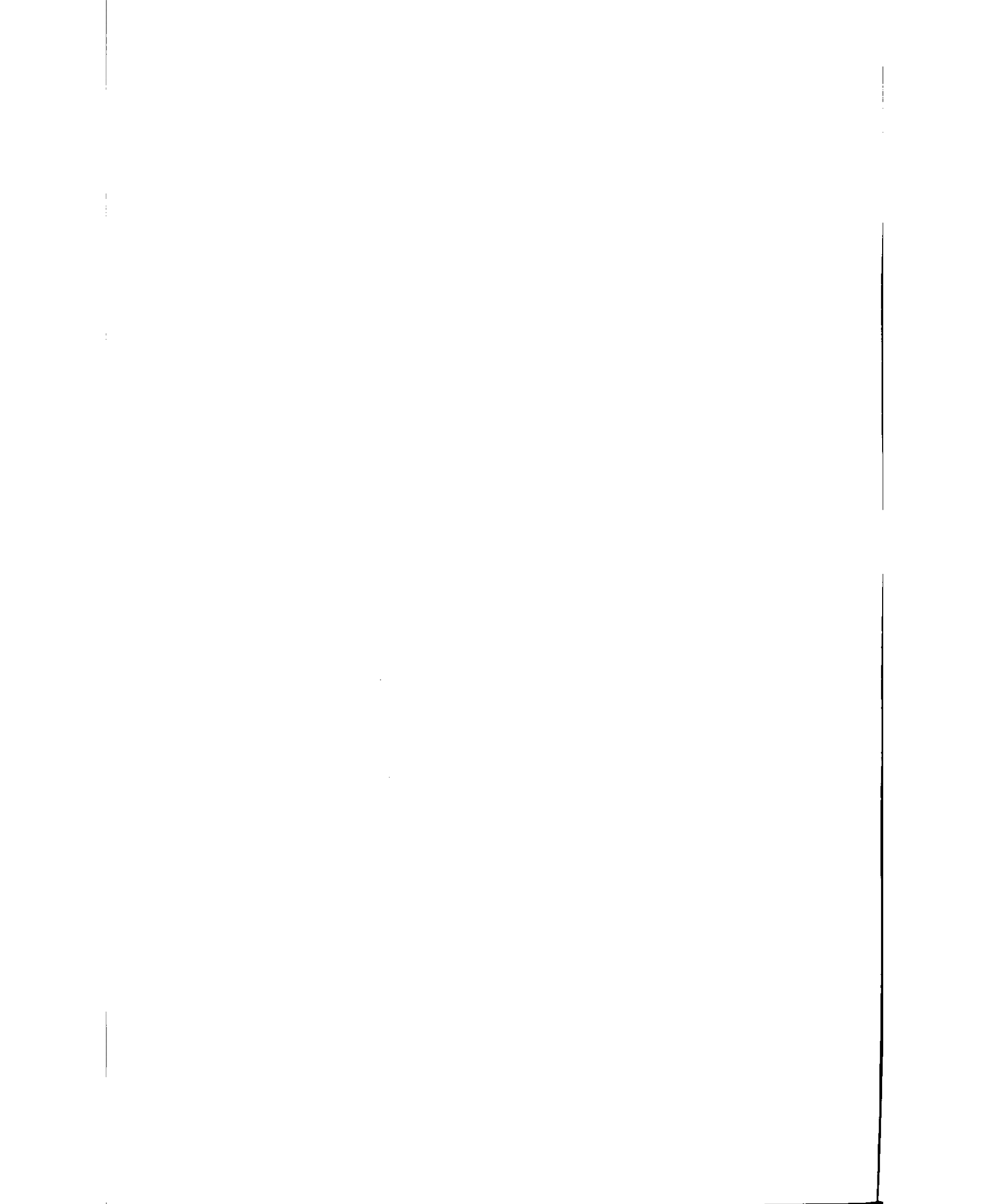
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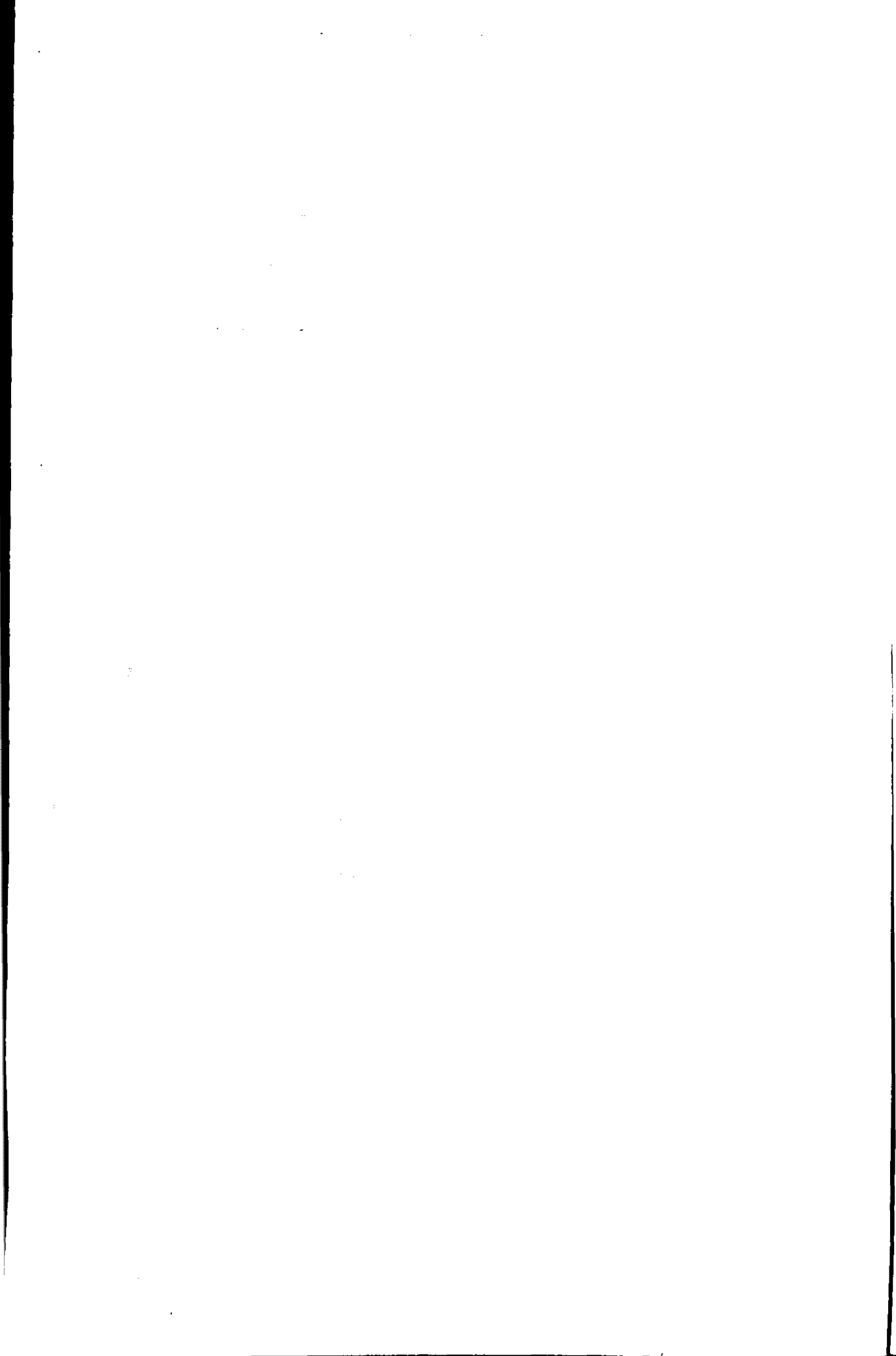


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Acknowledgment

The author wishes to express her appreciation to Professor Philip Alston
for his valuable and friendly guidance.

A special thanks goes to Mac Darrow.



To my grandmother Lolita

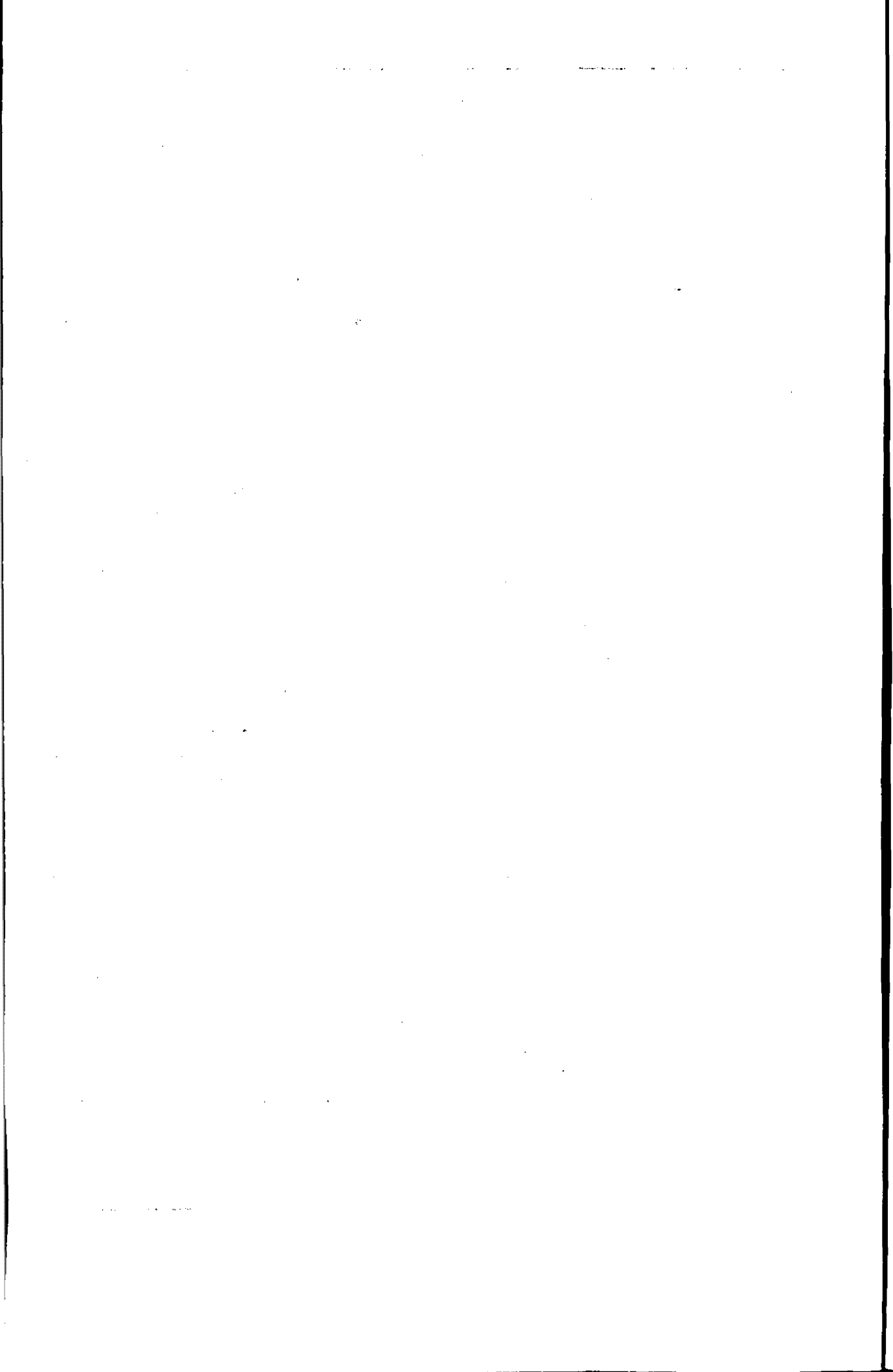


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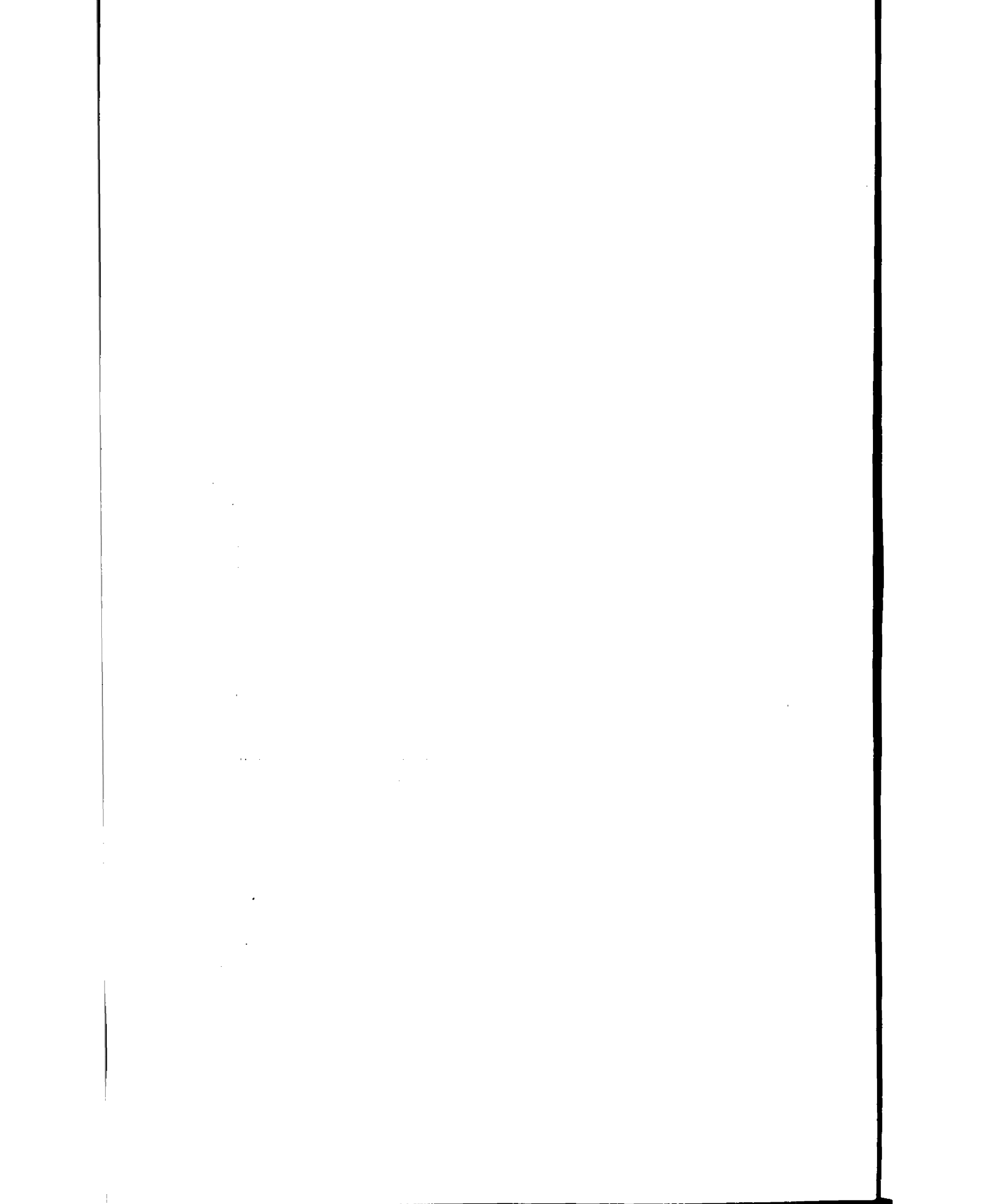
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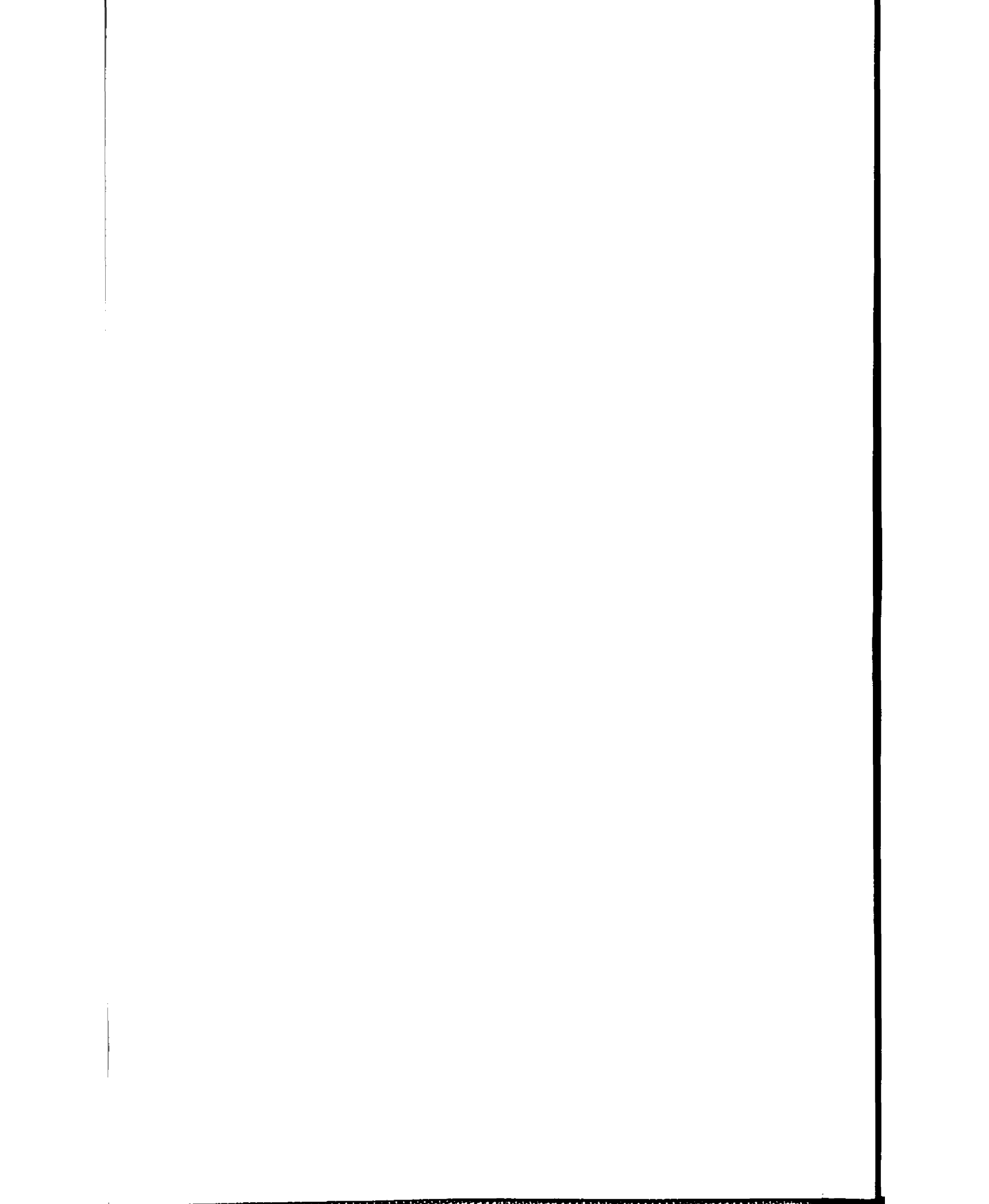
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Introduction

The performance of the European states at the UN Commission in Geneva in the last two years has again shifted the focus on this enormous country. The 15 European states are unable to find a common standpoint with regard to China, not at least because of economic interests. The impressive trade figures growing between the European Union and China gravely question the seriousness of any commitment to human rights on the side of Europe. Neither is a link established between China's accession to the WTO and the observance of human rights, nor are the impressive trade figures of the EU and China used to exert pressure on China. China even seems to reverse the position and to apply commercial bribery and threats to Western countries in response to criticism of its human rights record. If human rights indeed „nominally pertain to political co-operation“¹ instead of to aid or trade, then the current de-linking of human rights from trade with regard to China is nothing to complain about. If however human rights should be more than „deploring the critical situation“, then a human rights policy should also cover hard issues related to aid and trade policies.

The case of China was chosen, on the one hand, because it shows human rights at the crossroads between law and politics, as the protection and enforcement of human rights is both a political and a legal problem. As regards the political side, different understandings and concepts of human rights exist among the states of the world. The legal dimension of human rights enforcement exemplifies the structural weakness of the international legal system in lack of mechanisms to enforce international law.

¹ K. Tomasevski, *Development Aid and Human Rights Revisited*, Pinter, London, 1993, p. 73.



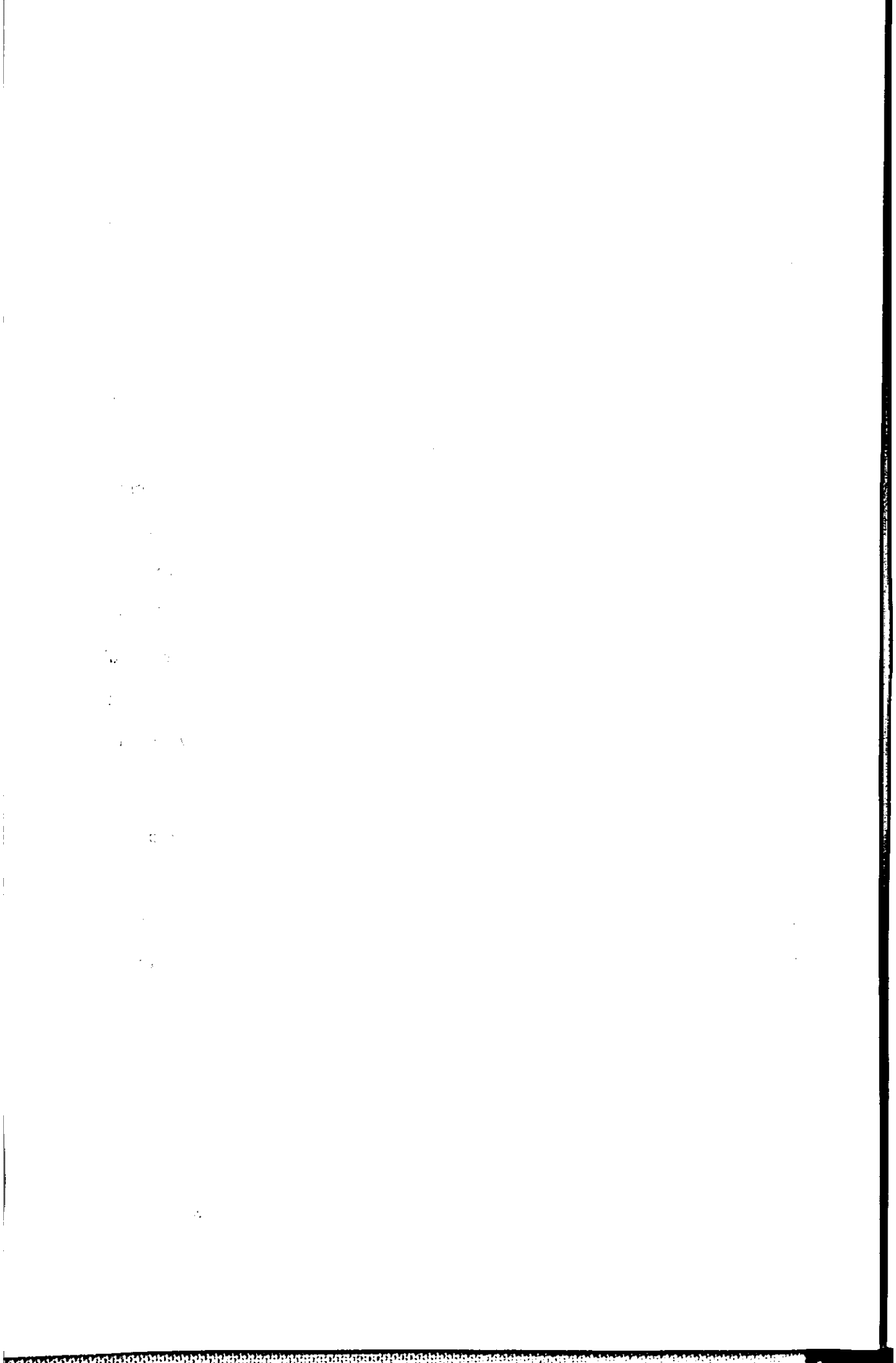
On the other hand, China is a good case to demonstrate the deficiencies and problems still connected with the Common Foreign and Security Policy (CFSP) of the European Union. Can it overcome the divergent economic interests of the Member States or is it too weak a procedure? What are the reasons for the European Union's retreat to the CFSP alone in order to deal with China instead of applying a comprehensive human rights policy? „China is today, by virtue of its size, economic vitality and future potential, of crucial importance from the European perspective as the EU seeks to expand its economic reach in the global context and to develop an effective Common Foreign and Security Policy“.²

This paper is an attempt to trace the development of the Union's human rights policy towards China and to analyse its significance in relation to the needs of China. It is a country in transition, moving from a totalitarian system under one-party rule to a more open society, and perhaps eventually to a state where the principles of pluralist democracy and a market economy are adhered to. Integration into the economic, social and political life of Western Europe („Wirtschaftliberalismus“³) is considered to represent the most appropriate means of ensuring that the events of 1989 will not be repeated.

It is the declared objective of the European Union to make its engagement in human rights more visible. To this end, coherence and targeting are necessary. According to the Commission document „The European Union and the External dimension of Human Rights Policy: From Rome to Maastricht and Beyond“, the first exercise of this kind, it is the Union's obligation to „define and implement a strategy guaranteeing the consistency, impact and efficiency of its activities“. The Union is, besides others, fulfilling this task by an „in-depth analysis of human rights issues in order to develop a

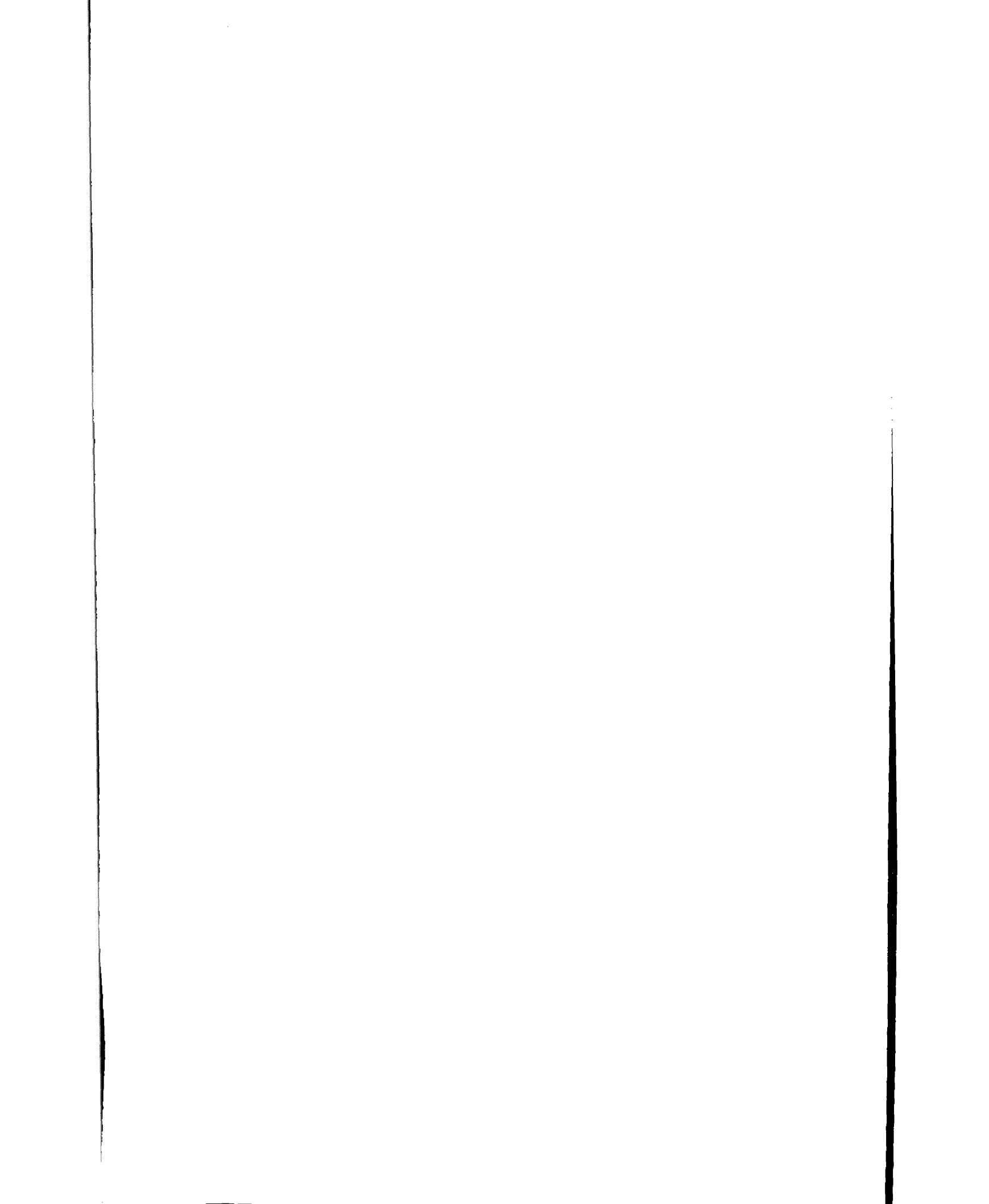
² R. Menotti, „European-Chinese Relations in the Nineties“, in: *The International Spectator*, No.4, October-December 1995, Vol.XXX, pp. 71-85, p. 72.

³ See M. Brenner, „Kritischer Dialog oder Konstruktives Engagement?“, in: *Internationale Politik*, No.9, 1997, Vol.52, pp. 7-12.



range of instruments tailored to the specific needs and features of the countries and regions concerned".⁴ Knowing that this is only one small part of the overall strategy to become visible, coherent and efficient on the world scene, and finally to reach the objective of asserting its identity on the international scene as stated in Art. B of the Treaty of Maastricht (TEU), the paper will nonetheless focus on the tailoring of a human rights policy towards China as this gives enough material for discussion.

⁴ „The European Union and the External dimension of Human Rights Policy: From Rome to Maastricht and Beyond“, COM (95) 567 final, p. 21s.



Chapter 1: The European Union as part of the international system of human rights law

This Chapter starts with describing the international system in which the European Union's human rights engagement takes place by referring to the major international human rights treaties and by giving a definition of human rights. It then, after the structure of the European Union will have been quickly examined, focuses on the CFSP as a framework for human rights protection.

I. The framework of international human rights law

1. The major treaties

International human rights law is closely connected to the UN system, a system that evolved after the cruelties of the second world war. At that time, it was recognized that the human rights of the world's population have to be vindicated and protected everywhere, not only by the states domestically, what had obviously not succeeded, but additionally by the community of states. The major concern of the world community after the war was to achieve peace and prevent the reoccurrence of the horrors of the war. The individual had, for the first time, become a focus of the international legal system. With the foundation of the United Nations in 1945 and the protection of human rights mentioned in the Charter, the human rights movement was born, although these human rights provisions were still „scattered, terse, even cryptic“.⁵ This new emphasis on peace and human rights found elaborated expression in a Resolution by the General Assembly, the Universal Declaration of Human Rights (UDHR) in 1948 and, in legal form, in the subsequent two Conventions, the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on

⁵ H. J. Steiner and P. Alston, *International Human Rights in Context*, Clarendon Press, Oxford 1996, p. 118; see the Charter provisions Art. 1 III, 13 I b, 55, 56, 62 II, 68.

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Economic, Social and Cultural Rights (ICESCR) which were approved in 1966 and entered into force in 1976, which together cover the provisions of the UDHR (except the right of property which was too controversial at that time) and form the so-called International Bill of Rights together with the UDHR. Another set of more specific human rights conventions emerged over the years: The International Convention on the Elimination of all Forms of Racial Discrimination (CERD, 1965), Convention on the Elimination of all Forms of Discrimination against Women (CEDAW, 1979), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, 1984) and the Convention on the rights of the Child (CRC, 1989). The participation of states in this international treaty system has become impressive despite the fact that the treatment of a State's own citizens was for a long time regarded as falling beyond the scope of international scrutiny, as opposed to the treatment of strangers.⁶ More than 3/4 of the world's states have ratified five of the treaties, and fifty percent have even ratified six.⁷

Last, but not least, one important regional treaty system for the protection of human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 concluded by the Member States of the Council of Europe. In the international context, it can be regarded as one of the most developed instruments for ensuring the protection and promotion of human rights.⁸ These treaties provide the framework for any international action on human rights be it within the

⁶ R. B. Lillich, *International Human Rights. Problems of Law, Policy and Practice*, Second Edition, Little, Brown and Company, Boston 1991, p. 5.

⁷ Report by the Committee on International Human Rights Law and Practice, in: J. Crawford (ed.), *International Law Association, Helsinki Conference 1996*, International Law Association, London 1996, p.338; for the exact numbers see J. B. Marie, „Instruments Internationales relatifs aux Droits de l'Homme: Classification et état des ratifications au 1er Janvier 1997“, in: *Revue Universelle des Droits de l'Homme*, No.1-4, 1996, Vol.8, pp. 89-105.

⁸ N. Dorr, „An Introduction to Human Rights: Developments since 1945“, in: Liz Heffernan (ed.), *Human Rights. A European Perspective*, Round Hall Press, Dublin 1994, pp.1-19, p. 17.

respective international fora or by including human rights in the individual policy of states (and of the EU).

2. What are human rights?

The term „human rights“ has two implications.⁹ The first is that they form the rights every *human* being should have just because one is a human being and potentially able to exercise rational choice, seen as the relevant parameter to distinguish human beings from, for example, animals. One does not have to earn human rights, they do not depend on citizenship (as opposed to fundamental rights), by definition they cannot be taken away and, finally, derive from the inherent dignity of the human person. The second is that they are *rights*, which means they entitle the human being to claim the right from those who deny it and that they give precedence to other political or moral matters (human rights as trump card) independently of the country and political system in which the person lives.¹⁰ Admittedly, the right (the entitlement) might not be a *legal* right (in the sense of being guaranteed in the laws of the country), but it is always a *human* right.¹¹ Human rights have become internationalized through their successive codification in international law (see the treaties above) and thus are progressively taken out of the solely control of the nation states. Nevertheless, their protection on the international level is not as easy as that, but provides us with many contentious issues.

Where do the rights come from? Some argue, international human rights are *natural rights* which existed before mankind entered into civil society with other human

⁹ J. Donnelly, R. E. Howard, „Introduction“, in: J. Donnelly, R. E. Howard (eds.), *International Handbook of Human Rights*, Greenwood Press, New York 1987, pp. 1-28, p. 1.

¹⁰ A. Kent, *Between Freedom and Subsistence. China and Human Rights*, Oxford University Press, Hongkong 1993, p. 7 says that every fundamental human right has got three correlative duties: to avoid depriving, to protect from deprivation and to aid the deprived.

¹¹ A. Sen, „Human Rights and Asian Values“, in: *The New Republic*, July 1997, pp. 33-40, p. 39.

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beings. As truths of nature, they are even seen as „rationally self-evident“ belonging to the human being. In entitling human beings to exercise their rights, to protect their personal sphere and to challenge the established political authority, natural rights -in line with liberal thought- were basically concerned with individuals and with their negative freedoms.¹² Bentham, one of the main protagonists of the legal positivist movement, has expressed its discontent with natural rights being declared the basis of law by saying that talk of natural rights „is simply nonsense; natural and imprescriptible rights (an American phrase), rhetorical nonsense, nonsense upon stilts“.¹³ Asking Bentham or other positivists about the concept of *moral rights* as a base for human rights, this concept does probably merit the same comment of being „nonsense“.¹⁴

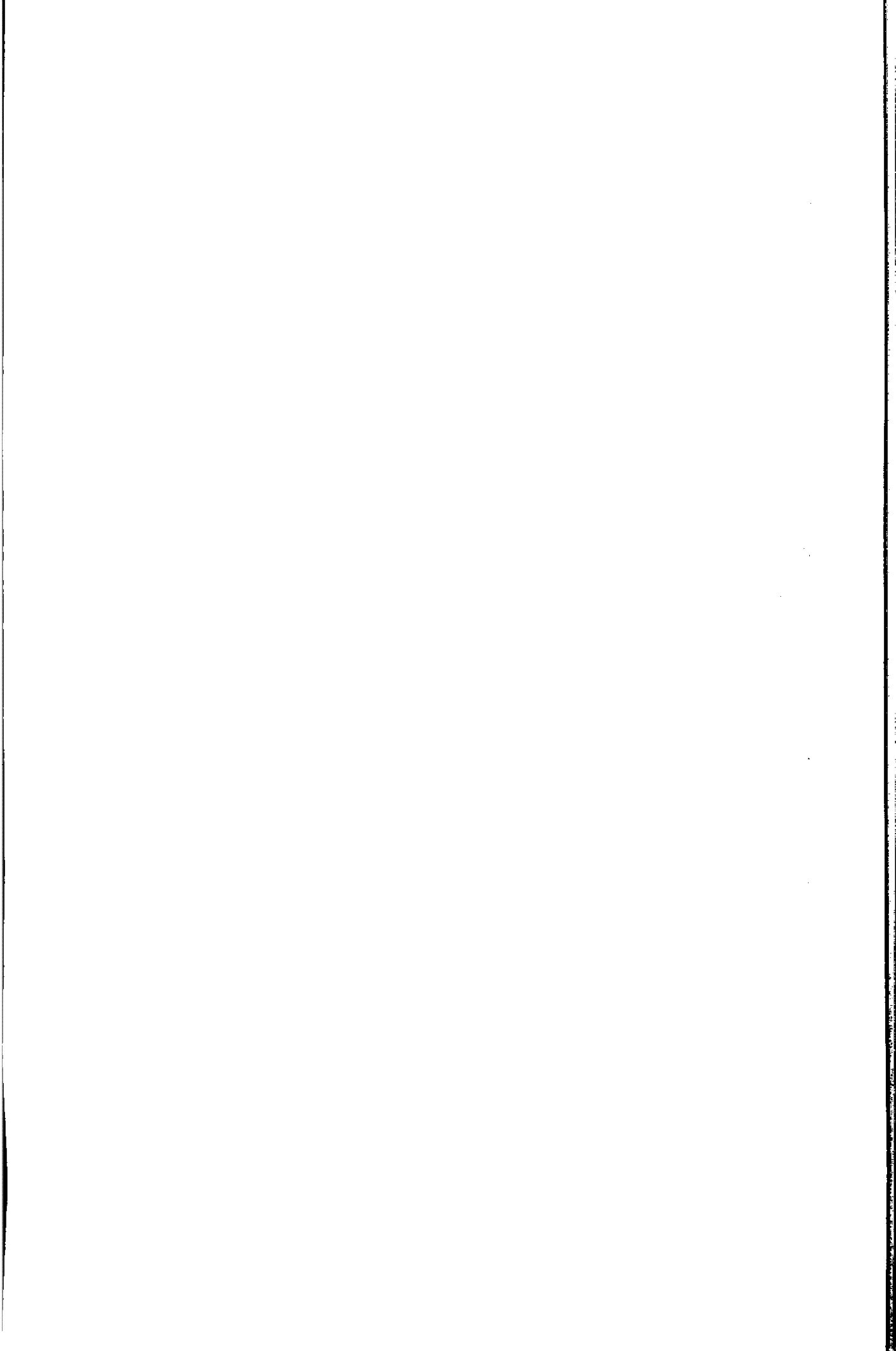
If international human rights derive from *codified law* (and not from natural or moral law), does this then mean that by agreeing to the international conventions cited above all the problems have been solved and states have agreed actually to grant the rights codified, or are there still barriers to the execution of these rights? Liberal ideas are said to have influenced the codification of the international human rights treaties. First, not only the Declaration of Independence of 4th July 1776, but also the Declaration of the Rights of Man and of the Citizens of 26th August 1789 are seen as predecessors of the present human rights' system and they, in their turn, reflect the tradition of liberal thought and natural rights. The innovation after the Second World War was not to grant rights to the human being, but to name these rights „human rights“, instead of „natural rights“ the idea remaining the same.¹⁵ Moreover, by the time of drafting the UDHR, the UN membership stood at 56 states and the now developing countries were

¹² D. Sidorsky, „Contemporary Reinterpretations of the Concept of Human Rights“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 170s.

¹³ J. Bowring (ed.), *The Works of Jeremy Bentham*, II, Russel & Russel, New York 1962, p. 501.

¹⁴ M. Cranston, *What are Human Rights?*, Bodley Head, Oxford 1973, p. 7: „In classifying human rights as moral rights it is important to notice something which distinguishes them from other kinds of moral rights. This is that they are universal.“

¹⁵ B. Weston, „Human Rights“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 168.

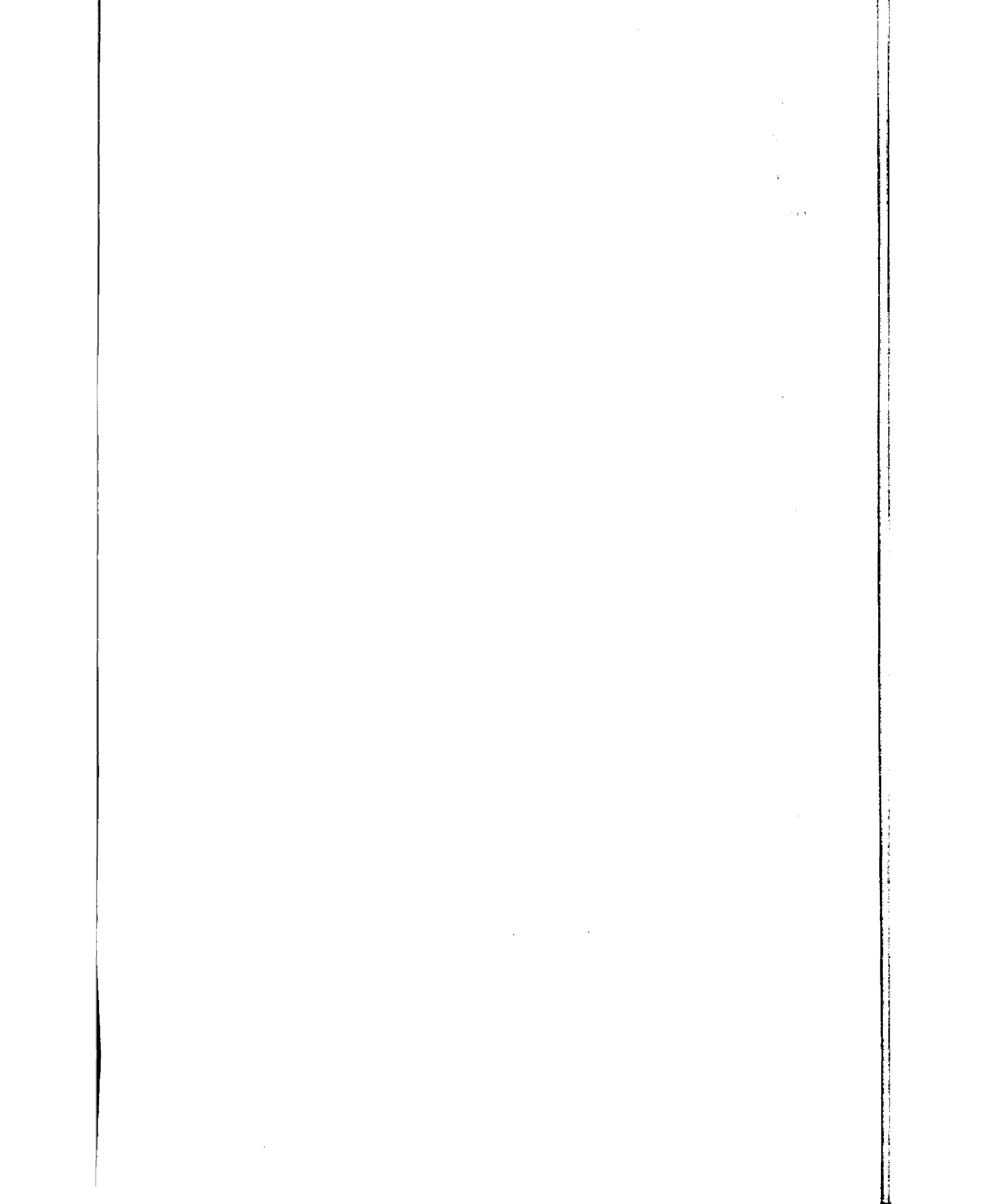


often still colonies or simply not members of the UN. Red China, for example, has only been a UN member since 1971, because at that time it was becoming clear that White China, the exiled Koumintang regime in Taiwan, would not resume its powers in the People's Republic of China and after the change of US policy it was widely accepted that Red China was the legitimate state successor.¹⁶ Nevertheless, the drafters of the UDHR took different views about culture and society into account and did not believe in individualism and its protection as the only valid way of governing society.¹⁷ The codification in a time and in surroundings of liberalism does not forcibly mean that other traditions, religions, cultures and societies were disregarded, nor that these traditions could not display elements of liberal thought. Another drawback is that codified human rights, as contained in the treaties, might well be comprehensive, but are not comprehensively signed and ratified by all countries of the world. Thus in stating human rights to be the codified rights of the international community, states can escape obligations by not adhering to the treaties. Consequently, the obligations must exist in other forms as well, be it customary law or general principles of law (Art. 38 of the Statute of the ICJ).

Which rights are human rights? In the natural law tradition of the predecessors of the international human rights movement, the natural rights included in the Declaration of Independence of 4th July 1776 and the Declaration of the Rights of Man and of the Citizens of 26th August 1789 were civil and political rights. After the Second World War, economic, social and cultural rights were included in that list by the UDHR, followed by a „third generation“ of rights launched by the recognition of the right to

¹⁶ U. Fastenrath, in: B. Simma (ed.), *The Charter of the United Nations, A Commentary*, Oxford University Press, Oxford 1994, Art. 3, No.8.

¹⁷ See, for example, American Anthropological Association, „Statement on Human Rights“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 198; The UDHR is neither a purely liberal document, nor can it be attributed to a single other tradition.



development by the UN Declaration on the Right to Development in 1986.¹⁸ Perceptions of which rights to protect differ from one country to another, so that whilst Third World countries traditionally emphasize economic and social rights, Western countries stress civil and political rights (see also below, China's position, Chapter 2).

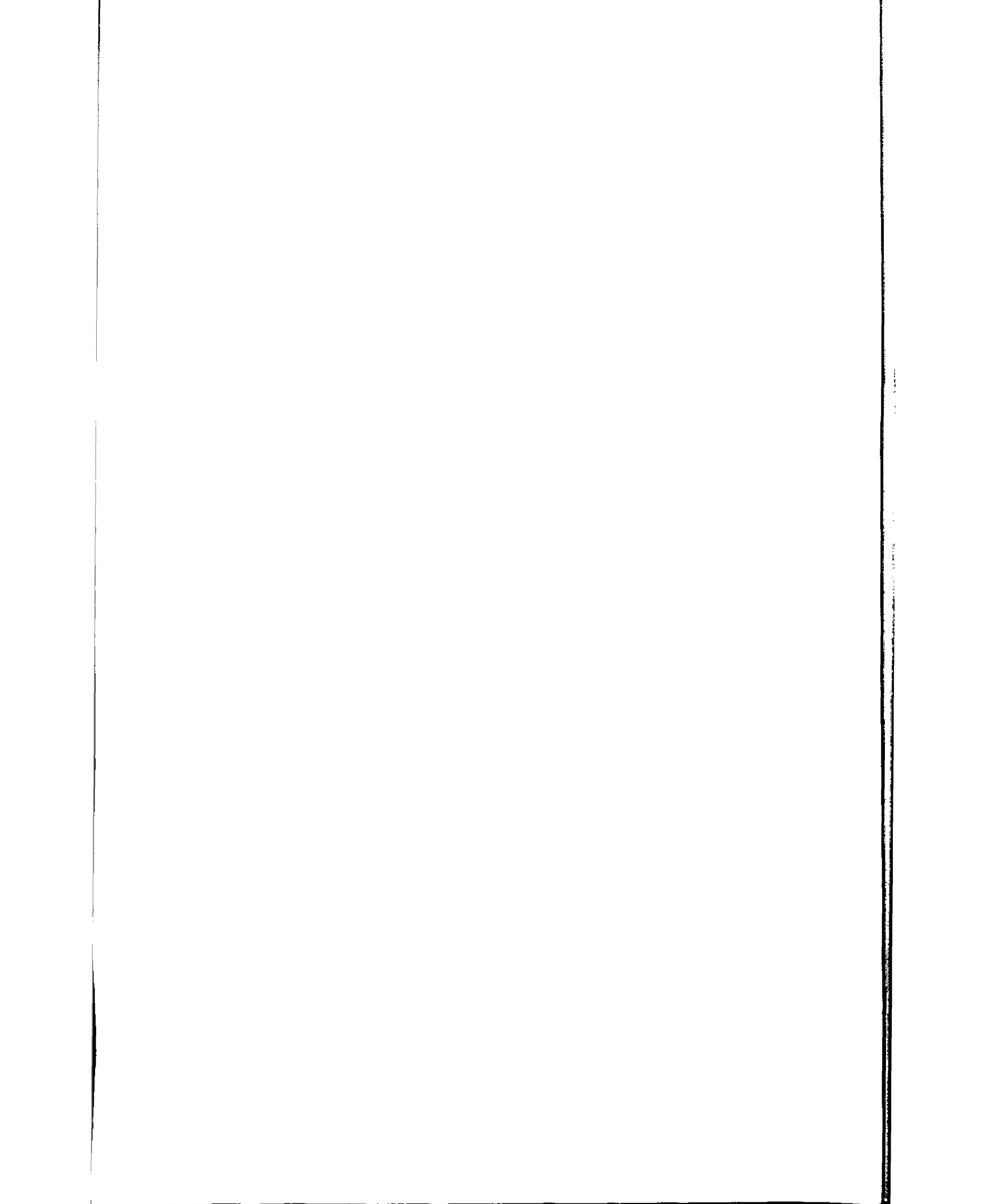
A great deal of this different respect of human rights is due to the fact that „rights“ and „politics“ are very close in this area of international law. Are human rights rights or political concepts? The rights discourse claims to explain and resolve social and other conflict by solely referring to the norm and applying it. The right itself is the basis of all interpretation. But the high level of abstraction, especially in the field of human rights („inhuman“, „degrading“, „equal protection“, right to health“), makes rights concepts so elastic that they can mean different things to different people.¹⁹ It would be misleading to believe that rights can be concretized without opening them to other disciplines such as social theory or political philosophy, and thereby they have to be „politicized“.²⁰ International human rights law is law, because it consists of mutually agreed norms of the state community to institutionalize state behaviour towards its citizens, and because it can be enforced by sanctions.²¹ The inherent contradiction

¹⁸ Ch. Loh, „The Vienna Process and the Importance of Universal Standards in Asia“, in: M. C. Davis (ed.), *Human Rights and Chinese Values*, Oxford University Press, Hong Kong 1995, pp. 145-167, p. 152.

¹⁹ K. Klare, „Legal Theory and Democratic Reconstruction“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 178s.

²⁰ For a very strong view of the political nature of human rights see M. Koskenniemi, „The Politics of International Law“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 50ss; Whilst talking about the increasing politicization of human rights in the UN, Lillich still submits that „Human Rights cannot, nor is it desirable that they should, be divorced from politics“, R. B. Lillich (note 6), p. 12; see also M. Koskenniemi, „International Law Aspects of the Common Foreign and Security Policy“, in: M. Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer 1998, pp. 27-44.

²¹ The law is a set of rules formally adopted by an (...) authority, and backed up by coercive sanctions, with the functions of institutionalizing and standardizing the social behaviors of individuals, organizations and governments, Chenguang, W., „Introduction: An Emerging Legal System“, in: Chenguang, W., Xianchu, Z. (ed.), *Introduction to Chinese Law*, Sweet & Maxwell, Hong Kong et al. 1997, pp. 1-30, p. 3.



between the law of human rights being dealt with and constructed by states (who send their political representatives along), but focusing on the *restraint* of governments can only be resolved through international co-operation and through the strengthening of institutions. The need for law to be open to politics and the intent of many governments to move away from the legal framework, because it impacts upon their political system and prescribes them how they have to treat their citizens, is a serious threat to the compliance with human right standards.²²

Are not duties as important as rights? Last, but not least, the question of „What are human rights“ cannot be answered without taking a quick look to the (corresponding) concept of duty which recently has found international expression in a draft document on an Universal Declaration on Human Responsibilities.²³ One provision of the UDHR also deals with duties and that is Art. 29, but it was not reproduced in any Convention, because the field of duties was left to regulation by states. In other cultures different fundamental words dominate the legal sphere. In Jewish law, for example, „an entitlement without an obligation is a sad, almost pathetic thing“.²⁴ In Chinese society, duties are set up for every level of society and often regarded as more important than pursuing individual rights.²⁵

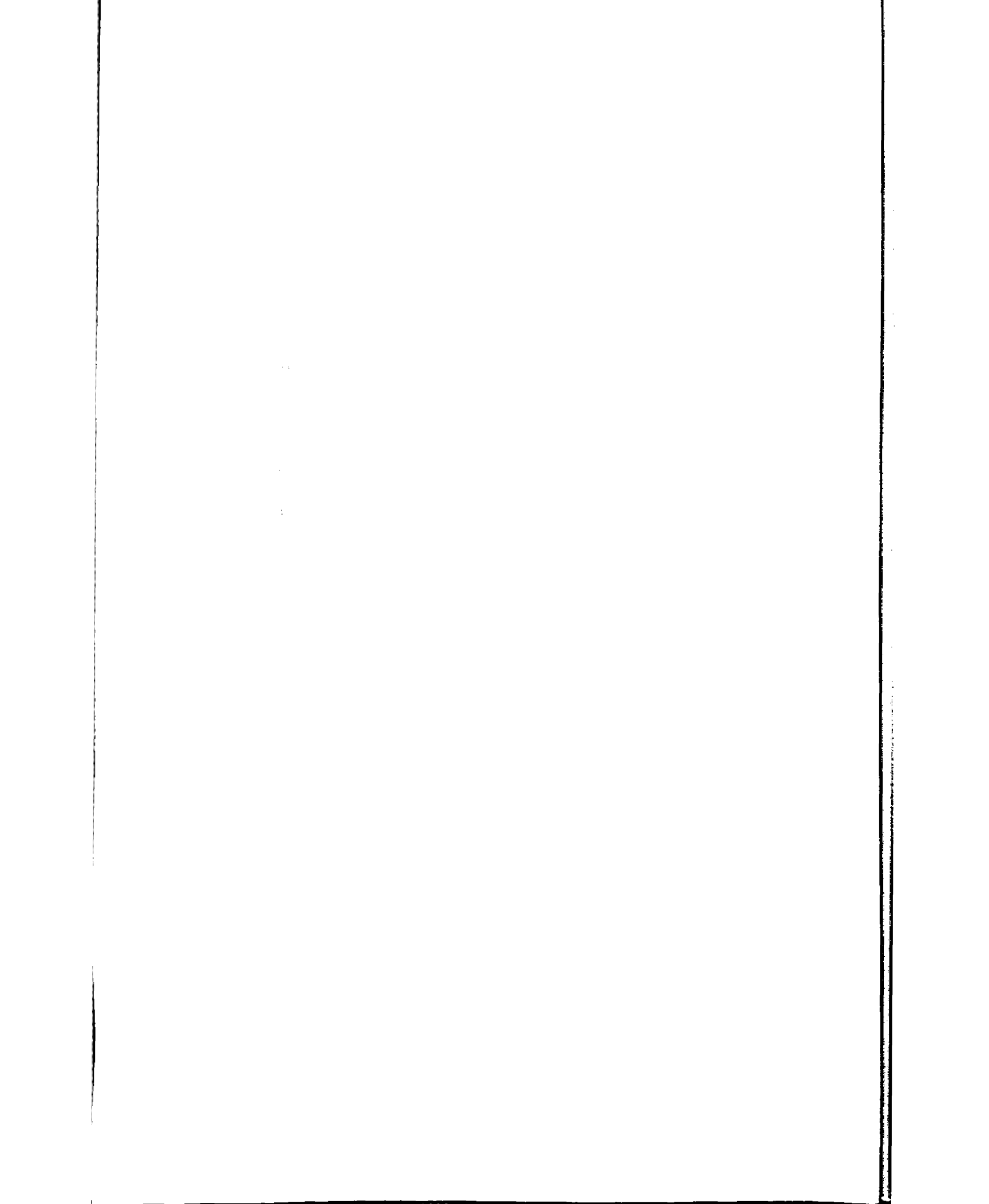
To sum up, human rights are entitlements of international law whose normative content involves the protection of the human dignity inherent in every human being all over the world, but whose implementation depends to a great extent on politics and state will to give life to the treaty provisions.

²² L. Henkin, „International Law: Politics, Values and Functions“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 350s.

²³ High level expert group meeting convened by the InterAction Council Noordwijk Forum, chaired by H. Schmidt, 20-22 April 1997, Vienna.

²⁴ R. Cover, „Obligation: A Jewish Jurisprudence of the Social order“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 182.

²⁵ M. Ng, „Are Rights Culture-bound?“, in: M. C. Davis (ed.) (note 18), pp.59-71, p.63s. She takes the prescription of duties in order to show that there also was a kind of concept of right in Confucian thought.



II. Who is the European Union in the international context?

1. Peculiarities of the treaty structure

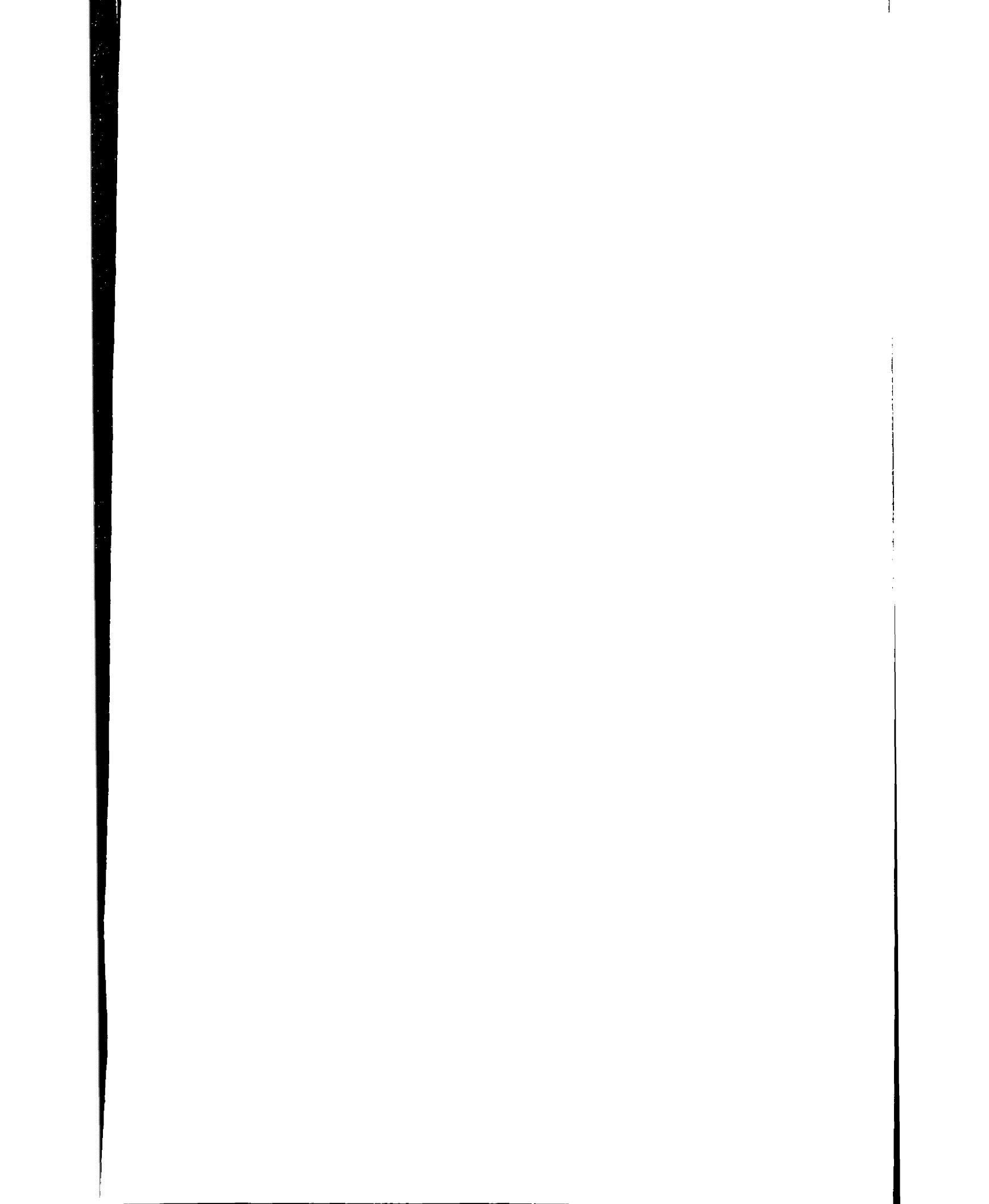
The Union is founded on the European Communities, the Common Foreign and Security policy (CFSP) and the Cooperation in the fields of Justice and Home Affairs (JHA).²⁶ The European Union is a new stage in the process of creating an ever closer union among the peoples of Europe (Art. A .2) and represents the „ultimate objective of the European integration“,²⁷ which, since Maastricht, has been widened from the economic to a political dimension by, amongst other things, the introduction of the CFSP and the JHA. In the early days after Maastricht there was much enthusiasm for the legal personality of the Union as declared by some authors.²⁸ A favourable interpretation of the CFSP treaty provisions supported this assumption. First, other than in the European Political Cooperation (EPC), it is no longer the „treaty members“ (Art. 30 I EEA), but „The Union and its Member States“ which shall define and implement the policy (Art. J.1 I TEU).²⁹ Second, Art. J.1. IV claims that the Member States „shall support the Union’s external security policy actively“ and Art. J.4. IV talks about the policy of the „Union“. Third, in Art. J.5 the assumption that there is a single EU-actor is made even more convincing by the statement that the Presidency shall represent the „Union“, and not the Member States. Moreover, Art. O mentions accession „to the Union“ and it has been submitted that, as new members could only adhere to a legal entity, the Union had become a legal personality through the implicit

²⁶ The pillar construction is commonly used to describe this phenomenon.

²⁷ P. S. R. F. Mathijssen, *A Guide to European Union Law*, 6th edition, Sweet & Maxwell, London 1995, p. 5.

²⁸ see G. Ress, Editorial, in: *Juristische Schulung*, No.12, 1992, Vol.32, p. 985; G. Ress, „Democratic decision making in the European Union and the role of the European Parliament“, in: D. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of H. G. Schermers*, Vol.II, Nijhoff, Dordrecht 1994, pp. 153-176, p. 156; contrary opinion see references B. Simma/Ch. Vedder, in: E. Grabitz (ed.), *Kommentar zur Europaeischen Union*, Art. 210, No. 6.

²⁹ With Amsterdam, Art. 11 (CV) TEU names only the Union as addressee of the provision.



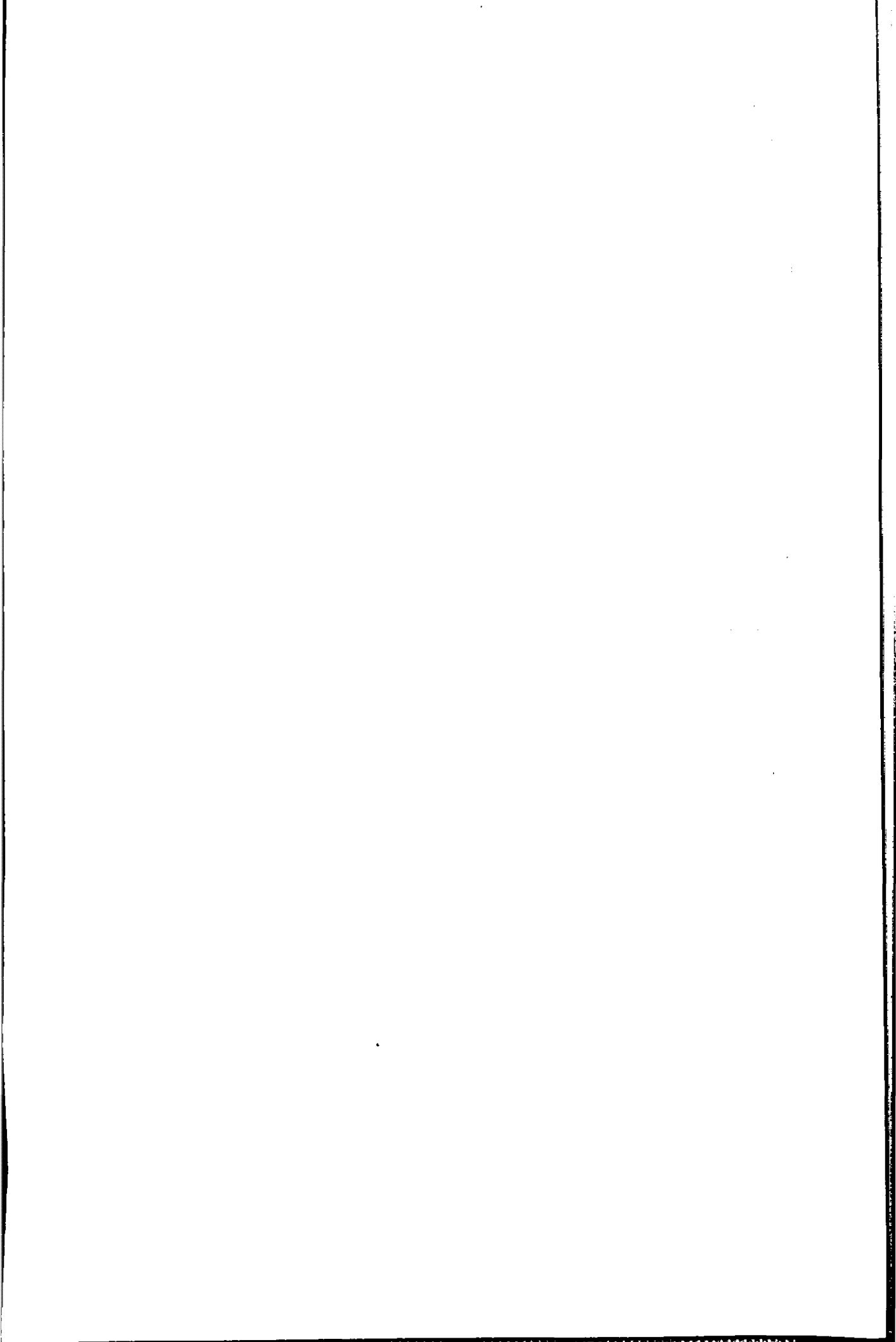
will of its founding states. In the end, however, the common opinion still is that the European Union does not enjoy legal personality, notwithstanding the references in the treaty.³⁰ In order to bestow an organization with legal personality, it has either to be explicitly stated somewhere in the treaty or must be deductible from other treaty provisions. Both is mostly denied with regard to the European Union. Even after the 1996 Intergovernmental Conference and with the Treaty of Amsterdam, the incertitude as to the status and role of the European Union has not been solved.³¹ The allegedly missing legal personality has as a consequence that in the case of the conclusion of an international agreement in the fields of the CFSP, the Union can only act through its Member States which perform the necessary acts.³² To sum up, in terms of legal personality the Union does not exist in the international context, but has remained a form of integrated co-operation among states (the correct formula should be: „the

³⁰ see H. Lecheler, „Der Rechtscharakter der ‘Europäischen Union’“, in: Jörn Ipsen, Hans-Werner Rengeling, Jörg M. Mössner, Albrecht Weber, *Verfassungsrecht im Wandel*, Carl Heymanns Verlag, Köln 1995, pp. 383-393; M. Pechstein, „Rechtssubjektivität für die Europäische Union?“, in: *Europarecht*, No.2, 1996, Vol. 31, pp. 137-144.

³¹ No explicit reference to the international legal personality appears in the Treaty, see T. Dodd; R. Ware; A. Weston, *The European Communities (Amendment) Bill: Implementing the Amsterdam Treaty*, Research Paper No.97/112, International Affairs and Defence Section, Hous of Commons Library, 5.11.1997, p.57; the widespread implicit allusions which could also be interpreted as done above, have nonetheless no legal meaning, because the Member States expressed their common consent not to bestow the Union with legal personality, even though it was a matter of concern in the run-up to the Intergovernmental Conference 1996. The main argument against a legal personality of the EU was that then the legal personality of the EC would have to end and this was at the moment neither desirable nor feasible. Moreover, the EU would have to be given a procedure for the negotiation and conclusion of international agreements, A. A. Dashwood, „Position Paper“, in: A.A. Dashwood (ed.), *Reviewing Maastricht*, Sweet & Maxwell, London 1996, p.220s.

The discussion, however, has not finished yet. More and more sholars seem to support the idea of an international legal personality for the Union. The author is currently involved in an analysis and interpretation of the Union's structure in the context of her Phd

³² Art. 24 of the Consolidated Version (CV) of the TEU introduces a limited treaty-making power of the EU in the field of the CFSP, and Art. 38 does the same for the JHA. But neither accords legal personality *as such* to the EU, because the power to conclude agreements is restricted to a very limited purpose („when it is necessary to conclude an agreement with one or more States or international organizations in implementation of this title“) and it is moreover clarified that this treaty-making power does not „imply any transfer of competence from the Member States to the Union“ (Declaration 4 of the Amsterdam Treaty), T. Dodd; R. Ware; A. Weston, see above, p. 57s.



Member States acting within the framework of the Union“, and not „the Union acts“³³) based on the three pillars, the last two being intergovernmental.

The EC, on the other hand, as an international organization, is a subject of public international law endowed with legal personality by its Member States; this is documented in Art. 210 TEC and confirmed by Art. 113, 229-231, 238 TEC giving international competences to conclude agreements with third states.³⁴ In using its external competences, the EC has become member of two international treaties - the GATT and the FAO³⁵ -, party to several international conferences (and their respective concluding documents) and to several international agreements between it and third states (trade and co-operation agreements). For third states this split of competences is very confusing given that in international fora the Presidency speaks on behalf of the *Union*, but when it comes to the negotiation of an agreement, the counterpart might be the Commission representing the *EC*³⁶ or a Foreign Minister representing a *Member*

³³ But the Council agreed to issue political statements on behalf of the Union, Decision of the Council, 93/591/EU, EG, EGKS, Euratom, 8.11.93; G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.), *Kommentar zum EU/EG Vertrag*, Art. J.5, No.3; Another indication for the possible legal personality of the Union.

³⁴ B. Simma/Ch. Vedder, in: E. Grabitz (ed.) (note 28) , Art. 210, Nr. 2; Also Art. 130y I, 130m II, 130r IV, 126-129, 129c, 73c TEC; Moreover the ERTA jurisdiction of the ECJ accords implicit external competences to the EC whenever there is an internal competence and whenever the EC cannot use this internal competence without having recourse to external competences as well.

³⁵ European Commission, *General Report on the activities of the European Union 1996*, Luxembourg, Office for official publications of the EC 1997, p. 291, pt. 746, the Community has been a full member of FAO since 1991.

³⁶ Or the Council, if the *conclusion* of the agreement is concerned, art. 228 TEC. Adding up to the confusion, the EC also is represented in many different ways ranging from a common delegation of EC and MS, to separate delegations of the MS and the EC, where the EC is either represented only by the Commission or by the Commission and the Presidency (bicephalous) or by the Commission, the Presidency and the MS (multicephalous), Ch. Vedder, in: E. Grabitz (ed.) (note 28), Art. 228, No.29. In practice, it appears, the Community and the Union are represented both by the Troika as this comprises the different modes of representation, although the Commission's role is more limited in the Troika (CFSP) than in a Community delegation.

State (in the case of a mixed agreement or as long as it is within Member States' competence).³⁷

2. Implications of the treaty structure for human rights³⁸

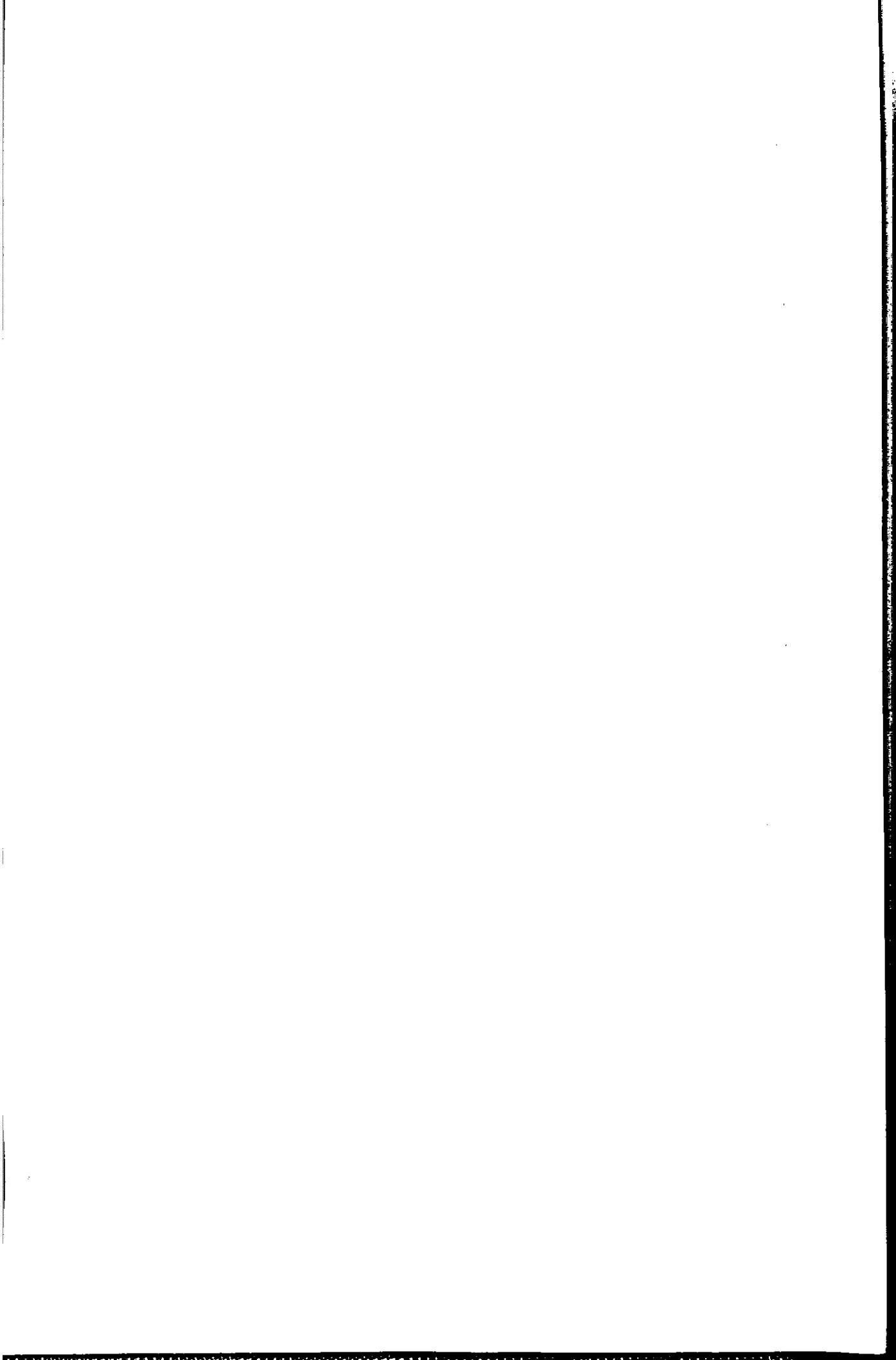
International human rights are a part of a comprehensive foreign policy.³⁹ In applying the discussion of the nature of the Union to human rights matters, several aspects of the Union's engagement therein, which cannot be found in a nation state, have to be distinguished: first, the Union's presence in human rights is more than the CFSP. It is the EC⁴⁰ and the EU engagement in international human rights' protection through either first pillar (Art. 113, 130uss, 238, 229-231 TEC) or second pillar (CFSP) measures, according to which different procedures apply. Second, the instruments of the CFSP aim, eventually, at forming a European identity in human rights (Art. B TEU) by giving more political weight to the Union. But, a contradiction arises from the missing legal personality of the European Union: how can the Union possibly assert

³⁷ A.A. Dashwood, Position Paper, in: A.A. Dashwood (ed.) (note 31), p. 220.

³⁸ To clarify the complicated issue, I am using the term „Union“ when referring to both the EC and the EU's foreign policy together, and the term „EU“ when referring to the CFSP alone.

³⁹ At least in the „liberal“ tradition that seeks to include moral issues in foreign policy as opposed to (neo-) realists; See for this important discussion S. Burchill, „Realism and Neo-realism“, in: S. Burchill, A. Linklater (eds.), *Theories of International Relations*, Macmillan Press, Houndsmill 1996, pp.67-92; S. Burchill, „Liberal Internationalism“, in: *ibid.*, pp.28-66, p.29, the moral aspirations of states are thwarted by the absence of a hierarchy in the international system. Thus the anarchical nature generates a system of power politics; R. B. Lillich, F. C. Newman, „The Carter Administration's Human Rights Initiatives“, in: R. B. Lillich, F. C. Newman (eds.), *International Human Rights: Problems of Law and Policy*, Little, Brown and Company, Boston et al. 1979, pp.824-871, p.826 the times of Kissinger, p.828 when and if human rights are supported depends on the coincidence with national interests and a analysis of the (low) political costs; A.-M. Slaughter Burley, „International Law and International Relations Theory: A Dual Agenda“, in: *AJIL*, No.2, 1993, Vol.87, pp.205-239, p.207; B. Soetendorp, „The Evolution of the EC/EU as a Single Foreign Policy Actor“, in: Walter Carlsnaes, Steve Smith (eds.), *European Foreign Policy. The EC and Changing Perspectives in Europe*, Sage, London 1994, pp.103-119, p.105; K. Waltz, *Theory of International Politics*, McGraw Hill, New York 1979.

⁴⁰ Trade policy is also foreign policy, P. Alston, „International Trade as an Instrument of Positive Human Rights Policy“, in: *Human Rights Quarterly*, No.2, 1982, Vol.4, pp. 155-183, p. 156.



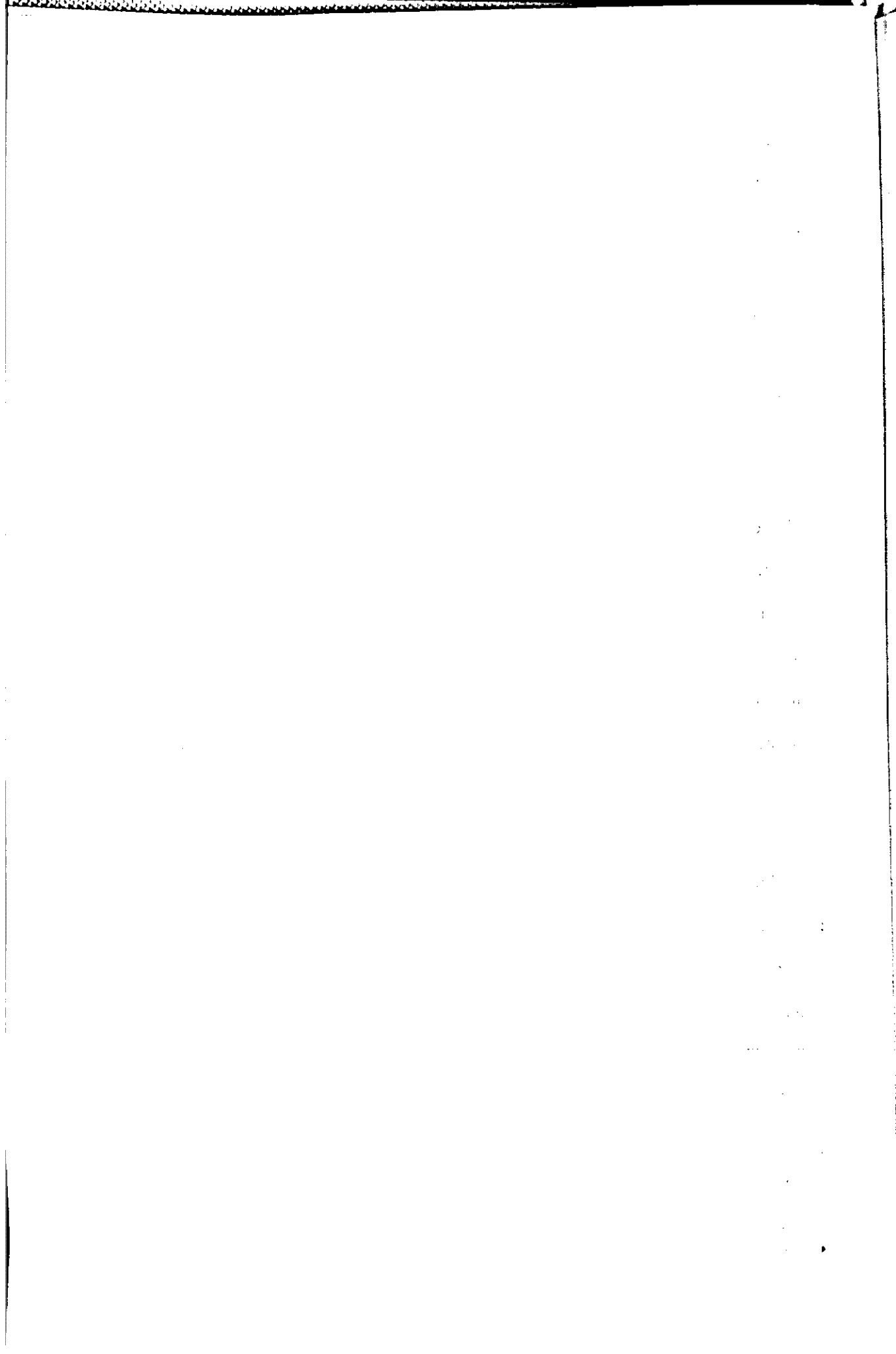
its „identity“ (Article B TEU)⁴¹ on the international scene if it does not even exist in public international law? The „international scene“ refers to all relations of the Union with third states and international organizations, and these relations are conducted within the foreign policy of the Union. The „new“ foreign policy (CFSP) *supplements* the EC (Art. A III TEU) which implies that the EC remains the principal entity of the Union, but that two new policy areas have been given to the Union to become operational at the international level.⁴² The answer to the contradiction is that the - legally non-existent- Union has been accorded the means to assert its *political* appearance in the global arena by the introduction of the CFSP in the TEU. And third, the Union is obliged by Art. C II to ensure the consistency of all *human rights* policies under the first (aid and trade, second generation conditionality) and the second pillar (CFSP) and their necessary co-ordination, as well as of Member States' human rights policies. Any further discussion of the *Union's* human rights policy has to take this split of competences in human rights between the EC, the EU and the Member States into account and to clarify that the human rights policy within the framework of the CFSP is (at least legally⁴³) distinct from that of the EC (although both are part of the Union), and of course distinct from the un-coordinated policies of the Member States.

The Union is a presence on the international scene, differing from state actors by its complicated composition and decision-making process. The aim of the present paper is to look more closely at the CFSP mechanism and its implications for an effective human rights policy for the Union by investigating upon the use of CFSP instruments

⁴¹ The EU's objective of asserting its identity (Art. B) „is of particular interest since it provides for joint action towards third countries, when until now the Member States have had a strong tendency to act individually in that area“, P. S. R. F. Mathijsen (note 27), p. 6.

⁴² P. S. R. F. Mathijsen (note 27), p. 394s: Art. A TEU stresses the fact that the CFSP is the foreign policy of the *EU* and not of the EC by stating that the Union is founded on the European Communities, *supplemented* (emphasis added) by the policies and forms of co-operation established by this Treaty.

⁴³ In practice, the same persons act, i.e. the Ministers in the Council of Ministers. But procedures and rights of the single organs are different according to which pillar is concerned. This is especially true for the Commission, the Parliament and the Court (see below).



in general and particularly towards China. If an international actor decides to make human rights an essential element of its foreign policy and assumes the international obligation in that field, it, according to Jack Donnelly⁴⁴, has to take certain steps: first, it must select a particular set of rights to pursue, secondly, it needs to explore the legal and moral implications of an intervention in a third state on humanitarian grounds and lastly, the concern of human rights has to be included in the broader foreign policy goals the international actor wants to follow.

The next section will discuss the evolution of an active human rights policy within the Union having these three issues in mind.

III. The CFSP

1. The CFSP as a mechanism to conduct foreign policy

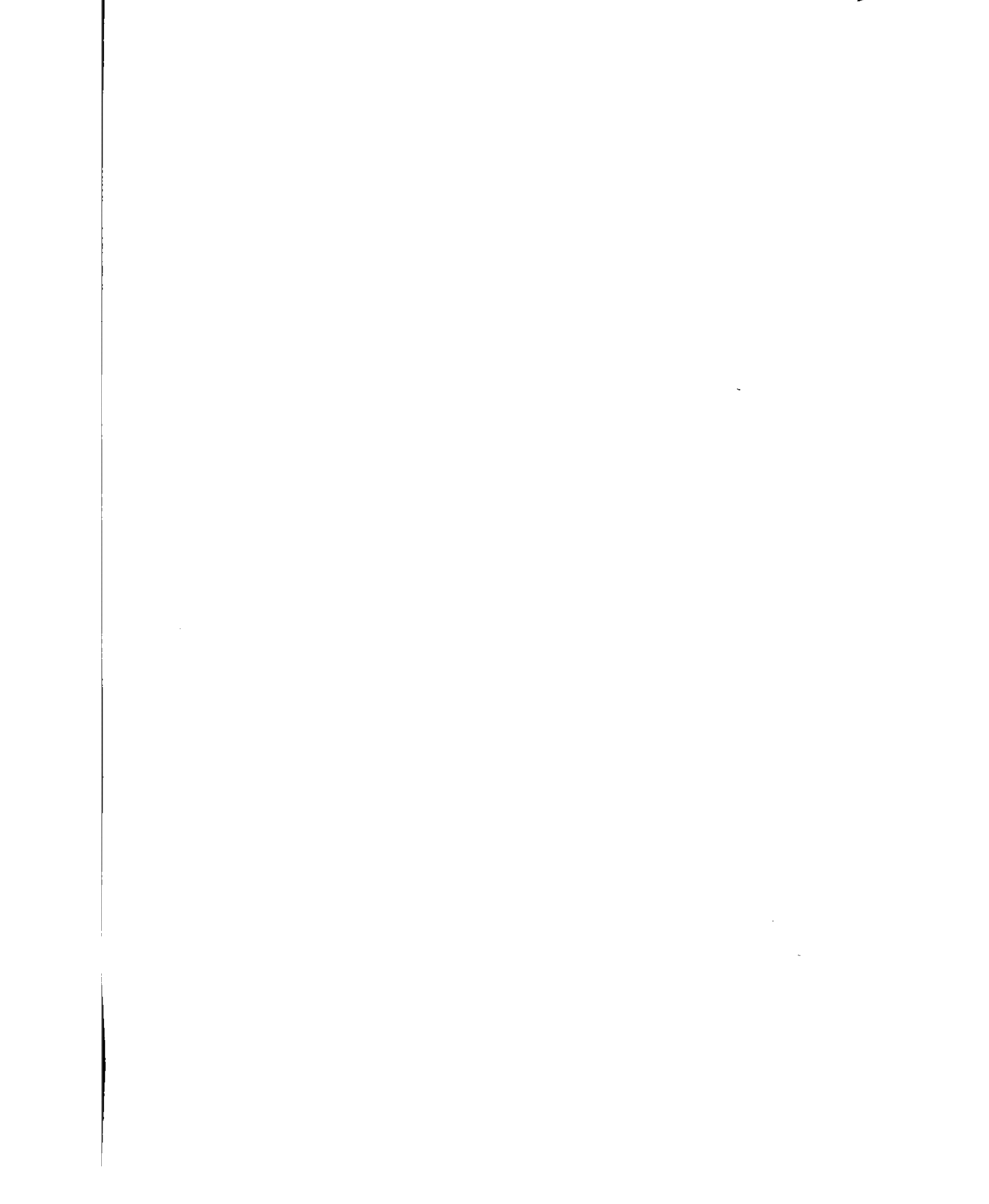
a. The scope of the CFSP

Foreign policy could be defined as „governmental activity which is concerned with relationships between the state and other actors, particularly states, in the international system“.⁴⁵ Hazel Smith,⁴⁶ applies this definition to the foreign policy of the EC as being: European Community activity which is concerned with relationships between the European Community and other actors, particularly states, in the international system. EC foreign policy has two strands: EPC and external relations. For the EU that means that the foreign policy is based on the Community policy and the CFSP

⁴⁴ J. Donnelly, R. E. Howard, „Introduction“, in: J. Donnelly, R. E. Howard (eds.) (note 9), pp. 1-28, p. 11.

⁴⁵ B. White, „Analysing Foreign Policy: Problems and Approaches“, in: M. Clarke and B. White (eds.), *Understanding Foreign Policy: The Foreign Policy Systems Approach*, Edward Elgar, Aldershot 1989, p. 1.

⁴⁶ H. Smith, *European Union Foreign Policy and Central America*, Macmillan Press, London, 1995, p. 19.



concerned with all sorts of relations to third states and international organizations. This of course is a very broad definition of foreign policy that includes the aid and trade policies of the Community. On the other hand, one could define foreign policy along the lines of (mainly) diplomatic instruments and security issues alone. It then would only be applicable to the CFSP.

The Common Foreign and Security Policy covers *all* aspects of a Foreign and Security Policy. The decisive innovation compared with the EPC, apart from the strengthening of the decision-making process and the introduction of new instruments, is that military security aspects (a common defence policy and a common defence) are no longer excluded from a common foreign and security policy.⁴⁷ There were several reasons for enhancing the competences of the EU in foreign policy. For example the realization that the growing economic integration of the Community (culminating in EMU) has to be counterbalanced by a larger presence in the political sphere; the aim of playing a major role in the East-European area as a regional power; and the break-up of the Soviet-Union which changed former defence and geo-political strategies.⁴⁸ As regards the Union structure, the CFSP *nominally* extends to all fields of foreign policy, thus including aid and trade (see Art. J.1 I which talks about „all areas“). In practice, the CFSP must not extend to the *acquis communautaire* as stated by Art. M TEU, which

⁴⁷ E. Regelsberger, „EPZ und GASP - attraktiver Verbund mit Schlupfloechern“, in: E. Regelsberger (ed.), *Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union*, 1993, pp. 179-192, p. 190 this ends the artificial separation between political, economic and military aspects of European security; M. Jopp, „Die außen- und sicherheitspolitische Identität Europas mit der Perspektive einer gemeinsamen Verteidigungspolitik“, in: R. Hrbek (ed.), *Die Reform der EU*, Nomos, Baden-Baden 1997, pp. 331-343, p. 331 talks about „soft security“ to describe the foreign policy of the EPC; European Foreign policy has made an evolution from classical diplomacy over crisis management, political and economic aspects of security to military security, „Part IV EC External Relations and the CFSP“, Topics for discussion, in: A.A. Dashwood (ed.) (note 31), p. 15.

⁴⁸ P. de Schoutheete de Tervarent, *L'introduction d'une Politique Extérieure et de Sécurité commune. Motivations et Résultats*, in: J. Monar (ed.), *The Maastricht Treaty on European Union*, European Interuniversity Press, Brussels 1993, pp. 129-132, p. 130; P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.), *La Conférence intergouvernementale sur l'Union européenne: répondre aux défis du XXIème siècle*, Clément Juglar, Paris 1996, pp. 253-314, p. 253.

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represents a barrier to excessive use of CFSP instruments in the field of Community law.⁴⁹ In comparison to the foreign policy conducted at EC level through aid, trade and association, the CFSP concerns (or should concern) mainly security and diplomatic components of a comprehensive foreign policy.

A common human rights policy is to be integrated in the overall foreign policy according to one of the five objectives of the CFSP in Art. J.1.II TEU which mentions respect for human rights and consolidation of democratic principles.⁵⁰ This objective is also common to the Community's external activities as stated in Art. 130 u TEC.⁵¹

b. The decision-making process

It has been seen above that the Union does not exist legally, but that one can perceive its foreign policy, and that the CFSP is the operational means of the EU in acting internationally.

Decision-making and implementation of this policy takes place in the Council, which is the major organ of the CFSP.⁵² It, for example, has been accorded the power to take the „decisions necessary for defining and implementing“ the CFSP and the task of „ensuring the unity, consistency and effectiveness of action by the Union“ (Art. J.8 II TEU). This, naturally, applies to human rights as an objective of the CFSP (Art. J.1 II TEU). Decisions are taken by unanimity, except in some cases foreseen by the treaty (Art. J.8 II TEU, and with the Amsterdam Treaty in implementation of common

⁴⁹ Again, note in this respect the work of the author on her Phd.

⁵⁰ E. Bonino, „La réforme de la politique étrangère et de sécurité commune: aspects institutionnels“, in: A. Mattera (ed.) (note 48), pp. 237-242, p. 238 deplors that there is no hierarchy between the different objectives.

⁵¹ P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.), *ibid.*, pp. 253-314, p. 261.

⁵² I. Macleod, I. D. Henry, S. Hyett, *The External Relations of the European Communities*, Clarendon Press, Oxford 1996, p. 420s.

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strategies, Art. 23 II (CV) TEU, see below Chapter 4). The work of the Council is prepared by the political committee installed under Art. J.8 V TEU and distinct from the COREPER under Art. 151 TEC. The task of the political committee is to „monitor the international situation in the areas covered by common foreign and security policy (including human rights) and contribute to the definition of policies by delivering opinions to the Council at the request of the Council or on its own initiative“ (Art. J.8 V TEU). As regards the detailed work, it is done in working groups consisting of Member States' representatives presenting their results to the political committee.⁵³ With Amsterdam, a new committee, the 'Policy Planning and Early Warning Unit', has been created to improve the efficiency and coherence of the CFSP.⁵⁴ It acts under the responsibility of the High Representative and, as its name suggests, prepares policy alternatives for the Council and aims at improving quick reaction to specific situations.⁵⁵

The Commission, in its turn, plays only a very subordinate role in the CFSP: excluded from any kind of decision-making, implementation and action, it has only to be fully associated with the work (Art. J.9 TEU) and enjoys a shared right of initiative (Art. J.8 III TEU) which has hardly been used so far.⁵⁶ As regards the European Parliament, its role is described in Art. J.7 TEU and is also very limited, not extending far beyond consultation.⁵⁷ This is especially deplorable because the European Parliament is the

⁵³ *ibid.*, p. 422.

⁵⁴ Declaration No.6 of the Amsterdam Treaty.

⁵⁵ T. Dodd; R. Ware; A. Weston (note 31), p. 30s; European Policy Centre, „Legal Analysis“, *Making Sense of the Amsterdam Treaty*, European Policy Centre, Brussels 1997, p. 113.

⁵⁶ M. Fouwels, „The European Union's Common Foreign and Security Policy and Human Rights“, in: *NQHR*, No.3, 1997, Vol.15, pp. 291-324, p. 315; I. Macleod, I. D. Henry, S. Hyett (note 52), p. 422; P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 268 mention some of the cases.

⁵⁷ I. Macleod, I. D. Henry, S. Hyett (note 52), p. 422.



body which has put the most emphasis on a clearly defined human rights policy.⁵⁸ In the end, the EU acts basically through the Council of ministers.

The European Council (Art. D TEU) is not a formal organ of the Union (see Art. E TEU), but in charge of providing the Union with guidelines and principles for action on the highest political level. Foreign policy considerations play an important role on the agenda of every European Council summit.⁵⁹ With Amsterdam, the European Council is also responsible for the decision and implementation of common strategies. It can be seen that there is no special organ dealing exclusively with human rights, but all organs have to include the five objectives of the CFSP in their work. As to the institutional arrangements in the field of human rights see Chapter 4 below.

c. Representation

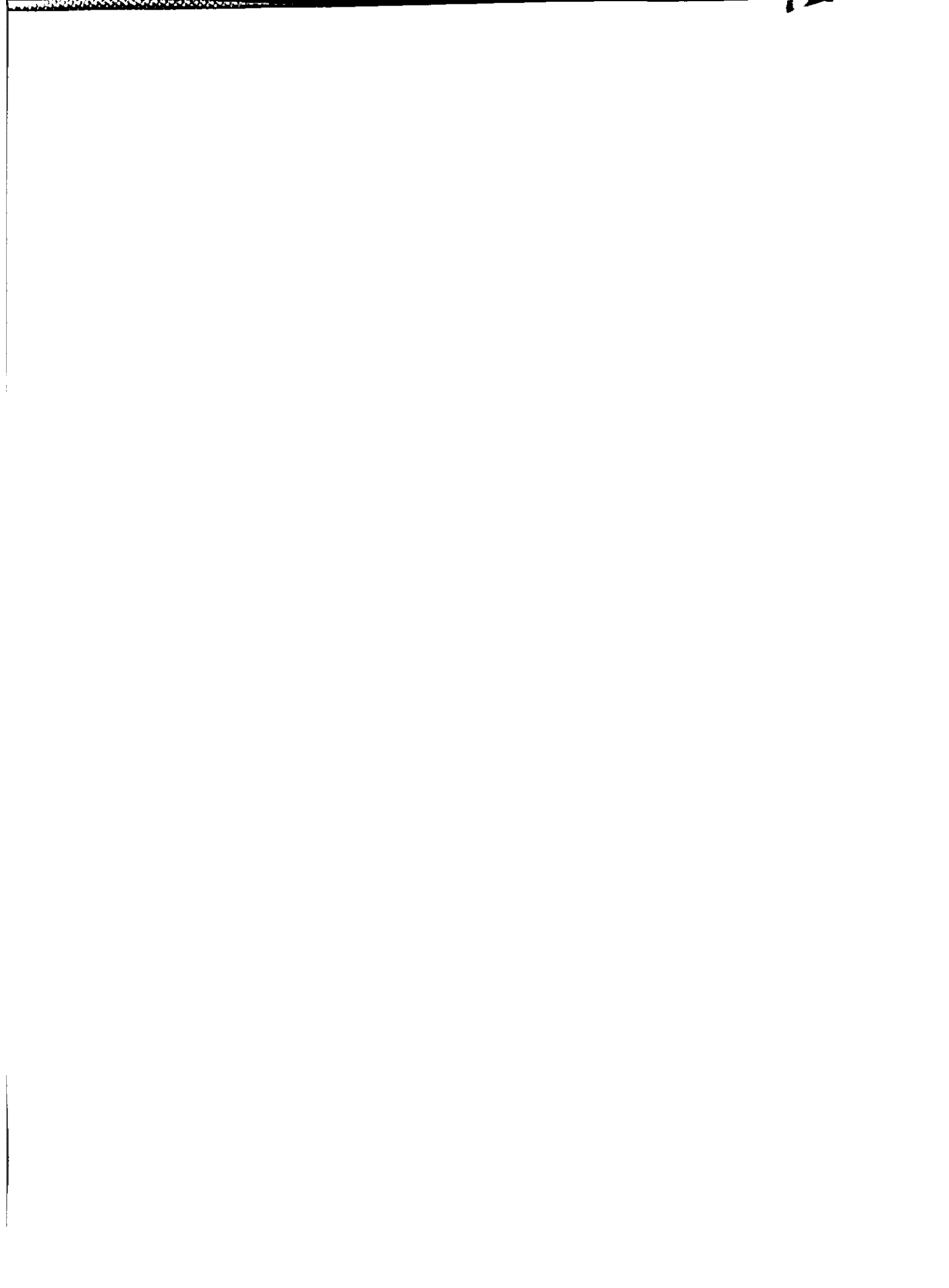
Naturally, an organization (or a framework) cannot appear in an assembly or conduct a political dialogue and speak for itself, but has to be given „a voice“.⁶⁰ The form of representation of the EU has been heavily criticized because it lacks continuity.⁶¹ The EU is officially represented by the Presidency of the Council (Art. J.5 I TEU) for the timeframe of 6 months, but can be assisted by the former and following Member State holding the Presidency (Troika, Art.J.5 III). Finally, the Commission has to be fully associated with the tasks of the Presidency. These tasks are the implementation of common measures, and the expression of „the position of the Union in international

⁵⁸ A. Clapham, *Human Rights and the European Communities: A Critical Overview*, Nomos, Baden-Baden 1991, p. 14.

⁵⁹ I. Macleod, I. D. Henry, S. Hyett (note 52), p. 420.

⁶⁰ According to the Neo-realist school, the stability of the EU-presence is dependent on the convergence of Member States' positions. If there are no common views, than the EU cannot exist, W. Wessels, „Von der EPZ zur GASP“, in: E. Regelsberger (ed.) (note 47), pp. 9-31, p. 19. It then, of course, cannot be represented by the Presidency.

⁶¹ K. de Gucht, „The Common Foreign and Security Policy (CFSP): Is there Room for New Perspectives in the Aftermath of Maastricht?“, in: *Studia Diplomatica*, Brussels, No. 2, 1997, Vol. 50, p. 49-83, p. 67.



organizations and international conferences“ (Art. J.5. II TEU). The status of an „associate“ gives the Commission only a limited role in the field of the foreign policy, in contrast to its important role in first pillar action.⁶² While the big advantage of the troika system could be to give extra weight to standpoints and share the burden of responsibility especially for smaller states,⁶³ the disadvantage is the frequent change in composition and the different handling of issues from one Member State to another. Should the associated countries, waiting for membership, already be included in the current representation process or formulation of common standpoints, then the possibility of an understandable representation of the EU becomes even more remote.⁶⁴ The Amsterdam Treaty has dealt with all proposals made to improve the situation, which included the establishment of a High Official, elected for a longer period of time and representing the Union in foreign policy matters. This solution was especially favoured by France which wanted one high representative on the top of the CFSP, „Mr. or Mrs. Europe“. Agreement was finally found to elevate the office of the Secretary General of the Council to a High Representative (Article 18 and 26 (CV) TEU), but not to create a completely new office within the CFSP. The Troika system has been kept, but its composition has been changed. It now consists of the Presidency, the High Representative and the Commission, Art. 18 (CV) EUV. The following country having the Presidency shall assist „if need be“.

As to the scope of the representation, it covers all matters falling within the common foreign and security policy, Art. J.5 TEU, and thus formally does not include first pillar issues. In practice, a distinction between political and economic questions in international fora and elsewhere can hardly be drawn. These issues are often

⁶² I. Macleod, I. D. Henry, S. Hyett (note 52), p. 419

⁶³ *ibid.*, p. 419.

⁶⁴ E. Regelsberger, „Gemeinsame Außen- und Sicherheitspolitik“, in: Werner Weidenfeld, W. Wessels (eds.), *Jahrbuch der Europäischen Integration*, 1994/5, Institut für Europäische Politik, Europa Union, Bonn 1995, pp. 219-228, p. 227.



interdependent.⁶⁵ The problem is that the scope of action (first or second pillar) is different, though the objective might be the same: human rights. Thus, the question of how the representation of the Union in human rights is conducted without doing harm to Community competences or Community representation rules has to look at the areas where the Community is present in an international fora due to its own competences independent of the Member States and of the EU. In these areas, Community rules should apply.⁶⁶ Within the CFSP, the representation is politically limited to areas that have been determined as being of general interest according to Art. J.2 I TEU.⁶⁷

2. The CFSP instruments

The EU has several instruments at its disposal to conduct a foreign policy and to promote the respect of human rights and democratic principles in third countries: Information and consultation (Art. J.2.I TEU), common positions (Art. J.2 II TEU), and joint actions (Art. J.3 TEU). The latter two were introduced by the Maastricht Treaty and did not exist in the EPC.⁶⁸ Furthermore, there are the classical diplomatic instruments such as démarches and declarations⁶⁹, the possibility commonly to support

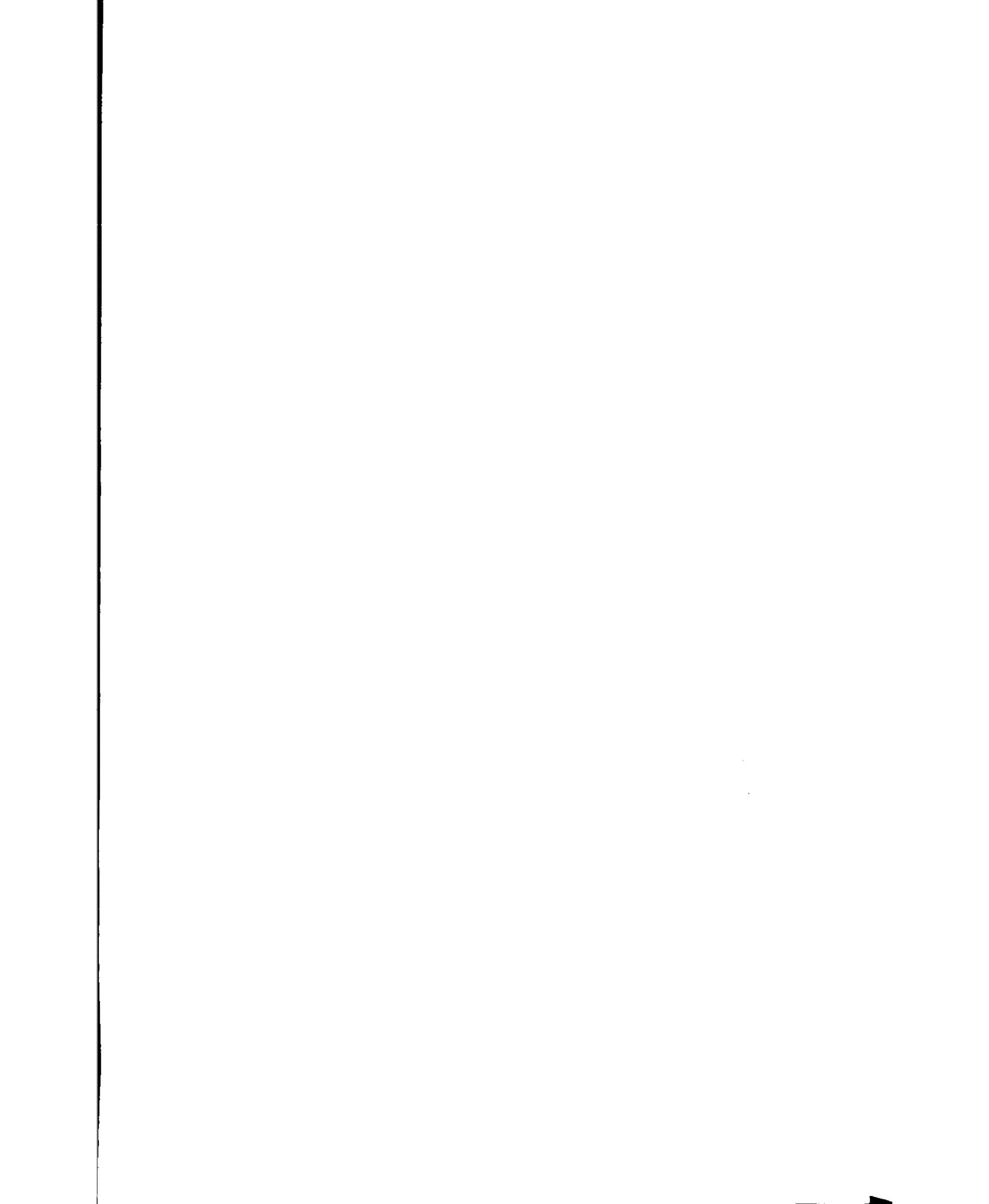
⁶⁵ For the General Assembly see K.-D. Stadler, „Die EG/EPZ in der UN-Generalversammlung - Meinungsfuehrerschaft im Werden“, in: E. Regelsberger (ed.) (note 47), pp. 107-126, p. 111.

⁶⁶ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.5, No.3.

⁶⁷ *ibid.*, Art. J.5, No.3.

⁶⁸ There was a form of concerted cooperation and common standpoints in the EPC as well, but it did not have the same impact and importance as under the CFSP, P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 274; European Commission, *General Report on the activities of the European Union 1994*, Luxembourg, Office for official publications of the EC 1995, p. 261, pt. 746.

⁶⁹ A démarche is an official communication made to the competent authority of a receiving state with the general aim of protecting or promoting an interest of the sending State. The basic purpose can be to communicate a given position or to lodge a protest, H.-P. Kaul, Démarche, in: Rudolf Bernhard (ed.), *Encyclopedia of Public International Law*, Vol.I, North-Holland, Amsterdam 1992, p. 998; A declaration is a means by which States and other subjects of public



or reject proposals in international organizations, and political dialogue.⁷⁰ The use of first pillar instruments to conduct a decision of the second pillar has been given legal grounds by bringing economic sanctions within the CFSP (Art. 228a TEC).

Common positions can be used to give more weight to the consultation and information under Art. J.2.I TEU and to express the political position of the Union. Their function is to facilitate „systematic co-operation“ (Art. J.1.III TEU, also new since Maastricht) between the Member States, who „shall ensure that their national policies conform to the common position“ (Art. J.2 II TEU). On the other hand, joint actions do not only explain policy objectives, but include the necessary steps to implement them.⁷¹ Despite this reasonable distinction in theory, a clear cut description as to when to use which instrument is lacking in the treaty and has led to the sometimes incoherent use of either of the two.⁷² In the Amsterdam Treaty, for the first time, some guidelines have been introduced to help the Council decide which instrument is appropriate. Under Article 14 I (CV) TEU, a joint action will „address specific situations where operational action is deemed to be required. They shall lay down their objectives, scope, the means to be made available to the Union, if necessary their duration, and the conditions for their implementation.“ A common position, under Article 15 (CV) TEU, will define „the approach of the Union to a particular matter of a geographical or thematic nature“. The Amsterdam Treaty has not only clarified the

international law express their will, their intent or their opinion when acting in the field of international relations. Its content can be any statement whatsoever, C.-A. Fleischhauer, „Declaration“, in: R. Bernhard (ed.), *Encyclopedia of Public International Law*, Vol.I, North-Holland, Amsterdam 1992, p. 971s;

The difference between them is difficult to discern; M. Fouwels sees the declaration as being a bit more flexible in its use dealing with positive as well as negative statements to specific or general issues (note 56), p. 298.

⁷⁰ M. Dembinski, „Langer Anlauf, kurzer Sprung. Die Aussenpolitik der Europäischen Union nach der Reform von Amsterdam“, HSK Report 7/1997, Oktober 1997, p. 29, the political dialogue already formed an important part of the EPC and also an area where the EPC acted with considerable success, as opposed to crisis management.

⁷¹ A.A. Dashwood, Position Paper, in: A.A. Dashwood (ed.) (note 31), p. 217.

⁷² M. Fouwels (note 56), p. 300.

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use of instruments, but also added new ones. Art. 12 (CV) TEU lists the means to be used to conduct a foreign policy and they now include „common strategies“, besides „defining the principles of and general guidelines for the common foreign and security policy“, „strengthening existing systematic co-operation“, „joint action“ and „common standpoints“. The common strategy is to be decided on by the European Council under Art. 13 (CV) TEU in the case of the Member States having important interests in common. The European Council also defines the objective, means and duration of the common strategies, which could, for example, address a particular country or region or even set out a broad policy issue.⁷³

The instruments in the field of the CFSP since the EPC through to Amsterdam are mainly diplomatic in nature, with the exception of the power to enact sanctions (by using Community competence, Art. 228 a TEC) and to commit joint actions. Subsequently, a classification of the different instruments in a rising scale regarding their response to violations will be taken.⁷⁴ The CFSP does not have the means usually described by the term „conditionality“⁷⁵ at its disposal, nor does the human rights policy under the CFSP promote human rights by means of positive initiatives such as the sponsoring of NGOs, increase of aid, granting of preferential treatment, a domain

⁷³ T. Dodd; R. Ware; A. Weston (note 31), p. 26.

⁷⁴ It cannot be denied that reaction to human rights violations is highly arbitrarily: little, geographically unimportant states do often have to confront harsher action than others, *ibid.*, p. 321. The following attempt to classify the CFSP instruments should help to provide a workable basis for the EU. It does not solve, however, the lack of coherent criteria as to *when* to cut off or withhold aid and *when* to suspend a trade agreement or the GSP in response to a violation of human rights.

⁷⁵ In the sense of negative conditionality which uses aid and trade instruments to enforce respect for human rights after violations have taken place. „Punitive Conditionality“, K. Tomasevski (note 1), p. 41, 44. There is, of course, also the idea of „positive conditionality“, which is based on a preventive approach and the belief that the (positive) linkage of human rights to aid and trade can incite a government to respect these values and support efforts of the civil society to liberalize the country; G. A. Lopez, D. Cortright, „Economic Sanctions in Contemporary Global Relations“, in: G. A. Lopez, D. Cortright (eds.), *Economic Sanctions. Panacea or Peacebuilding in a Post-Cold War World?*, Westview Press, Boulder, 1995, pp. 3-16, p. 4 talking about 'positive sanctions'; O. von Cranenburgh, „Development Cooperation and Human Rights: Linkage Policies in the Netherlands“, in: *Human Rights in Developing Countries Yearbook*, 1995, pp. 29-55, p. 45.

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- Positive
- Joint action supporting human rights initiatives or the democratic transition process (for example the dispatch of election observers, albeit closely related to first pillar measures in development co-operation).
 - common position stressing positive developments with regard to human rights and democratic principles (press release) and the expression of this position in international fora.
 - Support of a Resolution in an international organization considering favourably the human rights situation in a given country, rejecting a criticizing Resolution.
 - An autonomous declaration (often confidential) emphasizing positive developments in a given country.
 - use of political dialogue to address an issue of common concern.
 - A declaration or démarche condemning the human rights situation or the democratic process in a given country.
 - Support for a criticizing Resolution at an international fora.
 - Issuing a common position on a matter or region of common concern as far as human rights and democratic development are concerned.
 - Deferment of meetings
 - Withdraw the political dialogue and the diplomatic relations bilaterally
- Negative
- Deciding upon joint action to respond to violations of human rights in a third country, including the use of sanctions under the TEC (Art. 228a).⁷⁶

⁷⁶ A similar list can be found in respect to development cooperation in the Implementation Report of the 28 November Resolution, COM (94) 42 final.



Except the last three examples, which are closely interrelated with the „pressure“ taken from the first pillar instruments, the means under the CFSP may well be negative, but still aim at maintaining the contact with the given country as long as possible. Only if there is a mutual exchange of views, is the machinery of the CFSP able to function and develop its advantages as compared to first pillar instruments. The reason is, of course, that the CFSP relies on the means of diplomacy, typical foreign policy tools. The distinction between first and second pillar instruments is of an artificial nature because in any nation state, responses to human rights violations have the full range of reactions at their disposal and do not have to divide between „first and second pillar“. This distinction, which was kept by the Amsterdam Treaty, is taken as an opportunity to examine the effectiveness of „diplomatic“ (CFSP) tools in the field of human rights as opposed to aid and trade.

IV. Internal legal foundations of the European Union's human rights engagement

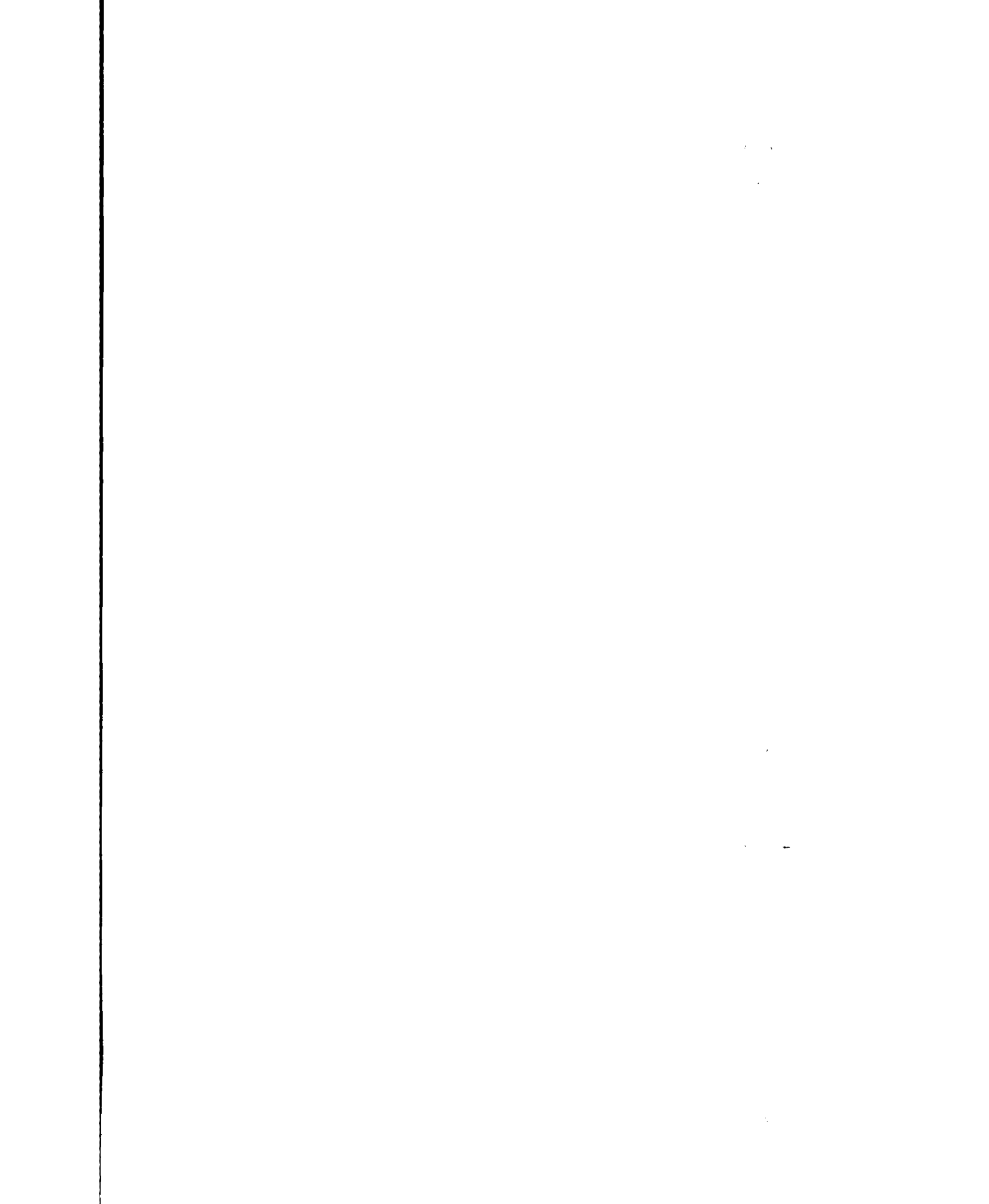
1. Within the Union

The Court of Justice with its famous judgments *Stauder*, *Nold* and *Hauer*⁷⁷ has paved the way for the internal dimension and respect of human rights and has elaborated their meaning and role in the absence of an EC catalogue of human rights.⁷⁸ Even though its

⁷⁷ Aff. 29/69, ECR 1969, p.419; aff. 4/73, ECR 1974, p.491; aff. 44/79, ECR 1979, p. 3727.

⁷⁸ As regards the terminology, the Court of Justice has elaborated its jurisdiction using the term „fundamental rights“. According to F. Emmert, *Europarecht*, Beck, München 1996, p. 296 fundamental rights (Grundrechte) comprise human rights (Menschenrechte) and citizens' rights (Bürgerrechte). The Court often uses „fundamental rights“ as an equivalent for „human rights“. The main difference between the terms is, to my mind, a technical one. Fundamental Rights are used in the context of (national) constitutions, show effects toward all state authorities and can be connected with the citizenship of a state, whereas human rights apply to everybody without regard to nationality, sex, race and are exercised in the international context. As regards the content, „both type of rights“ are to a large extent identical;

The missing human rights catalogue has been commented by the EP, see P. Mengozzi, *European Community Law. From Common Market to European Union*, Graham & Trotham, London 1992, p. 192;



jurisdiction has gained a stable footing and represents a basis for reference, the central weakness of the missing catalogue of rights or membership in a human rights treaty, has not been overcome so far. This is, as is well-known, due to the controversial decision of the ECJ about the competence of the Community in the field of human rights.⁷⁹ Maastricht not only introduced the CFSP, but for the first time also approached the issue of human rights and widened the scope of the Treaty: Art. F II TEU finally confirms the Court's jurisdiction and formulates the *duty* for the Union to respect fundamental rights when acting internally (or externally). The aim is to protect the citizens from an ever increasing public power, not bound by a human rights catalogue, but, in the case of the EC, bestowed with legislative power, pre-empting the national legislation and imposing duties directly upon the citizens (supranationality).⁸⁰ Not only the EC, but also the EU⁸¹ is bound by Art. F II TEU to respect fundamental rights within the Union whilst using its competences deriving either from the CFSP or from the provisions of the JHA providing for increased co-ordination in the field of justice and home affairs.⁸² Despite the indubitable innovation and improvement, Art. F II TEU has brought to the fore⁸³ the fact is that the EC is still not bound by a provision of the *TEC* (Art. F II figures among the General Provisions of the TEU) to respect

The ECJ had already developed human rights as 'general principles of Community law' before Maastricht and Amsterdam continued the human rights protection in the EU, J.V, Louis, „Le Traité d'Amsterdam. Une occasion perdue?“, in: *Revue du Marché Unique Européen*, 2, 1997, pp. 5-18, p. 8s.

⁷⁹ see opinion 2/94, ECR 1996, I-1759, par.36; case C-268/94 Portugal v. Council, ECR 1996, I-6177.

⁸⁰ Aff. 26/62 du 5.2.63 Van Gend en Loos; Aff. 6/64 du 15.7.64 Costa Encl.

⁸¹ At first sight, Art F II TEU does not seem to include the CFSP as it speaks of „general principles of *Community* law“ (emphasis added), but it figures within the general provisions and has therefore to be applied to all three pillars. See, G. Gaja, "The Protection of Human Rights under the Maastricht Treaty, in: D. Curtin, T. Heukels (eds.) (note 83), pp. 549-560, p. 559.

⁸² Although the CFSP provisions will hardly conflict with fundamental interests of the EU citizens, because their major concern are third states.

⁸³ G. Gaja, "The Protection of Human Rights under the Maastricht Treaty", in: D. Curtin, T. Heukels (eds.) *Institutional Dynamics of European Integration. Essays in Honour of H. G. Schermers*, Vol.II, Nijhoff, Dordrecht 1994, pp. 549-560, p. 549.

human rights when acting.⁸⁴ Another weak point was that the jurisdiction of the ECJ did not extend to Art. F II TEU (Art. L TEU)⁸⁵, although this did not hinder the Court from examining the consistency of Community acts with human rights law. It did so in applying the „infringement of this Treaty or of any rule of law relating to its application“ -rule in Art. 173 TEC to the general principles of Community law, which, in their turn, include human rights.⁸⁶ The Treaty of Amsterdam changes this situation for the better in integrating Art. F II TEU in the Court's jurisdiction, and thus filling the aforementioned lacuna. Notwithstanding the new treaty provision, it remains to be seen how the Union will respond to the internal challenges to its human rights policy in the next millennium,⁸⁷ and how the question of the missing legal base for human rights legislation will be solved.

2. External action

However, Art. F II TEU does not clearly state whether the Union should also *promote* human rights in its relations with third states. In view of the ECJ opinion on accession to the European Convention on human rights, Art. F II TEU may be relevant for the external dimension as well.⁸⁸

⁸⁴ The only provision of the *TEC* dealing with human rights protection, Art. 130 u, is only referring to the promotion of international respect of human rights in *third* countries, Hilf, in: E. Grabitz (ed.) (note 28), Art. F EUV, Nr.40 ss; E. Brok, „Die europäische Verfassung und die Regierungskonferenz 1996“, in: Jean-Denis Mouton, Torsten Stein (eds.), *Vers une nouvelle Constitution pour l'Union européenne? La Conférence intergouvernementale de 1996*, p. 19.

⁸⁵ G. Gaja, „The Protection of Human Rights under the Maastricht Treaty“, in: D. Curtin, T. Heukels (eds.) (note 83), pp. 549-560, p. 553 regards the omission in Art. L TEU to be the „result of inadequate drafting“.

⁸⁶ F. Emmert (note 78), p. 249.

⁸⁷ i.e. asylum, minorities, citizenship, economic and social rights, racism, religious freedom, gender equality, see European Parliament Report on Human Rights within the Union, discussed by J. van der Klaauw in: *NQHR*, No.2, 1997, p. 204ss.

⁸⁸ ECJ opinion 2/94, 1996, ECR I-1759, the ECJ does not distinguish between the internal and external dimension.



a. Evolution

Before Maastricht, there was no clear treaty-mandate for the EC to *promote* human rights in the outside world. Nevertheless, it has been including foreign policy aspects in the framework of its external relations given that external commerce as well as any kind of co-operation with third States is not „neutral“ towards, but includes foreign policy considerations, i.e. in areas such as association agreements, development aid and trade.⁸⁹ Several major statements affirm this approach.⁹⁰ Art. 130 u No.2 TEU, introduced with Maastricht, finally includes foreign policy aspects in policy-formulation and first pillar instruments and obliges the Community to contribute with its development policy to the general objective of developing and consolidating democracy and the rule of law, and to that of promoting respect for human rights and fundamental freedoms in third countries.⁹¹ In order to arrive at a global appreciation of human rights within the aid programmes, the Commission has recently proposed a Council regulation on human rights.⁹² However, these are limited competences in

⁸⁹ The third Lomé Convention, 8.12.1984, included for the first time a reference to human rights in the Preamble and in Article 4, which, though, remained very vague in nature. Only with the Fourth Lomé Convention in 1989, the human rights protection was set on firm footing in article 5 in linking development and the promotion of human rights, D. J. Marantis, „Human Rights, Democracy, and Development: The European Community Model“, in: *Harvard Human Rights Journal*, Spring 1994, Vol. 7, pp. 1-32, p. 6ss; See also COM (95) 216.

⁹⁰ Statement on human rights, adopted on 21 July 1986, meeting in the framework of European Political Cooperation and of the Council, Bulletin EC, No.7/8, 1986, Vol.19, pt. 2.4.4., p. 100; Declaration on human rights, European Council, Bulletin EC, No.6, 1991, Vol.24, Annex V, p. 17s; Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, Bulletin EC, No.11, 1991, Vol.24, pp. 122s; For the early days of human rights policy see, K. Arts, „European Community development cooperation, human rights, democracy and good governance: at odds or at ease with each other?“, in: Ginther et al. (eds.), *Sustainable Development and Good Governance*, Nijhoff, Dordrecht et al. 1995, p. 260.

⁹¹ In a recent case of the ECJ lodged by Portugal and supported by Greece, Art. 130 u TEC was questioned as a sufficient legal base for the human rights clause in the cooperation agreement with India. Instead, it was submitted by Portugal, the agreement would have to have been based on Art. 235 TEC. The Court ruled against this complaint and stated that Art. 130 u TEC provides the legal base and that the agreement can be concluded without recourse to Art. 235, Case C-268/94 of 3.12.96.

⁹² Proposal for a council regulation concerning the development and the consolidation of democracy and the rule of law and respect for fundamental rights and fundamental freedoms, submitted by the Commission on 24 July 1997, COM (97) 357 final, SYN 97/0191; see also J. van der Klaauw, „Human Rights News“, in: *NQHR*, No.4, 1997, p. 510s; Council Legal Service



particular fields; a comprehensive EC foreign policy competence is lacking due to Member States' reluctance to submit power to the supranational Community in this field.⁹³

The European Political Cooperation created in 1970 supplied the first legal framework to conduct a genuine common foreign policy, but remained purely intergovernmental.⁹⁴ Human rights considerations already played a role in the EPC as can be seen from the numerous statements in international fora on behalf of the Member States and from the preparatory reports of the political committee to the Council. Concrete action with regard to specific countries, however, was more limited and could often not surpass the reluctance of the Member States to find a common approach.⁹⁵

b. The Maastricht Treaty

The Maastricht Treaty, with the creation of the Union, has provided the EU with an internal legal base, Art. J.1 II TEU, for the promotion of human rights in third states (and Art. 130 u TEC for the EC). The article states that development and consolidation of democracy and the rule of law, and respect for human rights and fundamental freedoms should be pursued as one of the objectives of the CFSP. Thus, together with Art. F II TEU, the Maastricht Treaty has added a human rights

Document, unpublished paper.; A. Rosas, B. Brandtner, „Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice“, *EJIL*, to be published in 1998, pp. 1-23, p. 15s.

⁹³ The EPC remained purely intergovernmental and completely distinct of the EC apart from the SEA as a common legal framework. The proposal at the 1996 Intergovernmental Conference to include the CFSP in the Community law was rejected unanimously, „Part IV EC External Relations and the CFSP“, Topics for discussion, in: A.A. Dashwood (ed.) (note 31), p. 218.

⁹⁴ I. Macleod, I. D. Henry, S. Hyett (note 52), p. 411.

⁹⁵ M. Zwamborn, „Human rights Promotion And Protection Through The External Relations Of The European Community And The Twelve“, in: *NQHR*, No.1, 1989, Vol.9, pp. 11-27, p. 23ss.



dimension to the EU policies⁹⁶ and provided the necessary treaty base for co-ordinated promotion of human rights.⁹⁷

The EC and the EU engagement taken together results in the Union's engagement in human rights, but the focus of this work will be on the EU in the framework of the CFSP in order to then be able to give an overview of the achievements of the CFSP for the complete picture of human rights in the European Union.

V. How the European Union justifies its engagement in human rights

This part is not going to investigate the possible legal or moral basis in international law for the Union's, Member States' or the EC's human rights engagement as proposed by Jack Donnelly⁹⁸, but will instead discuss how the Union justifies and relates its engagement in human rights to the international context.

Despite its legal personality, the EC has not become a signatory of any human rights treaty because the necessary competence has not been bestowed on it.⁹⁹ However, all of its Member States are parties to the relevant international and regional agreements.¹⁰⁰ The same applies for the Union as a whole: Not being a member of any human rights treaty, because of its lack of legal personality, it still represents the

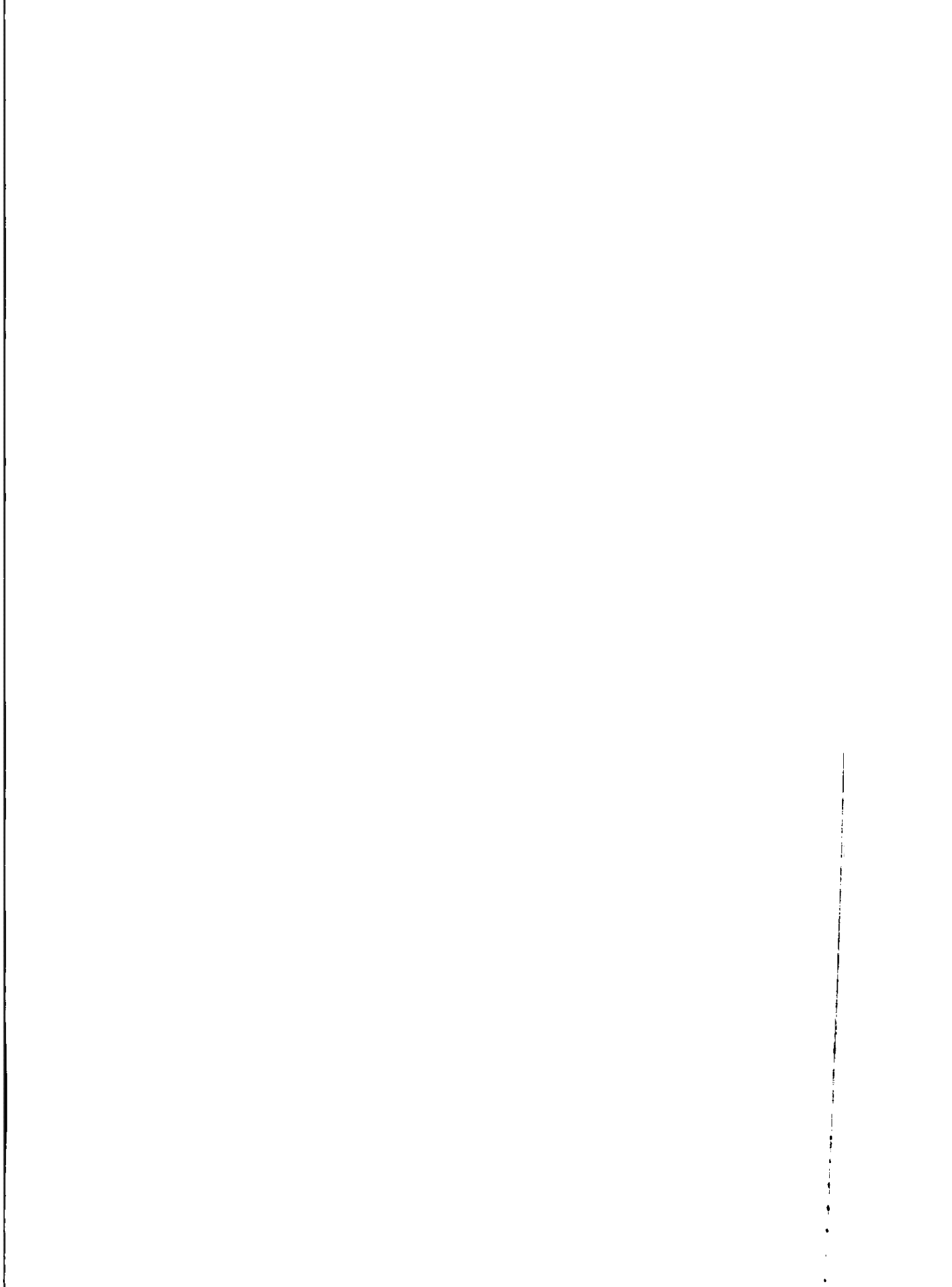
⁹⁶ Commission in its Communication „ The European Union and the External Dimension of Human Rights Policy“, COM (95) 567. It furthermore reminds us that the introduction of Art. F II was a fundamental change as regards the protection of human rights, because for the first time in EC history a reference to human rights appeared in the basic provisions of the treaty and not only in the preamble as with the SEA. Art. 130 u TEC and Art. J.1. II TEU are in line with this new evolution.

⁹⁷ The activities include action within the UN-framework and regional organizations, as well as autonomous action. It has to be remembered, though, that no explicit legal base exists for a *general* human rights policy of the Union, nor a specific legal base for pursuing human rights in the field of trade.

⁹⁸ see note 44.

⁹⁹ ECJ opinion 2/94, 1996, ECR I-1759, para. 36.

¹⁰⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, UNHDR, the two Covenants on civil and political, and economic, social and cultural rights, CERD, CEDAW, CAT, CRC, see Chapter 1.



Member States and their obligations from international treaties to promote human rights. Thus, the Union is not prevented from an engagement in human rights (in international fora or autonomous), just because it is not a signatory of the relevant human rights' treaties.¹⁰¹

Traditionally, the EC has justified its engagement in international human rights with the idea of a confederation of independent states all determined to „preserve and strengthen peace and liberty“ (Preamble TEC) in the world.¹⁰² The Commission's Communication on the External Dimension of Human Rights Policy¹⁰³ considers the Union's activities to fall „within the general framework constituted by the United Nations Charter and the Universal Declaration of Human Rights, complemented by the International Pacts on civil and political rights and on economic, social and cultural rights“ and regional instruments.¹⁰⁴ Problems arise with regard to states not party to a treaty, and to bilateral action outside the UN-framework. Such target states often invoke the principle of non-interference to oppose action in the field of human rights.¹⁰⁵ The Communication in this respect stresses the „relativity of the principle of non-interference“ whose content was highlighted by the European Council in June 1991 when it said that „ the different ways of expressing concern about violations of rights, as well as requests designed to secure those rights cannot be considered as

¹⁰¹ This is debatable, because even if the Community or even Union had legal personality, it does not forcibly entail that third states recognize the right of the Community or Union to act in favour of human rights. This is a strong argument backed by the fact that no International Organization can be a 'born' subject of international law, but is only created by its Member States.

¹⁰² K. Dicke, *Menschenrechte und europäische Integration*, Engel, Kehl 1986, p. 202s.

¹⁰³ COM (95) 567 final, p. 9.

¹⁰⁴ For actions within multilateral fora, the *droit de regard* provides a justification of customary law, P.-H. Imbert, „L'apparente simplicité des droits de l'homme. Réflexions sur les différents aspects de l'universalité des droits de l'homme“, in: *Revue Universelle des Droits de L'Homme*, 1989, Vol.1, pp. 19-29, p. 21, 22.

¹⁰⁵ For an interesting discussion as to possible legal bases see P. van Dijk, „ A common Standard of Achievement. About Universal Validity and Uniform Interpretation of International Human Rights Norms“, in: *NQHR*, No. 2, 1995, Vol.13, pp. 105-121.

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interference in the internal affairs of a State, and constitute an important and legitimate part of (their) dialogue with third countries“.

What can be said here, is that the EC as a subject of public international law is as much entitled to promote these allegedly universal values as are the states; its legal personality endows it with the capacity to exercise rights in international relations.¹⁰⁶ As regards the EU, it would seem contradictory if it acted on its own (by means of the CFSP) in a different way as the Member States act in their bilateral relations to other states, as it embodies the co-operation of the Member States. To conclude, the Union is allowed to express its views on human rights in third states internationally and to back them up with respective action in the same way as the Member States.

VI. The approach of the European Union in human rights

The Community in its „aid and trade“ human rights policies has, since it became aware of the impact of human rights observance in the third countries to its external policies in the 1990s, generally followed a positive approach aiming at the creation of surroundings conducive to human rights. This attitude was alluded in the June European Council Declaration¹⁰⁷ and expressed in the November 28 Resolution of the Council.¹⁰⁸ The latter states that „the Community and its Member States will give high priority to a positive approach that stimulates respect for human rights and encourages democracy“. Such a positive approach can be implemented through active support for

¹⁰⁶ Proposal for Council Regulation COM (97) 357 final, p. 22; R. Frid, „The Relations between the EC and International Organizations. *Legal Theory and Practice*“, Kluwer, The Hague et al. 1995, p. 10; ICJ Advisory Opinion on „Reparation for Injuries suffered in the Service of the United Nations“, 1949, ICJ Reports 174, p. 179.

¹⁰⁷ Bulletin EC, Vol. 24, No.6, 1991, pp. 17-18, at para.11 it states that the Community and its Member States „actively promote“ human rights, but does not explain what that implies.

¹⁰⁸ Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development of 28 November 1991, Bulletin EC, No.11, 1991, Vol. 24, pp. 122s.



useful initiatives furthering this end (election monitoring, strengthening of the judiciary, support for NGOs) and through an open and constructive dialogue. Its emphasis is put on creating an environment conducive to the respect for human rights, supported by an increase of aid to countries respecting these values.¹⁰⁹ Negative measures, in short all forms of sanctions¹¹⁰ (second generation conditionality¹¹¹), are seen only as the last resort and are only considered appropriate responses in the „event of grave and persistent human rights violations or serious interruptions of the democratic process“.¹¹² If sanctions are nevertheless applied, the Community seeks not to penalize the population and attempts to continue humanitarian and emergency aid in spite of the sanctions imposed.¹¹³ The official position of the Community appears again in the Commission document COM (95) 567, „The European Union and the External Dimension of Human Rights Policy“. On page 10 the Commission identifies the areas of activity which „correspond to a positive, practical and constructive approach based on the concepts of exchange, sharing and encouragement“.

In a narrow sense, the ‘content’ of the positive approach in human rights, i.e. positive initiatives in aid and trade (accompanied by constructive dialogue), applies merely to the Community. Only in some exceptional cases, as for example election-observers, are positive EC-measures applied with the *former* consent of the Council in the framework

¹⁰⁹ *ibid.*, p. 122.

¹¹⁰ From behind-the-scenes approaches or public statements to the suspension of all forms of cooperation.

¹¹¹ First generation conditionality means economic conditions attached to development cooperation and was initiated by the IMF in the 1980s as a form of enhanced crisis management which was necessary to get the exploding debts and balance of payments problems in the developing countries under control, O. Stokke, „Foreign Aid: What now?“, in: O. Stokke (ed.), *Foreign Aid toward the year 2000*, Frank Cass, London 1996, pp. 16-130, p. 94s.

¹¹² Resolution of the Council and the Member States (note 108), p.122, unfortunately the Resolution stops here and does not define when such a grave and persistent human rights violation occurs or when the democratic process is seriously interrupted; see also Bull. EC, Vol.26, No.5, 1993, Declaration of the Council in preparation for Vienna, pt. 1.3.41.

¹¹³ Report on the implementation of measures intended to promote observance of human rights and democratic principles, COM (95) 191 final, p. 25.



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of the CFSP (joint action or common position).¹¹⁴ Such measures can be financed from the Community budget, although decided in the CFSP.¹¹⁵ In a wider sense, positive measures are also to be found in the CFSP including all those instruments which appear in the rising-scale as set out in the list above (Chapter 1, III 2): in particular certain joint actions and common positions, some declarations and démarches and positive resolutions in international fora.¹¹⁶ Additionally, the political dialogue conducted with third countries not only covers co-operation agreements between the EC and third states, where there are specific organs to deal with the interpretation of the convention and arising problems, but is often conducted by the Troika¹¹⁷ on EU side (see for example China). The positive approach regards negative measures, as a last resort and they, if necessary, can be applied by the EC or by the Union (depending on what instruments are used).¹¹⁸ All in all, the positive approach is reflected in both EC and EU human rights policy. This is also expressed in the Commission's communication (95) 567 which is concerned with the *Union's* human rights policy, i.e.

¹¹⁴ see Report From The Commission on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995), COM (96) 672 final, p. 7.

¹¹⁵ The implementation reports of the „European initiative for democracy and the protection of human rights“ (Chapter B7-7 of the Community budget), SEC (92) 1915 final, COM (95) 191, COM (96) 672, give an interesting overview of the use of the financial tools to promote human rights. The initiative was set up in order to achieve the Treaty objectives of developing and consolidating democracy and the rule of law and respect for human rights and fundamental freedoms as stated in Art. F II, J.1.II TEU and Art. 130 u TEC;

As to the budget, Art. J.11.II TEU states that administrative expenditure shall be charged to the budget of the European Communities. The same applies for operational expenditure if the Council unanimously so decides and entails the budgetary procedure laid down in the EC treaty. Lastly, operational expenditure can also be charged to the Member States.

¹¹⁶ This position is confirmed by the Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights, 1995, 19.6.1996, p. 13 by stating that the „focus must be on prevention rather than just reaction“.

¹¹⁷ Presidency of the Council, former and future Country to hold the Presidency. See above Chapter 2, representation.

¹¹⁸ Behind-the-scenes approaches and confidential statements, as well as statements in international fora, are classical tools of the EPC, and now the CFSP. The suspension of aid or trade agreements, on the other hand, belongs to the sphere of the EC, see below under instruments.

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including the CFSP.¹¹⁹ Unfortunately, the emphasis is still on Community measures and their effective implementation. Only rarely, is recourse made to the instruments of the CFSP and no guidelines for the CFSP are set up,¹²⁰ the reason presumably being the limited role of the Commission in this EU policy.

To sum up it can be said that the CFSP functions as a mechanism to conduct a foreign policy which has a human rights policy as one of its objectives. The instruments to promote positively both sets of human rights, which enable the EU to participate in international human rights debates by autonomous action or within international fora, have been described above. In general, it can be stated that the EU follows a positive approach with its instruments as far as human rights are concerned. The Union not only uses the CFSP to assert its identity, but is also an aim in itself concerning the progressive co-ordination in the field of human rights (Art. C II TEU).

¹¹⁹ P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 267 talk about „communications mixtes“ to explain the practice of the Commission to issue Communications that cover more than one pillar.

¹²⁰ The actual Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights, 1995, 19.6.1996, p. 13 talks about the „finetuning“ of the Union's strategy towards the promotion of human rights and that the Commission's Communication COM (95) 567 final will serve as an important factor of reference; J. van der Klaauw, „Commission Communication on the Union's External Dimension of Human Rights Policy“, Human Rights News, in: *NQHR*, No.1, 1996, Vol. 14, p. 76 submits that the Communication is laudable in as much it gives an overview of the Commission's efforts to promote human rights. He deplores that the chapter dealing with the strategy for a more consistent and transparent policy remains rather vague and general. Common criteria for a coherent policy are not elaborated.

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Chapter 2: A view to China

The present chapter first investigates the EU's approach to China and then explores the latter's perception of human rights from Confucian days to current socialist China. This second discussion focuses on the implications of the thus described Chinese position for the protection of human rights in the world. China provides an interesting playing field for an examination of the current problems posed by an intergovernmental human rights policy based on respect of „universal“ values.

I. The Official EU position towards China

1. The Asia strategy

„The Union needs as a matter of urgency to strengthen its economic presence in Asia in order to maintain its leading role in the world economy.(...) Matters relating to good governance, including human rights, should *also* play an important role in the Union's relations with Asian countries“ (emphasis added).¹²¹

To talk about Asia in general is an „over-simplification“ as the 26 countries and three regions (East, South-East, South¹²²) of Asia have very different political, cultural, social and economic backgrounds. To a certain extent, though, industrialization is assimilating the existing differences which justifies the common treatment in a single communication.¹²³ The Commission's Communication relies basically on two areas of action: The new political approach and the EU's new trade & co-operation strategy towards Asia. The former is based on the political dialogue with Asia about arms

¹²¹ „Towards a New Asia Strategy“, COM (94) 314 final, p. 1s.

¹²² East: Korea (ROK), China, Taiwan, Hong Kong (SAR), Macao, Mongolia, North Korea; South-East: Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand, Cambodia, Laos, Vietnam, Burma; South: India, Pakistan, Sri Lanka, Nepal, Bangladesh, Maldives, Bhutan, Afghanistan, COM (94) 314 final Annex III.

¹²³ „Towards a New Asia Strategy“, COM (94) 314 final, p. 3.

control and non-proliferation, human rights and drugs and takes account of Asia's growing role in world politics; the latter pays respect to the increasing economic power of the Asian countries and the enormous market for European goods behind it. Due to the fact that the Asian development (necessarily) takes place far away from Europe and at its own pace and according to its own structures, the EU has to take the different cultural, economic, social and political backgrounds into account when formulating its strategy. These differences include the divergent perceptions of universal values such as international human rights. As regards the different countries of Asia, it „will be necessary (...) to prioritize both in terms of countries and in terms of sectors, and to apply different instruments to countries that are at different levels of development“.¹²⁴ China is especially mentioned in this Communication in connection with the European participation in the reform of its previously centrally managed economy, the integration of China into the world trading system, and the already established political dialogue.

2. Towards a „Long Term Policy for China-Europe Relations“

The term „constructive engagement“ is used to describe the policy of diplomatic, commercial and cultural contacts with the target country.¹²⁵ The Commission Communication on a „Long-term Strategy for China-European Relations“, COM (95) 279 final recommends to the Union, not least in view of the economic profile of the EU in China, that it rely on constructive engagement in its political relations with China.¹²⁶ The long term relationship seems to be guided by the idea that integrating China in the world economy through increasing contacts is likely to be more effective

¹²⁴ *ibid.*, p. 18, 23.

¹²⁵ *The Economist*, „How America sees China. Friend or Foe?“, 25.10.97, p. 24.

¹²⁶ This Communication has been approved by the Council on 4.12.95, Bull. EU, No.12, 1995, Vol. 28, p. 153s.

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in achieving the liberalization of the market and the political system than constant pressure in human rights and democratization matters.¹²⁷ Only if a society is based on free flow of trade, investment, people and ideas, can human rights develop and be understood, which makes the opening up of China a very important issue in the bilateral relations.¹²⁸ The participation of China in the international community should be enhanced and used to engage China in a political dialogue covering issues such as non-proliferation of chemical and biological weapons, but also exchange of views on human rights.¹²⁹ Quiet diplomacy and not public condemnation is advocated given that highly visible actions are seen as counterproductive because they might provoke negative reactions in the target country and, as a result, reduce the possibilities of outside influence.¹³⁰ The action the ECU is ready to take, according to the Commission, spreads over three levels: (1) the „support of potential efforts in China to open up and liberalize all areas of Chinese life“, with a view to strengthening civil society and the rule of law, (2) the raising of „issues of human rights in the bilateral dialogue“ and finally (3) the „engagement of the international community in the dialogue through multilateral fora“.¹³¹ None of the intended measures is of a negative nature in the sense of conditionality, but only in the sense of possibly using the bilateral

¹²⁷ R. Menotti (note 2), p. 74-79; *ibid.*, p. 77, According to the functionalist view, increasing economic contacts will further the political situation. „Spill-over“ effect.

¹²⁸ „A Long Term Policy for China-EU Relations“, COM (95) 279 final, p. 5.

¹²⁹ A bilateral political dialogue has been set up to this end in 1994, covering regular meetings between the Chinese Foreign Minister and the EU ambassadors in Beijing and between the EU Presidency's Foreign Minister and the Chinese Ambassador in the EU Presidency capital and ad hoc meetings of the Foreign Ministers. The already ongoing meetings between the EU Troika and China at ministerial level as well as between the Commission and China will continue after 1994. On top of that, a bilateral dialogue designed to tackle issues of human rights has also recently been launched at China's suggestion, COM (95) 279 final, p. 4.

¹³⁰ R. Menotti (note 2), p. 79.

¹³¹ „A Long Term Policy for China-EU Relations“, COM (95) 279 final, p. 5.

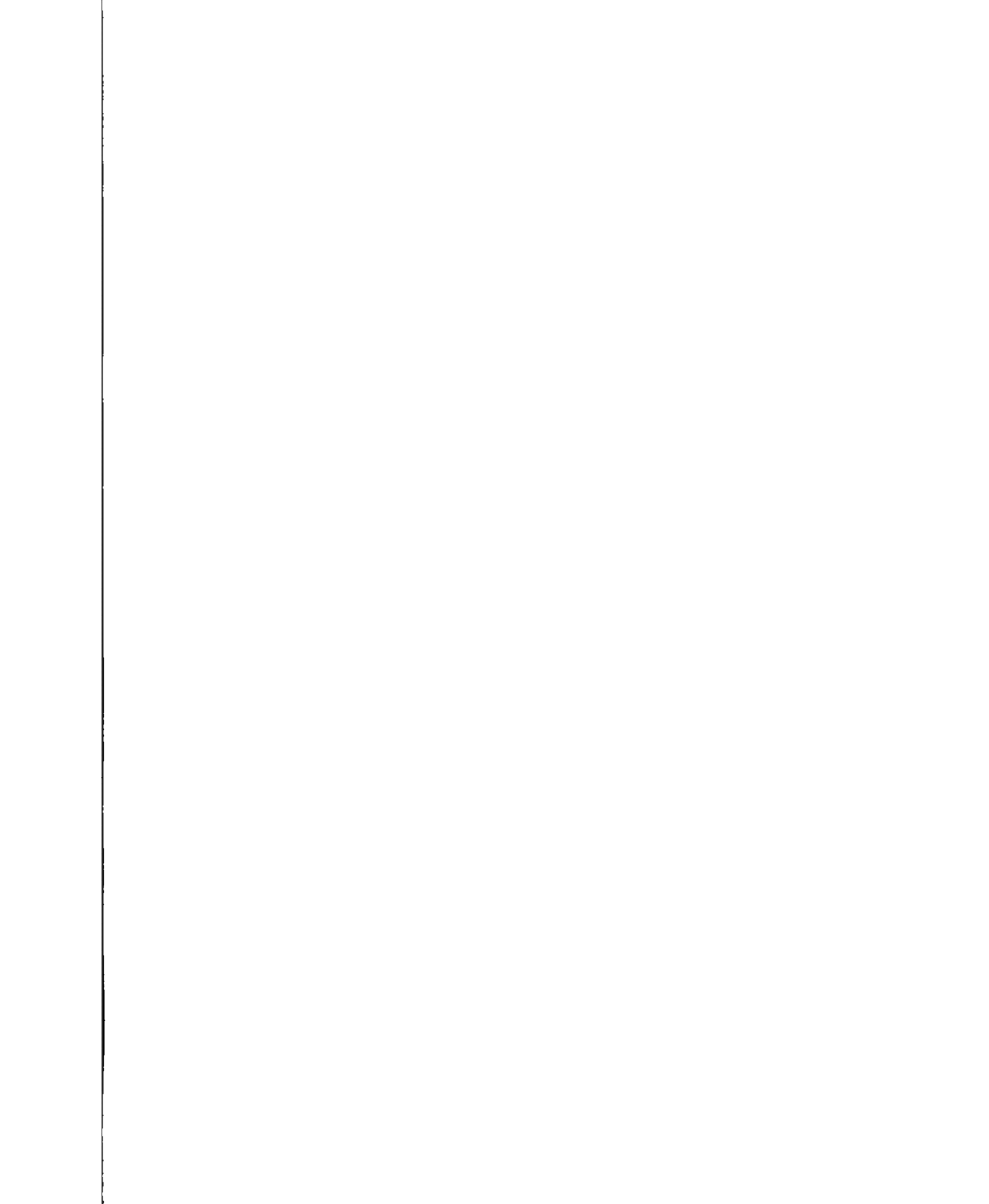


dialogue or an international debate to criticize China's human rights performance or to exert pressure on Chinese authorities to liberalize.¹³²

The notion of „constructive engagement“ can be subsumed under the positive approach of the Union with some differentiations. The positive approach consists of a constructive dialogue and initiatives to promote human rights in the given country (help in conducting elections, democratic assistance, promotion of the rule of law, protection of minorities, awareness raising, civic education and so on), as well as an increase in aid if the human rights record of the country is improving. „Constructive engagement“ towards China also focuses on a constructive dialogue and may include practical action, meaning the use of financial tools to promote human rights with an emphasis on support of the legal and judicial system in China.¹³³ Till now, the two are comparable. What makes the difference is that negative measures are excluded from „constructive engagement“ and that it is by definition accompanied by increased contacts in trade and in international (economic) fora in order to achieve China's opening up. The creation of a web of cultural and economic contacts is seen as the panacea (and excuse?, see below Chapter 4) to change China from the bottom up. In sum, the „constructive engagement“ of the Union towards China is a weaker form of human rights engagement, as it only has had limited recourse to the quite successful positive measures under the first pillar, does not apply negative measures and ultimately relies on political change through China's integration in economic, commercial and political frameworks, and through dialogue.

¹³² As „exertion of pressure“ is how J. van der Klaauw interprets the first level of action, „Human Rights News“, in: *NQHR*, No. 3, 1995, Vol.13, p. 380.

¹³³ „A Long Term Policy for China-EU Relations“, COM (95) 279 final, p. 6; J. van der Klaauw, „EU Human Rights Policy in Practice: the Recent Cases of Rwanda, China and Turkey“, Human Rights News, in: *NQHR*, No. 3, 1995, Vol.13, p. 380.



3. Current developments

Without going into the details of the tabling of a resolution at Geneva at this stage, it has to be mentioned that the EU decided upon a new approach in EU-China human rights policy in 1998.¹³⁴ Instead of supporting a resolution in Geneva it is going to rely on bilateral dialogue alone. In doing so it refused the possibility of strengthening the dialogue within the multilateral framework of UN meetings as proposed by the third level of action in the Communication. The EU claimed that the motion at Geneva was no longer warranted because of the recent progress in the country.¹³⁵ For the first time, however, concrete human rights related action in the field of first pillar measures is not only considered necessary, but also decided. Financial and technical co-operation is stepped up and the intended co-operation programme covers both the EU and Chinese priorities, because it consists of initiatives to strengthen the rule of law, civil and political rights (local governance), as well as the promotion of economic and social rights (poverty alleviation, with emphasis on women, disabled, aged or children).¹³⁶

The decision to take the new approach¹³⁷ was followed by a new Commission's Communication on the „Building (of) a Comprehensive Partnership with China“¹³⁸ It was issued in the broader context of the death of Deng Xiaoping more than a year ago and the hand-over of the British colony of Hong Kong without any major problems.

¹³⁴ Xinhua News Agency, 23.2.98, „eu agrees on human rights move over china“; SZ, 23.2.96, „EU aendert China-Politik“, p.6, European Report No.2300, 18.3.98, p. V-7, European Report No.2294, 25.2.98, p. V-1.

¹³⁵ European Report No. 2294, 25.2.98, p. V-1.

¹³⁶ Background note on China and Human Rights, February 1998, unpublished paper, p. 2.

¹³⁷ It was based on the outcome of several meetings within the Ministerial dialogue on human rights which took place on 23./24.10.97 in Luxembourg, and on 1./2. 12.97 in Beijing. The third meeting is scheduled for the 23./24.2.98 in Beijing, Background note on China and Human Rights, February 1998, unpublished paper, p. 2;

Western diplomats admitted that China's move to allow access to a prison in the context of the third meeting was mainly motivated by the desire to escape scrutiny at Geneva, European Report No. 2294, 25.2.98, p. V-2.

¹³⁸ COM (98) 181 final, 25.3.98; European Report No. 2301, 21.3.98, p. V-3.



Moreover, the visit of Jian Zemin to the US in October last year¹³⁹ represents a „ground-breaking“¹⁴⁰ step for further co-operation of East and West. The paper mentions several developments that have influenced the EU to renew its partnership with China:¹⁴¹ One, the Communist Party has engaged in „an ambitious economic and social reform agenda“ for the next five years building upon the achievements of the Deng-reforms. Two, China has acted in an increasingly responsible and mature manner in international affairs and promoted peace and stability in the region through its foreign policy. Three, the Asian financial crisis underscores the need for further reform and liberalization in China and serves as a warning signal for the Chinese authorities not to commit the same errors as some of their Asian neighbours have done. Finally, on top of that, the EU itself is changing and the communication says the prospect of the single currency and enlargement eastwards, and the new policy instruments of the Treaty of Amsterdam have equipped the EU „with new means to assert itself on the world stage“. The new strategy is based on five pillars, which are the following: engaging China further, through an upgraded political dialogue, in the international community;¹⁴² supporting China's transition to an open society based upon the rule of law and the respect for human rights;¹⁴³ integrating China further in the world economy by bringing it closer into the world trading system and by supporting the

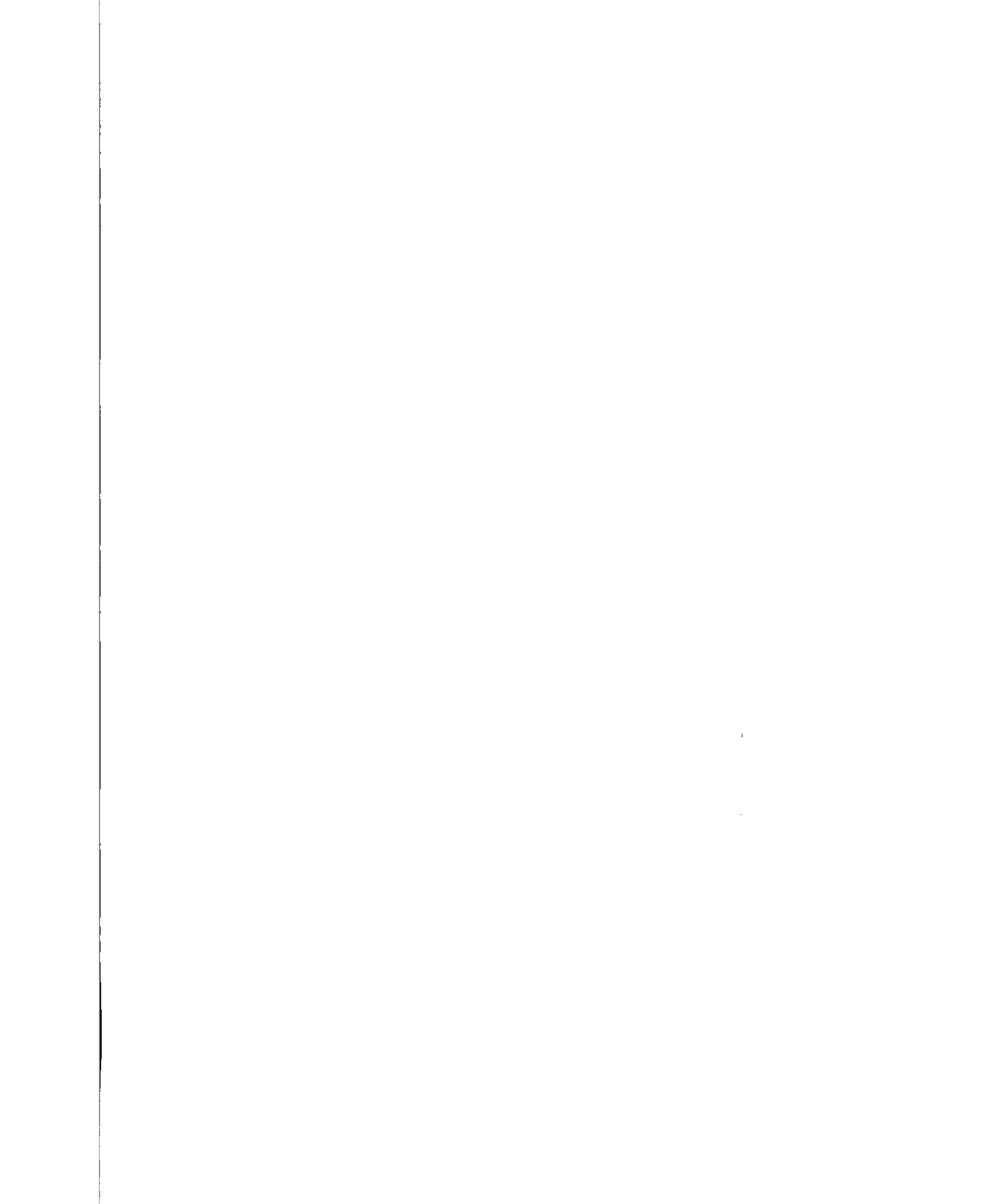
¹³⁹ International Herald Tribune, 25./26.10.97 „Beijing Maneuvers to Defuse Rights Issue Ahead of Jiang's US Visit“; International Herald Tribune, 29.10.97 „Clouds Over Jiansg Visit“, „Business Leads Diplomacy in Relations With Beijing“, p.1; SZ, 29.10.97 „Verbissene Demonstration der Partnerschaft“, SZ, 29.10.97, „Ritterschlag fuer einen Bittsteller“; SZ, 31.10.97 „Die zweite chinesische Offensive“.

¹⁴⁰ European Report No. 2301, 21.3.98, p. V-3.

¹⁴¹ COM (98) 181 final, <http://europa.eu.int/en/dg01/chincom.htm>, p. 3.

¹⁴² The „upgraded“ EU-China bilateral dialogue, for example summit meetings and greater involvement of China in regional and multilateral initiatives of global interest, complements the already established political dialogue (broader dialogue and experts dialogue).

¹⁴³ Despite serious shortcomings in human rights, the focus is on dialogue and not on confrontation. Thus the human rights dialogue and new cooperation programmes are seen as the right approach.



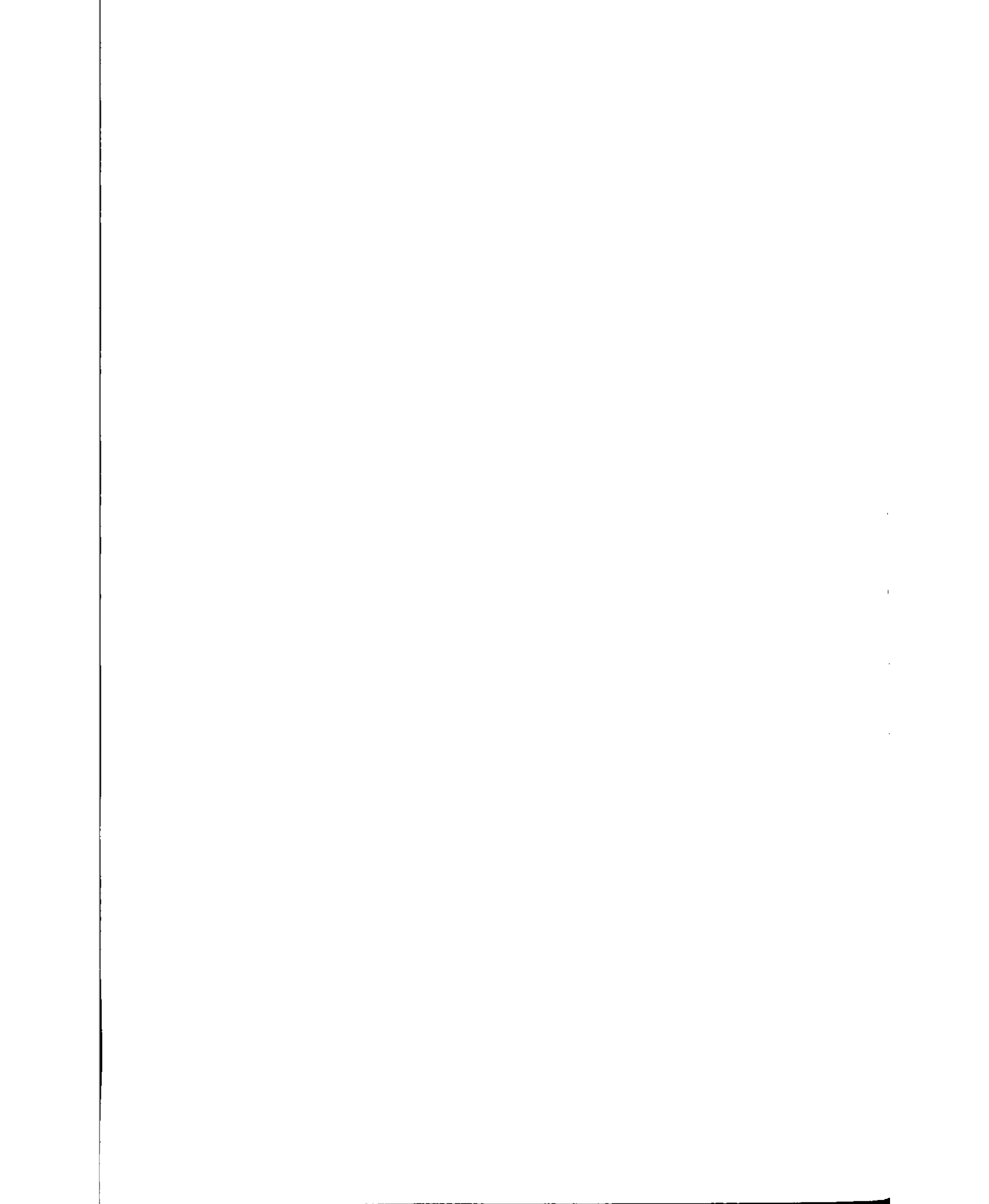
process of economic and social reform underway in the country;¹⁴⁴ making Europe's funding go further,¹⁴⁵ and finally raising the EU's profile in China.¹⁴⁶ Human rights issues can be addressed in the broader political dialogue and, of course, in the specific dialogue on human rights. Moreover, positive human rights and democracy promotion should take place in the framework of the intended co-operation programmes.

So far, the co-operation programme has only been agreed upon and has not been implemented. Thus, the bilateral political dialogue is the only measure the EU envisaged towards China in 1998. Negative measures are not considered appropriate in the context of EU-China human rights relations. If a look at the list of measures in Chapter 1 III 2 is taken, it is realized that the range applicable to China is to be found in the middle of it (silent diplomacy). It covers confidential and public declarations and démarches, be they negative or positive, and political dialogue, as well as action in international fora with the exception of 1998 (if it is merely an exception !?).

¹⁴⁴ The assistance for China to become a global economic player should be achieved through a combination of trade discussions and targeted cooperation initiatives. The most pressing issue is China's accession to the WTO. China's market economy status has been recognized by the EU recently, International Herald Tribune, 28.4.98, „EU Overture to China and Russia“, the Trade Ministers of the EU agreed on 27.4.98 to remove China as well as Russia from the list of nonmarket countries.

¹⁴⁵ The current level of funds is considered sufficient, but the implementation and cooperation with other donors should be improved.

¹⁴⁶ To this end the Commission could set up a press and information service in Beijing, expand the programme for Chinese visitors to Europe and improve cultural exchange programmes.



II. Chinese position in human rights

The Chinese Government regards demands for human rights as „impact(ing) on the very survival of its political regime“, criticizing the one party system in China and denying China's own and specific values and forms of governance.¹⁴⁷ Moreover, the linking of trade or aid to the observation of human rights and democratic principles and any other measure to promote human rights in China is clearly seen as an interference in internal affairs. This official position is expressed in the „White Paper“ of 1991 and its successor of 1995.¹⁴⁸ Additionally, China is eager to stress that human rights standards depend heavily on a country's current economic and social situation.¹⁴⁹

1. How did China come to adopt such a human rights policy?

a. Confucianism in China

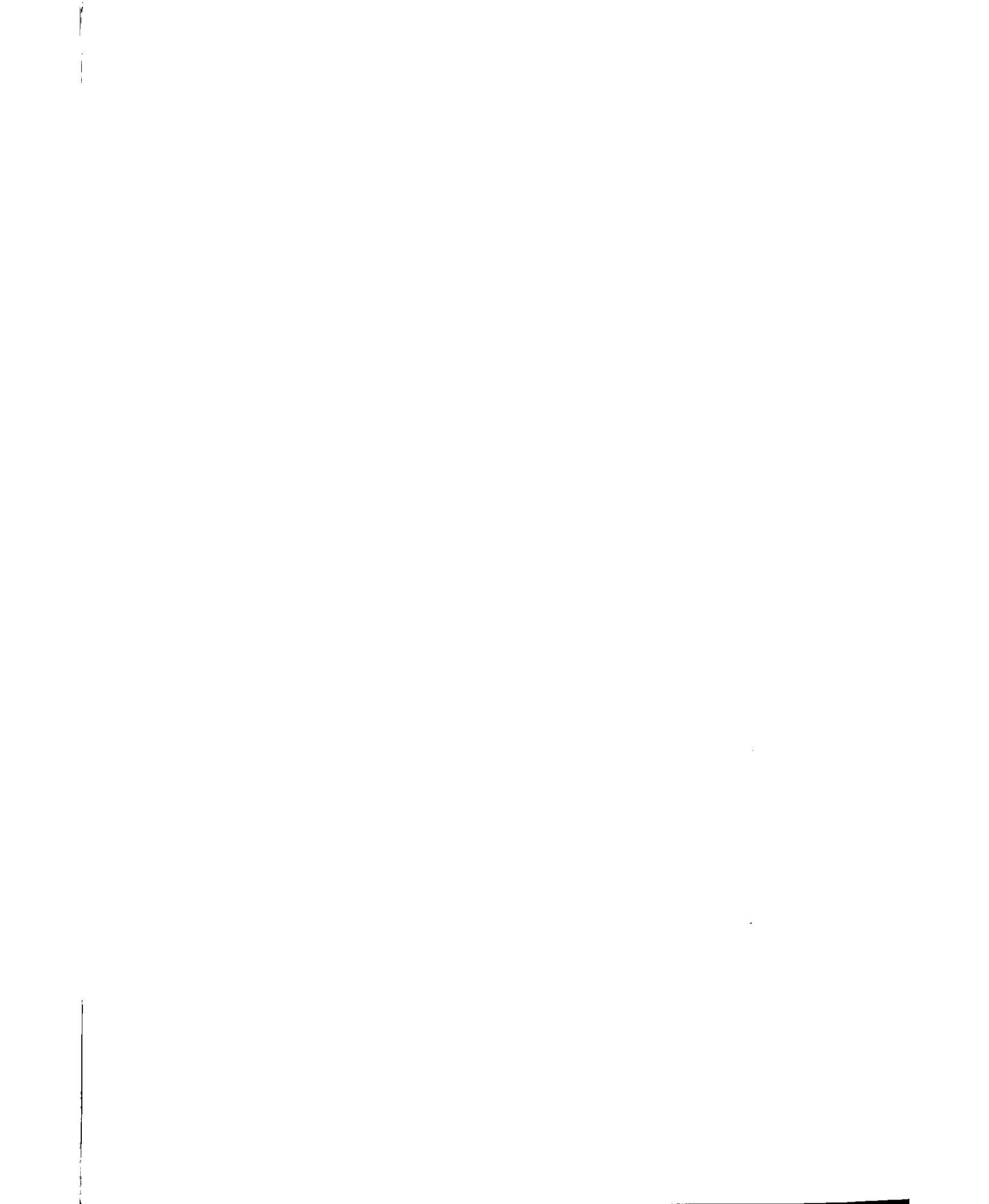
The aim of this short overview is neither to contribute to the numerous elaborations on Confucianism, nor to offer a new interpretation of it, but simply to highlight some central elements of this value system so prevalent in China, in order to be able to discuss human rights issues in contemporary China with a deeper background.

The Emperor Wuti (156-87 B.C) of the Han Dynasty proclaimed Confucianism to be the main and only ideology in China out of hundred different schools, which was maintained by the subsequent dynasties to the extent that Mencius (372-289 B.C) was

¹⁴⁷ Ming Wan, „Human rights and Sino-US relations: policies and changing realities“, in: *The Pacific Review*, No.2, 1997, Vol.10, pp. 237-255, p. 247.

¹⁴⁸ Information Office of the State Council of the People's Republic of China, Human Rights in China, 1991, pp.83-84, from now on „White paper“; Information Office of the State Council, „The Progress of Human Rights in China“, as an update to the White paper, 27.12.95.

¹⁴⁹ Statement by Mr. W. Min, Minister of the Chinese Delegation at the Third Committee of the 51st Session of the General Assembly on Item 110(a), 14.11.96, press release, p. 1 in the context of the period of study before adhering to a human rights convention.



also included as the second sage.¹⁵⁰ The Confucian ideological background, which has no metaphysical foundation and does not worry about the world beyond,¹⁵¹ has been influential in China for 2000 years and is still to be found in contemporary China even if there was no official return to Confucianism after the republican period.¹⁵² The primary source for Confucianism are the Analects, with the guiding principle of benevolence.

The principle of benevolence requires to love all men. In order to fulfil Confucian spirit, one had to be reverent, respectful, full of fraternal submission and uprightness, and filial, but not lacking in personal dignity. Without these attributes a person will never be full of loving spirit (benevolent) and it was everybody's duty to promote this benevolence in the world.¹⁵³ But, in loving all men, social status has always to be maintained.¹⁵⁴ Tao is the immutable order of cosmic and social harmony (the orders of society were just a special application of the world order) and this harmony must not be disturbed by any „orgiastic or ecstatic“ element. The individual was required to adapt to the given world instead of wanting to change it.¹⁵⁵ This concept of harmony acquired a very important place in Confucian ideology and provided the basis of

¹⁵⁰ Confucian was a philosopher who lived from 551-479 B.C, Zheng Yun, „L'approche Chinoise des Droits de L'Homme“ , in: A. Lapeyre, F. de Tinguy, K. Vasak (eds.), *Les Dimensions Universelles des Droits de L'Homme*, Bruylant, Bruxelles 1990, pp. 265-274, p. 267s.

¹⁵¹ C.K. Yang, „Introduction“, in: H. H. Gerth (ed. and translator), *M. Weber, The Religion of China*, The Free Press, London 1964, pp.xiii-xLiii, p.xxix s; M. Weber, *The Religion of China*, H. H. Gerth (ed. and translator), The Free Press, London 1964, p. 144: the Chinese language does not even have a special word for religion; Despite its secular orientation, Confucianism, in 1906, was elevated to the state-religion, O. Weggel, „Asien im Jahre 2050. Versuch einer virtuellen Umrissbestimmung“, in: *China Aktuell*, Januar 1989, Vol. XXVII, pp. 42-68, p. 45.

¹⁵² Zheng Yun, „L'approche Chinoise des Droits de L'Homme“ , in: A. Lapeyre, F. de Tinguy, K. Vasak (eds.) (note 150), pp. 265-274, p. 269.

¹⁵³ D. Gangjian, S. Gang, „Relating Human Rights to Chinese Culture. The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence“, in: M. C. Davis (ed.) (note 18), pp. 35-56, p. 38, 41.

¹⁵⁴ L. Hainian, „Human Rights Perspectives in Diversified Cultures“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.), *Human Rights: Chinese and Dutch Perspectives*, Nijhoff, The Hague 1996, pp. 17-24, p. 19.

¹⁵⁵ C.K. Yang, „Introduction“, in: H. H. Gerth (ed. and translator) (note 151), pp.xiii-xLiii, p. xxix s; M. Weber, *The Religion of China*, H. H. Gerth (ed. and translator) *ibid.*, p. 153.



tolerance in the spirit of the Analects. The emphasis on social harmony is one reason for the modern orientation of Chinese leaders away from the individual and towards harmony of the community. Confucianism had a strong authoritarian component as the proclaimed social harmony was based on a hierarchical ordering of individuals and groups¹⁵⁶ and on discipline. In line with the demand for order and discipline, conflict avoidance plays a great role in Confucian societies and there is accordingly almost an „obsession“ to negotiate in various forms in Asian societies.¹⁵⁷

The concept of morality was also based on tolerance and founded on a strict class distinction between „little man“ and „princely man“. The moral code, fit for the princely man, is of a very high standard and obliges him to fulfil his duties towards the community and for the welfare of the little man. In such a concept, there is no need for rights, as the princely man has his own privileges and the little man is sufficiently protected by the princely man.¹⁵⁸ The powers of the ruling class are not restricted by law as in Western countries, but by moral codes, according to the principle „do not do unto others what you would not like others to do unto you“.¹⁵⁹ As a consequence of the concern with elite politics in Confucian thought, western democracy is not a typical feature of China, but somewhat alien to it.¹⁶⁰

Another general principle of Confucian ethics was justice which had a higher position than written law, but which was subordinate to the ethic of kindness. To seek justice was to respect kindness and to esteem benevolence, which, as a consequence, made

¹⁵⁶ J. D. Seymour, „China“, in: J. Donnelly, R. E. Howard (eds.) (note 9), pp. 75-98, p. 75; A. Sen (note 11), p. 34.

¹⁵⁷ O. Weggel (note 151), p. 47.

¹⁵⁸ M. Ng, „Are Rights Culture-bound?“, in: M. C. Davis (ed.) (note 18), pp. 59-71, p. 66.

¹⁵⁹ D. Gangjian, S. Gang, „Relating Human Rights to Chinese Culture. The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence“, in: M. C. Davis (ed.) (note 18), pp. 35-56, p. 40.

¹⁶⁰ *ibid.*, p. 50, Marxism also proclaims that the ruling class and the ruled remain two identities and does not agree with the ancient Greek ideas of democracy in city-states.

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justice more important than interests. This did not mean, though, that interests were absent from Confucian thought, they simply had to respect the principle of propriety and righteousness.¹⁶¹

The term „human rights“ does not appear in the Analects, and was linguistically and historically absent in ancient China.¹⁶² It was not a major concern of Confucian as he was basically concerned with adaptation (duty) of the human being to the social order of the world and of the society.¹⁶³ This lacuna, however, can be questioned to the extent that features of modern human rights ideology¹⁶⁴ are nevertheless to be found in his value system, an enterprise that will be undertaken in Chapter 4 of this paper.

b. Traditional China

The body of law in traditional China consisted in one big code containing all the different types of norms influenced by Confucianism and feudal ethical rules - „Taking moral means as the primary, and legal means as the secondary“, i.e. legal rules were taken to enforce moral standards.¹⁶⁵ These standards, in their turn, were part of „li“, the norms of conduct, tacitly agreed upon in society, based on Confucian thought (see above). The stability of the traditional law system in China was fortified by Confucian ideas and supported the maintenance of the feudal regime based on the unequal status of persons.¹⁶⁶

¹⁶¹ *ibid.*, p. 45s.

¹⁶² M. Ng, „Are Rights Culture-bound?“, in: M. C. Davis (ed.) (note 18), pp. 59-71, p. 65, 66ss.

¹⁶³ Funabashi, Y.; Oksenberg, M.; Weiss, H., *China auf dem Weg zur Grossmacht. Konsequenzen einer interdependenten Welt. Ein Bericht an die Trilaterale Kommission, Arbeitspapiere zur Internationalen Politik 87*, Europa Union Verlag, Bonn 1994, p. 85, the term human right (*ren quan*) was only introduced in Chinese language in the 19th century; A. Kent (note 10), p. 49.

¹⁶⁴ F. ex. human dignity, respect of the personality, rationality, humanity.

¹⁶⁵ Chenguang, W., „Introduction: An Emerging Legal System“, in: Chenguang, W., Xianchu, Z. (eds.) (note 21), pp. 1-30, p. 5, 7.

¹⁶⁶ *ibid.*, p.3ss; L. Hainian, „Human Rights Perspectives in Diversified Cultures“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.) (note 154), pp. 17-24, p. 19.



The greater importance of social status over legal rules implies that the rule of law did not exist to protect the single member of society. Rather, the concern of the (written) law was to protect government powers and social interests instead of the rights of individuals. The principle which governed society, was the 'rule of man' („everything the ruler says is right“), excluding any form of democratic system, but promoting the totalitarian, almost despotic¹⁶⁷, regime.¹⁶⁸ In practice, in the feudal history of China, arbitrary action of the feudal ruler was often the rule, leaving little room for liberties for the people.¹⁶⁹ In theory, the (Confucian) moral code applied also to the ruler and was meant to limit his powers (see above, princely man). The Mandate of heaven obliged the ruler to advance the welfare of the country's citizens¹⁷⁰ and the Confucian idea was that *because* the rulers wanted the best for their people, you had to be obedient and fulfil your duty. It is not the right place to discuss these characteristics of feudal China in any depth, thus the (incomplete) conclusion drawn here is that despite moral codes obliging the ruler, the 'rule of man' often prevailed over these rules in the time of the dynasties.

c. Socialism

The last dynasty (Qing Dynasty from 1644 - 1911) marked the end of feudal rule in China and the beginning of the republican period which lasted till 1949 when the PRC was founded. Its first 7 years can be described as the transition from „New Democracy

¹⁶⁷ A. Kent (note 10), p. 31.

¹⁶⁸ Chenguang, W., „Introduction: An Emerging Legal System“, in: Chenguang, W., Xianchu, Z. (eds.) (note 21), pp. 1-30, p. 5.

¹⁶⁹ L. Rendong, *Theorie und Praxis der Menschenrechte. Eine Betrachtung aus chinesischer Sicht*, Konrad-Adenauer-Stiftung, Arbeitspapiere, Menschenrechte in Ostasien, Juni 1993, Sankt Augustin, pp. 35-50, p. 48.

¹⁷⁰ J. F. Copper, „Defining Human Rights in the People's Republic of China“, in: Wu, Yuan-li; M., Franz; Copper, J. F.; Lee, Ta-ling; Chang, Maria Hsia; Gregor, A. James (eds.), *Human Rights in the People's Republic of China*, Westview Press, Boulder and London 1988, pp. 9-17, p. 9.



Revolution“ to „Socialist Revolution“ whose purpose it was to establish a socialist system. This system required, in the economic field, public ownership and central economy, in the political sphere, the democratic dictatorship of the proletariat and the supremacy of the Party, and, finally, in the ideological realm, the influence of Marxist theory.¹⁷¹

According to Guo Luoji¹⁷² the Chinese (the party and the Government's) human rights perception in modern times has evolved in three steps. Accompanying the China Communist Party's (CCP) rise to power was the general attitude that human rights as proclaimed in the French enlightenment were an essential part of a lively citizenry. That also meant that the early conceptions of human rights in China were basically adapted from the West. Emphasis on human rights was used as a way of enhancing opposition to the one-party power of the Nationalist government and its striking disregard of human rights.¹⁷³ Once in power, these arguments were abandoned and a strict anti-human rights regime took hold, going hand-in-hand with significant human rights infringements. As soon as a claim for human rights endangered the Party's position and its power, such movements were suppressed violently. In the second phase, starting after the cruel Cultural Revolution and in parallel with the first opening up to the West in 1978 by Deng Xiaoping, political leaders proclaimed human rights to be different in China¹⁷⁴ and the Western concept of human rights being in violation of

¹⁷¹ Chenguang, W., „Introduction: An Emerging Legal System“, in: Chenguang, W., Xianchu, Z. (eds.) (note 21), pp. 1-30, p. 9s.

¹⁷² „A Human Rights Critique of the Chinese Legal System“, in: *Harvard Human Rights Journal*, Spring 1996, Vol.9, pp. 1-14.

¹⁷³ A. Kent (note 10), p. 40, the Kuomintang had come to power in 1928 when the united the country after long fights between different warlords. They established a central government in Nanking and followed a strict regime of political „tutelage“.

¹⁷⁴ „What are human rights? First, how many people's human rights? Is it the human rights of the minority, or the human rights of the majority, the human rights of the entire nation? What the West calls „human rights“ and the human rights we are talking about are two separate things. We have different conceptions.“, Deng Xiaoping, *Gao zichan jieji ziyouhua jiuoshi zou zibenzhuyi daolu* (Pursuing Bourgeois Liberalism is the Same as Taking the Capitalist Road), in: 3 *Deng Xiaoping Wenxuan* (Selected Works of Deng Xiaoping), Renmin Chubanshe 1993, p. 123, 125.

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the „Four Cardinal Principles“ governing Chinese life.¹⁷⁵ Human rights appeals were seen as slogans of the bourgeoisie and not taken as being applicable to Chinese society.¹⁷⁶ Instead, a socialist conception of human rights emerged, which can be characterized as follows: in contrast to the Western capitalist states, where only the rich part of the population enjoys human rights and the poor citizens are not protected by the system made by the rich, in socialist states the ruling classes represent their people and know what is the best for them.¹⁷⁷ A short look at the Chinese state¹⁷⁸ seems necessary in order to understand the implications of this socialist approach. China is governed by the National People’s Congress (NPC) in which the Communist Party is the permanent ruling party. According to Art. 2 of the Constitution „All powers in the PRC belong to the people. The NPC and the local People’s Congresses at various levels are the organs through which the people exercise state power.“ The Congresses are constituted through democratic vote (Art. 4 of the Constitution). In China, legislative, executive and judicial functions are not separated, but derive from the NPC which means that it combines several state functions. The separation of powers is often regarded as „a capitalist element“ and therefore denied.¹⁷⁹ The worker owes the state complete obedience, because the state is doing its best for the

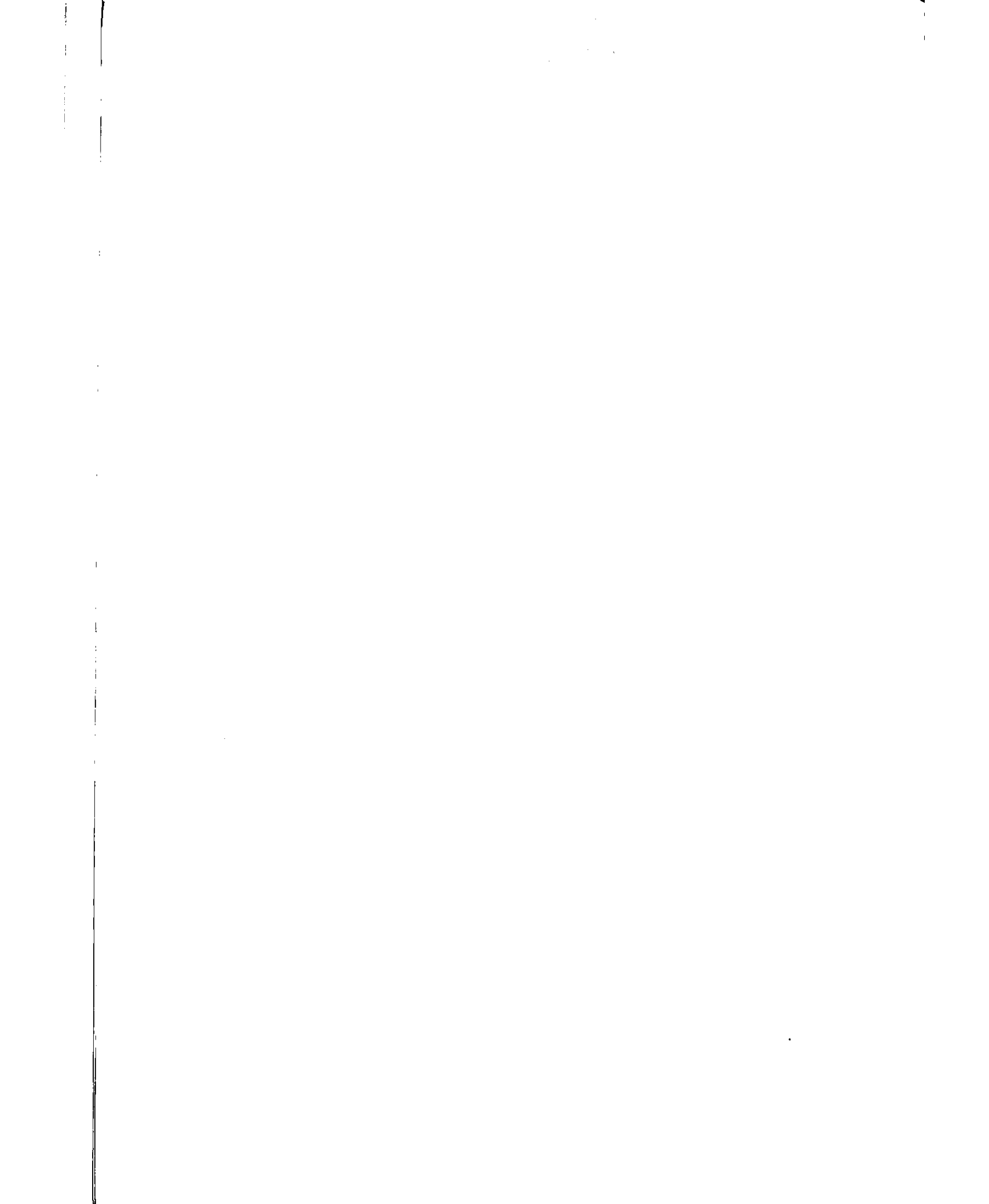
¹⁷⁵ They are: socialism, people’s democratic dictatorship, leadership of the Communist Party and Marxist, Leninist and Mao Zedong thought, Deng Xiaoping, „Jianchi sixiang jiben yuanze“ (Persevering in the Four Cardinal Principles), in: *Deng Xiaoping Wenxuan 1975-1982 (Selected Works of Deng Xiaoping 1975-1982)*, Renmin chubanshe 1983, p. 144, 150s, 159s.

¹⁷⁶ G. Luoji, „A Human Rights Critique of the Chinese Legal System“, in: *Harvard Human Rights Journal*, Spring 1996, Vol.9, pp. 1-14, p. 3.

¹⁷⁷ L. Rendong (note 169), p. 44s.

¹⁷⁸ Art. 1 of the Constitution states: China is a „socialist state under the people’s democratic dictatorship led by the working class and based on the alliance of workers and peasants“, A. P. Blaustein, G. H. Flanz (ed.), *Constitutions of the countries of the world*, Oceana, New York 1992, p.K1ss; The Communist Party, in its turn, is the „vanguard of the Chinese working class“ as quoted in the first sentence of its General Programme, Z. Guobin, „Constitutional Law“, in: Chenguang, W.; Xianchu, Z. (eds.) (note 21), pp. 31-74, p. 36, J. F. Copper, „Human Rights and the Chinese Political System“, in: Wu, Yuan-li; M., Franz; Copper, J. F.; Lee, Ta-ling; Chang, Maria Hsia; Gregor, A. James (eds.) (note 170), pp. 56-76, p. 59 lists contradictions about the formal assertion that the NPC controls the Party and the realities.

¹⁷⁹ Z. Guobin, „Constitutional Law“, in: Chenguang, W.; Xianchu, Z. (eds.) (note 21), pp. 31-74, p. 37, 43.



individuals and knows what behaviour concords with the rules and interests of society which are of paramount importance. The Loyalty to the state implies that duties prevail over rights in case of conflict.¹⁸⁰ There are no natural or human rights in the sense that they exist irrespective of the state in which a person lives. Rather, human rights are determined by the socialist state in which the transformation of the society through the establishment of common means of production has led to a different position for the individual.¹⁸¹ In this system, almost everybody, except some class-enemies, can enjoy their rights. But, in any case has the economic, social and cultural situation of the country to be taken into account, because it forms the *objective* condition for the accomplishment of human rights, implemented by the ruling classes.¹⁸² Among these economic and social orientation, the right to life or to subsistence is the most fundamental right and has to be guaranteed first. It is regularly claimed by the Chinese government that feeding 1.2 billion people is already difficult enough and that the major achievements in this respect should be taken into account by the world community.¹⁸³ For example, the family policy of a given country has to be seen in relation to the right to subsistence. In order to guarantee their people an enjoyable life in accordance with the economic situation and the speed of development, sensitive family planing is necessary. This is the corollary to the Western countries promoting big families in order to increase economic power.¹⁸⁴ The next argument brought forward is that stability of the country is the paramount objective of any policy, because an instable China would end in chaos and anarchy where human rights will

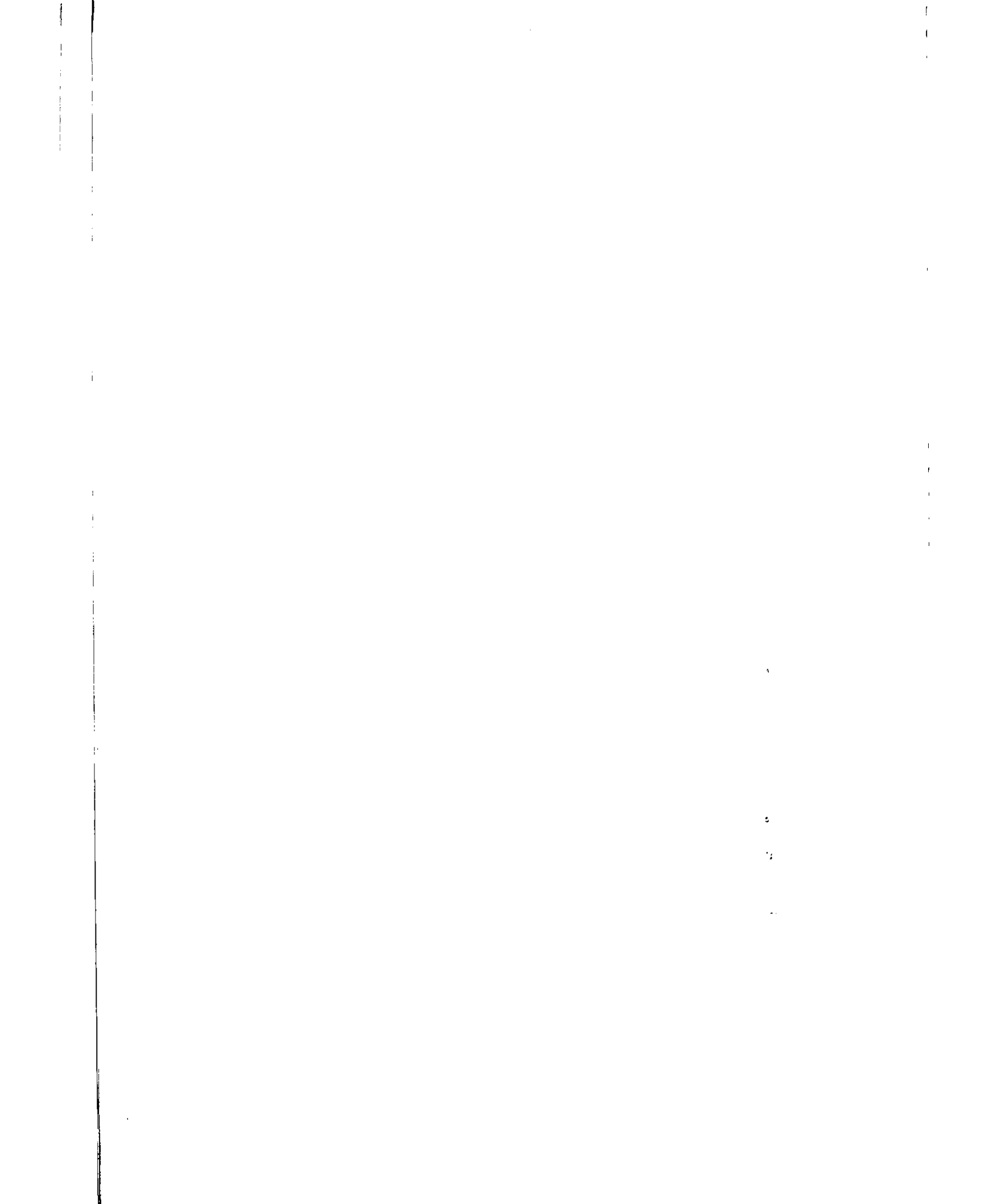
¹⁸⁰ A. Kent (note 10), p. 46.

¹⁸¹ *ibid.*, p. 11, 30s, the traditional Confucian concepts of the individual have reinforced Marxist ideas about the prevalence of society over the individual.

¹⁸² L. Rendong (note 169), p. 44s.

¹⁸³ White paper, note 148, p. 7; Institute of Current China Studies, Institute of Current China Studies, „CCP Sets Its Own Standards of Human Rights“, Inside China Mainland, No.3, March 1995, Vol.17, Taipei, Taiwan R.O.C., p. 24.

¹⁸⁴ G. Luoji (note 176), p. 46.



never be accomplished. Only after stability has been attained, through, besides others, the guarantee of the right to life to the people, then it is possible to talk about human rights.¹⁸⁵ After the events of the Tiananmen Square in June 1989 (third phase), the assertion of a different approach in human rights was taken to justify the Chinese action by saying that it protected the right to subsistence of the Chinese people. The „dissident players“ demonstrating for democracy do (of course) not merit this right; even less so if the the *nation's* right to subsistence is endangered.¹⁸⁶ In order to counter effectively the international criticism, the Chinese government additionally declared and condemned human rights' concerns by third states as intolerable interference in the internal affairs of China and as infringing upon its sovereignty,¹⁸⁷ which is a consequence of the assertion that the state alone knows what is the best for its citizens. The state's sovereignty is one of the highest goods and has to be internationally respected, as stated in the UN Charter in Art. 2 (7). The principle of state sovereignty extends to two pillars: One is the internal dimension which means that states have the ultimate control over their citizens and their territory, and two, externally, that every State is regarded equal with respect to every other state.¹⁸⁸

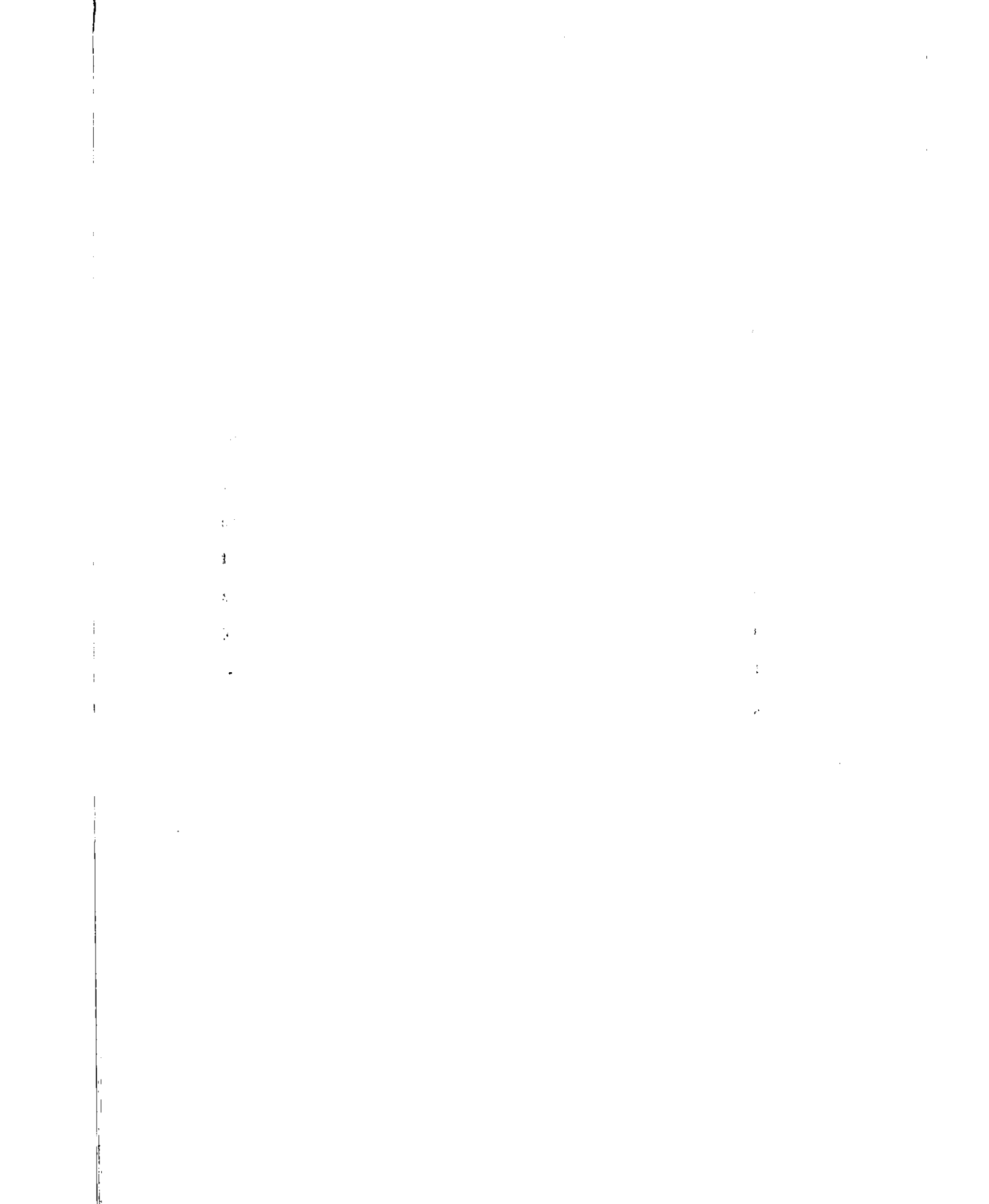
These are the historical roots of the modern Chinese understanding of human rights. How do these different conceptions live on in the current debate and conflict with the modern ideology of human rights as promoted by the international system?

¹⁸⁵ Institute of Current China Studies, „CCP Sets Its Own Standards of Human Rights“, *Inside China Mainland*, No.3, March 1995, Vol.17, Taipei, Taiwan R.O.C., p. 24; The problem of instability of China should, however, not be underestimated. By supporting anti-government democratic forces the target country might turn into complete turmoil. An attitude that has been favoured by the US in some instances, D. K. Mauzy, „The human rights and „Asian values“ debate in Southeast Asia: trying to clarify the key issues“, in: *The Pacific Review*, No.2, 1997, Vol.10, pp. 210-236, p. 214. It is submitted that none of the Western countries would then be ready to restore order and peace in China or any other country.

¹⁸⁶ G. Luoji (note 176), p. 6.

¹⁸⁷ For this new movement towards cultural relativism see also A. F. Bayefsky, „Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies“, in: *Ratio Juris*, No.1, 1996, Vol. 9, pp. 42-59, p. 43.

¹⁸⁸ K. Mills, „Reconstructing Sovereignty: A Human Rights Perspective“, in: *NQHR*, No.3, 1997, Vol.15, pp. 267-290, p. 269.



2. Implications of the current Chinese Government's position in human rights

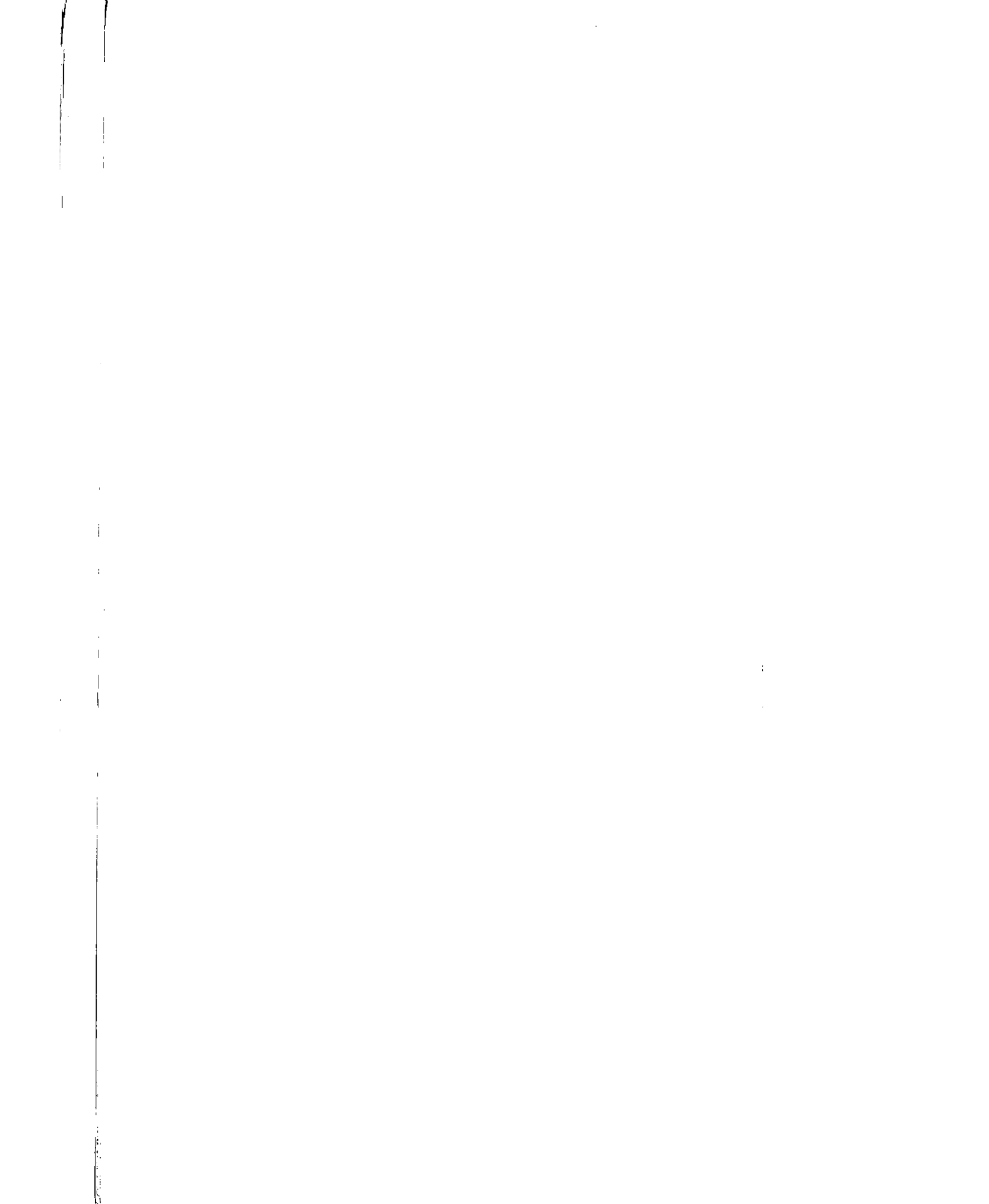
a. Universality versus relativity

aa. The state of affairs

The idea of human rights is based on the concept of universality which underlies all international human rights documents and represents the foundation of an international engagement in human rights vis-a-vis target states. Universality means that the rights should be enjoyed by all „without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status“ (Art. 2 of the UDHR). The Asian countries, on the other hand, rely on cultural relativist claims which submit, with variations, that the international norms are not of universal validity and that there is no uniform interpretation of them. Human rights can differ from one state to another depending on a state's values and cultural and religious tradition.¹⁸⁹ The cause of all disagreement about human rights and their nature is not that the community of states cannot find a common interpretation, but that the concept of human rights addresses the individual, but, on the same time, impacts on the political system of the state. The distribution of power and its limits, as well as the relations from state to society are directly affected by human rights law.¹⁹⁰ Additionally, the character of *international* human rights law displays the paradox that the initial actors are still states, even if individuals are empowered by the laws. Without the consent of the nation state as to the ratification of the treaty or as to supervision by the Treaty body, the citizen cannot invoke the norms in front of the international

¹⁸⁹ A useful overview of the literature can be found in A. D. Renteln, *International Human Rights: Universalism versus Relativism*, Sage, Newbury Park 1990.

¹⁹⁰ D. K. Mauzy (note 185), p. 210.



authority. If international human rights norms are not transformed into national law, then the individual cannot even invoke them before national courts.¹⁹¹

bb. Are there Asian values?

According to the above mentioned cultural relativist, human rights differ from one state to another because the value-systems are different. Two different versions of relativism can be discerned: one position, the „strong relativist“ position, sees values to be so different that there can be no universal rights. Human rights are simply not applicable to Asian societies, which have a different perception of the *concept and nature* of human rights. A second position, is the „softer“ version which states that human rights are universal by nature, but different value systems influence the interpretation and implementation of human rights in a given country. Human rights *should* be promoted everywhere, but they cannot be fostered in the same way as there are objective conditions to be met first. „We also have the right to XYZ, but in a different way.“ It lies within the competence of the state to decide how the human dignity is guaranteed in its country. The crucial question for the international lawyer in this case is whether the substance of the right is still maintained.

The question of values will be dealt with only superficially, as Confucian values were already described above and a comprehensive overview would go beyond the scope of the paper. Asian and Chinese values are, despite all attempts to find commonalities (cross-cultural attempts), different to Western values¹⁹² and will not become the same in the near future. In the Asian countries, for example, the individual does not enjoy the same standing as in Western societies. Individuals have to serve the interests of the

¹⁹¹ In Germany, this transformation takes place under Art. 59 II of the constitution. The relevant international act has to be confirmed and ratified by the Parliament.

¹⁹² at least for the educated in Asia, D. K. Mauzy (note 185), p. 217.



community (communitarianism) or often of the state¹⁹³ and are unable to pursue their own aims first and foremost. Personal freedom is not regarded an important value in Asian societies.¹⁹⁴ The ideal society is one of moderation and equilibrium. The perceived Western, especially American, decay of society (crime, divorces) is objected to and feared.¹⁹⁵ Last, but not least, the Asian way is to reach consensus through consultation and not confrontation. This value, which is fundamental to Confucian thought, concurs perfectly with China's and other Asian countries' claims that aid and trade should not be linked to human rights, nor conditionality imposed on the third world countries,¹⁹⁶ nor Asian countries condemned in international fora, but co-operation be favoured.

cc. Are human rights universal?

The attempts to find a basis for the universal respect of human rights is almost as old as the human rights movement itself, but has been subject to challenge from many sides.¹⁹⁷ Parallel to the legal arguments, therefore, a philosophical discussion as to the moral foundation of human rights has developed. Whether such a universal nature is drawn from human dignity¹⁹⁸, the concept of natural rights and self-evidence, the

¹⁹³ The state is not seen the adversary against whom liberties have to be defended, *ibid.*, p. 218; Yash Ghai, „Human Rights and Governance: The Asia Debate“, in: *Australian Yearbook of International Law*, 1994, Vol.15, pp. 1-34, p. 17.

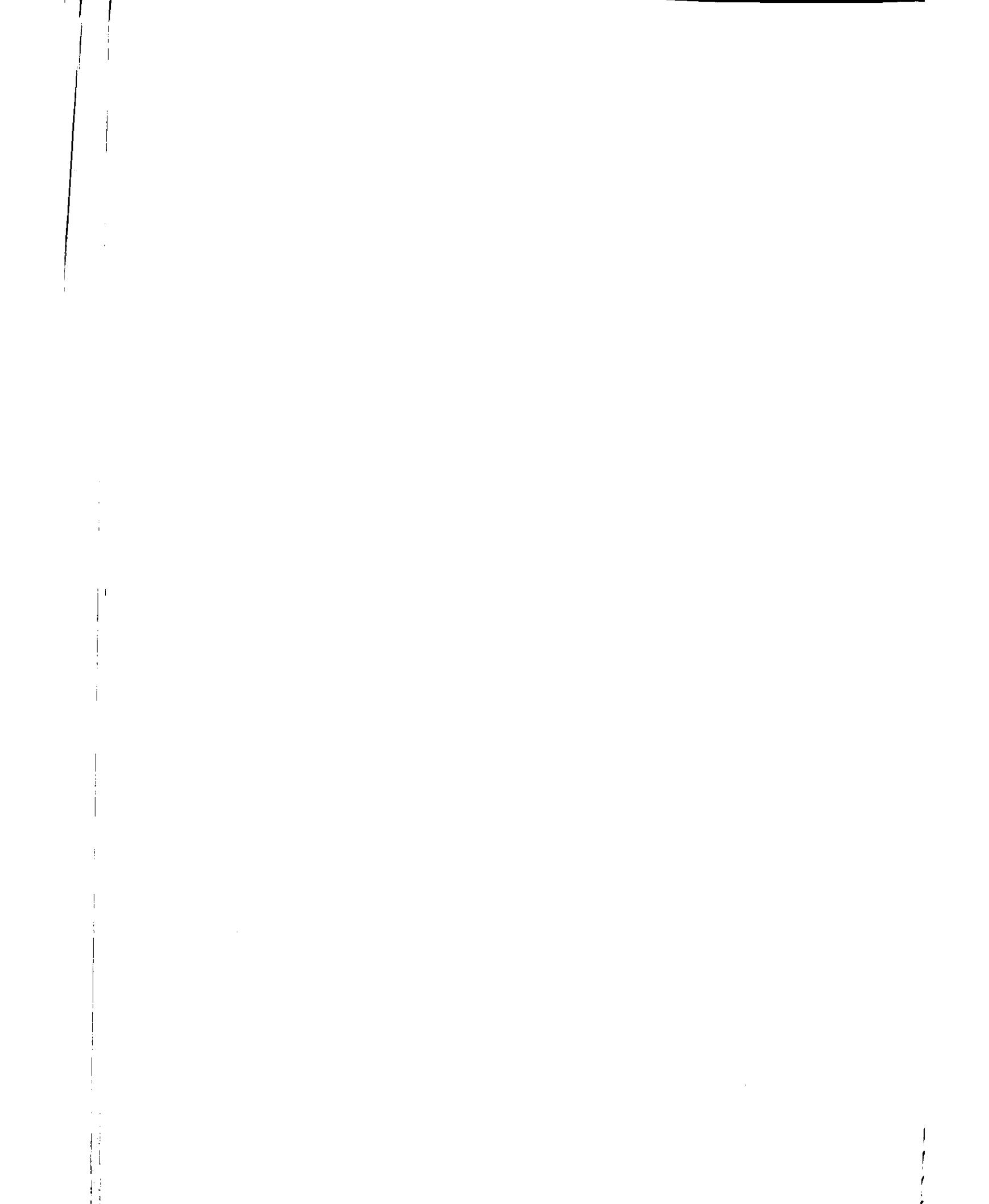
¹⁹⁴ A. Sen (note 11), p. 33.

¹⁹⁵ D. K. Mauzy (note 185), p. 212; Y. Funabashi, M. Oksenberg, H. Weiss (note 163), p. 83.

¹⁹⁶ Statement by Indonesian Foreign Minister Alatas at Vienna, 14.6.1993 as cited by P. van Dijk (note 105), p. 105: „Human rights are vital and important by and for themselves. So are efforts at accelerated national development, especially of the developing countries. Both should be vigorously pursued and promoted. Indonesia, therefore, cannot accept linking questions of human rights to economic and development cooperation, by attaching human rights implementation as political conditionalities to such cooperation. Such a linkage will only detract from the value of both.“

¹⁹⁷ Yash Ghai (note 193), p. 2.

¹⁹⁸ J. Maritain, *The Rights of Man*, G. Bles, London 1944, p. 37: „The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end, an end which must be treated as



principle of equality, morality or human worth, cultural relativists will always find an argument to counter these assumptions as they are all closely related to culture and society. From their point of view human rights are a Western (even hegemonic) concept that endangers different political systems, cultures, values and forms of governance.¹⁹⁹ The task for an international lawyer is, in full conscience of the debate about the philosophical foundation for the human rights' movement, to built upon the feebleness of the existing legal arguments and develop them further or even develop new concepts that can support the notion of universality.

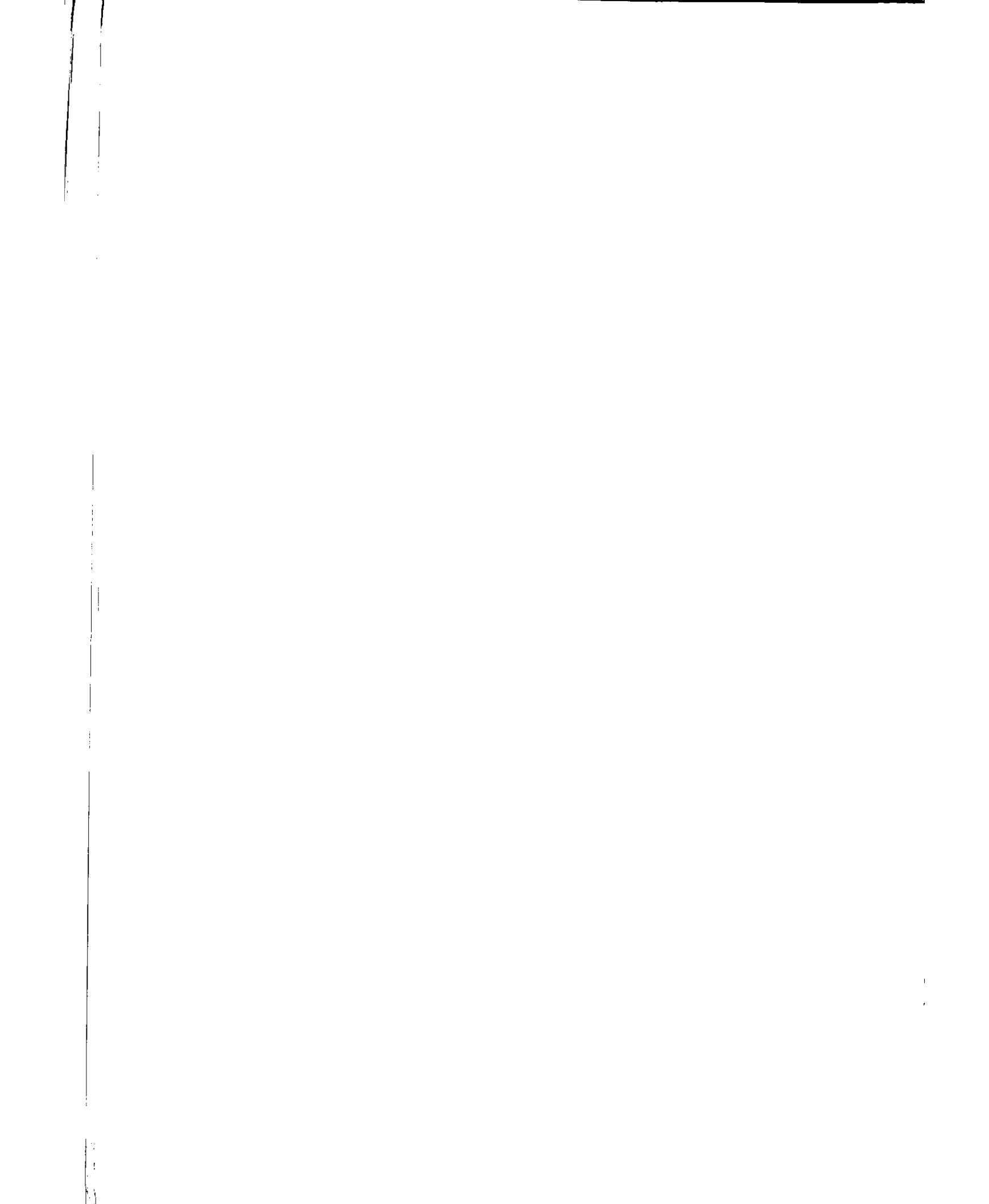
How can human rights' norms be of universal validity? This is the case in international law if they are part of the jus cogens. Art. 53 of the Vienna Convention of the Law of the Treaties defines such a norm as a norm „accepted and recognized by the international community of States as a whole, as a norm from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character.“ Are international human rights norms accepted and recognized by the international community as a whole and accepted as norms from which no derogation is permitted? Some might be.²⁰⁰ According to Bilahari Kausikaan²⁰¹ this hard core of rights might even be smaller than the West assumed at Vienna. One only has to look to China in order to see that much derogation is allowed in order to protect the state's and nation's interest. All of a sudden the right to life of the citizens does not count any more (Mao's Great Leap Forward, Tiananmen or family planing policy) or the freedom of expression is restricted as soon as the

such . The dignity of the human person? The expression means nothing if it does not signify that, by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to man because of the very fact that he is a man.“

¹⁹⁹ A. Sen (note 11), p. 39, he contends that this linkage „though quite artificial, can be rethorically quite effective“.

²⁰⁰ D. K. Mauzy (note 185), p. 226, she cites: opposition to trade in slaves, piracy, genocide, crimes against humanity, and racial discrimination agreed upon at Vienna.

²⁰¹ Straits Times, 5.7.1993.



„stability“ of the country is endangered. Does this imply that human rights norms cannot be universal?

The concept of obligations erga omnes which includes the outlawing of acts of aggression, the prohibition of genocide and the principles and rules concerning the basic rights of the human person, including slavery and racial discrimination²⁰² does not lead much further than the notion of jus cogens, because only a few („basic“) human rights are said to belong to this category by the Court. Nevertheless the Court's judgment can be interpreted in a way that establishes the principle that (all) human rights form a separate category of international law, a category that does not rely on reciprocity.²⁰³ This would mean that human rights represent a *distinct feature* of international law, their characteristic being that they are universal in nature.²⁰⁴ Different cultures might more easily accept that human rights acquire a distinct place in international law, than that they, as a consequence and a matter of fact, are universal. Moreover, dispute is likely to arise about the rights covered by the concept of the obligations erga omnes.

This section is not going to detail further legal arguments for the universal nature²⁰⁵ of human rights, nor for the possible right of states²⁰⁶ to act in defence of human rights in

²⁰² ICJ, Barcelona Traction, Light and Power Company, Limited, Second Phase Judgement, ICJ Reports 1970, pp. 3, p. 32.

²⁰³ P. van Dijk (note 105), p. 108; R. Bernhardt, „Thoughts on the interpretation of human rights treaties“, in: F. Matscher and H. Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda*, Heymann, Cologne et al. 1988, pp. 65-71, p. 65s with regard to human rights treaties, cited by P. van Dijk, see above, p. 108.

²⁰⁴ „If the norms referred to by the Court do involve universal obligations, then the norms themselves should also be of a universal character“, P. van Dijk (note 105), p. 108.

²⁰⁵ For example the „membership to an international constitutional order“ as submitted by P. van Dijk, *ibid.*, p. 107, According to him, the mere membership in the international community of states has the corollary of binding force of the constitutional law of this community. This higher law consists of fundamental norms established within that community without the necessity to have agreed to that particular norm; Another possibility would be to rely on the treaties in the field of human rights and to take the successive codification of human rights norms as an indicator of their universality, with the serious lack of comprehensiveness as regards the number of states, see also B. Simma, P. Alston, „The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles“, in: *Australian Yearbook of International Law*, 1992, Vol. 12, pp. 82-108, p. 87; Finally, the UDHR in its complexity could be taken as customary law or

a third country, but will turn to the practical discussions that took place at Vienna in 1993. This concurs with Jack Donnelly's view that it is better to refer to the *general acceptance*²⁰⁷ of human rights as documented in the UDHR, in the world-wide ratification of most of the international human rights agreements, and in the affirmation of this acceptance at different conferences,²⁰⁸ instead of searching for a *coherent* philosophical or legal base. A clear legal or normative base to universality which is accepted and supported by all nations will probably never evolve as long as the world consists of different nations living in different political systems and as long as the international system is made up of states with no authority to impose actions or legislate.

dd. Vienna - The end of the debate?

The final document of the Vienna Conference on Human Rights proclaimed that the universal nature of human rights is „beyond question“.²⁰⁹ Did this end the ongoing conflict between mostly developing countries, China especially, and the Western world

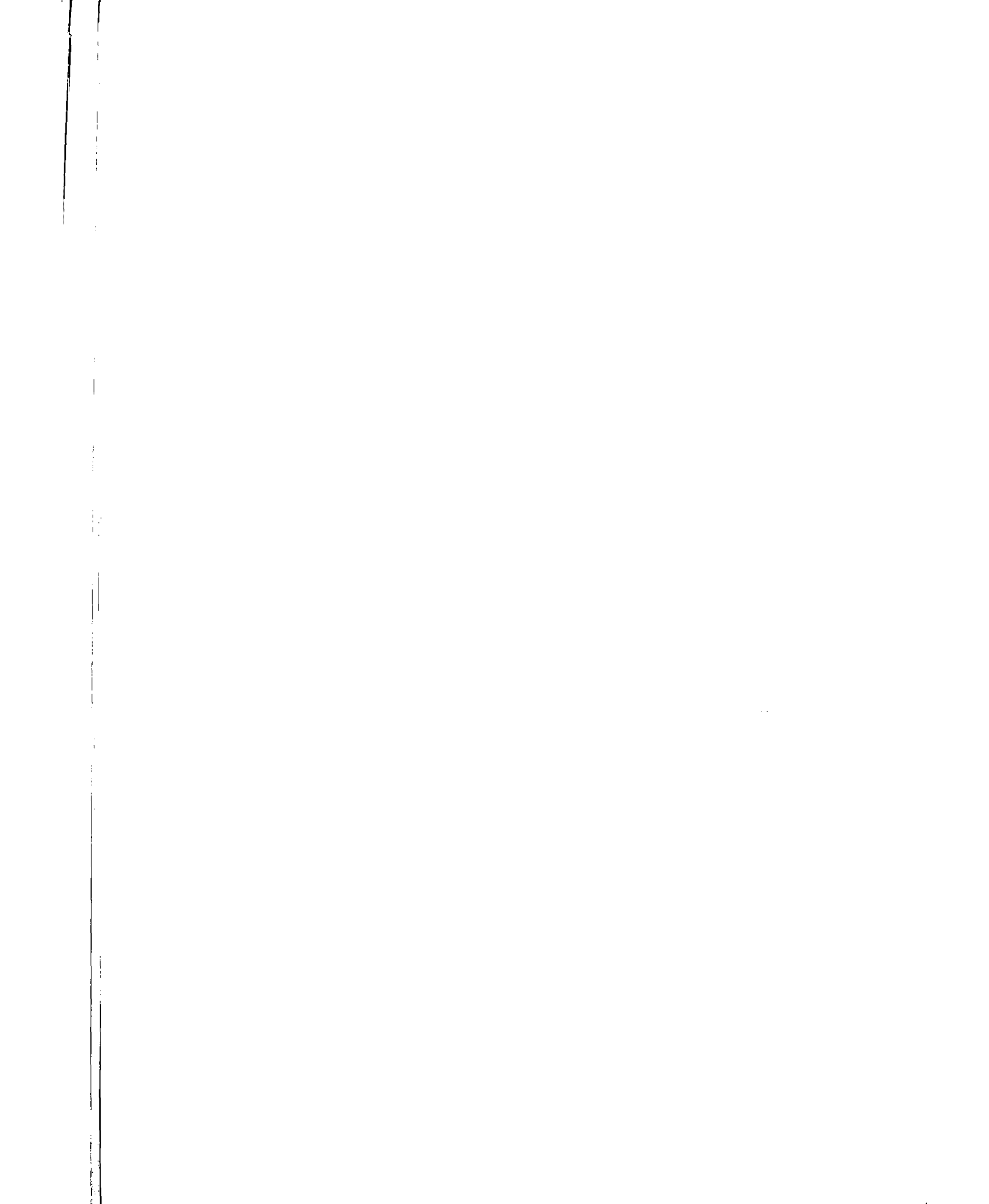
statement of general principles, both being sources of international law according to Art. 38 of the Statute of the ICJ, O. Schachter, „International Law in Theory and Practice: General Course in Public International Law“, in: 178 *Recueil des cours* 21, 1982-V, pp. 333-342, p. 334s proposes several kinds of evidence in the context of customary law formation; B. Simma, P. Alston, see above, furthermore discuss general principles as sources of human rights law.

²⁰⁶ This discussion is of course closely related to the sources of human rights and the legal foundations for universality. Once a universal legal foundation has been found, all states are obliged to respect human rights. To what extent third states can deduct a right to act from this foundation is, of course, another question. Only if the legal foundation implies a duty „*erga omnes*“, then the obligation of the accused state has the corresponding right of the accusing state. Such a justification (*erga omnes*) could be found in customary law, in the general principles or by invoking Art. 55, 56 of the UN-Charter. It is widely accepted that a *droit de regard* exists as regards international fora and that severe human rights violations can be taken up in bilateral relations without encroaching upon the *domaine réservé*.

²⁰⁷ J. Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca 1989, p. 2.

²⁰⁸ see also P. Baehr, „The Universality of Human Rights“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.) (note 154), pp. 25-43, p. 33.

²⁰⁹ UN Doc. A/CONF.157/23, 12.7.1993, par. 1.

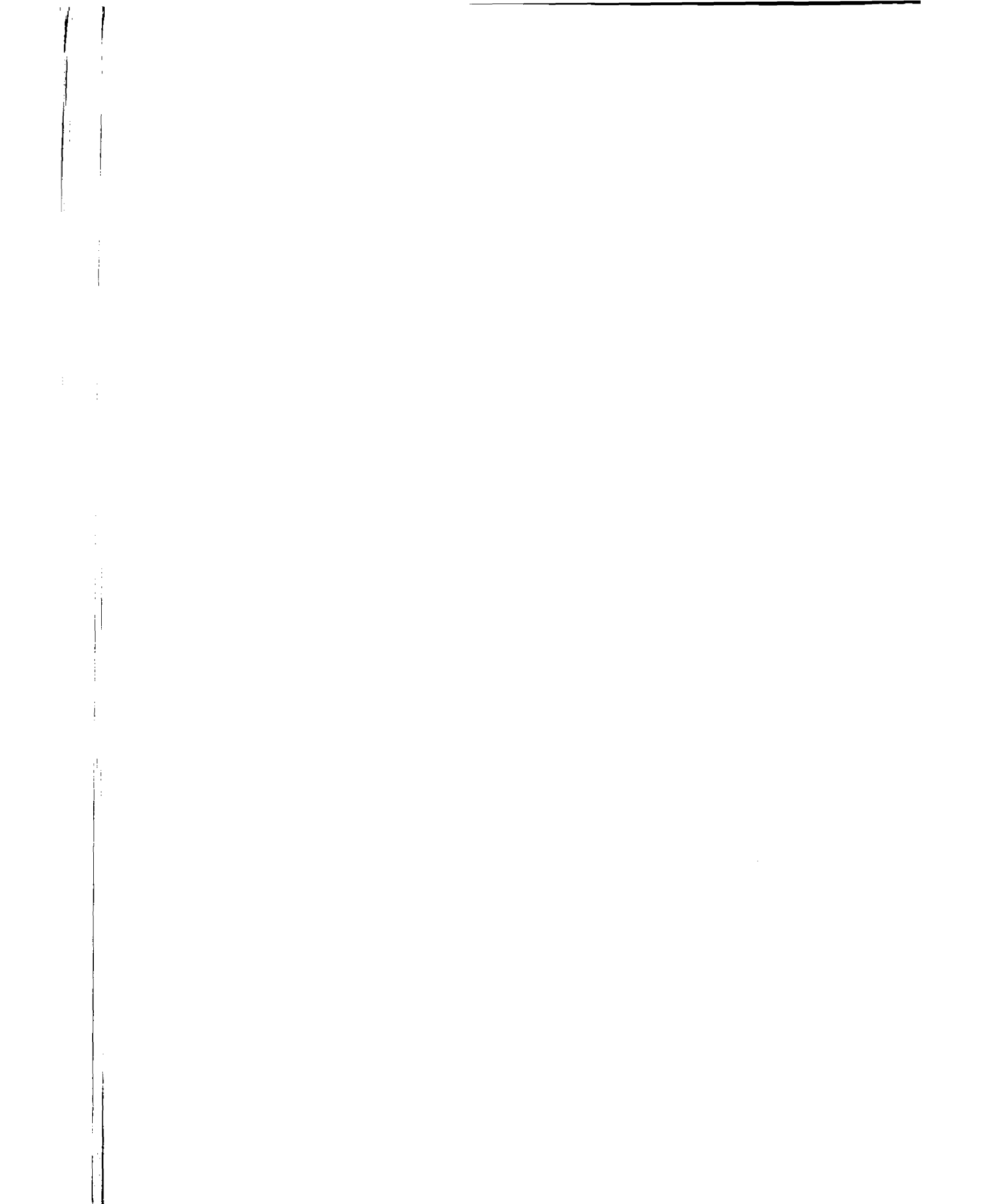


as to the applicability and interpretation of human rights? It might not have delivered the desired result of a mutual understanding. What it affirmed, in line with the previous Bangkok Declaration²¹⁰ and its „sister declaration“ of Asian NGOs (Bangkok NGO Declaration)²¹¹, was the acceptance (in formulation) that the *nature* of human rights is universal. However, the final document of Vienna could not prevent the Bangkok Declaration from influencing the wording of paragraph 5 in the sense that national particularities have to be taken into account.²¹² The final document with its paragraphs 1 and 5, in the first place, seems to be a great achievement in terms of the acceptance of the universal nature of human rights. It appears as if the afore-mentioned „strong relativist“ has been defeated and left the floor to the „soft“ relativist. But does this concession really help if the some parts of paragraph 5 take away all its force and innovation? The reference to national particularities not only gives rise to a different *interpretation* of universality, but questions *the idea* of universality as such. While the Asian countries affirmed the different circumstances in which rights are being respected, they are likely to reduce universality to a mere formal commitment without substantive content. This is where interpretation and nature meet: an interpretation must never reduce the core of a human right below a certain limit. This opinion does not allege that human rights are the same everywhere and for everybody, but simply

²¹⁰ Bangkok Declaration, 1993, adopted at the United Nation's Asia Regional Meeting on Human Rights in Bangkok on 29.3.-2.4.93.

²¹¹ The Bangkok NGO declaration differs in interesting points from the ASEAN governments attitude. It put more emphasis on the universality of human rights, although it still leaves room for cultural influences as long as they do not derogate from the universally accepted norms. Nevertheless, not all of the Western values are accepted as being applicable to the Asian countries. However, not all of the local NGOs support the Western approach, but criticize it heavily as being hegemony, D. K. Mauzy (note 185), p. 222.

²¹² „All human rights are universal, indivisible and interdependent and inter-related. (...) *While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect human rights and fundamental freedoms*“ (emphasis added), UN Doc. A/CONF.157/23, 12.7.1993, par. 5.



that no political, economic and cultural system is allowed to deny them their universal nature.²¹³

In the end, Vienna did not succeed in finding a consensus between Western and Asian countries on the issue of universally applicable standards and there was no real exchange of views between the developing and the developed world.²¹⁴ The formulations chosen permit interpretation in either direction. Moreover, cultural relativists still claim that universality cannot convince because it relies on unchangeable, static rights instead of accepting that rights can change as a result of evolving values (human rights might be universal in nature, but have to be considered with the understanding that „norms and values change over time“, Bangkok Declaration).²¹⁵ What it might have enhanced is a greater acceptance by the third world that there are, in general, some universal values, even though their codification might have arisen in the West.²¹⁶

ee. Recent developments in China

China can rightfully be named as one of the main proponents of the Bangkok Declaration with its rejection of the universal applicability of human rights²¹⁷ and a

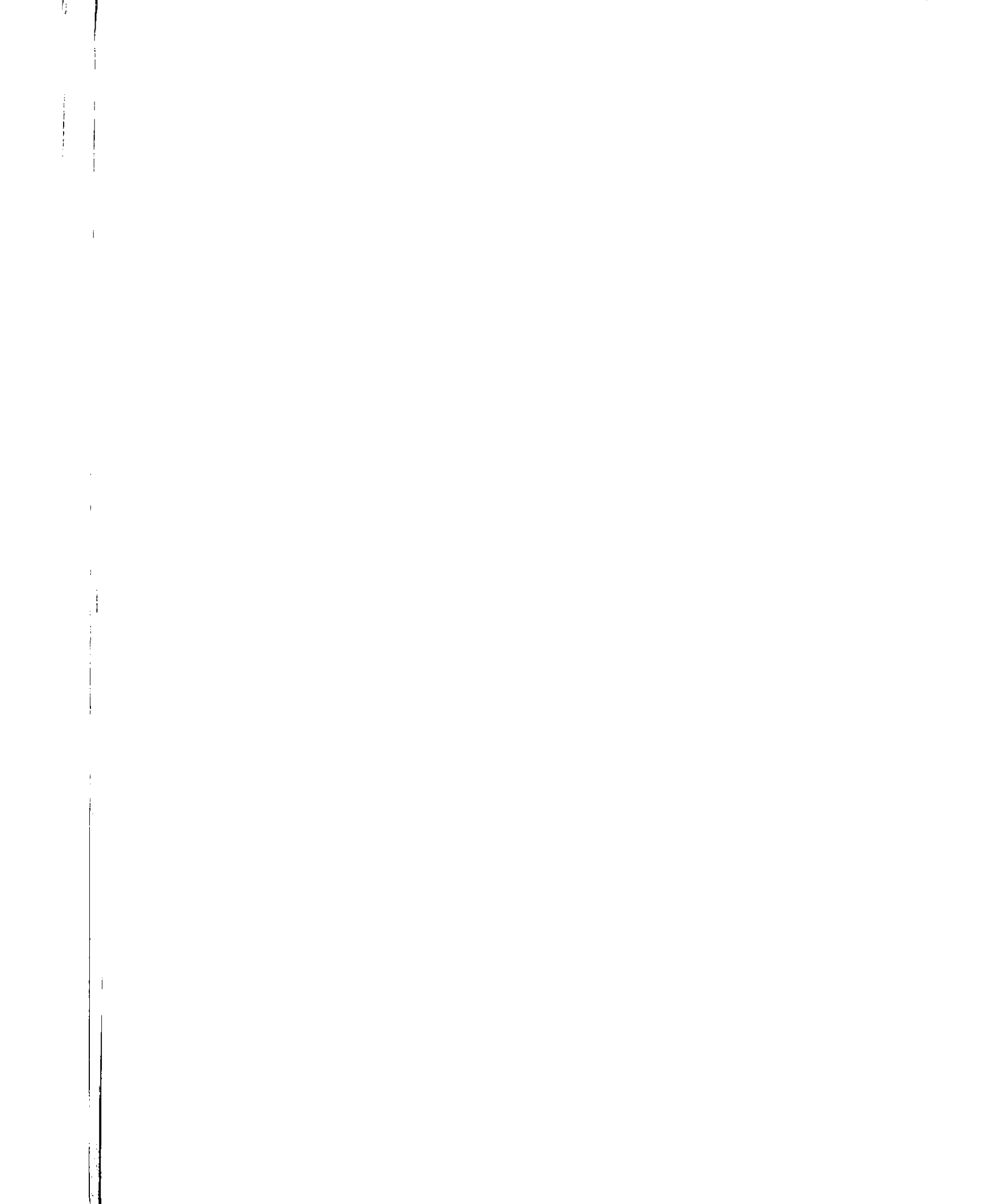
²¹³ P. Alston, „Importance of the Inter-Play between Economic, Social and Cultural Rights, and Civil and Political Rights“, in: *Human Rights at the Dawn of the 21st Century*, Interregional meetings organized by the Council of Europe in advance of the World Conference on Human Rights, 28.-30.1.93, Council of Europe Press, Strasbourg 1993, pp. 59-74, p. 66s, he states that the non-negotiable nature of human rights has been established in international law and despite enormous room for debate about the best way of implementing the objectives, it is to say that simply „the objectives themselves are not open to refutation on economic rationalist or other grounds“.

²¹⁴ D. K. Mauzy (note 185), p. 226, see also F. van Hoof, „Asian Challenges to the Concept of Universality: Afterthoughts on the Vienna Conference on Human Rights“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.) (note 154), pp. 1-16.

²¹⁵ D. K. Mauzy (note 185), p. 221, 226s.

²¹⁶ W. Barnds, „Asia: progress and problems“, in: McColm, R. Bruce (eds.), *Freedom in the World*, Freedom House, New York 1992, pp. 29-31, p. 30.

²¹⁷ M. Davis, „Chinese Perspectives on Human Rights“, in: M. C. Davis (ed.) (note 18), pp. 3-24, p. 3.



strong protagonist of cultural relativist claims in general (sovereignty, non-interference, differing perceptions of human rights, different value system). However, the idea that human rights are of a universal nature seems to persist and grow in official Chinese positions. In November 1996 the Chinese spokesman at the Third Committee of the General Assembly (51st session) praised the achievements of international instruments for the protection of human rights.²¹⁸ China was said to be willing to contribute to this process, to be a signatory of 15 international human rights conventions, among them four of the main ones (racial discrimination, torture, rights of the child, women) and to act in accordance with the Treaty obligations in sending the required reports to the respective Treaty body.²¹⁹ Recently, it has even signed the International Covenant on Economic, Social and Cultural Rights, and announced to sign the Covenant on Civil and Political rights.²²⁰ Taking these formal standards together, China is on its way to a comprehensive human rights commitment, international claims can in the future be based on treaty law, and criticism should take into account that China has signed more conventions in the field of human rights than the US. China's statement at the Vienna Conference: „Thus one should and cannot think the human rights standard and model of certain countries as the only proper ones and demand all others to comply with them“, which denied human rights their universality,²²¹ seems to have yielded to a „softer version“. The ongoing debate thus centers around the „right“ interpretation of human rights²²² and no longer questions the

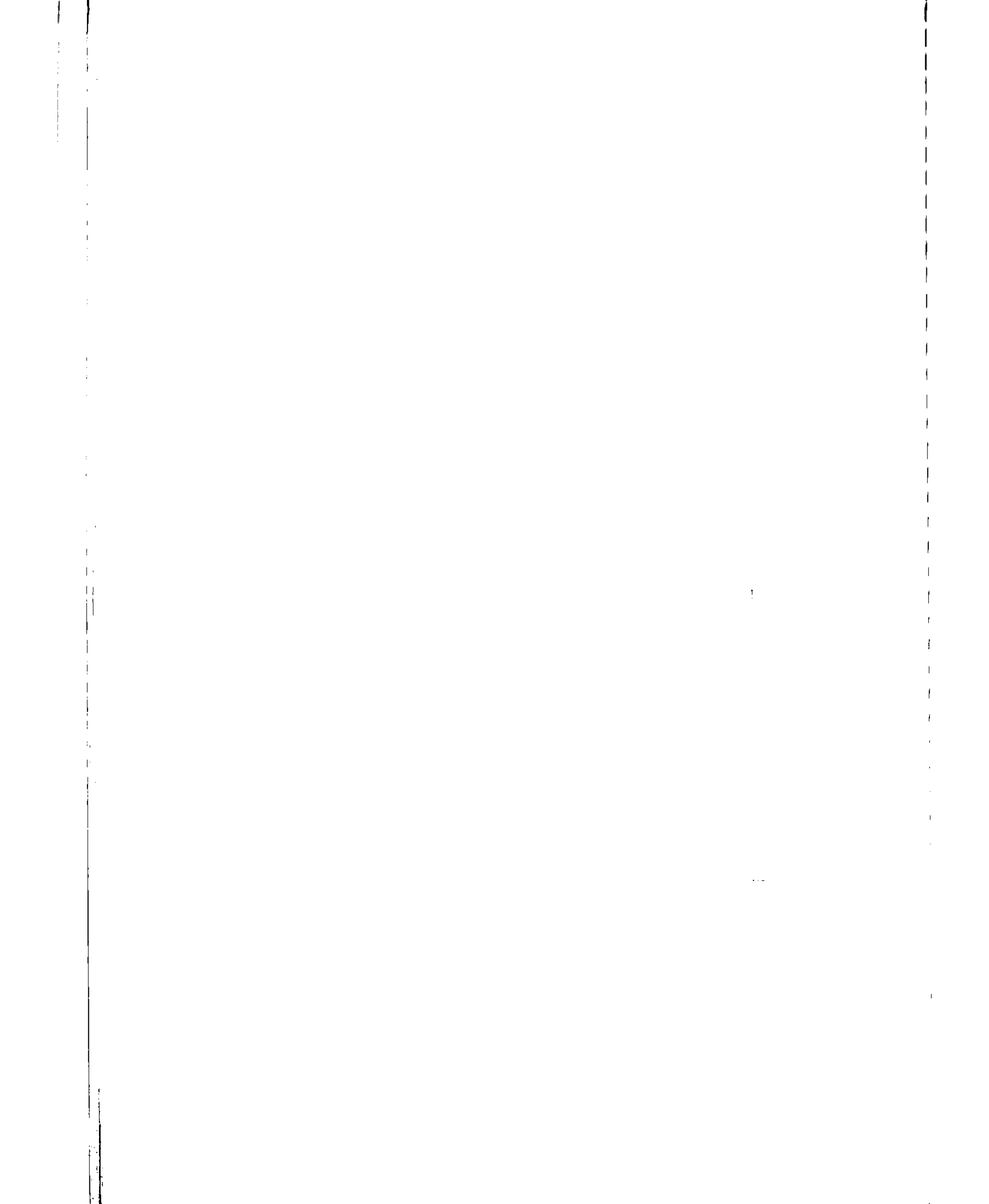
²¹⁸ Statement by Mr. W. Min (note 149), p. 1.

²¹⁹ *ibid.*, p. 3s.

²²⁰ European report, No.2294, 25.2.1998, p. V-1; European report, No.2300, 18.3.1998, p. V-7.

²²¹ F. van Hoof, „Asian Challenges to the Concept of Universality: Afterthoughts on the Vienna Conference on Human Rights“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.) (note 154), pp. 1-16, p. 5.

²²² D. Ayton-Shenker, „The Challenge of Human Rights and Cultural Diversity“, United Nations background note, <http://www.org/rights.dpi1627e.htm>, p. 3. She sees human rights as a legal minimum standard of protection which is necessary to guarantee human dignity. In no ways does this mean that states do not have room for cultural variation.



objective of universal human rights as such. Nor does China see the concept of human rights as „a slogan of the bourgeoisie“ anymore.²²³ All in all, a significant improvement can be observed even though China still regards outside criticism of its human rights record in form of resolutions (for example: UN Commission) or bilateral action unacceptable. China believes that it is the States parties to the international treaties which implement the conventions and not the Treaty bodies²²⁴ or other countries. For example, in 1997, it reacted very furiously at a resolution of the European Parliament that had criticized its worsening human rights record and had urged for the maintenance of the arms embargo in force since 1989. Such a move is seen as a gross interference in China's internal affairs.²²⁵

After having examined the features of the relativist-universalist debate, states or the Union might now refer to the legal positivist Bobbio²²⁶ and say that „the substantial problem is not so much that of justifying them (human rights) but that of protecting them. It is not a philosophical problem, but a political one.“ For our purposes, human rights might be seen „not as a legal, but a political problem“. This is not meant to drive us away from the legal framework, but to say that the implementation of the legal framework is subject to political forces. It is thus a political decision to have an active human rights policy whether or not this always has a firm legal basis in international law. This paper will later investigate to what extent the EU turns words into deeds and acts on behalf of human rights (Chapter 3), but will first continue the analysis of the Chinese position.

²²³ Xia Yong, „Human Rights and Chinese Tradition“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.) (note 154), pp. 77-90, p. 77.

²²⁴ Statement by Mr. W. Min (note 149), p. 2.

²²⁵ European Report No. 2233, 19.6.97, p. V-3.

²²⁶ N. Bobbio, „Sul fondamento dei diritti dell'uomo“, in: *Revista internazionale di filosofia del diritto*, 1965, pp. 302-309, p. 309.



b. Economic, social and cultural rights

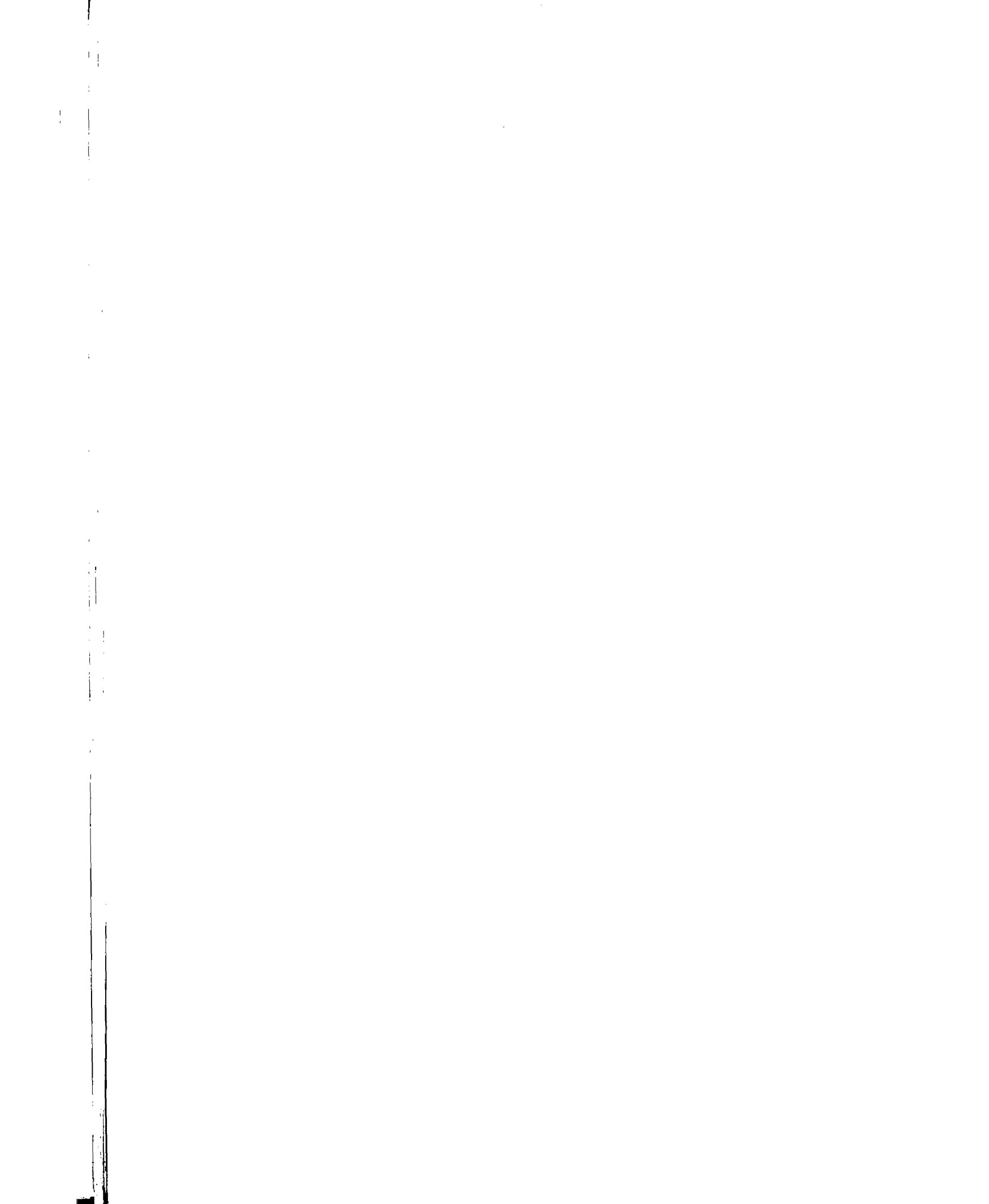
In China, the basic needs of the population as expressed in economic and social rights gain priority over the realization of civil and political rights. For instance, the Chinese spokesman stated at Vienna that: „When poverty and lack of adequate food and clothing are commonplace and people’s basic needs are not guaranteed, priority should be given to economic development“²²⁷ (which is an objective condition for the protection of human rights, see above). This Chinese view fits into the broader framework of an Asian conception of human rights. Governments are „compelled“ by mass poverty and absolute deprivation in parts of Asia to focus first and foremost on the transformation of the society in the economic field.²²⁸ The Bangkok Declaration states that economic and social progress facilitates the growth of democracy and human rights.²²⁹ In this context, a comparison can be drawn to the strategy of Deng Xiaoping in 1977-1979 in order to lead China out of its crisis: first came the open-door policy; second, economic reform; and third, confirmation of the power of the Communist Party. Economic reforms were conceived to come first and political reforms second,²³⁰ if ever. The Marxist view was that the „bourgeois“ civil and political rights manifest and lead to social and economic inequality, whereas the „true“

²²⁷ At the Vienna Conference in 1993, as cited by P. van Dijk (note 105), p. 118; in its 1994 Report the Committee on Foreign Affairs of the European Parliament deplores that China is still equating human rights solely with economic and social rights, Report of the Committee on Foreign Affairs and Security on relations between the European Union and the People’s Republic of China, Rapporteur Miss Maria Adelaide Aglietta, A3-0011/94, 7.1.94, p. 11.

²²⁸ Ch. Muzaffar, „EU-policy: a perspective from Asia“, in: European Parliament, *Summary record of presentations made at the public hearing on the Human Rights Clause*, Committee on Foreign Affairs, Security and Defence Policy, Sub-committee on Human Rights, Committee on External Economic Relations, 1995, pp. 66-75, p. 68; In 1998, China blamed the UN Commission of putting too much emphasis on civil and political rights, instead of economic, social and cultural rights and the right to development, M2 PRESSWIRE, 14.4.98, „UN Commission on Human Rights continues debate on promotion of human rights and advisory services“.

²²⁹ Yash Ghai (note 193), p. 31, he discusses the arguments of the „supporters of the market“ and backs them with the historical case in the West, where democracy followed the rise of the market. However, there are other solutions equally valid (see Chapter 4).

²³⁰ H. Weiss, „Zwischen Marktwirtschaft und Kommunismus. Moeglichkeiten und Grenzen chinesischer Reform“, in: *Internationale Politik*, No.6, 1997, Vol.52, pp. 48-52, p. 49.



rights derive from state-ownership of the means of production and their equal distribution.²³¹ The possibility of achieving both at the same time, as prescribed by the principle of indivisibility, is not taken into account by Chinese official voices, neither is the idea that the two sets of rights could be mutually reinforcing. In further defending their claim, Asian governments often state that civil and political rights are simply not applicable to the Asian societies, because Asian values do not protect freedom as much as in Western societies, but regard order and discipline as more important.²³² Due to the different value systems of Western and Asian countries, agreement over the respect and promotion of civil and political rights is difficult to reach. Thus, the denial of the equal importance of civil and political rights in China is closely related to the debate about the universality of human rights. Finally, the authoritarian system with its suppression of civil and political rights is often taken as an explanation for the substantive economic successes in at least South-East Asia.²³³

c. „Chinese people can enjoy human rights“

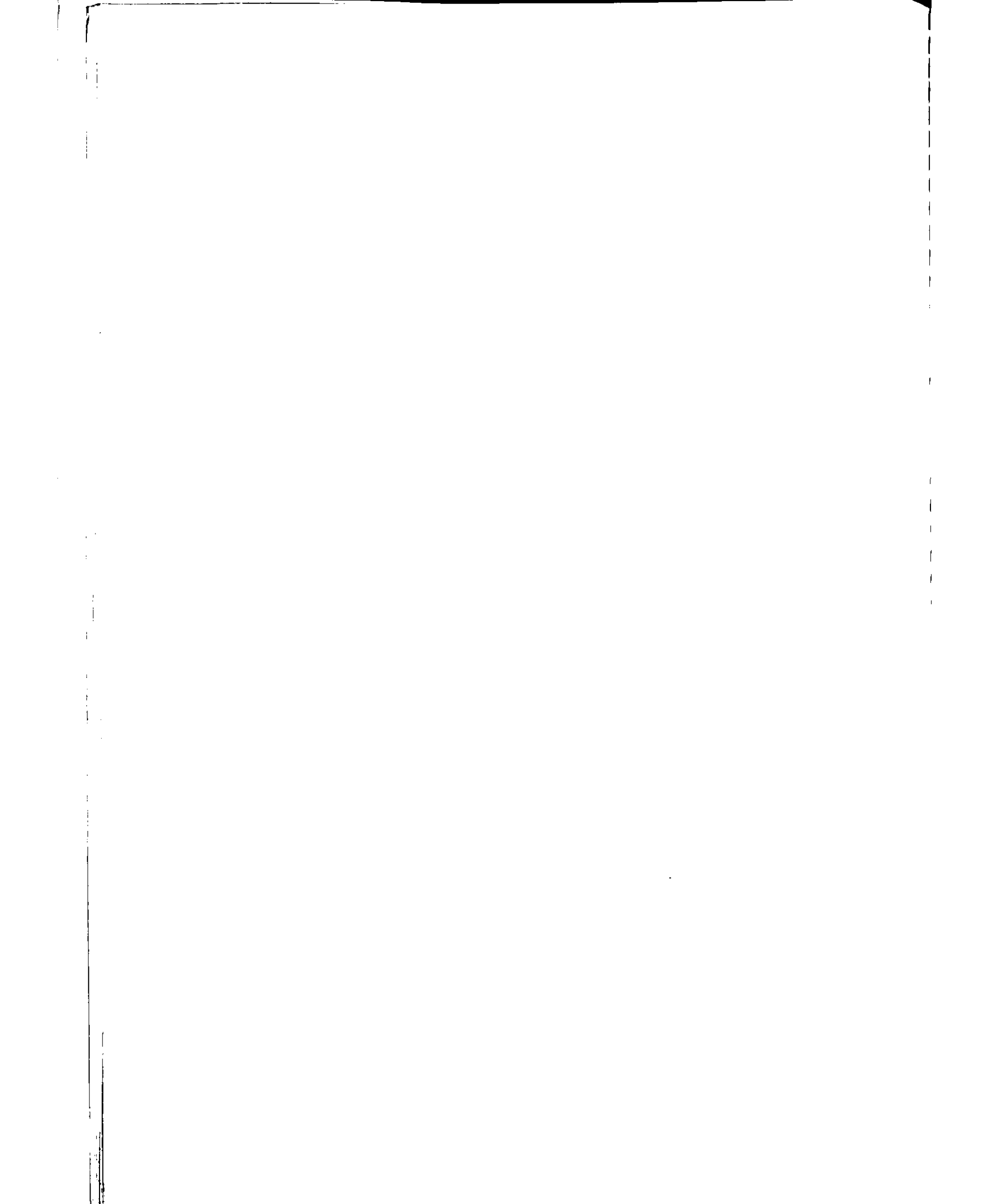
In response to the 1996 US State Department annual human rights report on China's poor human rights record, Beijing issued a condemnatory response and firmly opposed any actions taken on the basis of that report by stating that they would „interfere with another country's internal affairs“ on the pretence of protecting human rights.²³⁴ „The US... should make greater efforts to improve its domestic human rights conditions,“

²³¹ A. Kent (note 10), p. 11.

²³² A. Sen (note 11), p. 33.

²³³ *ibid.*, p. 33; Yash Ghai (note 193), p. 12s, he sees the second reason for the relevant economic success of some Asian countries in the family networks combined with authoritarian rules; H. Weiss (note 230) questions whether the economic successes in China would have been possible with a parallel opening of the political sphere and cites Russia's development as an antithesis.

²³⁴ Institute of Current China Studies, „The CCP's Human Rights Standards“, Inside China Mainland, No.5, May 1996, Vol.18, Taipei, Taiwan R.O.C., p. 24.



the official Xinhua news agency said.²³⁵ Shen Guofang, the Ministry of Foreign Affairs Spokesmen, explained that external worry was not necessary as the laws and the Constitution of China fully respect and protect the rights of the Chinese citizens. He even declared that Chinese people are enjoying an unprecedented level of democratic rights.²³⁶

China has had four constitutions, the last one drawn up in 1982 is currently in force. All of them reflect the political developments, especially the Constitution drawn up during the Cultural Revolution (of 1975) which consisted of only 30 articles and was a sharp reflection of the state of „no law, no heaven“. Even if three years later a new constitution was enacted, and the number of articles doubled, the spirit did not change until the current 1982 Constitution.²³⁷ This one proclaims the Four General Principles, already mentioned in the context of the Chinese understanding of human rights²³⁸, as the guiding ideology. The Constitution contains provisions relating to both sets of rights. The peoples' rights as regards political participation and socialist democracy are stated in article 12 of the Constitution and people's duties and rights are further spelled out in Chapter 2, articles 33-56 of the Constitution. They include equality before the law, political rights and freedom of expression and religious belief, freedom of the person and a number of economic and social rights²³⁹, as well as the basic duties of the people (Art. 51-56, as well as Art. 24). What is interesting in the context of the

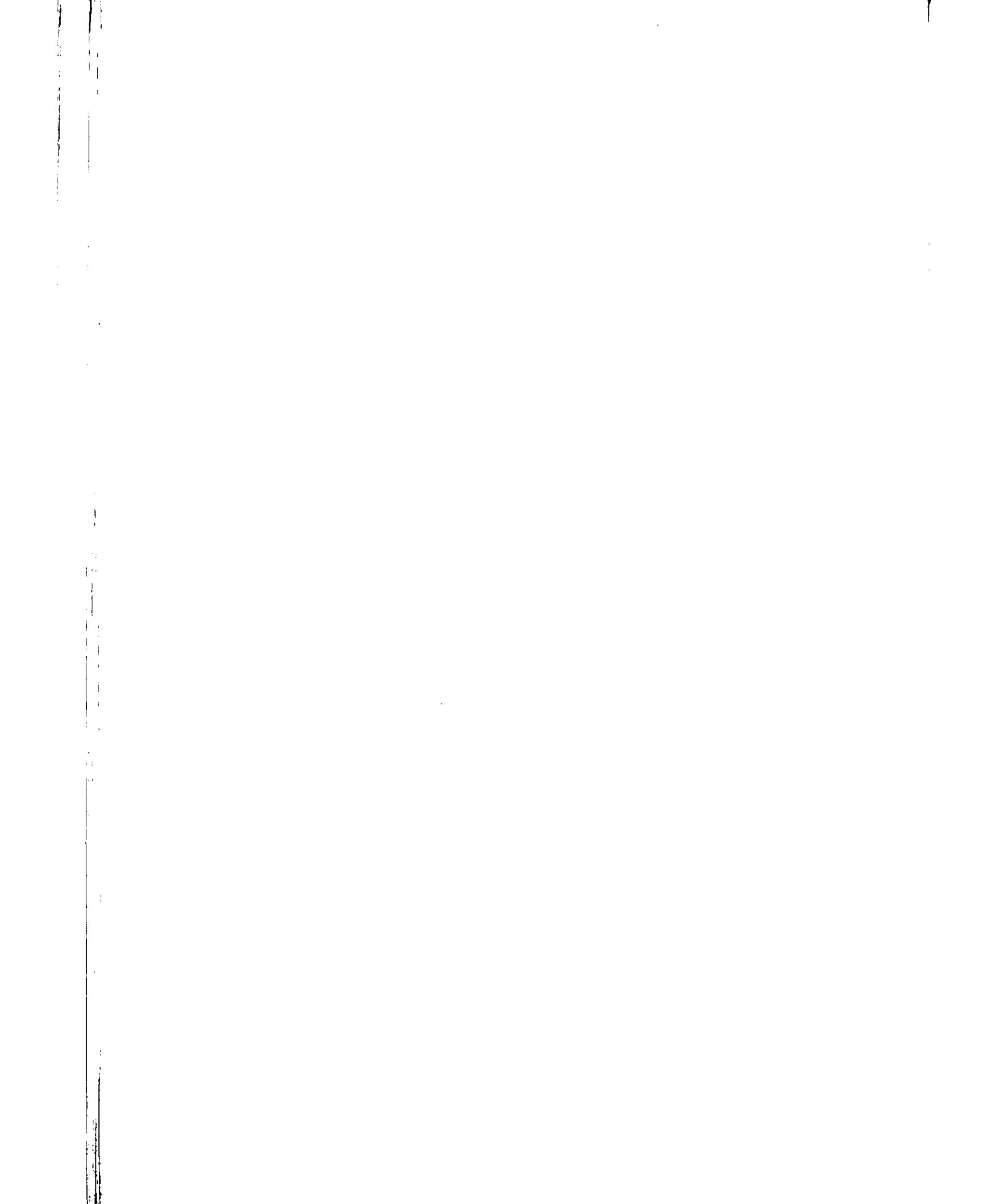
²³⁵ The Reuter European Community Report, 11.3.96, BC cycle, „China dismisses EU, US human rights criticism“: The US report said China had stepped up repression and by year's end „almost all public dissent against the central authorities was silenced by intimidation, exile or imposition of prison terms or administrative detention.“ The report said China held perhaps thousands of political prisoners and still had not provided a full accounting for all those missing from the 1989 military crackdown on pro-democracy protesters in Tiananmen Square. Beijing denies this.

²³⁶ Institute of Current China Studies, „The CCP's Human Rights Standards“, Inside China Mainland, No.5, May 1996, Vol.18, Taipei, Taiwan R.O.C., p. 24.

²³⁷ Z. Guobin, „Constitutional Law“, in: Chenguang, W.; Xianchu, Z. (eds.) (note 21), pp. 31-74, p. 34.

²³⁸ see note 175.

²³⁹ right to work, to rest, to social help and insurance, the right to get material help from the state, the freedom to education in the fields of sciences and culture.



people's duties is that the Constitution foresees in the preamble that „The people of all nationalities, all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the *duty* to uphold the dignity of the Constitution and ensure its implementation“ (emphasis added). It implies that in interpreting the Constitution, the notion of duty prevails. According to Zhu Guobin²⁴⁰ „almost all Chinese constitutional law scholars agree that the 1982 Constitution is the ‘best’ among the four constitutions in PRC history in terms of its content and forms“. It has been amended twice in 1988 and 1993 to take account of the economic development and opening-up which had touched political fields as well. Private economy and the property of land were subject of the first amendment, whereas the second one introduced even bigger changes to the socialist market economy.²⁴¹ Moreover, China has undergone significant changes as regards the domestic law in the field of human rights protection. In this regard it has formulated a new Prison Law, the Judges Law, the Law of the Protection of Minors and the Law on the protection of Women's Rights and interests, and in 1996 amendments to the Criminal Law have been accepted. Altogether, it forms a big step forward in the promotion and protection of human rights.²⁴²

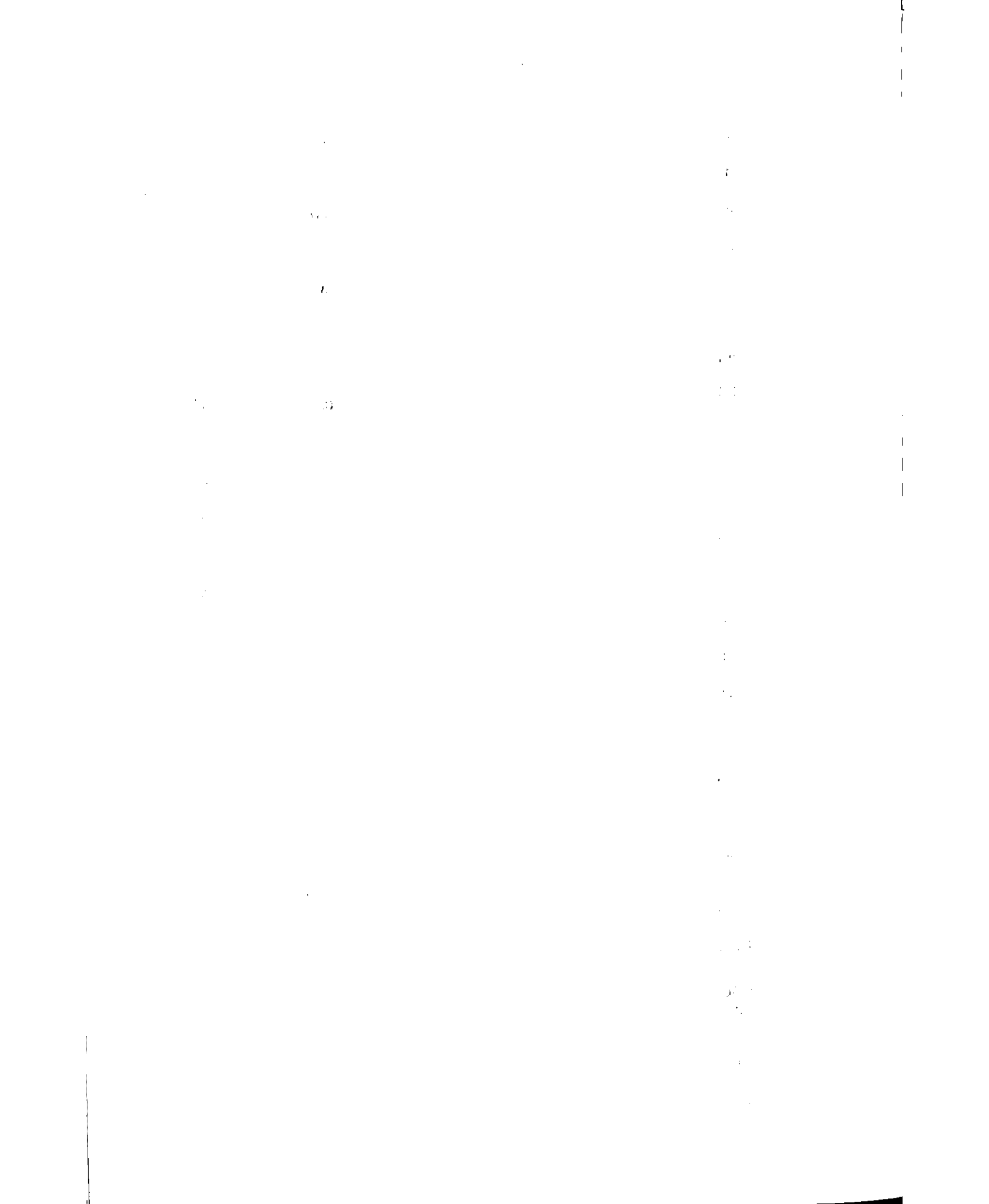
Judicial organs in China (courts, procuratorates and public security organs) transform the citizen's legal rights into actual rights.²⁴³ The public security organs are a branch in the administrative system, the other two are created by the people's congresses. Out of

²⁴⁰ Z. Guobin, „Constitutional Law“, in: Chenguang, W.; Xianchu, Z. (eds.) (note 21), pp. 31-74, p. 35.

²⁴¹ *ibid.*, p. 36, according to him, bigger, radical changes are not possible within the current framework.

²⁴² Statement by Mr. W. Min (note 149), p. 3.

²⁴³ Han Yanlong, „Legal Protection of Human Rights in China“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.) (note 154), pp. 91-102, p. 99; Z. Guobin, „Constitutional Law“, in: Chenguang, W.; Xianchu, Z. (eds.) (note 21), pp. 31-74, p. 58.



these two, the courts exercise exclusive state adjudicatory power, whereas the procuratorates are responsible for legal supervision on behalf of the state.²⁴⁴ The court system spreads over two instances with the Supreme People's Court at the top.²⁴⁵ A citizen, determined that some of his rights have been violated, can file complaints to these organs with the possibility of appeal. Moreover, the courts have to respect the constitutional principles such as equality before the law, independence, open trials, presumption of innocence.²⁴⁶ China has also made efforts to develop its judicial system by promulgating the Administrative Procedure Law of the PRC in October 1990. Besides this formal way of pursuing one's rights, there are further non-judicial methods of human rights protection.²⁴⁷ According to the official view, Chinese people therefore can enjoy their rights (be they human rights in the socialist sense or legal rights of laws and Constitution), but they „simply do not desire to exercise them“.

d. „In China, after all, there are no human rights violations“

This attitude is documented in the 1991 White paper and goes as far as alleging that there are no political prisoners in China and that all trials are public.²⁴⁸ Moreover, the paper states, the proper treatment of prisoners is guaranteed by law and respected by prison personnel. Shen Guofang, the Ministry of Foreign Affairs Spokesman, not only declared that the people are enjoying an unprecedented level of democratic rights, but stressed also that China's political situation is stable, the economy develops steadily,

²⁴⁴ Chenguang, W., „Introduction: An Emerging Legal System“, in: Chenguang, W., Xianchu, Z. (eds.) (note 21), pp. 1-30, p. 23.

²⁴⁵ *ibid.*, p. 23.

²⁴⁶ Z. Guobin, „Constitutional Law“, in: Chenguang, W.; Xianchu, Z. (eds.) (note 21), pp. 31-74, p. 59.

²⁴⁷ Han Yanlong, „Legal Protection of Human Rights in China“, in: P. R. Baehr, F. van Hoof, L. Nanlei, T. Zhenghua (eds.) (note 154), pp. 91-102, p. 99s.

²⁴⁸ Report of the Committee on Foreign Affairs and Security (note 227), p. 11ss.

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civil society is formed, the different nationalities living together are progressively united and the people are secure.²⁴⁹

Summing up the Chinese arguments, the conclusion could arguably be that China does not need any „lecture“ from outside how to treat its own citizens. The socialist system in itself provides for an excellent level of protection of the people's rights as the ruling class is the working class. The socialist understanding of human rights gives the citizens adequate protection and its focus on economic and social rights does not mean it does not respect human rights. All in all, the human rights record of China is not bad and people do not complain about it. However, in Chapter 4 this conclusion will be scrutinized.

²⁴⁹ Institute of Current China Studies, „The CCP's Human Rights Standards“, Inside China Mainland, No.5, May 1996, Vol.18, Taipei, Taiwan R.O.C., p. 24.



Chapter 3: Implementation

After the previous analysis of the EU and China, this Chapter investigates the practice of the EU in the CFSP. By looking at the use of the instruments it implicitly asks the question whether the EU has been able to assert its identity on the international scene (Art. B TEU) and prepares the discussion of Chapter 4 as to whether the EU effectively transformed its China strategy into practice.²⁵⁰ While examining the use of instruments towards China, much devotion will be given to the performance of the EU at the UN Commission in Geneva. As a preliminary question to this analysis, a look will be taken at the existing obligations in the CFSP for common action.

I. Existing obligations

1. Obligations for the Member States to act coherently

The Member States co-operate in a „systematic“ way (Article J.1.III first indent TEU) by co-ordinating the preparatory foreign policy process, conforming the national policies to the common positions and maintaining them in international fora, Article J.2.I, II, III, J.5 IV, J.6 TEU, and they implement common actions, Art. J.1. III second indent, J.3 No.4, J.5 IV, J.6 TEU. These articles are complemented by the general duty of co-operation in Art. J.1.IV²⁵¹ and apply to international fora as well as to autonomous action. The commitment to common objectives of the foreign policy as mentioned in Art. J.1.II TEU, compared with the language of the EPC, displays a certain increase in determination. Nevertheless, the general aim of working together in specific fields of foreign policy remained a political obligation and the areas in which joint measures are taken is subject to the political will of the Member States. As long

²⁵⁰ By tailoring the instruments at hand to this specific country (see introduction).

²⁵¹ „The Member States support the Union’s external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity“.

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as there is no common analysis and definition of common interests, it will be difficult to fine-tune the different interests of the Member States and to arrive at a „Union interest“.²⁵² With Amsterdam, a new ‘Policy Planning and Early Warning Unit’ has been created in attaching it to the treaty in a protocol. Its task is to strive for coherence and consistency of CFSP action and to prepare policy options for the Council; it is located in the Council Secretariat under the responsibility of the High Representative.²⁵³

Moving away from the general aim of working together and defining areas for action, the instruments to follow a common line and pursue the thus defined objectives, i.e. *common positions* and *joint actions*, are not only politically, but also legally binding upon the Member States. They are designed to extend beyond mere ‘declarations of intent’ in contrast to the provisions of the EPC in the framework of the SEA.²⁵⁴ The latter were of a political nature even though they were included in an international treaty among states.²⁵⁵ Among the two instruments, joint actions require a higher commitment than common positions,²⁵⁶ given that heterogeneous action would counteract the aim and credibility of a joint action completely. This intention was expressed by stating that „joint actions shall *commit* the Member States in the positions

²⁵² G. Burghardt, G. Tebbe, „Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union - Rechtliche Struktur und politischer Prozess“, in: *Europarecht*, No.1/2, 1995, Vol.30, pp. 1-20, p. 7.

²⁵³ European Policy Centre, „Legal Analysis“ (note 55), p. 113; T. Dodd; R. Ware; A. Weston (note 31), p. 30s.

²⁵⁴ P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 280, the EPC as a „point de référence“; G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.3, No.16.

²⁵⁵ The legal nature (*Rechtsnatur*) of a provision does apparently not determine their legal effect (*Rechtswirkungen*) in public international law. Member States can decide whether, in a treaty, they want to enter into legally binding or only politically binding obligations. The rationale behind is it that international law has to be interpreted according to the will of the states and is thus determined by it.

²⁵⁶ N. Petersen, „The European Union and Foreign and Security Policy“, in: Ole Noergaard, Thomas Pedersen, N. Petersen (ed.), *The European Community in World Politics*, Pinter, London 1993, pp. 9-30, p. 20.



they adopt and in the conduct of their activity“, whereas common positions oblige the Member States only to *ensure* conformity. Because of this vague formulation, it has been contested whether common positions imply a *legal* obligation. Their use and treatment has however shown that they are respected by the Member States as legally binding.²⁵⁷ If deviations nevertheless occur, Art. J.1.IV TEU forms the ultimate limit for divergent Member States action, but given the lack of a judicial control by the Court of Justice further discussion as to the binding nature remains purely academic²⁵⁸ and an introduction of a legal control in form of a „communitarisation“ of the CFSP was rejected at Maastricht with the establishment of the pillar structure, which was affirmed at Amsterdam.²⁵⁹ Thus control of Member States' action lies with the Council and is of a political nature only. The divergent interests of the Member States often prevail and counteract common action what makes the Council's task a difficult one. Additionally, lone action by a Member State is not legally affected by a contrary CFSP decision, but remains valid (for example a treaty of one Member State with a third state).²⁶⁰ And finally, legal effects on third persons as foreseen by the Community

²⁵⁷ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.2, No.7; I. Macleod, I. D. Henry, S. Hyett (note 52), p. 417, 418 talk about 'express obligation' and 'commitment'.

²⁵⁸ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.2, No.7; In theoretical terms and because of the missing judicial control, the Member States could invoke norms of the CFSP in front of the ICJ. A provision similar to Art. 219 TEC does not exist in the second pillar, P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 272.

The exclusion of control by the Court is also the explanation that many authors talk about the *politically* binding character of the CFSP provisions, pointing at their distinctiveness from Community law. They disregard, however, that a legally binding provision can exist in international law just because this will have been expressed in a treaty and judicial control is not decisive. As an example see P. de Schoutheete de Tervarent, L'introduction d'une Politique Extérieure et de Sécurité commune. Motivations et Résultats, in: J. Monar (ed.) (note 48), pp. 129-132, p. 131 who talks about the political obligation.

²⁵⁹ For the intergovernmental conference, A. A. Dashwood, „Position Paper“, in: A.A. Dashwood (ed.) (note 31), p. 218; T. Dodd; R. Ware; A. Weston (note 31), p. 24. The pillar structure has remained unchanged.

²⁶⁰ I. Macleod, I. D. Henry, S. Hyett (note 52), p. 417; P.-Ch. Mueller-Graff, „EPZ/GASP im System der Europäischen Union - Kohärenzgebot aus rechtlicher Sicht“, in: E. Regelsberger (ed.) (note 47), pp. 53-68, p. 67s;



instruments (directives and regulations, Art. 189 TEC)²⁶¹ and the principle of the pre-eminence of the Community legal order do not apply in the field of the CFSP. In sum, the CFSP is an intergovernmental procedure which remains in the field of traditional international law. It also has not become -yet- a third variant between community law and international law called „union law“.²⁶²

Despite the trend of the Member States to diverge, the force of 'ideas' should not be underestimated. Away from the (legal) discussion about the degree of obligation, commitments of an international treaty, be they legal or political, are open to other influences, including moral ones. The human rights idea, for example, whilst not always prevailing, can give impetus to the process and have a uniting force among the different political perceptions of the Member States.²⁶³ Moreover, the political commitment of the Member States raises the threshold for lone effort in the field of the foreign policy.²⁶⁴

Legal effect, in its turn, can be divided into two parts which are the binding effect of the members of the community and, second, the legal effect as to the invalidity of later contrary acts. It has to be remembered that the place of international law in the hierarchy of norms is below Constitutional national law, and sometimes even below or on the same level with state law.

²⁶¹ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Vorb. zu Art. J.1.-J.11, No.25.

²⁶² *ibid.*, Vorb. zu Art. J.1.-J.11, No.24.

²⁶³ see H. Wallace, „Politics and Policy in the EU: The Challenge of Governance“, in: Wallace, H.; Wallace, W. (eds.), *Policy-Making in the European Union*, Oxford University Press, Oxford 1996, pp. 3-36, p. 12s interplay of ideas, interests and institutions, p. 13 „where ideas and interests (we insist on both) are broadly congruent, that is to say shared across and within the member states, or complementary, that is mutually compatible and mutually reinforcing, there is a propensity to adopt collective policies and for the transnational arena to be accepted as the preferred form of governance“; p. 22 „ideas have played a very important part in defining the grounds for cooperation and for sustaining cooperation even when the direct consequences may be uncomfortable“; Funabashi, Y.; Oksenberg, M.; Weiss, H. (note 163), p. 6 they discuss the common interests of the Member States with regard to China. Among their six categories figure human rights as included in the UDHR.

²⁶⁴ P.-Ch. Mueller-Graff, „EPZ/GASP im System der Europaeischen Union - Kohaerenzgebot aus rechtlicher Sicht“, in: E. Regelsberger (ed.) (note 47), pp. 53-68, p. 68.



2. Union obligation

The co-ordination of external policies is necessary due to the split of competences between the EC, the EU and the Member States in foreign policy. In order to reach a coherent external face of the Union, it can not be tolerated that the three actors express different, even contrary views. The answer to this problem is that the Union has been obliged in the Treaty to assure the consistency of all its external activities in the field of foreign policy as stated in Art. C II TEU.²⁶⁵ Art. C II TEU places the responsibility for this co-ordinating aim of the Union jointly on the Council and the Commission, thus the Member States are (by this article) not obliged to act unilaterally.²⁶⁶ The Council is additionally in charge of ensuring the coherence of the CFSP with Member States policies as stated in Art. J.8.II TEU, which confirms its role in assuring coherence in the CFSP besides being the decision-making organ.²⁶⁷

Already one year before the Treaty of Maastricht, agreement was found as to three institutional points which relate to the aim of coherence: one is that the distinction between the EPC Council meeting and the EC General Affairs Council meeting was no longer to be maintained, but one joint meeting was to be held instead. Even though the method of preparation remained different (COREPER, Art. 151 TEC and Political Committee, Art. J.8.V TEU), the agenda covered both EPC/CFSP and Community matters. Secondly, the EPC secretariat was merged with the Council secretariat and thirdly, it was already agreed that the Commission should have a non-exclusive right of initiative in the fields of the EPC.²⁶⁸

²⁶⁵ With Amsterdam also reinforced by the wording (the Commission and the Council) „shall cooperate to this end“; Hilf/Pache, in: E. Grabitz (ed.) (note 28), Art. C, Nr.13.

²⁶⁶ *ibid.*, Art. C, Nr.15

²⁶⁷ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.8, No.9.

²⁶⁸ S. J. Nuttall, „The Foreign and Security Policy Provisions of the Maastricht Treaty: Their Potential for the Future“, in: J. Monar (ed.) (note 48), pp. 133-138, p. 134.



The Maastricht Treaty then clarified the hierarchy between the COREPER and the political committee in affirming the precedence of the COREPER over the political committee as regards the preparation of the work of the Council (Art. J.8.V TEU).²⁶⁹ The exact division of labour between the different institutions has been elaborated in a Council decision according to declaration No.28 of the Maastricht Treaty final document in 1993.²⁷⁰ With regard to the two committees, it determined that the preparation of political issues would still take place in the political committee, but that its recommendations would not go directly to the Council, but to the COREPER first. The COREPER, though, has made limited use of its parallelly established right to amend the proposals of the political committee.²⁷¹ Secondly, Maastricht also brought another clarification: first pillar measures, especially trade measures, should support initiatives taken in the framework of CFSP and back them up with the necessary coercion.²⁷²

Thus, the Member States and the Union are legally bound by the treaty to ensure the coherence of the whole range of the external activities of the Union. The Member States have to ensure that their national foreign policies, which continue to co-exist with the common policy,²⁷³ conform with common action in the field of the CFSP, and the Commission and the Council are jointly obliged to ensure the consistency of the external face of the Union as a whole (Art. C II TEU).

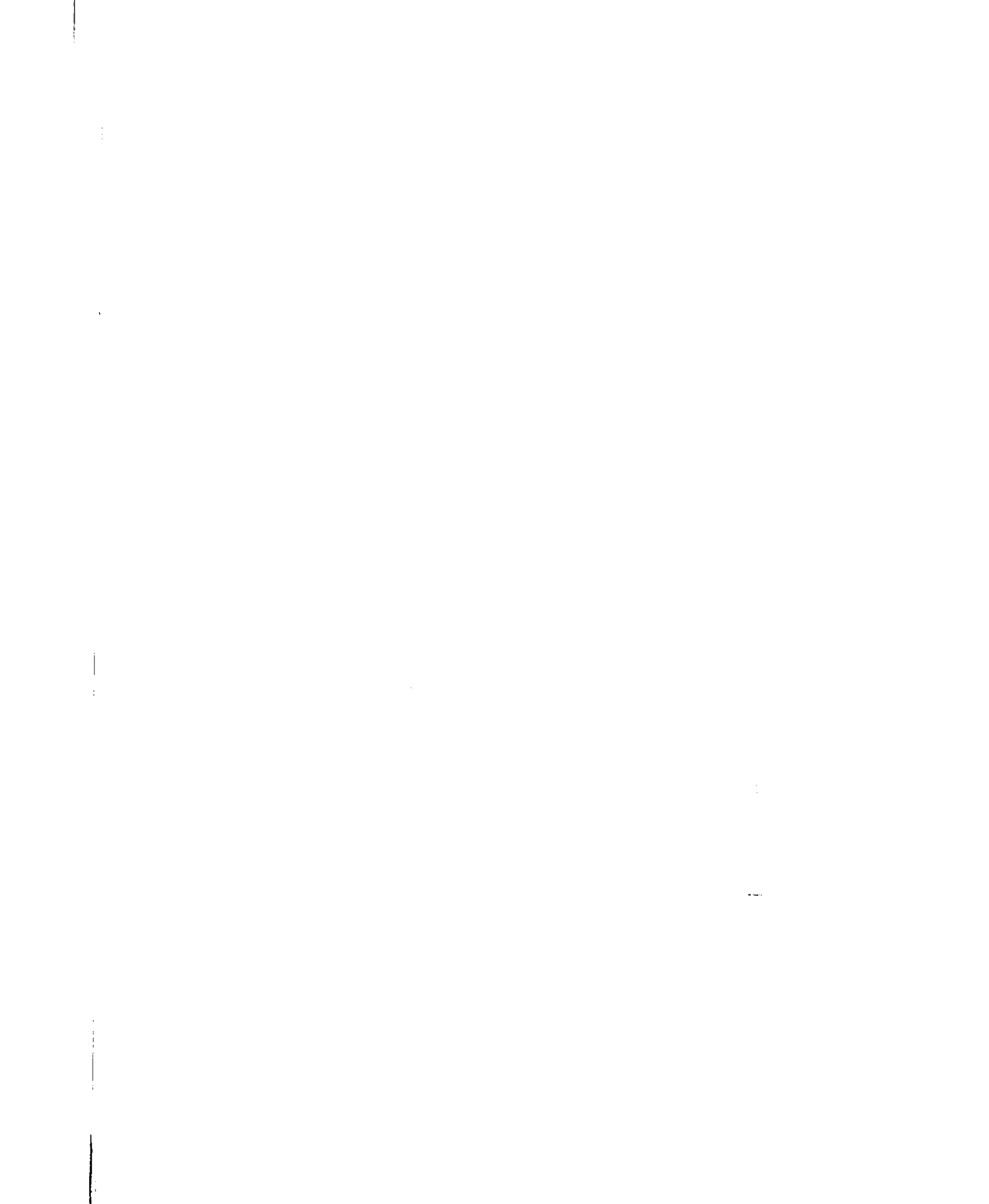
²⁶⁹ P. Willaert, C. Marqu ez-Ruiz, „Vers une politique  trang re et de s curit  commune:  tat des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 265.

²⁷⁰ Council doc. 9252/1/93, 27.10.93.

²⁷¹ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.8, No.15.

²⁷² Hilf/Pache, in: E. Grabitz (ed.) (note 28), Art. B, Nr. 10; I. Macleod, I. D. Henry, S. Hyett (note 52), p. 416; see Art. 228a TEC.

²⁷³ P. Willaert, C. Marqu ez-Ruiz, „Vers une politique  trang re et de s curit  commune:  tat des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 274.



II. The use of the instruments

The CFSP instruments can either be used autonomously by the Council of Foreign Ministers in response to an international human rights issue or in connection with the deliberations of an international organization. A general problem linked with foreign policy and its assessment, is that a great deal happens „in private“ and does not appear on the official listings. Thus, for example, in 1996, the proportion of public condemnation in the field of human rights to the number of total condemnation was only 23%.²⁷⁴

1. EU „action“

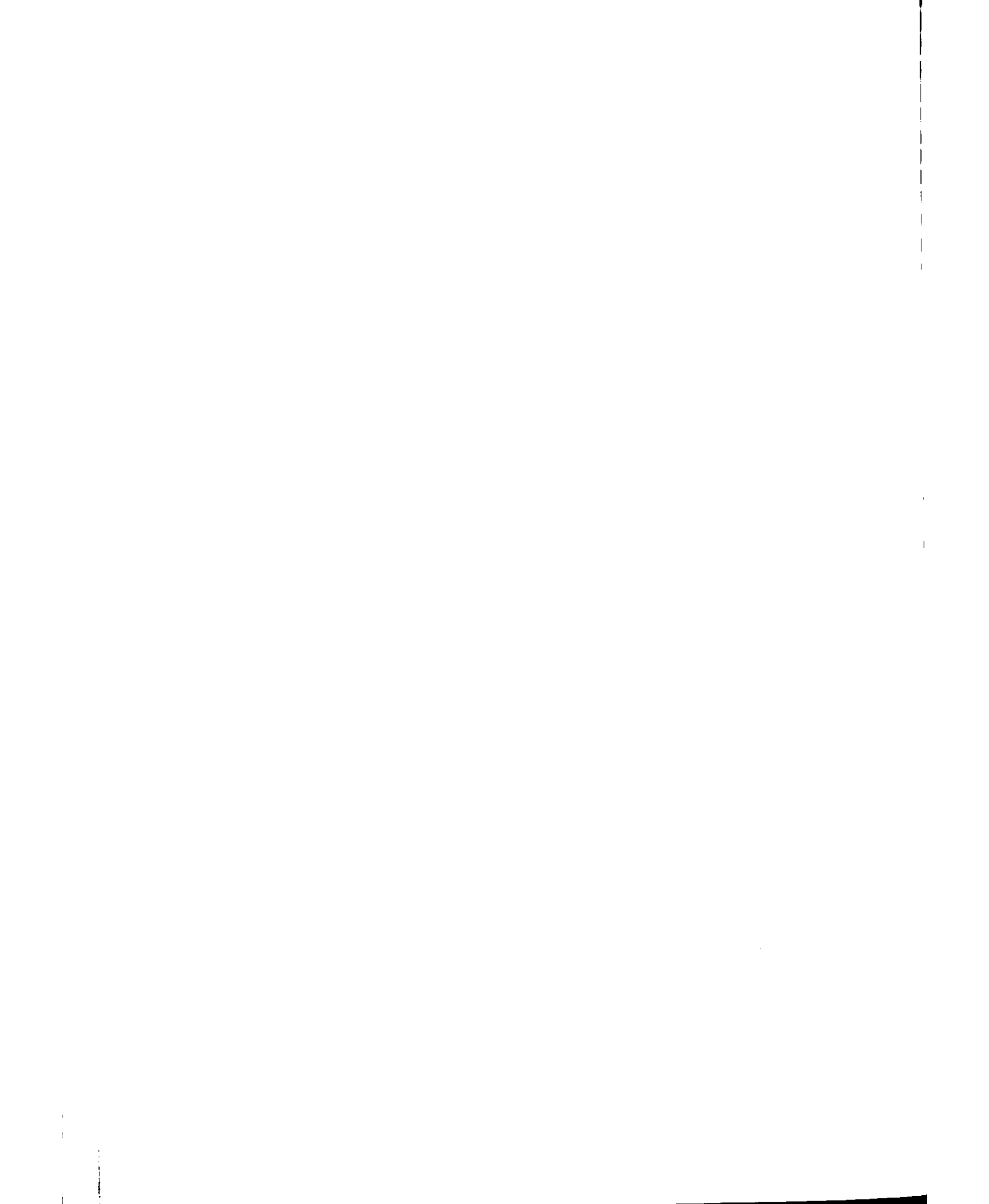
a. The use in general

The instruments at the disposal of the European Union since Maastricht have already been mentioned above: declarations and démarches, political dialogue, common positions and joint actions. Despite the new range of tools, the European Union has relied mainly on classic instruments -declarations and démarches- in the human rights field. For example, between November 1993 and October 1995, the European Union issued 89 (1993/94) and 60 (1994/5) declarations.²⁷⁵ The number fell to 35 in 1996²⁷⁶ without a considerable increase in joint actions or common positions. As concerns the content, the declarations addressed mostly the current situation in particular countries, but some also dealt with general issues on the observance of human rights. Most condemned the human rights situation in the addressed country, whereas only a few

²⁷⁴ European Commission (note 35), p. 27, pt. 40.

²⁷⁵ Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights, 1994, 17.1.1995, p.5; Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights 1995, 19.6.1996, p. 5.

²⁷⁶ Fouwels (note 56), p.298; Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights 1996, issued 1997, p. 5.



praised a positive development.²⁷⁷ In contrast to the declarations, the number of démarches increased between November 1993 and October 1996 from 50 to 83 to 96 in twelve month periods. Their intent is mostly to condemn violations in specific cases or sometimes to prevent them.²⁷⁸ They are usually carried out by the Presidency's ambassador abroad²⁷⁹ and are directed to the competent authority in the receiving state.²⁸⁰

The European Union, however, has not relied solely on the classic instruments, but also had recourse to the new instruments introduced with Maastricht to promote and safeguard human rights. Their use is also easier to determine as they are all made public, although it is difficult to view their content as dealing with „human rights“ exclusively. Eight common positions, adopted on the basis of Article J.2 TEU, were issued by the European Union between November 1993 and October 1996, which had human rights either as their primary or secondary objective out of 24 in total.²⁸¹ Examples are the objectives and priorities of the European Union towards Rwanda and also towards the Ukraine, the dispatch of human rights observers to Burundi and human rights and the transition to democracy in Nigeria.²⁸² From November 1996 till July 1997 the EU issued common positions on Cuba, Iraq and the city of Mostar which had a human rights component²⁸³ and in 1998 one on Afghanistan, one involving

²⁷⁷ *ibid.*, p. 298.

²⁷⁸ *ibid.*, p. 298; Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights, 1995, 19.6.1996, p. 5, talks of 70 démarches in 1995.

²⁷⁹ M. Fouwels (note 56), p. 297.

²⁸⁰ see note 69, a declaration is used as a means to express the opinion and intention towards third states officially and is directly issued by the EU.

²⁸¹ see Common Foreign and Security policy, in: European Commission, *Repertoire de la législation en vigueur*, 31eme édition, Journal officiel de la Communauté, Luxembourg 1997, p. 1171ss.

²⁸² CFSP 94/697; CFSP 94/779; CFSP 95/091; CFSP 95/515, Common Foreign and Security policy (note 281).

²⁸³ CFSP 96/697 democratic transition process; CFSP 96/741 in the context of the „oil-for-food“ resolution; CFSP 97/193, Common Foreign and Security policy (note 281).

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restrictive measures against the Federal Republic of Yugoslavia and, finally, one concerning Rwanda.²⁸⁴ As already mentioned, common positions do not aim first and foremost at changing the political situation in the third country, but want to coordinate the Member States' foreign policies and align them to the common objective (Art. J.2 II TEU) which implies that the internal repercussions of such an instrument are higher than the impact in the addressed country.²⁸⁵

As regards common action in the field of human rights, between November 1993 and October 1996 the European Union adopted seven joint actions under Article J.3. TEU (out of 17) which included human rights aspects. Among them were election observers to Russia, support for the transition towards a democratic and multi-racial South Africa and support for the electoral process in Bosnia and Herzegovina.²⁸⁶ From November 1996 some other joint actions have been decided such as support for the democratic transition process in Zaire, a special envoy for the Middle East peace process and an assistance programme to support the Palestinian Authority in its efforts to counter terrorism.²⁸⁷ All of these actions were taken unanimously; none of them made recourse to the possibility under Article J.3. II TEU.²⁸⁸ The new instruments have so far been used little in the field of human rights, but nevertheless their initial application can be seen as a good start.

²⁸⁴ CFSP 98/006; CFSP 98/045; CFSP 98/047, [http://wwwarc.iue.it/iue/efpb2?nd=&cp=&d...ghts&txqual="+phrase+all+words+&mmode=and](http://wwwarc.iue.it/iue/efpb2?nd=&cp=&d...ghts&txqual=)

²⁸⁵ M. Fouwels (note 56), p. 300.

²⁸⁶ CFSP 93/603; CFSP 93/678; CFSP 96/406, *ibid.*, p. 300.

²⁸⁷ CFSP 96/656; CFSP 96/676; CFSP 97/289, *Common Foreign and Security policy* (note 281).

²⁸⁸ P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 270; The European Parliament regrets the limited use of joint actions and also requests the Council to make more use of qualified majority voting, EP doc A4-133/97, *Report on improving the impact of joint actions*, Committee on Foreign Affairs, Security and Defence Policy, Rapporteur Enrique B. Crespo, p. 6.



Another frequently used instrument of the EU foreign policy is political dialogue.²⁸⁹ The Presidency, often in the form of the Troika, conducts several high-level political meetings with third countries and regional groupings. Political dialogue can encourage mutual trust and create an environment suitable to address topics of common interest. One important condition of the success of such dialogue is that it should be initiated as soon as possible, that the authorities do not wait until human rights violations have occurred, and that care is also taken that there is an efficient follow-up.²⁹⁰ The extent to which human rights' and democratization issues are effectively dealt with on these occasions is unfortunately impossible to assess, but it seems rather limited as regards Latin America (San José dialogue and Rio group), Asia, the NIS and the Mediterranean countries. The Lomé countries, due to the established institutions, and the CEEs, because of the common interests of accession, might be a rare exception. In general, the advantages of political dialogue lie in the long-term, its disadvantages in the difficulty to provide an effective short-term response to systematic human rights violations or interruptions of the democratic process.

b. China as a target of the CFSP instruments

In the context of the EU's engagement in human rights, China assumed its own status. It is dealt with by the proclaimed 'constructive engagement' and cannot (one hopes) be taken as the norm because, firstly, all forms of negative measures (from critique to sanctions) are excluded from the EU's strategy, and secondly, the case of China is too

²⁸⁹ The political dialogue is one of the classical instruments of diplomacy (declarations, démarches, high-level visits and meetings, offering of good offices and sending of mediators) which were used in the EPC, P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 290s.

²⁹⁰ Interview with Dr. E. Simmonds, Dossier Human rights, democracy and development, in: *The Courier*, 128, 1991, pp. 52-55, p. 53.



strong an example of economic interests squeezing human rights and allocating them their place after stability and trade.

aa. The instruments used

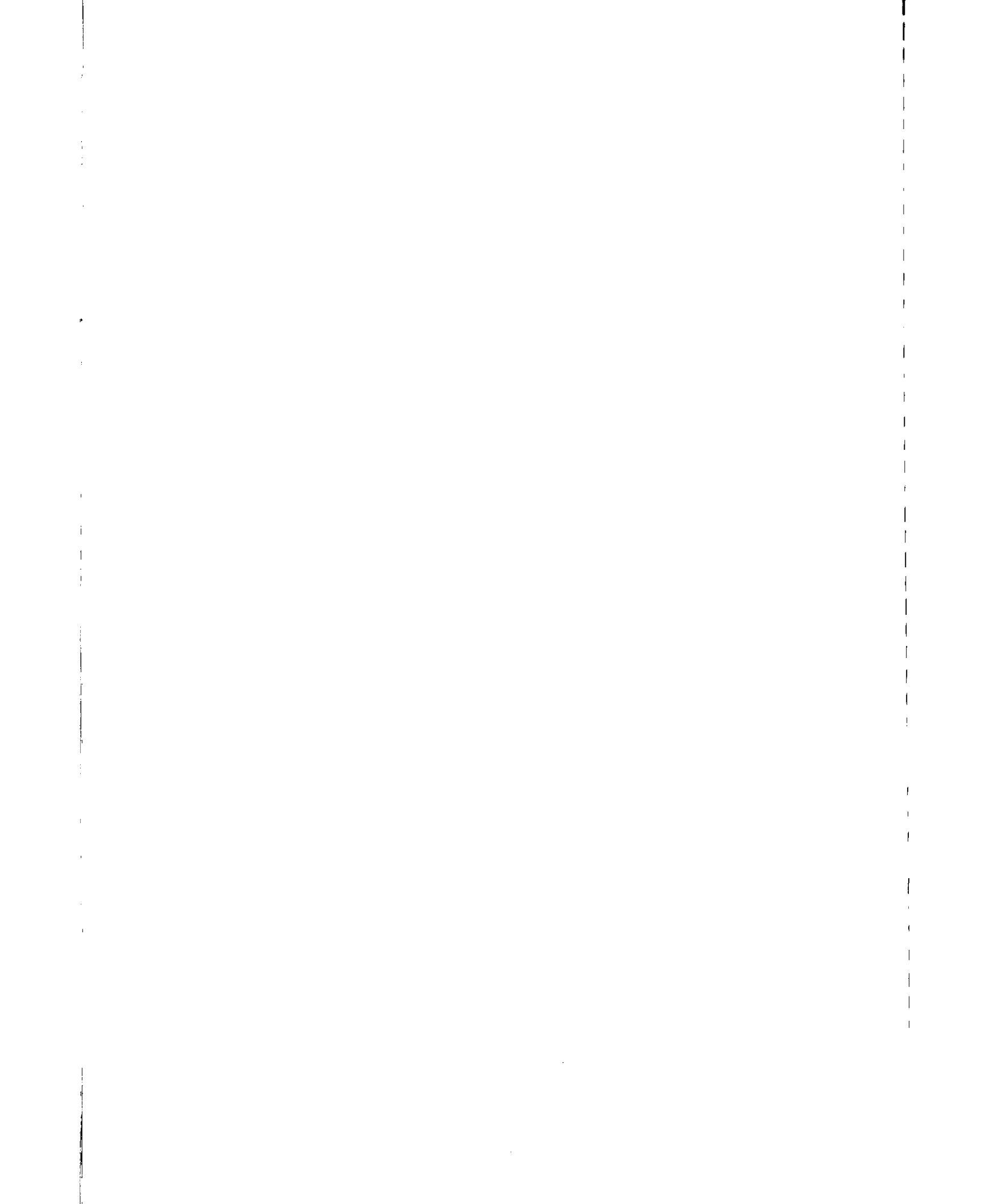
The steps taken to scrutinize and criticize China have remained solely in the field of diplomatic measures, no recourse having been made to the new instruments of the CFSP. The EU issued eight human rights-related démarches and only two declarations between November 1993 and October 1996.²⁹¹ One reason surely is that the impact of a common position or a joint action with regard to the human rights situation is much bigger and more visible than the one of a (confidential) declaration or démarche and that this result is not desired towards China. Secondly, China, as has been demonstrated, is still a defender of cultural relativist claims and therefore keen on arguing in favour of an untouchable domain of state sovereignty. Thirdly, the first guidelines issued by the European Council in 1992 do not define Asia as an area suitable for joint actions²⁹² which shows the reluctance towards that area to speak out on human rights.

bb. Political dialogue

An area in which the EU has been particularly active is the installment and execution of a regular dialogue at expert and ministerial level as has already been pointed out in Chapter 2. The first meeting of the experts dialogue on human rights was held in Brussels in January 1995 and the subsequent meeting in January 1996 in Beijing. The

²⁹¹ M. Fouwels (note 56), p. 319.

²⁹² They mention Central and Eastern Europe, the former Soviet Union and the Balkans, and the Mediterranean, European Council Lisbon meeting, 26./27.6.1992, Bull. EC, No.6, 1992, Vol.25, pp. 7-24, p. 20s.



broader political dialogue has been maintained in parallel since 1994.²⁹³ In 1996, the expert dialogue was interrupted by the Chinese side after the EU tabled a resolution criticizing China at Geneva (UN Commission) so that the scheduled October 1996 meeting did not take place, but dialogue was resumed in September 1997.²⁹⁴ Alongside these meetings, the joint committee meeting within the framework of the Cooperation Agreement has also taken place, but the main topics of discussion were economic in nature.²⁹⁵ Besides that, the Community conducts a regional dialogue with ASEAN, covering discussions on human rights and democratic principles.²⁹⁶ It seems as if this dialogue forms the only active policy towards China in 1998 due to the recent decision of the Foreign Ministers not to table a resolution on China this year at Geneva. The right way to deal with China is certainly not easily found and divergent approaches clash. The overall question is whether to engage or disengage („Eindaemmen oder Einbinden“) China and experts fight with activists on that issue (see Chapter 4).²⁹⁷

2. The EU and international organizations

The second axis of EU engagement in human rights lies within the deliberations and actions of international organizations. In this case, initiatives are on a firmer footing as regards the justification in international law (*droit de regard*²⁹⁸) and these multilateral measures have also the important advantage of a „shield effect“ for the single states. The European countries are generally said to favour this kind of operation to bilateral

²⁹³ Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights, 1995, 19.6.1996, p. 8.

²⁹⁴ European Report No.2294, 25.2.98, p.V-1; Background note on China and Human Rights, February 1998, unpublished paper, p. 1.

²⁹⁵ For October 1993-November 1994, General Secretariat of the Council, *Schedule of Action of the European Union on Human Rights*, 18.11.94, unpublished paper.

²⁹⁶ see COM (98) 40 final, p. 17; For the activists critique of ASEM 2, see Agence France Presse, 4.4.98, „Activists blast Asia-Europe Summit for playing down human rights“.

²⁹⁷ The Economist, „How America sees China. Friend or Foe?“, 25.10.97, p. 23-30.

²⁹⁸ P.-H. Imbert (note 104), p. 21, 22.

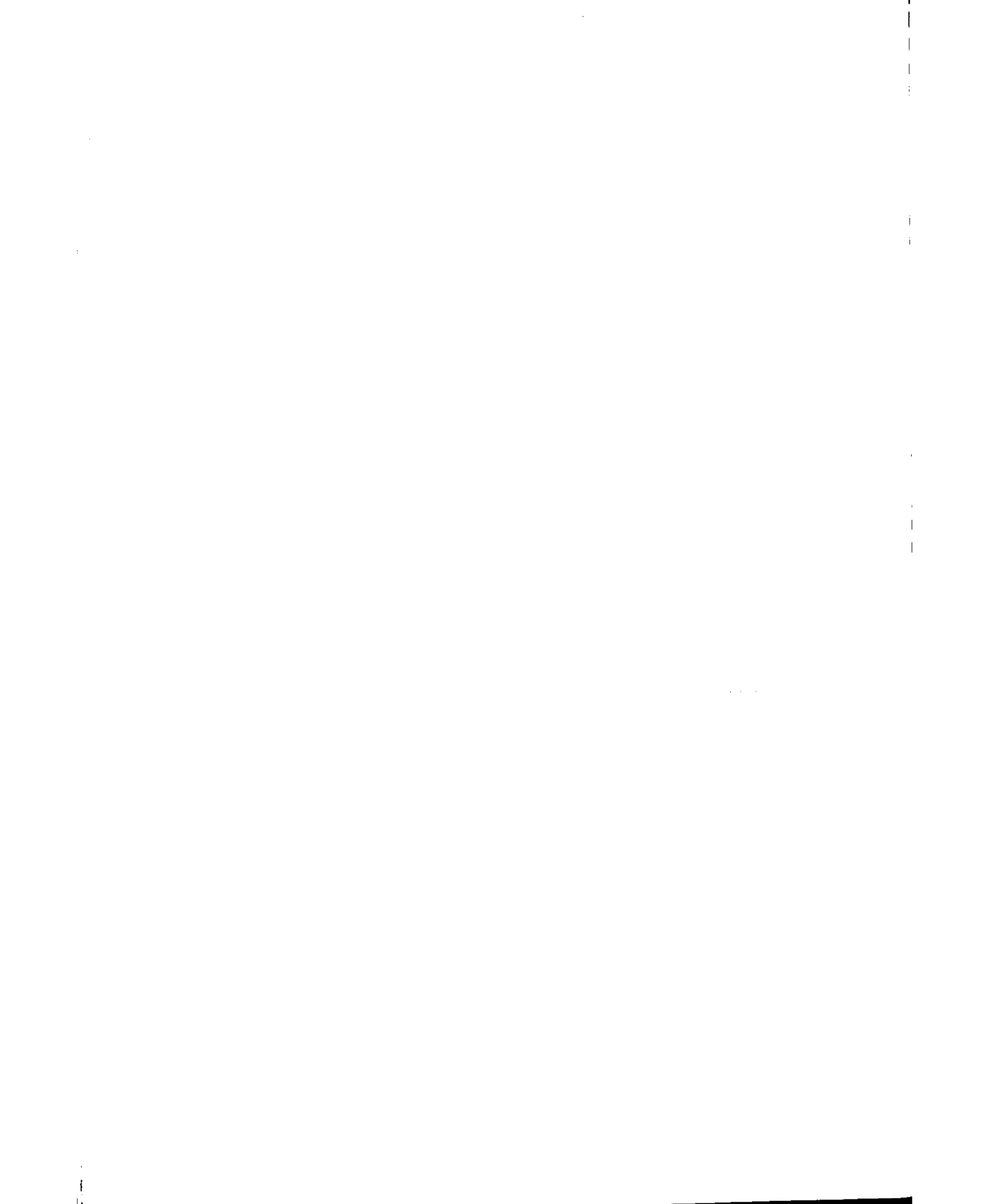
action.²⁹⁹ The theoretical framework of such an engagement will now be discussed in order then to turn to the special case of China and assess the initiatives taken in one very important forum, the UN Commission on Human Rights, which convenes on a yearly basis in Geneva, in Spring (3.).

According to the Commission's Communication COM (95) 567 final, the Union in the field of human rights effectively participates in the deliberations of the leading international organizations. It maintains special relationships to the Council of Europe, the UN and the OSCE. The contribution of the European Union to the work of these fora includes „working on the regulatory output of these international bodies and extending the relevant instruments, tightening up prevention and safeguard mechanisms, defining priorities and implementing specific projects“.³⁰⁰ As regards the CFSP, the instruments at hand to achieve this purpose are declarations (informal or formal as a common position) made on behalf of the European Union, the common rejection or support of a resolution and its explanation. Within the UN system, the European Union has, for example, actively participated in the most recent important

²⁹⁹ Human Rights Watch Asia, „Chinese Diplomacy, Western Hypocrisy and the UN Human Rights Commission“, Report, No.3 (C), March 1997, Vol. 9, p. 1.

³⁰⁰ COM (95) 567 final, p. 7;

In this context, some clarification as to the treaty structure is again needed. The „special relationships“ are set up by the Commission by invoking Art. 229-231 TEC for all administrative relations below observer status of the Community. For active participation in the deliberations of these organizations, external competence of the Community (art. 228 TEC together with the relevant norm) is needed. In using this competence, the Community has become an observer in most of the relevant international organizations, which does not automatically give a right to speak, but may be granted on an informal basis. A right to vote can never be deducted from an observer status. In these cases, the Community has to rely on cooperation on the side of the Member States, as was expressed in former art. 116 TEC and is now drawn from Art. 5 TEC. In some cases the Community could use its competence to also become a member, as happened with regard to FAO and WTO. The EU participates in all the cases where political declarations in the field of CFSP are at stake. The question of membership or observer status does not arise, as the EU acts through the pooling of the Member States, which are all members to the relevant organizations. Declarations are all issued on behalf of „the Union“, see Decision of the Council, 93/591/EU, EG, EGKS, Euratom, 8.11.93. In cases where neither Community competences, nor co-ordination in the second or third pillar are at stake, the Member States are free to act individually. For a discussion of the role of the Community in international organizations see R. Frid (note 106).



world conferences on human rights (i.e. Vienna World Conference on Human Rights, June 1993; Beijing, World Conference on Women, September 1995; Copenhagen Conference on Social Development, March 1995).³⁰¹ Moreover, it participates in the Charter-based body, the UN Commission by giving an annual country-by-country assessment of the human rights situation under item 12 of the agenda and tabling resolutions. It is in this latter context that the performance of the European Union in April 1997 when a resolution on China was to be tabled gave such a poor picture of the capacity to find a common position. And last, but not least, it plays an important role in the work of the General Assembly and its sub-committees.

3. The case of China at the UN Commission

In terms of multilateral dialogue, the UN Commission on Human Rights which meets every year in Geneva in the Spring is an interesting fora to discuss with regard to Chinese perceptions of human rights and to have a look at EU-policy. Although a resolution by the UN Commission is neither accompanied by sanctions or specific obligations, it is a curiously potent tool in inter-state relations.³⁰² Targeted countries, and especially China, want to be the „good boys“ and fear harm to their international image.

a. The EU and the tabling of resolutions in Geneva

A resolution in Geneva allows the states to criticize China and put pressure on it, without needing to take recourse to trade and economic conditionalities. Thus, it is in

³⁰¹ Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights, 1995, 19.6.1996, p. 2.

³⁰² Human Rights Watch Asia (note 299), p. 2.

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harmony with the current „de-linking“ of human rights and trade³⁰³ and would likely to be preferred by states. Nevertheless, the United States and Europe failed six years (1990-1996, except 1995) to even table a resolution at Geneva. In 1997 the heterogeneous picture came to its completion with the European States being unable to find a consensus about the tabling of the resolution which, then, in 1998, led to the decision already mentioned, to refrain from any support of a resolution. In the following section, the last four years of EU engagement in the UN Commission will be examined.

aa. 1995

Since the 1989 massacre in Beijing that silenced the Tiananmen Square democracy movement the EU has yearly tabled a resolution criticizing China's human rights record.³⁰⁴ In 1995 the proposal for a resolution, sponsored by the US, Europe and Japan,³⁰⁵ for the first time surpassed the „no-action“ motion, and China's human rights record was debated in public.³⁰⁶ The resolution, however, was defeated in the end, albeit only narrowly, by just 21 votes to 20 with 12 abstentions, Russia having changed its attitude in the last minute.³⁰⁷ Intense lobbying by both sides had preceded the down-voting of the draft resolution and China which had pressed neighbours and Third World nations for support took notice of this result with delight.³⁰⁸ It would remain the closest China has ever come to a condemnation at Geneva up to 1998.

³⁰³ For example the accession of China to the WTO is not been made conditional on the respect for human rights and also the US decided in 1994 not to link the preferential trade to human rights, see note 417, 'presidential remarks'.

³⁰⁴ Agence France Presse, 17.4.96, „EU slams China's human rights policy“.

³⁰⁵ Kyodo News Service Japan Economic Newswire, 24.2.96, „US to join EU in criticizing China's human rights“.

³⁰⁶ Human Rights Watch Asia (note 299), p. 3.

³⁰⁷ *ibid.*, p. 3.

³⁰⁸ The Reuter European Community Report, 11.3.96, BC cycle, „China dismisses EU, US human rights criticism“.



bb. 1996

After the defeat of the last year, EU Foreign Ministers had to decide on their strategy towards China for the current year. After an informal meeting of EU Foreign Ministers in Sicily at the beginning of March³⁰⁹ and a following meeting on 29.3.96 in Turin, the EU Foreign Ministers decided to table a resolution which would address the Tibet problem and the treatment of other ethnic, cultural, religious and linguistic minorities, as well as expressing concern about dissidents, the death penalty and the under-developed Chinese legal system. The formerly demanded improvements³¹⁰ had not been undertaken by China and the „time of waiting was now over“.³¹¹ Due to the composition of the Commission as basically anti-western, the resolution had little chance of being passed, but the EU wanted to show its determination, diplomats affirmed.³¹² Nevertheless, the decision for confrontation was not undisputed given the rapprochement of the EU and Asia resulting from the Asia-Europe summit³¹³ and China's behaviour towards Taiwan.³¹⁴ Moreover, the human rights session coincided

³⁰⁹ Reuters Financial Service, 9.3.96, BC cycle, „EU turns up heat on Beijing over human rights“; The Reuter European Community Report, 10.3.96, BC cycle, „EU puts pressure on China over human rights“, some officials expressed their views in favour of the resolution, whereas Finland's representative assumed „constructive and critical dialogue“ to be a good approach and, finally, the Italian Presidency after a meeting declared the Chinese to be very sensitive on the issue of human rights and said the EU was intending to use the resolution as „a kind of threat“.

³¹⁰ Improving conditions at its orphanages, releasing dissident Wei Jingsheng and allowing the UN access to conduct an analysis of human rights conditions, The Reuter European Community Report, 10.3.96, BC cycle, „EU puts pressure on China over human rights“.

³¹¹ The Reuter European Community Report, 29.3.96, BC cycle, „EU to condemn China on human rights“.

³¹² *ibid.*

³¹³ Agence France Presse, 01.4.96, „European Union to take China to task over human rights“, Europe has only just begun to „woo“ the Asian region - long dominated by the United States and Japan.

³¹⁴ The Reuter European Community Report, 29.3.96, BC cycle, „EU to condemn China on human rights“.



with a European tour of Chinese Prime Minister Li Peng in early April.³¹⁵ In this context, non-governmental organizations such as Amnesty International have accused the 15-member EU of sacrificing human rights to economic interests.³¹⁶

The United States decided to join the European Union in proposing a UN resolution which criticized China's poor human rights record.³¹⁷ The EU, in its general address, observed that economic reforms were transforming Chinese society and improving living conditions, which could lead to increased freedoms.³¹⁸ Finally, the draft, which was critical of China, failed and China was able to block the resolution by moving a procedural „no-action“ vote, which means that there is not even a debate.³¹⁹

cc. 1997

The reluctance on the side of the EU to table a resolution this year became already visible very early, i.e. in the end of 1996. The different working groups were bouncing decisions back and forth thereby delaying any timely statement. In contrast, the Chinese side had early started active lobbying to prevent such a motion.³²⁰ Human Rights Watch suspected that „some countries are not yet convinced, such as France

³¹⁵ Human Rights Watch Asia (note 299), p. 4 discusses the China-France deal in March 1996 about an airbus contract which foresees some signs on the Chinese side in exchange for the dropping of the resolution by the EU. Italy and Germany were said to be in favour of the deal as well which, though, in the end was not finalized because of China's rejection to agree to a timetable for ratification of the two covenants.

³¹⁶ Agence France Presse, 01.4.96, „European Union to take China to task over human rights“.

³¹⁷ Kyodo News Service Japan Economic Newswire, 24.2.96, „US to join EU in criticizing China's human rights“.

³¹⁸ Agence France Presse, 17.4.96, „EU slams China's human rights policy“.

³¹⁹ South China Morning Post, 27.1.97, „Beijing set to escape human rights action; EU divided and US reluctant to take initiative“; Ming Wan (note 147), p. 244, The Western states were not strong enough to defeat the Asian and African developing countries in this respect supporting China.

³²⁰ Japan Economic Newswire, 22.1.97, „EU urged to condemn China at UN human rights forum“.



and Italy, probably for business reasons.³²¹ Just as the Human Rights Working Group was about to convene again on 23.1.97, being the fourth attempt of the EU to come to a common conclusion, China proposed a human rights dialogue meeting for the 14.2.97 in the framework of the ASEM-summit³²², which again prevented a decision to be taken. France and Italy were reportedly still opposed to tabling a resolution that year.³²³ The February two-day General Affairs Council meeting came to the conclusion to intensify dialogue between the EU and China on human rights and Ministers said the EU will first monitor the Chinese reaction before it decides whether to submit a resolution. Hope was expressed that the situation would change rapidly.³²⁴

The United States were also hesitant to take the lead in 1997 and an American diplomat said that the US preferred what they called „constructive dialogue and engagement“ in guiding China to improve its human rights record instead of confrontation.³²⁵

In the end, the draft resolution was supported by Denmark, the Netherlands and the United Kingdom; France, Germany, Italy and Spain opting out.³²⁶ For the first time since 1990 the EU was prevented from acting in a bloc due to the French-led revolt,

³²¹ *ibid.*, Human Rights Watch Asia (note 299), p. 4s, the airbus contract between China and France was finalized in April 1996 and seen as an offense of the US being the former main supplier of aircraft (Boing) to China. During Jiang Zemin's Europe trip in July 1996, further business deals were to be done.

³²² Human Rights Watch Asia (note 299), p. 12.

³²³ *South China Morning Post*, 27.1.97, „Beijing set to escape human rights action; EU divided and US reluctant to take initiative“.

³²⁴ *Japan Economic Newswire*, 25.2.97, „EU urges continued dialogue on human rights in China“.

³²⁵ *South China Morning Post*, 27.1.97, „Beijing set to escape human rights action; EU divided and US reluctant to take initiative“.

³²⁶ *European Report*, No. 2226, 24.5.97, p. V-4; The European Parliament welcomed these efforts in a resolution and condemned the subsequent Chinese practice of discriminatory measures. It asked Member States, Council and Commission to protest against these measures and the Council to find a common stand in human rights towards China, *Bull. EU*, No.5, 1997, Vol.30, pt.1.4.85, p. 76.

backed by the above mentioned countries.³²⁷ A similar split has apparently opened between the United States and Canada.³²⁸ Foreign Minister Niels Helveg Petersen said that Denmark would not alter its decision because of Chinese warnings of retaliation or Beijing's sudden announcement to sign the UN covenant on economic, social and cultural rights as soon as possible.³²⁹ Finally, the UN vote was again blocked by China and did not come for discussion.³³⁰

dd. 1998

In order to restart the EU-China dialogue on human rights, China had tried to get the promise of the EU not to table a resolution this year at Geneva. In September 1997, however, the EU and China agreed to re-commence dialogue without any preconditions.³³¹ In commenting on this move, Luxembourg Foreign Minister Jacques Poos said that the tabling of the resolution „remains an open question. But if we see sustained progress and a new dynamic and a development of co-operative agreements in human rights ... we must take advantage of this new atmosphere. Results are more important than rhetoric“.³³² In February, Chinese Prime Minister Li Peng toured Europe with a delegation of 50 people and had economic and political talks in Belgium, Denmark and the Netherlands.³³³

³²⁷ Agence France Presse, 9.4.97, „China gleeful over EU split on human rights“.

³²⁸ *ibid.*

³²⁹ *ibid.*

³³⁰ European Report, No. 2226, 24.5.97, p. V-4.

³³¹ Algemeen Nederlands Persbureau English News Bulletin, 24.9.97, „EU, China restart dialogue on human rights“; Agence France Presse, 25.9.97, „EU to discuss human rights with China“.

³³² Algemeen Nederlands Persbureau English News Bulletin, 24.9.97, „EU, China restart dialogue on human rights“; see also Economist, „How America sees China“, 25.10.1997, p. 30, China shows a greater willingness to adhere to the relevant international rules.

³³³ BBC Summary of World Broadcasts, 11.2.98, „Vice-Premier Li Lanqing discusses human rights, Asia- EU ties during talks in Belgium“; BBC Summary of World Broadcasts, 18.2.98, „Chinese, Dutch premiers exchange views on Sino- EU ties, human rights, Iraq“, Li Peng spoke positively of the dialogue, already been held for the fourth time between China and the EU



The final decision to drop condemnation at the UN Commission in Geneva was taken on Monday, 23rd February at the General Affairs Council meeting in Brussels.³³⁴ It will be the first time since 1989 that the EU is abstaining from the tabling of a resolution and the decision appeared well-timed, just before a four-day visit to China by the Minister for Foreign Affairs, Mr Andrews. The UK was holding the presidency at that time and would have been in charge of tabling the resolution.³³⁵ What was furthermore decided was that the EU would vote against a „no-action“ motion, deliver a criticizing speech at the opening session of China's human rights record and continue to raise individual cases of concern bi- and multilaterally.³³⁶ In March, also the US decided not to propose a resolution at Geneva that year.³³⁷ Although, in the overall context, little change has been made on the Chinese side,³³⁸ the results of the dialogue were seen as „encouraging“ by the Union and good relations must not be endangered.³³⁹ Several reasons can be listed to have influenced the EU Foreign Ministers' decision: the first is purely pragmatic. It would be difficult for the EU to reach consensus given the complicated constellations last year before and after the

(January 1995, February 1996 (interruption after April 1996, informal meeting March 1997), October 1997 and December 1997); At the same time, Sir L. Brittan held a speech in China and talked about the future partnership between the EU and China, „The EU and China: building a partnership for the future, <http://europa.eu.int/en/comm/dg01/0216.peki.htm>.

³³⁴ Xinhua News Agency, 23.2.98, „eu agrees on human rights move over china“; SZ, 23.2.96, „EU aendert China-Politik“, p.6, European Report No.2300, 18.3.98, p. V-7, European Report No.2294, 25.2.98, p. V-1; the decision was already pre-announced by Western diplomats in Beijing, The Irish Times, 21.2.98, „EU likely to stop censuring China over human rights“.

³³⁵ The Irish Times, 21.2.98, „EU likely to stop censuring China over human rights“; This is particularly interesting with regard to the „ethical“ foreign policy proposed by Britain this year, Agence France Presse, 23.2.98, „EU abandons US over human rights in China“.

³³⁶ Japan Economic Newswire, 23.2.98, „EU rules out UN resolution on human rights in China“, European Report No.2294, 25.2.98, p.V-1, the decision also included the prohibition of any Member States action alone. This is, from a human rights point of view a dangerous issue and should be regarded at very critically. It was not clear, how the EU should vote if the US tabled a resolution.

³³⁷ European Report No.2301, 21.3.98, p.V-3; The Independent, 16.3.98, „Peking escapes censure from the UN; China is not under attack for human rights as it prepares for a new PM“ the US announced its decision only on the weekend before the opening session of the Commission.

³³⁸ The Irish Times, 21.2.98, „EU likely to stop censuring China over human rights“.

³³⁹ Japan Economic Newswire, 23.2.98, „EU rules out UN resolution on human rights in China“



resolution finally had been tabled.³⁴⁰ Secondly, the political dialogue, resumed in December 1997, was set for another round two days later in form of a seminar in Beijing.³⁴¹ Thirdly, China released the dissident Wei Jingsheng and allowed him to travel to the US for medical treatment, and in the field of law it has made changes in its criminal code to transform China into a more law-based society³⁴² and signed International Covenant on Economic, Social and Cultural rights in October 1997.³⁴³ A British diplomat stressed that the EU now had to focus on the implementation of international obligations as China has signed the the International Covenant on Economic, Social and Cultural Rights and promised to sign the one on Civil and Political Rights as well.³⁴⁴ The move of China to allow the UN group on arbitrary detention³⁴⁵ and UN Human Rights Commissioner, Mrs Mary Robinson, to visit China this year was also mentioned.³⁴⁶ Finally, several countries are not interested in difficult relations with China: for the United Kingdom it is important to get the relations going which were difficult after the handover of Hong Kong, but have since become warmer. Denmark, bruised by its experience last year, has no intention of becoming Beijing's whipping boy again, diplomats in Beijing say. Ireland, as well, does not seem keen on any confrontation over the issue³⁴⁷, and neither is the Netherlands whose Company Royal Dutch/Shell has just signed the biggest foreign funding joint-venture in China - a 4.1. billion petrochemical plant.³⁴⁸

³⁴⁰ The Irish Times, 21.2.98, „EU likely to stop censuring China over human rights“.

³⁴¹ *ibid.*

³⁴² *ibid.*

³⁴³ Agence France Presse, 24.2.98, „China welcomes EU decision on human rights“.

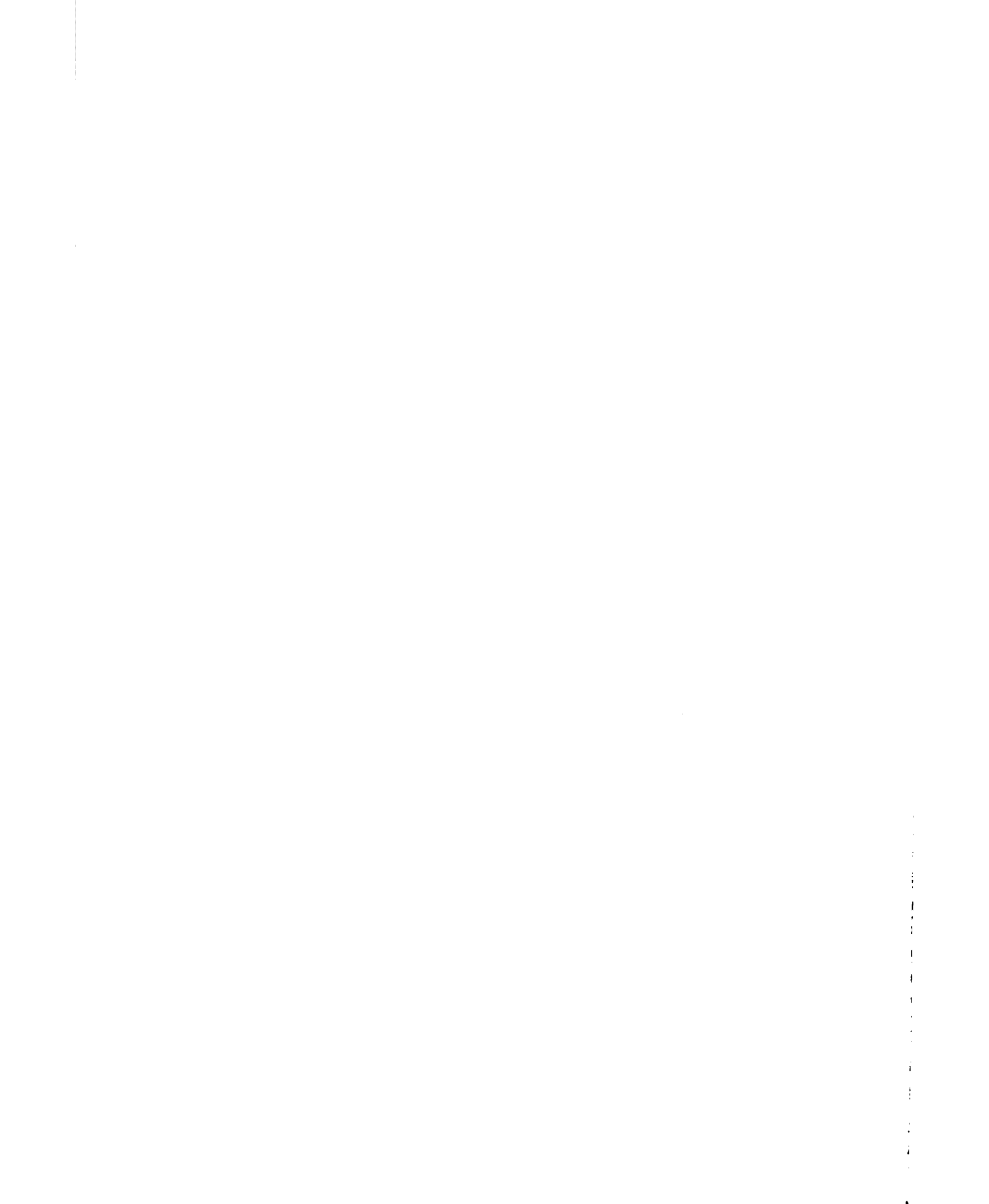
³⁴⁴ Agence France Presse, 23.2.98, „EU abandons US over human rights in China“.

³⁴⁵ *ibid.*

³⁴⁶ The Irish Times, 21.2.98, „EU likely to stop censuring China over human rights“.

³⁴⁷ *ibid.*; Agence France Presse, 31.3.98, „Danish MPs criticize softer approach to China“, Denmark even decided a cooperation programme for China and was accused of following a zig-zag human rights policy towards Beijing.

³⁴⁸ Europe Information Service, European Report, 18.3.98, „EU/CHINA: Brittan defends EU human rights policy“, moreover, there were many other high profile visits of Europeans in China“.



The decision was a sign of the priority the Council attached to developing relations with China and it introduced a plan for a high-level EU-China meeting at the next Asia-Europe summit meeting (ASEM 2) to be held in April 1998 in London.³⁴⁹ Dialogue should be stepped up for at least one meeting every six months.³⁵⁰ EU Foreign Ministers voiced expectations for an early and fruitful visit to China by the UN High Commissioner for Human Rights³⁵¹ and for positive results in the new programmes of practical co-operation.

At the opening session,³⁵² the EU Humanitarian Aid Commissioner, Emma Bonino, made no explicit reference to China when talking about human rights' abuses³⁵³ and Mr. Lloyd on Tuesday 17.3.98 was simply asserting that the EU is not tabling a resolution because of the dialogue taking place. He later told journalists, „We are not saying to the Chinese there is no (human rights) problem. Rather the opposite, but the question is one of tactics. The point is to make an assessment as to how best we take human rights in China forward.“³⁵⁴ Because of the EU and US decisions, the this yearly session was „conspicuously silent“ about China's human rights abuses.³⁵⁵

With a view to next year, the willingness of the EU to abstain from the tabling of a resolution, according to British Foreign Secretary, Mr. Robin Cook, depended on

³⁴⁹ European Commission, DG I, „Reinforcing the partnership of equals between Asia and Europe“, <http://europa.eu.int/en/comm/dg01/asem21.htm>, one of the three dimensions of ASEM was the strengthening of the political dialogue, p. 2s; Deutsche Presse Agentur, 2.4.98, „EU and China pledge WTO push, human rights talks“.

³⁵⁰ Xinhua News Agency, 23.2.98, „eu agrees on human rights move over china“.

³⁵¹ Japan Economic Newswire, 23.2.98, „EU rules out UN resolution on human rights in China“.

³⁵² Session was held from 16.3.-24.4.98 in Geneva.

³⁵³ Europe Information Service, European Report, 18.3.98, „EU/CHINA: Brittan defends EU human rights policy“.

³⁵⁴ Agence France Presse, 17.3.98, „EU defends China human rights approach at human rights commission“; M2 PRESSWIRE, 17.3.98, „FCO Tony Lloyd to visit Geneva“; M2 PRESSWIRE, 18.3.98, „FCO UN Commission on Human Rights“; speech available at (<http://www.fco.gov.uk/>).

³⁵⁵ Agence France Presse, 24.4.98, „Amnesty slams UN Human Rights Commission for lack of action on abuse“.

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several factors which demonstrate the good faith of China. They were: a successful visit by Mrs Robinson; Red Cross access to prisons; further releases of dissidents; and access for the EU Troika to Tibet.³⁵⁶

b. The Chinese response

In general, China is more active and, furthermore, more sophisticated in using diplomacy and propaganda for its own aims. On the one hand, this can clearly be seen in the UN Commission in 1997 (see below), but also in bilateral relations, China adopted a strategy how to deal with America and the West, which the US and EU apparently did not do. China, for example, started an immense media campaign to tackle the human rights' issue: other countries were criticized and China's performance was praised, given the different and difficult historical, cultural and social peculiarities of China.³⁵⁷ Additionally, it puts more effort in isolating the United States and integrating itself in the world community by establishing closer links with the other Asian countries; by doing so, the common values were stressed and resulted in the Bangkok Declaration.³⁵⁸ Last, but not least, the strategy of emphasizing the economic development of the Chinese market had two major effects: the first was that western donors seemed to believe that democracy would spread through the country as a result of the increased wealth of the population; and secondly, that China acquired a better

³⁵⁶ The Irish Times, 24.2.98, „EU ministers agree not to put motion on human rights“; Agence France Presse, 24.2.98, „China welcomes EU decision on human rights“ at the round of the dialogue on human rights, experts warned that the decision for 1999 would be taken according to the progress made; Future relations with China are to be laid down in a Commission document, European Report No. 2301, 21.3.98, p. V-3; COM (98) 181 final; Europe Information Service, European Report, 18.3.98, „EU/CHINA: Brittan defends EU human rights policy“.

³⁵⁷ Ming Wan (note 147), p. 241.

³⁵⁸ *ibid.*, p. 241.



bargaining position because of the keenness of the Western industrialized nations to get to grasp with the immense Chinese market.³⁵⁹

aa. 1995 and 1996

In the 1995 session of the UN Commission, China has seen an erosion of its ability to block potentially embarrassing resolutions at the Human Rights Commission,³⁶⁰ because the participating states not only blocked the Chinese „no-action“ motion, but almost succeeded in passing the resolution (see above). This hard stance of the US, the EU and Japan had provoked China's rancor considerably, despite the defeat of the resolution in the end.³⁶¹ It was therefore likely that China's lobbying efforts would increase in 1996 to prevent a resolution to be tabled. The deal China proposed to France in 1996 not to table a resolution was already mentioned above,³⁶² but obviously did not succeed. Nevertheless, Li Peng finalized the Airbus contract with France in April 1996, 10 days before the UN Commission's vote on 23.4.96.³⁶³

The US decision to propose a resolution in Geneva, resulted in recent Chinese crackdowns on pro-democracy activists, including Wei Jingsheng who had been arrested a short while ago, and on those in the Tibet Autonomous Region.³⁶⁴ Moreover, Beijing has warned the US against repeating such a „plot“ as in 1995 and was expected to „ruffle at the move, putting a damper on already frayed US-China“

³⁵⁹ *ibid.*, p. 241.

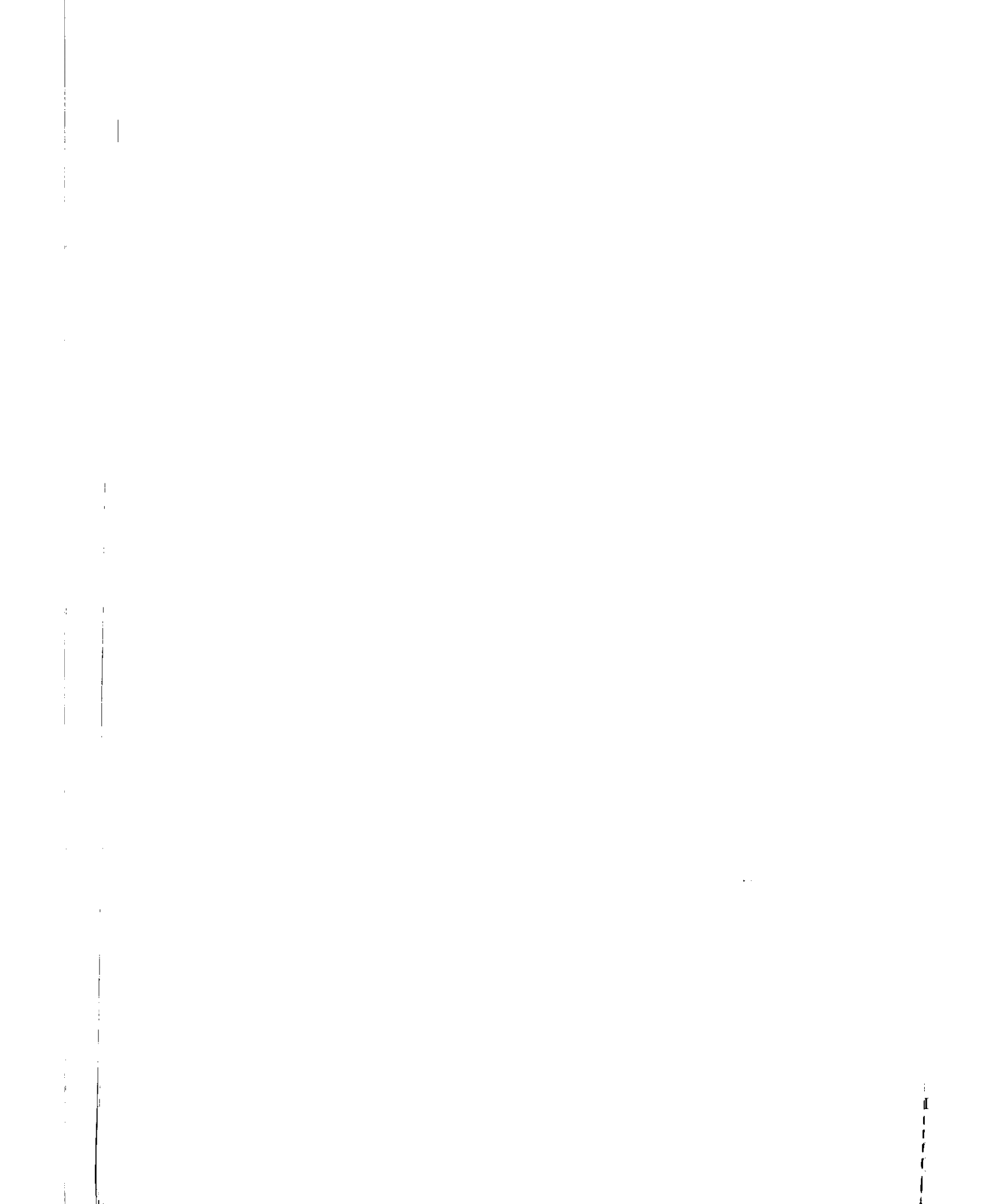
³⁶⁰ The Reuter European Community Report, 11.3.96, BC cycle, „China dismisses EU, US human rights criticism“.

³⁶¹ Kyodo News Service Japan Economic Newswire, 24.2.96, „US to join EU in criticizing China's human rights“.

³⁶² see note 315.

³⁶³ Human Rights Watch Asia (note 299), p. 4.

³⁶⁴ Kyodo News Service Japan Economic Newswire, 24.2.96, „US to join EU in criticizing China's human rights“.



relations.³⁶⁵ According to Beijing, the overseas criticism by the US and the EU of its human rights record constitutes an interference in the internal affairs of a state and the planned UN resolution against China is bound to fail. It is not new for China to attack Western scrutiny and claim that it is motivated by the aim to split China, to subvert socialism³⁶⁶ and to transform the Commission into a forum for levelling accusations at the South.³⁶⁷ Despite the „wrong“ approach of the EU, Beijing was still willing to talk to Europe and Washington: „On the question of human rights, we have always called for dialogue, not for confrontation,“ Qian said.³⁶⁸ Nevertheless, dialogue was interrupted after the EU had tabled the resolution.³⁶⁹

bb. 1997

Human Rights Watch said China has started a stepped-up campaign over the last six months to arrest dissidents and hand out extraordinarily harsh sentences especially with regard to Tibetan activists.³⁷⁰ Qian Qichen, the Chinese Foreign Minister saw little chance for an EU sponsored resolution to succeed in 1997, as former resolutions since 1990 had all had the same end: defeat. Instead of confrontation, China's position on the question of human rights was one of dialogue on the basis of equality and mutual respect.³⁷¹ The split of the EU over the matter gave confidence and satisfaction to China and is a major diplomatic coup for it, which sees its strategy of threat and

³⁶⁵ *ibid.*

³⁶⁶ The Reuter European Community Report, 11.3.96, BC cycle, „China dismisses EU, US human rights criticism“.

³⁶⁷ Agence France Presse, 01.4.96, „European Union to take China to task over human rights“.

³⁶⁸ The Reuter European Community Report, 11.3.96, BC cycle, „China dismisses EU, US human rights criticism“.

³⁶⁹ It was resumed in September 1997, European Report No.2294, 25.2.98, p. V-1.

³⁷⁰ Japan Economic Newswire, 22.1.97, „EU urged to condemn China at UN human rights forum“.

³⁷¹ Agence France Presse, 6.3.97, „EU certain to lose anti-China human rights resolution: Chinese Foreign Minister said“.



commercial bribery as being effective in watering down Western criticism of its human rights record.³⁷² Again, China warned that all countries supporting the resolution would damage their relations with the Asian giant. „Supporting this resolution will not be beneficial to any nation's ties with China,“ Foreign Ministry spokesman Shen Guofang said. With regard to France and Italy, China has been effusive in praising their conduct.³⁷³

The Dutch representative's speech criticizing China in human rights, was called by a representative of the Chinese delegation as „unwarranted accusations“. Only the Chinese people themselves would be able to judge China's human rights situation. It is moreover nothing more than „wishful thinking“ to expect China to accept the EU's political and value system.³⁷⁴ After the resolution had been tabled by Denmark supported by the Dutch, China started to apply discriminatory measures against these two countries ranging from disrupting economic contacts³⁷⁵ to the suspension of diplomatic relations. Ireland was also punished by the cancellation of a visit by the economic czar, Mr Zhu Ronghi.³⁷⁶

³⁷² Agence France Presse, 9.4.97, „China gleeful over EU split on human rights“; Human Rights Watch Asia (note 299), p. 5, President Jian Zemin toured Europe in July 1996 with the aim of closing business deals. Before, in June 1996, China had threatened Germany to impose economic sanctions because of a planned conference on Tibet sponsored by the Friedrich-Naumann Stiftung and subsidized by the German government. The German Government finally withdrew its money, but the conference was held which led to the closure of the foundation's office in Beijing. As a response, the German Bundestag discussed China's appalling human rights record and China, in its turn, canceled an invitation to Foreign Minister Kinkel. Bowing to Chinese economic threats, relations were normalized in September 1996 and big commercial deals were signed. Similar action was taken in Italy, the Netherlands and Britain.

³⁷³ Agence France Presse, 9.4.97, „China gleeful over EU split on human rights“.

³⁷⁴ BBC Summary of World Broadcasts, 11.4.97, Source: Xinhua news agency, Beijing, 9.4.97, „UN official refutes Dutch- EU accusations on human rights, Hong Kong“.

³⁷⁵ European Report No. 2226, 24.5.97, p. V-4.

³⁷⁶ The Irish Times, 21.2.98, „EU likely to stop censuring China over human rights“; SZ, 19./20.4.97 „China sagt Europa Besuch Zhus ab“.



cc. 1998

On the day of the decision, China's vice Foreign Minister, Wang Yingfan, said despite disagreement over human rights China and the EU had „found a way to settle their differences“ through dialogue.³⁷⁷ Chinese Foreign Ministry spokesman Zhu Bangzao rejected any connection of the EU decision and concessions on the Chinese side. „Whatever decision the EU makes,“ he went on, „China promotes and safeguards human rights and will be unwavering in doing so.“³⁷⁸ Nevertheless, just some days before the opening session, China had announced that it would sign the UN covenant on civil and political rights, although, it has not given a timeframe. Apparently, it was concerned to escape scrutiny this year³⁷⁹ despite the EU decision. On 19.4.98, dissident Wang Dan was released on medical terms and now lives in the US China denied any connection with this deal and the US decision in Geneva.³⁸⁰

Having been successful in the end due to the EU and the US decision and the general improbability of a resolution passing anyway, the Chinese reaction to the outcome of the session of the UN Commission was, naturally, purely positive.

c. Evaluation

The outcome of the 1998 session has been defended by European diplomats and has provoked the anger of human rights NGOs and dissidents in and outside of China.

³⁷⁷ Agence France Presse, 23.2.98, „EU abandons US over human rights in China“; Agence France Presse, 24.2.98, „China welcomes EU decision on human rights“; China reacted in the same way after the US decision to drop a resolution, Agence France Presse, 16.3.98, „China welcomes US decision on rights resolution“.

³⁷⁸ The Straits Times (Singapore), 25.2.98, „China- EU accord on human-rights issue“.

³⁷⁹ The Independent , 13.3.98, „China makes rights pledge“; The New York Times, 13.3.98, „On Eve of Geneva Rights Talks, China Agrees to Sign UN Pact“.

³⁸⁰ International Herald Tribune, 23.4.98, „U. S. offers to ease sanctions on China“, p.7 Mr. Wang' release is seen as part of a deal between the Chinese and the Americans; But China denied any deal with the US over the resolution, Deutsche Presse-Agentur, 21.4.98, „China denies W. Dan's release was deal with US“; International Herald Tribune, 22.4.98, „Wang Hopes to Go Home“, p. 6.



Where Sir Leon Brittan, France and England spoke all positively of the „wise“ decision of the EU and the positive results of the new orientation of human rights policy,³⁸¹ the „other voices“ were much more critical. The multilateral human rights protection has this year been defeated by the need for a common performance of the EU in order to avoid another „1997“. Every form of pressure, even the more lenient diplomatic one has been given up with regard to China.

These „other voices“ pled for a comprehensive approach in human rights including positive measures and multilateral critique and rejected the approach of the West as lacking political will.³⁸² The current tactics shed a negative light on the EU human rights policy and exposes it as „pure rhetoric“.³⁸³ Amnesty International has accused the EU of sacrificing human rights for trade deals and expressed deep concern about the possibility of powerful countries escaping scrutiny in Geneva. The arguments brought forward could not justify the EU decision, because in „practice very little has changed“.³⁸⁴ With regard to the UN Commission, Amnesty accused it of choosing a compromise rather than action to protect the victims.³⁸⁵

³⁸¹ In a national discussion, Robin Cook, defended its human rights policy by saying that the U.K. had found the „third way“, not to ignore, not to lecture, but to seek discussion; France, as well, saw its policy of constructive engagement affirmed by the release of Wan Dang, Agence France Presse, 20.4.98, „France hails Chinese dissident release“; Sir L. highlighted a number of areas where China had improved its policy, „not least because of the pressure brought to bear by the EU“, he claimed. „I stress that the ongoing EU-China dialogue fully and frankly addresses the most sensitive issues concerning human rights, such as the death penalty, prison conditions and ethnic and minority groups“, Sir L. Brittan said. He added that the EU's policy of political and economic engagement with China was more likely to produce results than one of isolation, Europe Information Service, European Report, 18.3.98, „EU/CHINA: Brittan defends EU human rights policy“.

³⁸² Agence France Presse, 23.2.98, „EU abandons US over human rights in China“; Agence France Presse, 23.4.98, „UN rights commission wraps up session amid pledge of deep reforms“.

³⁸³ Agence France Presse, 23.2.98, „EU abandons US over human rights in China“.

³⁸⁴ Agence France Presse, 24.2.98, „Amnesty attacks EU "disappointment" over human rights in China“; The New York Times, 13.3.98, „On Eve of Geneva Rights Talks, China Agrees to Sign UN Pact“ in a report AI stated that despite some concessions not much has changed.

³⁸⁵ Agence France Presse, 24.4.98, „Amnesty slams UN Human Rights Commission for lack of action on abuse“.



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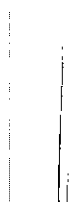
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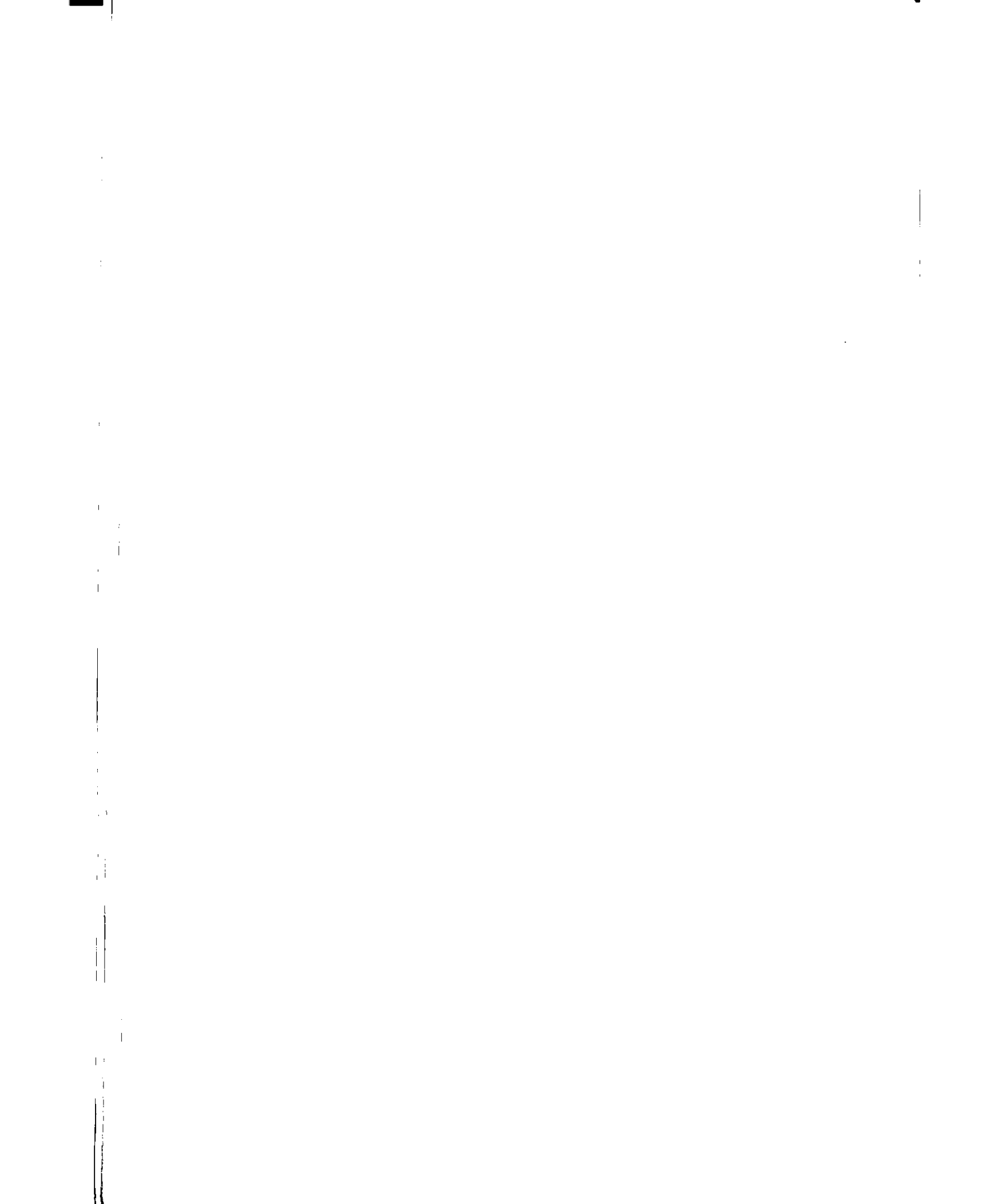


Wei Jinsheng, China's most prominent dissident, was very unsatisfied with the EU decision and asserted that the proclaimed approach of constructive engagement was not the right way to deal with China in human rights. He also does not believe the arguments advanced by the EU: one, China had already announced to sign the Covenant on civil and political rights one year ago; two, the other Covenant has only been signed and not ratified yet; three, there are thousands of political prisoners who remain without trial; four, torture is still widespread; and lastly, any dissent is firmly suppressed.³⁸⁶ Wei had also the opportunity, against the disapproval of China, to address the UN Commission this year. He accused the West of not supporting the peaceful activities of the Chinese people and leaving them alone in their fight for human rights in their country. Additionally, Wei said, the West had an erroneous picture of China due to the Media which „portray a China of cellular phones, Mercedes Benz and McDonalds. They intend to convince the world that China is a new land of opportunities. Yet they forget that there are 1.3 billion Chinese, 1.2 billion of whom are poor“³⁸⁷

All in all, from a human rights point of view, the result of the UN Commission in 1998 was very disappointing. Even more striking was the difference between the lobbying efforts made by China and by the Western world.

³⁸⁶ Europe Information Service, European Report, 18.3.98, „EU/CHINA: Brittan defends EU human rights policy“; Wei said that the decision was based on distorted facts Agence France Presse, 5.3.98, „Wei slams Europe as US mulls China rights resolution“; Wei voiced disappointment with the new approach, and stressed that the Chinese government „has not shown any intention to improve the human rights situation“, Agence France Presse, 30.3.98, „Denmark backs cooperation with China over human rights“.

³⁸⁷ Agence France Presse, 9.4.98, „China's Wei accuses West of abandoning human rights efforts“.



4. Can China afford this confrontation?

China's strategy obviously was to use its important economic position in the world economy to lobby and bargain as regards the decision at Geneva. If lobbying efforts did not produce the desired results, it did not hesitate to apply diplomatic and economic sanctions vis-à-vis the target country afterwards. It is extremely interesting, how the Western world plays this game of intimidation and is unable to find a hard stance towards China and to condemn these practices. The only EU organ which did so was the European Parliament in a resolution asking the Member States to act and express their discontent with such behaviour and to lodge official protests.³⁸⁸ Obviously, nothing really happened, and the protest was only expressed by the EU's representative in Beijing.³⁸⁹ The first step in asking whether China can afford confrontation is to have a quick look at China's economy and its likely development in the future, in order to then assess the economic relations with the US and the EU and ask why China can be so powerful in the context of world power.

As regards China's economy, Xiaming Liu and Haiyan Song³⁹⁰ have given an interesting account of the status-quo and the likely evolution of China's economy. The high competitive advantage of China, which means the competitiveness of products in international markets and which is measured in growth rates and world market shares of a country's products, is based on products being all labour-intensive goods.³⁹¹ This competitive advantage is related to the outcome of its „national diamond“³⁹² and the

³⁸⁸ European Parliament Resolution on discriminatory measures taken by China against certain member states, 15.5.97, Bull. EU, No.5, 1997, Vol. 30, pt.1.4.85, p. 76.

³⁸⁹ European Report 2226, 24.5.97, p. V-4.

³⁹⁰ X. Liu, H. Song, „China and the Multinationals -A winning Combination“, in: *Long Range Planning*, February 1997, Vol.30, pp. 74-83.

³⁹¹ *ibid.*, p. 75.

³⁹² Factor conditions (f.ex.: natural resources, climate, labour forces, infrastructure, research institutes), Demand conditions (f. ex.: home demand, growth of it, transmission of nation's domestic preferences to foreign markets), Related and supporting industries, Firm strategy, structure and rivalry, *ibid.*, p. 74s.





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combination of it with multinational business activity, first and foremost in Hong Kong and Taiwan. According to them, China's competitive advantage is not seen to be sustainable. It should therefore build on extending its four national factors and not mainly rely on labour-intensive products, but also capital-intensive manufactures.³⁹³ All in all, they classify China as „the largest potential market in the world“.³⁹⁴

The current competitiveness of China is not only based on labour intensive goods, but also on the combination with foreign investment and import of technology, an evolution that had been generated by the Chinese Government after the opening-up in 1978.³⁹⁵ It derives from this second component and the analysis given above that China, in order to remain competitive, needs foreign investment and technology. The US, for example, still is the largest market and a very crucial supplier of high technology in the world. With regard to the US China would clearly lose more than it would win if it cut economic ties.³⁹⁶ Secondly, the trade surplus of China with regard to Europe is high³⁹⁷ and cannot be only compensated by turning to America, Japan or Russia. Europe provides China mainly with machinery, and imports textiles and clothing, toys, electrical material, leather goods and footwear.³⁹⁸ China needs the preferential access to the Western markets and the hard currency to sustain its economic growth. Moreover, China's desired accession to the WTO will not be possible without support from these two regions. The EU has just decided to regard

³⁹³ *ibid.*, p. 78.

³⁹⁴ *ibid.*, p. 81.

³⁹⁵ *ibid.*, p. 82; H. Weiss (note 230), p. 48.

³⁹⁶ Ming Wan (note 147), p. 241; International Herald Tribune, 28.4.98, the American consumer is still seen as the main driver of Chinese growth.

³⁹⁷ European Commission Delegation in China, „The EU and China“, <http://www.ecd.or.cn:/vhost/ecd/pamphlet/pam972.html>, 15.344 million ECU.

³⁹⁸ European Commission Delegation in China, „The European Union and China“, <http://www.ecd.or.cn:/vhost/ecd/pamphlet/ecu2.htm>, p. 2.



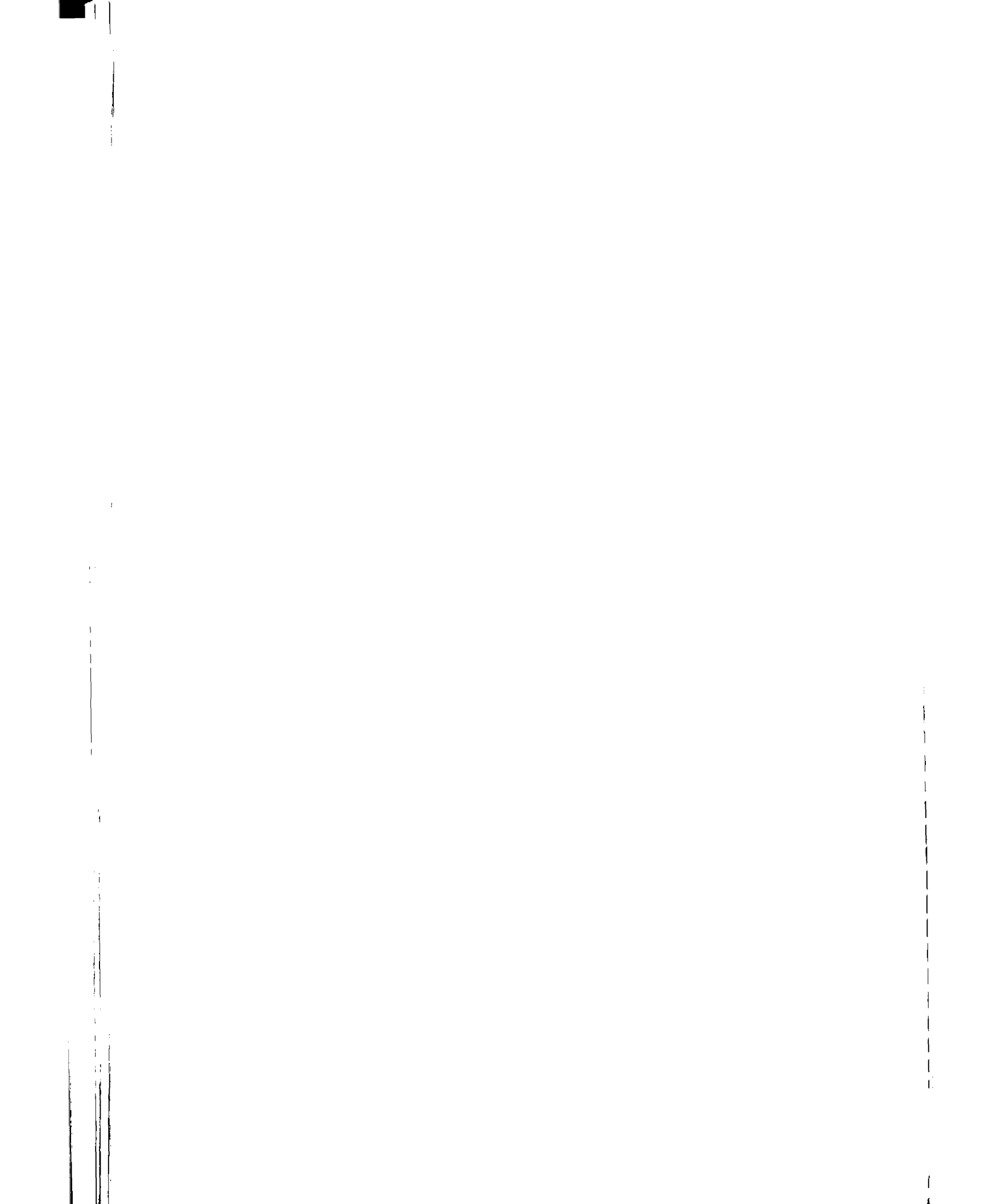
China as a „market-economy“ which will facilitate, inter alia, accession to the WTO.³⁹⁹ The fact that Europe and the US do not prevent China from playing with them cannot accordingly be explained by the potential independence of China from these two markets, but from the fact that none of the two wants to lose share of this immense market with regard to the other, supported by multinational firms and their lobbying. In the sphere of geo-politics, it is hard to assess in a few words, whether the EU and US have to fear China and should avoid confrontation for that reason. Two points are certain: China is modernizing its military and aiming at elevating the resources of the National army⁴⁰⁰ and nobody wants an unstable China that poses threat to the whole world. China is already a nuclear power and one of the world's biggest arms producers and exporters. Additionally, it must not be forgotten that it holds a seat in the UN Security Council.⁴⁰¹

In conclusion for this chapter, it may be said that little use of CFSP instruments in the field of human rights was made, particularly with regard to China. The UN Commission provides an interesting example of the attitude of the Western states, and especially the EU, towards China and leads to the next question: as to the explanation and consequences of the insubstantial engagement of the EU in human rights.

³⁹⁹ International Herald Tribune, 28.4.98, „EU Overture to China and Russia“, the Trade Ministers of the EU agreed on 27.4.98 to remove China as well as Russia from the list of nonmarket countries. This decision has also implications for the anti-dumping policy of the Union.

⁴⁰⁰ X. Gu, „Militärische Aufholjagd. Die Modernisierung der chinesischen Streitkräfte“, in: *Internationale Politik*, No.6, 1997, Vol.52, pp. 11-16, p. 11; *Die Zeit*, 24.20.97, „Einbinden statt Eindämmen“; *The Economist*, 3.1.1998, „The Next Balance of Power. A geopolitical detective story“, pp. 17-19.

⁴⁰¹ „A Long Term Policy for China-EU Relations“, COM (95) 279 final, p. 1.



Chapter 4: The insubstantial human rights engagement of the European Union under scrutiny

This chapter seeks to explore some of the possible explanations for the limited use of CFSP means by the EU for human rights aims and the insubstantial engagement of the *Union as a whole* towards China. It also asks whether the CFSP is an adequate means to conduct a foreign policy which is efficient, credible, consistent and coherent and whether the tailoring of the instruments as decided in the most recent Commission Communication, COM (98) 181 final corresponds to the specific needs of China.

I. Reasons for insubstantial engagement

In general, *EC* engagement in human rights has been more visible than *EU* engagement so far. The *acquis communautaire* of positive and negative measures in human rights can claim a considerable evolution and is based on a good footing within the EC structure of decision-making and implementation. With regard to China, the EC can use the means of the ALA-regulation 443/92⁴⁰², the framework of the 1985 Cooperation Agreement (although it does not include a human rights clause) and the new programme of „practical co-operation“⁴⁰³ to further human rights. Unfortunately, China has too often been the „human rights exception“.⁴⁰⁴ The EU, by virtue of the CFSP, is even more torn between economic interests and ethical principles of international relations. It has not made use of the possibilities at hand, i.e. common positions and joint actions, but has instead withdrawn to the invisible tools of the EPC, declarations, *démarches* and political dialogue towards China. In the framework of the

⁴⁰² OJ L 52, 27.2.1992.

⁴⁰³ see COM (98) 181 final.

⁴⁰⁴ see R. Cohen, „People's Republic of China: the human rights exception“, in: *HRQ*, No. 4, 1987, Vol.9, pp. 447-549.



UN Commission a negative trend can be observed from 1989 to 1998 ranging from the undisputed tabling of a resolution after the Tiananmen massacre to the abstaining from any engagement (even excluding Member States single action) in 1998.

1. Economic interests prevail

The China case has shown that economic interests place human rights in third position after stability and trade. The Union thus is more driven by its economic interests than by its commitments to human rights. The question could therefore be asked whether an economic institution like the Union should not even try to have a human rights policy because any conflict would be solved in favour of commercial aspects anyway.

a. An economic institution

The history of the European integration is one of economic integration.⁴⁰⁵ The Community was designed to achieve closer economic ties between the Member States according to the objectives set out in Art. 3 TEC. The old Art. 8 TEEC provided for completion of the internal market in 12 years time, i.e. 31.12.69.⁴⁰⁶ The EC was conceived to lead to prosperous economic growth and by co-ordinating the economies of the Member States contribute to peace and stability in the world (see Preamble and Art. 3 TEC). The founding fathers did not think of fundamental rights, including social welfare rights, and abstained from including them in the treaty because they all had national constitutions protecting the rights of the citizens, they, secondly, had just recently signed the European Convention for the Protection of Human Rights and

⁴⁰⁵ The absence of any reference to human rights in the treaties establishing the European Communities reflects the „economic substance“ of the treaties and the reluctance on the side of the Member States to transfer sovereignty in other fields than economic, D. Napoli, „The European Union’s Foreign Policy and Human Rights“, in: N. A. Neuwahl, A. Rosas (eds.), *The European Union and Human Rights*, Kluwer, The Hague 1995, pp. 297-312, p. 299.

⁴⁰⁶ F. Emmert (note 78), p. 17.



Fundamental Freedoms, and, finally, supported the tradition of international law that international treaties would not have direct effect in the national sphere.⁴⁰⁷ Additionally, the European project was not envisaged to become a state-like feature and specific protection of the citizens was thus not deemed necessary. With Maastricht and the transformation of the EC into a political Union - a constant process of closer co-ordination - the political element of respect for human rights and democratic principles has become central for the conduct of activities, as demonstrated in several articles of the treaty (Art. F II, J.1.II TEU, Art. 130 u TEC).⁴⁰⁸ With regard to the external dimension, even without an explicit reference in the treaty, the fact that all members of the Union are liberal democracies, obligates them to advocate these values in their relations with third states as well,⁴⁰⁹ enhanced by the fact that the respect for human rights in the external relations does not impede internal economic development (but of course influences the competitiveness in the international arena). Still, the Union has not become a nation state and is not intended to become one in the near future,⁴¹⁰ but it has acquired more and more features of a nation state and has not always been able to make the necessary internal developments (democracy deficit, transparency, regional policy, citizen's protection). Prevalence of economic interests can not justify the neglect of human rights, be it internal or external, and the (initial) focus on economic integration does certainly not *impede* an institution from pursuing an active human rights policy at the same time. Such a policy could even be very

⁴⁰⁷ *ibid.*, p. 293; D. Napoli, „The European Union's Foreign Policy and Human Rights“, in: N. A. Neuwahl, A. Rosas (eds.) (note 405), pp. 297-312, p. 299.

⁴⁰⁸ see also COM (95) 567 final.

⁴⁰⁹ see preamble of the SEA which introduced the first mentioning of respect for human rights in the internal and external dimension of European law. Recital 5 states: ...“in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter“.

⁴¹⁰ M. Pechstein, „Das Kohärenzgebot als entscheidende Integrationsdimension der Europäischen Union“, in: *Europarecht*, No.3, 1995, Vol.29, pp. 246-258, p. 248.



effective if backed by economic potential. It is the balancing of economic interests and 'soft issues' that determines the game.⁴¹¹

b. The role of enterprises in the market

aa. Their influence on the China strategy

China is the largest potential market in the world. By exploiting its natural competitive advantage and by cleverly using the contacts with multinationals, the already existing advantage can be maintained and even improved.⁴¹² The open-door policy of Deng Xiaoping after 1978 has paved the way for this policy and the Chinese government today has acknowledged the fact that China has to collaborate in order to compete. The preferential policies towards foreign investors have to be pursued and even enhanced. However, firms still complain that there is no open market, no market economy in China and that their investments do not rest on firm foundations as regards sustainability and confidence.⁴¹³ The lobby of the multinationals is strong and usually not in favour of human rights. One only has to think of the Airbus contract with France or the Shanghai underground envisaged by German firms. Kinkel has explained the German position towards China by saying: „China is a big, important power that is on the way to broader, greater importance. Therefore, you cannot balance the relationship with a country like that only on the needle tip of the human rights question“.⁴¹⁴ On the

⁴¹¹ Because of this bias, it could also be proposed that the Union increases its engagement in the Council of Europe instead of trying to combine issues that partly contradict each other.

⁴¹² X. Liu, H. Song (note 390), p.81s.

⁴¹³ Funabashi, Y.; Oksenberg, M.; Weiss, H. (note 163), p.54; T. Heller, guest lecture in the seminar on „Globalization and International Trade Law“, held by Prof. Snyder at the European University Institute in Winter 1997; International Herald Tribune, 25./26.4.98, „China Bans the Door-to-Door Seller“, the bans threatens hundreds of dollar of investment of multinational firms; In July 1998 China has backtacked from this blanket ban and allowed Amway Corp. to resume operations, Herald Tribune, 22.7.98, p.15. This shows again how unpredictable China's policy for foreign traders is.

⁴¹⁴ International Herald Tribune, 13.7.1995, p.1.



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occasion of signing a major automobile contract with the Chinese government, Chancellor Kohl claimed that differences in conceptions of citizen rights need to be respected when dealing with China, even if in principle the universality of basic human rights forms the framework of action. Different degrees or stages of economic development, as well as distinct historical traditions need to be taken into account.⁴¹⁵ With a view to America, the same influential role is played by American firms. They have even established a closer web of relationships with the Chinese side than exist between the Chinese and American governments, and Clinton has to beware to keep pace with these „foreign policies“.⁴¹⁶ The United States' policy towards China would give enough room for another extensive survey. It should just be mentioned here that the yearly granting of the MFN status to China is a highly controversial issue and Bill Clinton, for example, ran its election campaign in 1992 by, besides others, proclaiming a policy of criticism towards China, which, in the end, proven very shortlived.⁴¹⁷ The prospects for a common strategy of the EU and the US towards China are mixed,

⁴¹⁵ International Herald Tribune, 21.7.1995, p. 6.

⁴¹⁶ International Herald Tribune, 29.10.1997.

⁴¹⁷ See J. A. Dorn, „Trade and Human Rights in China“, <http://www.cato.org/dailys/11-15-96.html>, p. 1s for the Jackson-Vanik amendment of 1974 and J. Haacke, „Chinas Mitwirkung an multilateralen Foren der Zusammenarbeit im Pazifik“, in: *Aussenpolitik*, No. 2, 1997, Vol. 48, pp.166-176, p. 170; I.M. Destler, *American Trade Politics*, Institute for International Economics, Washington DC 1995, p. 230, for the election campaign; Ming Wan (note 147), p. 240ss, critical of the US policy; Presidential remarks on 26.5.94, New York Times, 26.5.94 „(...) I am moving, therefore, to delink human rights from the annual extension of Most Favoured Nation trading status for China...we have reached the end of the usefulness of that policy“;

The ups and downs of the US policy towards China were announced as coming to an end with the historical visit of Jiang Zemin to the United States in October 1997. Foreign policy experts have figured out the new policy to be followed into the next millennium: 'Criticism of the Chinese human rights record whilst simultaneously maintaining trade'. The leading ideology behind this is that economic development and liberalization will automatically lead to the emergence of democratic values as happened in the US, SZ, 29.10.97, „Ritterschlag fuer einen Bittsteller“; SZ, 31.10.97, „Die zweite chinesische Offensive“, Jian Zemin and Bill Clinton have a big task in front of them to find a way through the jungle of different views, diverging theories and realities of trade and globalization; I.M. Destler (above), p.235, Market freedom, economic development and international engagement are more likely to promote democracy and human rights.



given the competition for markets and the different approaches as regards reaction to human rights violations in the world.⁴¹⁸

The tension between multinational firms and Union policy lies in the fact that despite the exclusive competence of the EC for commercial policy (Art. 113 TEC), economic policy is still national.⁴¹⁹ Moreover, even in the field of Art. 113 TEC, the EC sets only the framework for action, which is then filled in by national contracts about the transfer of goods. Services and intellectual property issues remained within national competence even after Amsterdam. Due to Member States reluctance to cede power in these areas, only a last minute amendment could be included in the treaty which foresees extension of paragraphs one to four to services and intellectual property if the Council unanimously so wishes.⁴²⁰

The interest of many international firms does not concord with a progressive human rights policy, but aims at exploiting the cheap labour, good investment opportunities

⁴¹⁸ In a speech to students at Leiden University, Van Mierlo said that „The EU and the US are natural partners when it comes to promoting democracy and human rights. They need each other and have to work together to book results“, *Algemeen Nederlands Persbureau English News Bulletin*, 13.12.96, „V. Mierlo calls for closer EU/US cooperation on human rights“; Nevertheless, there have been differences in view about how to proceed, namely with regard to Cuba and Iran, *International Herald Tribune*, 28.4.98, „Shell to Test US On Iran Sanctions“, the main point of disagreement is about the extraterritorial nature of the US legislation;

Sir Leon Brittan, as well, in his speech at Washington one year later was very optimistic about the good prospects for a firm relationship between Europe and the US He stressed the common values such as human rights, political freedoms and free speech, alongside with the interest in peace and stability and in fostering open trade, speech of Sir L. Brittan on 21.11.97 at the Europe Institute in Washington, „Europe and America: staying together“, <http://europe.eu.int/en/comm/dg01/spslb5.htm>, p.2s; see also Sir L. Brittan in a speech to the Capital Hill Club in Washington, 19.3.96, „Europe, the US and Asia: Facing up to global challenges“, <http://europe.eu.int/en/comm/dg01/sp190396.htm>.

⁴¹⁹ Ch. Joerges, „European Economic Law, the Nation-State and the Maastricht Treaty“, in: Renaud Dehousse (ed.), *Europe After Maastricht. An ever closer Union?*, Law Books in Europe, Muenchen 1994, pp. 29-62, p. 32.

⁴²⁰ European Policy Centre, „Legal Analysis“ (note 55), p. 97; M. Petite, „The Treaty of Amsterdam: Ambition and Realism“, unpublished paper, p.20s, translation of the text published in *Revue du Marché Unique Européen*, No. 3, 1997, pp. 17-52; The European Parliament in a resolution on the Treaty of Amsterdam pledges the Member States to quickly take a decision on the transfer of competences to the Community which, according to its view, has to be competent in all the areas covered by the WTO, *Agence Europe, Documents*, No.2060, 3.12.1997, p. 3, par.9.



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and at securing a competitive advantage. In an interview, Hang Dongfan, a well-known Chinese Unionist and human rights activist, explained that the human rights situation of workers is the worst in those areas in China, where a lot of foreign investment is spent. This usually are the Special Economic Zones along the coast. Multinational firms do not respect workers rights, but aim at exploiting their labour force. When asked about the usefulness of German import restrictions for Chinese products produced under violation of basic labour rights, he answered that such a policy was not realistic. The German market, for example, relies to strongly on the cheap Chinese products that it would agree to impede trade with them. The better solution would be to introduce the social clause in international agreements and to set up a code of conduct for investment of international firms.⁴²¹

bb. The enterprises' self-restraint

How far have efforts gone to set up code of conducts for multinational firms? The European Parliament in a resolution in 1996, demanded such a code be set up.⁴²² In lack of concrete standards so far, it referred to an OECD proposal for the procedure of controls and sanctions. Thus far, such initiatives have not led to the establishment of a code as international firms are usually reluctant to agree to norms which restrict their economic freedom. But, there are also different trends to be observed. For example, there is a growing awareness that human rights considerations play a role in investment and business programmes, because sustainability is dependent on social surroundings⁴²³ and due to consumer pressure at home, trade cannot be completely de-linked from

⁴²¹ Bass, H.; Wauschkuhn, M.; Wohlmuth, K., Menschenrechte, Arbeitsverhältnisse und Gewerkschaften in China - internationale Perspektiven, Berichte des Arbeitsbereiches Chinaforschung im Institut für Weltwirtschaft und internationales Management, Nr. 6, Mai 1996, Universität Bremen. Interview mit Hang Dongfang, p.47-62, p. 58ss.

⁴²² EP Doc. A4-400/96.

⁴²³ Comparison is made with the discussion about sustainable development in development policy.



these aspects. In this context, Fresenius Medical Care AG decided to end a joint venture with a Chinese hospital, because of the possibility of trade in organs by the partner firm.⁴²⁴ Levi Strauss & Co. decided to withdraw from China in 1993 after it learnt that child and prison labour was used at its factories and that there was military presence. Its guidelines prohibit it from using factories where such exploitation occurs. Yet, it never fully abandoned China, but reduced production from 3 million to 800.000 units and stopped selling clothes there. No other American firm has followed the example of Levis. In 1998, a time of increasing political and commercial friendliness between the US and China, the company decided to resume its ties with China. Its hope is to find producers who will adhere to the company's guidelines.⁴²⁵

c. trade figures

Admittedly, China is too big a temptation for international firms to abandon. Trade between the EU and China is governed by the 1985 Trade and Co-operation Agreement which is revised constantly by the EC-China Joint Committee. China has become the EU's fourth largest supplier in the world (3rd position counting Hong Kong, Macao and Taiwan) and the 7th (3rd if one includes Hong Kong, Macao and Taiwan) largest export market. The trade surplus of China in 1996 was 15,344 billion ECU⁴²⁶ and 20 billion ECU in 1997 which reflects China's potential as well as its remaining market barriers.⁴²⁷ China mainly imports goods, machinery and advanced technology from the EU alongside with EU investment in China.⁴²⁸ According to the

⁴²⁴ Frankfurter Allgemeine Zeitung, 5.3.98 „FMC kuendigt in China Joint-venture auf“.

⁴²⁵ International Herald Tribune, 9.4.98, „Jeans Maker to Resume Its China Business“, p. 1, 4.

⁴²⁶ European Commission Delegation (note 397), p. 1s.

⁴²⁷ European Commission, „Building a Comprehensive Partnership with China“, COM (98) 181 final, [http:// europa.eu.int/en/comm/dg01/chincom.htm](http://europa.eu.int/en/comm/dg01/chincom.htm), p. 9.

⁴²⁸ European Commission (note 397), p. 1s.



World Bank, in 2020, China will become one of the top three traders⁴²⁹ and Sir Leon Brittan has said it will have surmounted the economy of the US by then.⁴³⁰

Despite trade and economic integration being one of the main pillars of the European project towards an ever closer Union, it is no solution to give up any active human rights policy with regard to one country. On the one hand, such a policy would become awfully arbitrary, and on the other hand, would lead to a loss of credibility for the whole enterprise.

2. Is the positive approach not the right way to promote human rights?

The positive approach of the Union as it was sketched out above, includes first and second pillar measures although it was developed with regard to the Community alone. It will be mentioned here, because China is a striking, not necessarily positive, example of this approach.

One important drawback of the positive approach is the danger of hypocrisy. How can an organization like the Union, which proclaims human rights to be one of the „cornerstones of European co-operation“⁴³¹ and has further expressed this will in the Maastricht Treaty⁴³² deal with a country that constantly violates internationally accepted rules without losing credibility? Moreover, the arbitrary side of such a policy must not be forgotten: smaller states can get away with little, whilst China has a big margin as to its behaviour before action is taken.⁴³³ Additionally, the political message,

⁴²⁹ European Commission (note 427), p. 9.

⁴³⁰ European Report No.2288, 4.2.98, p. V-4.

⁴³¹ Statement on human rights (note 90), pt. 2.4.4., p. 100.

⁴³² European Commission, „The European Union and the External Dimension of Human Rights Policy: From Rome to Maastricht and Beyond“, COM (95) 567 final, especially p. 21.

⁴³³ M. Fouwels (note 56), p. 318ss in this respect compares China and Haiti. The Joint Assembly under the Lomé convention noted that China is granted a more lenient attitude than most of the ACP countries, K. Tomasevski, *Between Sanctions and Elections*, 1997, p. 43s, see also the discussion on a procedure for the implementation of Art. 366s of the Lomé convention,



demanding internal change, which is proclaimed towards China, is unlikely to reach the Chinese Government, if all economic advantages stay in force and political relations remain untouched. In such a constellation, there is no need for change. Last, but not least, suspicion has been raised that an EU labour law policy in third countries and the inclusion of the human rights clause in trade agreements is mainly driven by protectionist ambitions and not so much by concern for the rights of the workers and people.⁴³⁴ Implemented in this way, human rights policy becomes empty rhetoric.

On the other hand, the big advantage of positive measures, i.e. prevention, should not be dismissed either.⁴³⁵ The Commission in its Communication on the External Dimension of human rights policy⁴³⁶, explained some of the correlations between an active human rights policy and conflict prevention by saying that many of the international conflicts are rooted in a deep disregard of human rights. Those violations lead to upheaval which then generates further violations. In sum, a vicious circle is created. An active human rights policy aims at diminishing reasons for conflict and at creating an environment, conducive to human rights. An important factor of this policy is the realization that change can only come from the inside and cannot be imposed.⁴³⁷ That explains why election-monitoring and support for NGOs are such crucial factors in EU policy.

In conclusion, the positive approach surely is in danger of becoming a policy of hypocrisy and arbitrariness. However, if applied comprehensively, negative measures might either not be necessary or can be applied with caution as ultima ratio, which, in

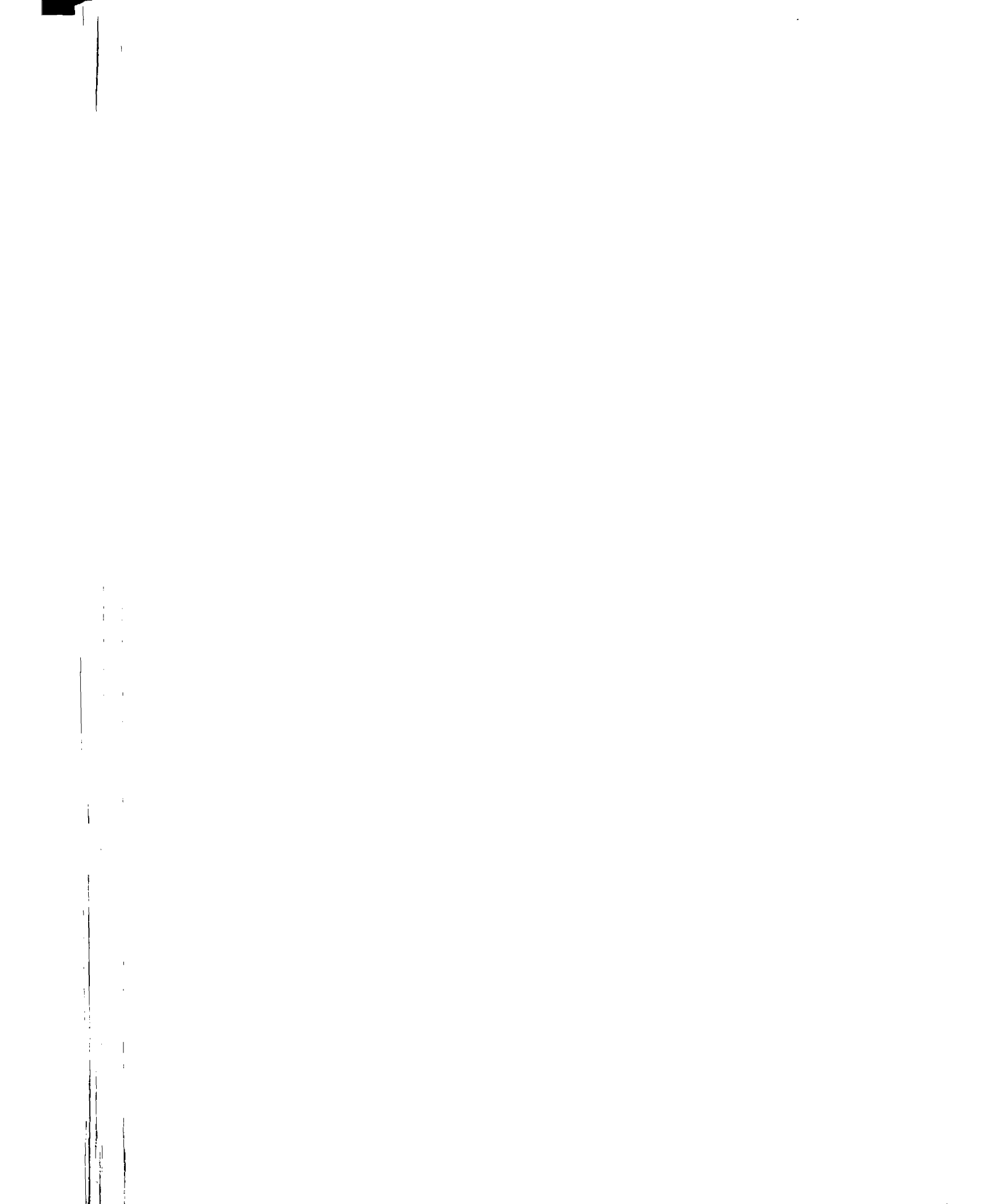
European Parliament, Committee on development and Cooperation, *Interim Report*, EP doc. A4-0175/97, especially p. 10.

⁴³⁴ Ch. Muzaffar (note 228), p. 72s; P. Alston, „Linking Trade and Human Rights“, in: *German Yearbook of International Law*, 1980, Vol.23, pp.126-158, p. 132, 149.

⁴³⁵ see also P. Alston (note 40), for the advantages of a positive linkage of trade and human rights.

⁴³⁶ COM (95) 567 final.

⁴³⁷ P. Alston (note 40), p. 169; M. Marin, Democracy cannot be imposed from the outside, in: *The Courier*, 128, 1991, pp. 50-51.



return, gives credibility to such an approach. The policy of constructive engagement with China, where negative measures are completely excluded, does not have the possibility to gain credibility by reference to this „last resort“. Section II is an attempt to shed further light on a possible justification for the purely positive approach of cooperation with China. It asks whether China indeed might be a „human rights exception“ and has to be treated like one for good reasons. In that case, this attitude should be made public to prevent criticism from smaller states about arbitrariness.

3. The CFSP - too weak a procedure

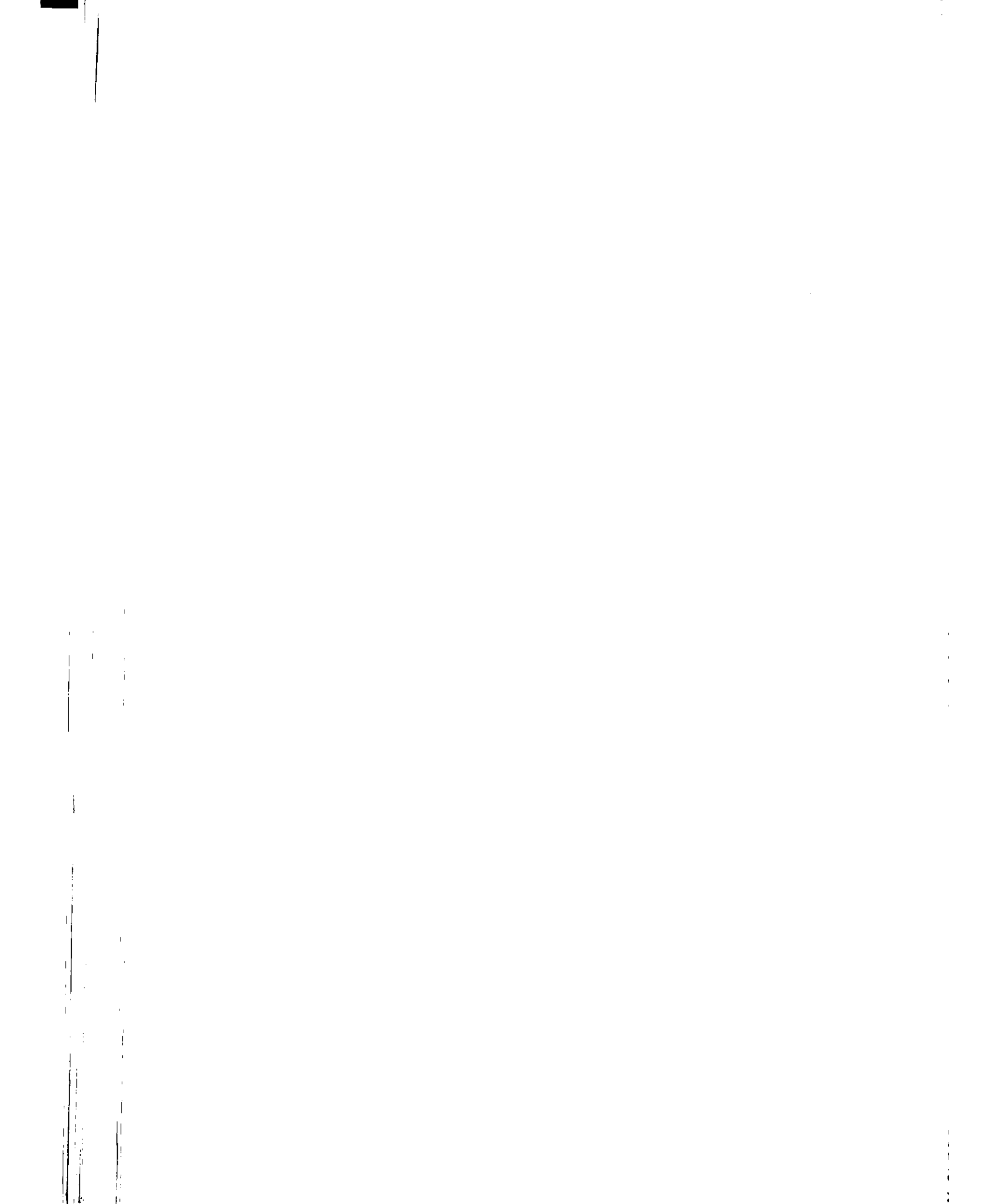
Much has been written about the poor image Europe projected in recent regional or international crises and in international fora.⁴³⁸ Much of this criticism can be explained by the „capability-expectations gap“⁴³⁹ that has plagued European foreign policy from its beginning and means that there are serious differences between the role Europe is expected by in- and outsiders to play in the world and the internal ability to do so: decision-making, resources and instruments.⁴⁴⁰ Since 1954, when the European Defence initiative failed due to France's veto, and with the Fouchet-plan in the 1970s, a concept has taken possession of the European foreign policy and is still the main reason for a rather reactive policy: intergovernmentalism.⁴⁴¹ It is reflected in the

⁴³⁸ For example in September 1996, the EU could not find a common stand as to how to react to the Iraqi violations of the protected zones and the US attack in response, in April 1997 the EU was unable to cooperate whether to table a resolution on China at the UN-Commission, an EU-ASEAN agreement in February 1997 was cancelled because of differences between Portugal and Indonesia, M. Dembinski (note 70), p. 8s; For Yugoslavia and the EPC see P. von Jagow, „Das Krisenmanagement der EG/EPZ im Jugoslawienkrieg - Eine gemischte Bilanz, in: E. Regelsberger (ed.) (note 47), pp. 85-93.

⁴³⁹ Ch. Hill, „The Capability-Expectations Gap, or Conceptualizing Europe's International Role“, in: *Journal of Common Market Studies*, No.3, 1993, Vol.31, pp. 305-328.

⁴⁴⁰ *ibid.*, p. 315.

⁴⁴¹ G. Burghardt, G. Tebbe (note 252), p. 3s; The CFSP is an intergovernmental procedure, K. W. Lange, „Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union“, in: *JZ*, No.9, 1996, Vol.51, pp. 442-448, p. 442; J. Janning, „Aussen- und Sicherheitspolitik nach Maastricht“, in: Werner Weidenfeld (ed.), *Maastricht in der Analyse. Materialien zur*



unanimity principle and the limited role of the supranational Commission and the European Parliament in the CFSP. Moreover, because of the exclusion of jurisdiction by the ECJ in the field of the CFSP, the established obligations for the Member States to co-ordinate their action and to speak with one voice (see above) cannot be legally enforced and thus remain rather limited.

The next part will discuss the unanimity principle as a main impediment to progress and as too weak a procedure to combine the divergent interests of the Member States in an area traditionally at the core of national sovereignty: the foreign policy.⁴⁴² The instruments of the CFSP require unanimity (or at least consensus as an alternative form of unanimity⁴⁴³) and only very restricted possibilities for majority vote exist. Maastricht introduced them for the first time in Art. J.8 II TEU and this can be regarded as a „saut qualitatif“ compared with the EPC.⁴⁴⁴ Often, however, the very limited opening-up to majority voting is seen as too small a change to improve the efficiency of the CFSP.⁴⁴⁵ Art. J.8 II TEU provides for majority vote in two cases: administrative questions⁴⁴⁶ and Art. J.3 II TEU. The latter concerns the implementation of joint actions, but the areas in which measures can be decided by majority vote have to be defined *before* by

Europäischen Union. Strategien und Optionen fuer Europa, Bertelsmann, Guetersloh 1994, pp. 55-69, p. 63.

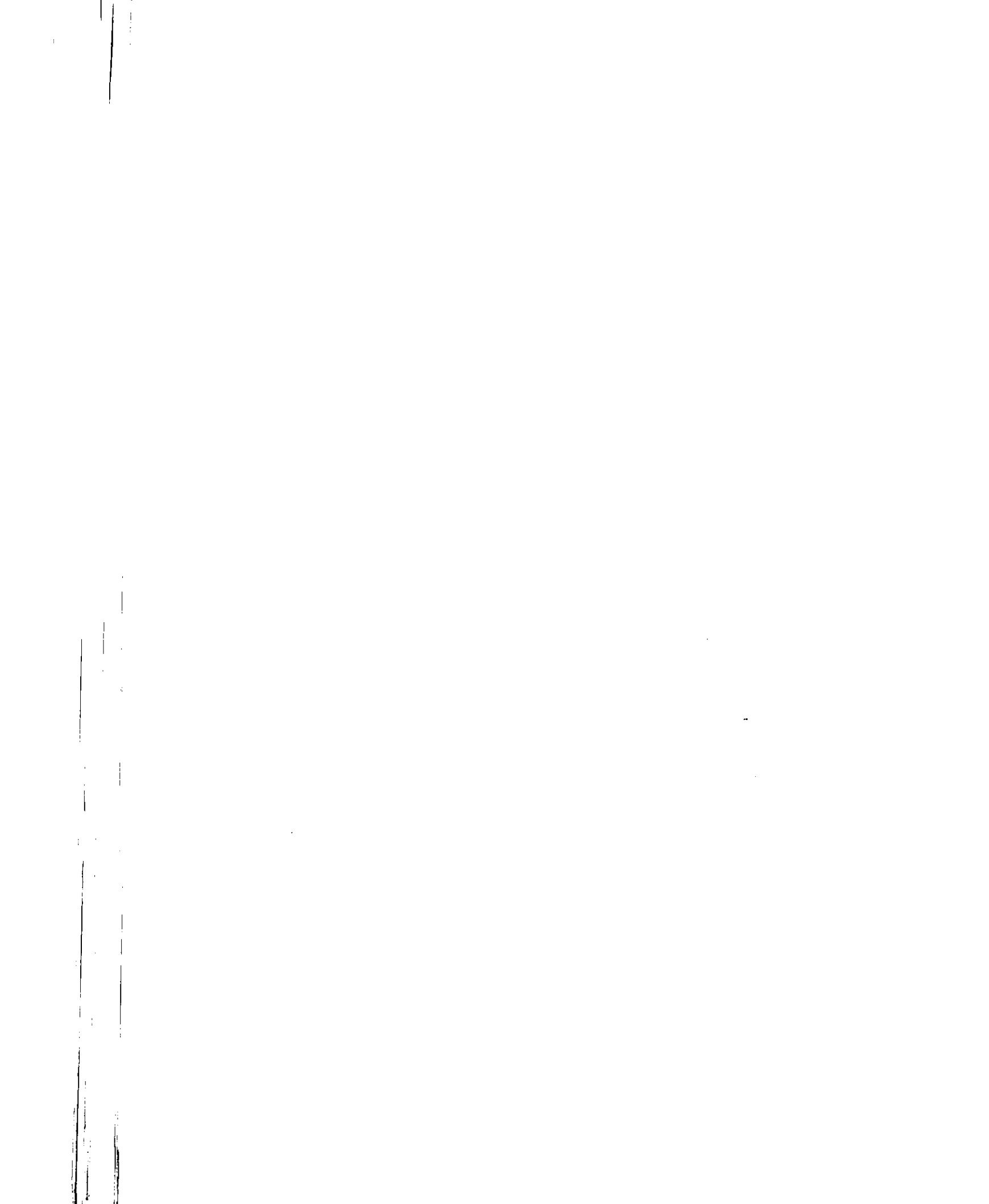
⁴⁴² M. Dembinski (note 70), p. 8, 14, 18.

⁴⁴³ W. Wessels, „Von der EPZ zur GASP - Therorienpluralismus mit begrenzter Aussagekraft“, in: E. Regelsberger (ed.) (note 47), pp. 9-29, p. 19; An abstention can already prevent a decision to be taken as Art. 148 III TEC is not mentioned in Art. J.11 I TEU, K. W. Lange (note 441), p. 444; This changed after Amsterdam, Art. J.13 I TEU, E. Regelsberger, M. Jopp, „Und sie bewegt sich doch! Die Gemeinsame Aussen- und Sicherheitspolitik nach den Bestimmungen des Amsterdamer Vertrages“, in: *Integration*, No.4, 1997, Vol.20, pp. 255-263, p. 260.

⁴⁴⁴ E. Regelsberger, „EPZ und GASP - attraktiver Verbund mit Schlupfloechern“, in: E. Regelsberger (ed.) (note 47), pp. 179-192, p. 188, for the external observer, the introduction of majority voting may seem more than due, but for some diplomat it might still seem as a quasi revolutionary act in the field of „high politics“; N. Petersen, „The European Union and Foreign and Security Policy“, in: Ole Noergaard, Thomas Pedersen, N. Petersen (ed.) (note 256), pp. 9-30, p. 22 „majority voting was one of the toughest issues concerning the CFSP“ at the IGC for Maastricht.

⁴⁴⁵ see M. Dembinski (note 70).

⁴⁴⁶ Administrative questions are, according to the Council's rules of procedure, decided by simple majority, I. Macleod, I. D. Henry, S. Hyett (note 52), p. 421.



the Council *unanimously* according to Art. J.8 II TEU.⁴⁴⁷ All in all, one Member State can still prevent the Union from going ahead by blocking decisions⁴⁴⁸ and the complicated procedure of Art. J.3 II TEU is reflected in the fact that it has not been used so far.⁴⁴⁹ The declaration No.27 annexed to the Maastricht Treaty does not introduce another form of majority voting, but only reflects the political intention of the Member States not to block a decision with the veto right if a qualified majority exists; it is not a legally binding provision.⁴⁵⁰

During the negotiations for the Treaty of Amsterdam, the reform of the unanimity vote was only favoured by Germany, Benelux, the Commission and the Parliament, whereas England, Denmark, Greece, Portugal, Sweden, Finland and Ireland opposed the introduction of further majority voting.⁴⁵¹ After hard discussions, a new Art. J.13 TEU was included in the Treaty whose structure Elfriede Regelsberger describes as „late baroque“.⁴⁵² It introduces two significant changes to the decision-making procedure. One regards ‘common strategies’ and the other, the possibility of constructive abstention.

Common strategies are a new instrument in the CFSP procedure, which have the particularity that they are decided by the European Council by unanimity, but that common positions, joint actions or any other decision implementing („on the basis of“)

⁴⁴⁷ This compromise was finally found, because the United Kingdom opposed any automatic majority vote, G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.3, No.12; K. W. Lange (note 441), p. 444 the decision concerns only the „HOW“ and not the „IF“ of a joint action.

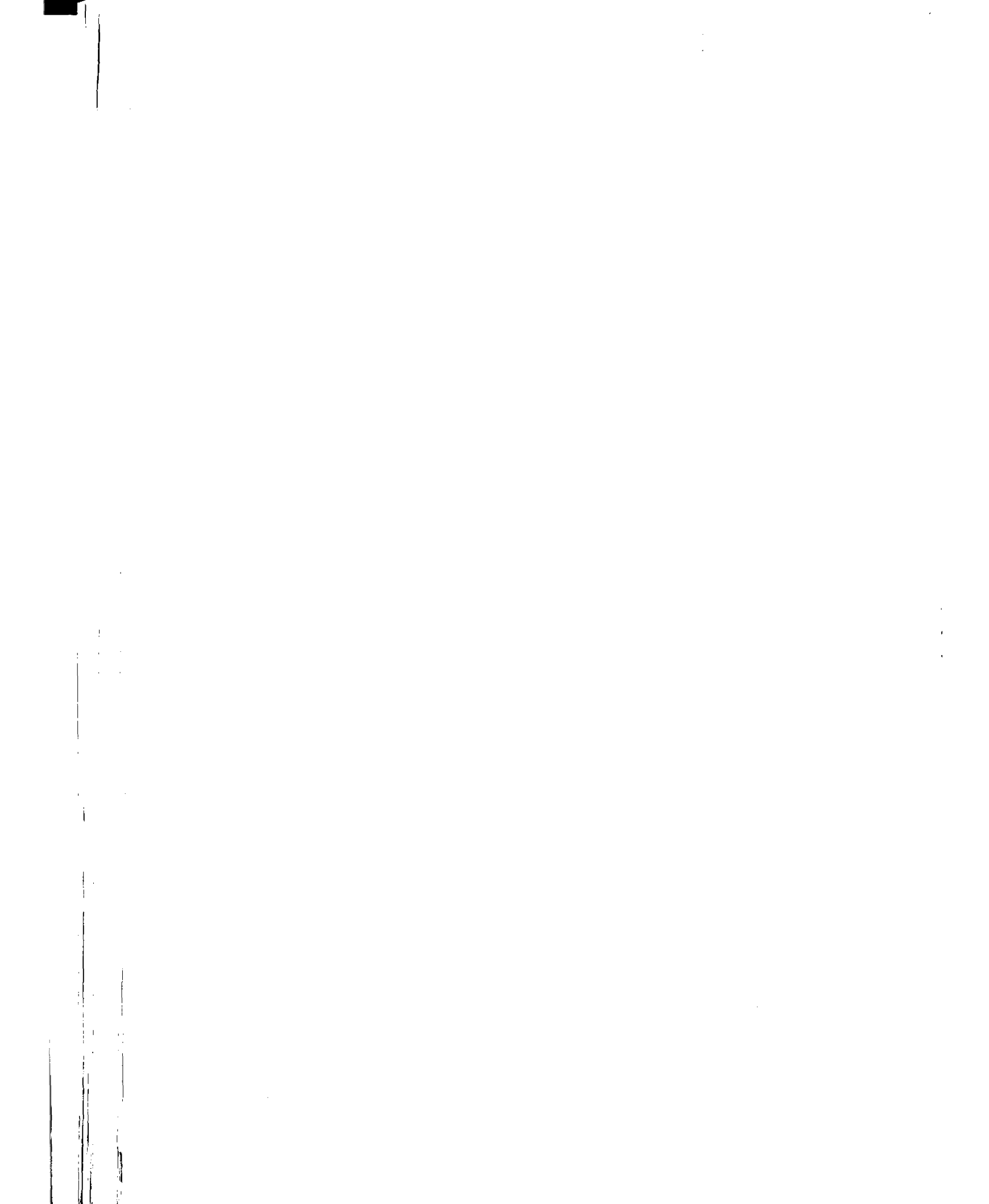
⁴⁴⁸ J. Monar, „Das duale System von EG und EPZ/GASP im Test - vorprogrammierte Konfliktszenarien“, in: E. Regelsberger (ed.) (note 47), pp. 75-84, p. 83.

⁴⁴⁹ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.3, No.12; „The Debate“, in: A.A. Dashwood (ed.) (note 31), p.263 the reason why the provision has not been invoked so far is not that Member States have blocked it, but that they didn't think it was necessary.

⁴⁵⁰ G. Burghardt, G. Tebbe, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art. J.3, No.13.

⁴⁵¹ M. Dembinski (note 70), p. 45.

⁴⁵² E. Regelsberger, M. Jopp (note 443), p. 260.



the common strategy shall be decided by majority vote (Art. 23 TEU (CV)). The problem with the common strategies is that it is very unlikely that the Heads of State in the European Council at their tense meetings will be able to decide on such precise common strategies that lay the ground for majority vote by the Foreign Ministers in the CFSP. Moreover, the 'security clause' enables the Member States to prevent decisions from being taken as soon as national interests are at stake.⁴⁵³ If the other Member States in this latter case can find a qualified majority, then the decision to invoke national interests is regarded as merely postponed and transferred to the European Council for resolution by unanimity (Art. 23 II TEU). It becomes clear from these provisions, though, that the use of the veto is discouraged and would be deemed a „serious step“.⁴⁵⁴

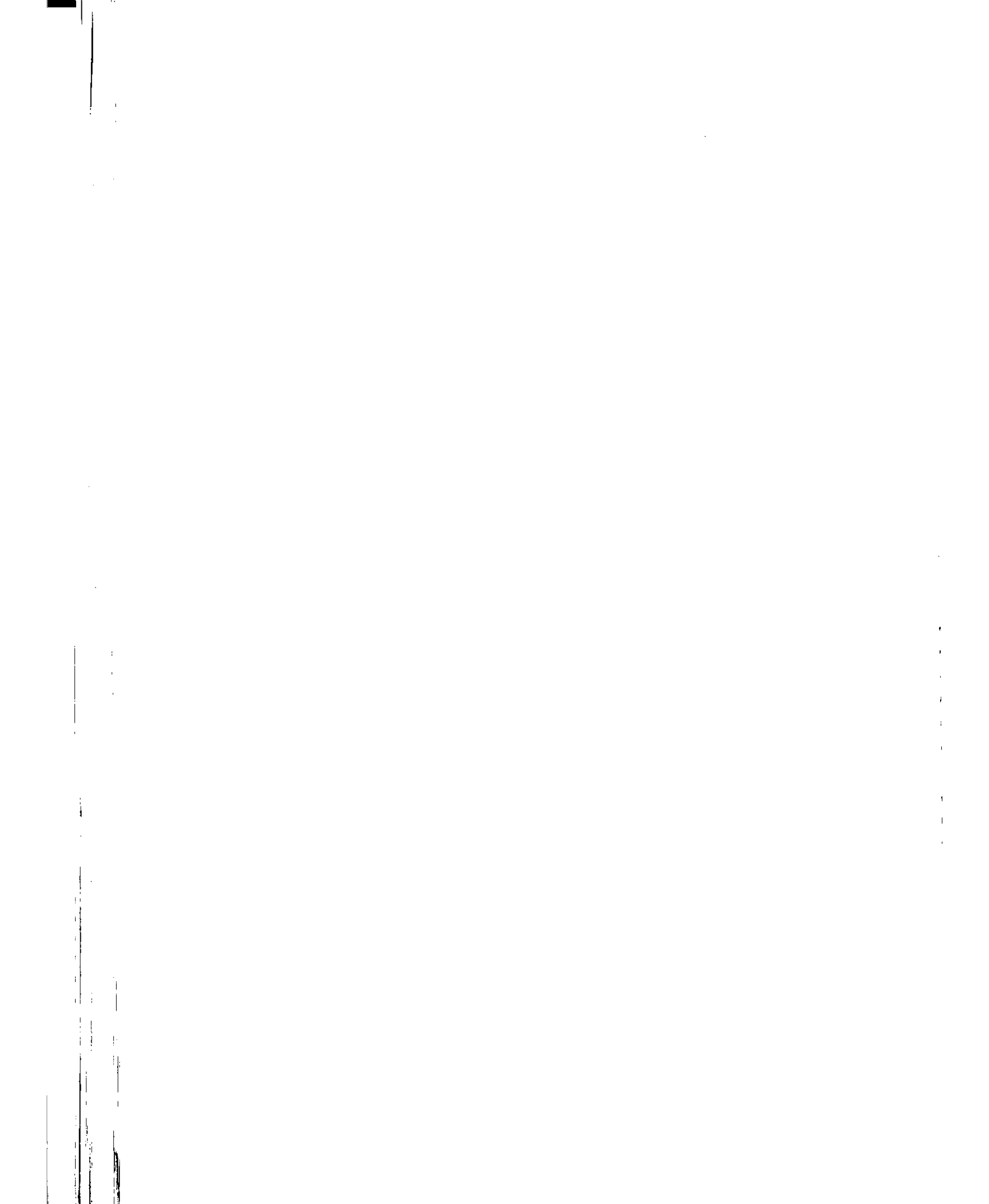
The second innovation concerns a more flexible procedure in decision-making. The idea was taken up after the negotiating partners had realized that an improvement in majority voting would be very hard to reach.⁴⁵⁵ The new procedure resembles the flexibility provisions introduced with the Amsterdam Treaty in the first and third pillar, but does not belong to flexibility „strictu sensu“.⁴⁵⁶ It is no closer co-operation between two or more states (as for example regulated in the field of defence, Art. J.4.V TEU), but allows one third of the Member States to abstain constructively from a decision without preventing the others from acting together in the name of the Union (Art. 23 TEU (CV)). The question remains, however, how credible a joint measure will be when it is not supported by one or two (the limit being one third of the votes) of the big Member States⁴⁵⁷ or when an embargo is imposed by 10 states only, but the

⁴⁵³ M. Dembinski (note 70), p. 50; E. Regelsberger, M. Jopp (note 443), p. 260s.

⁴⁵⁴ *ibid.*, p. 261 they see it as being doubtful whether the veto will only be used in rare cases or whether it will become the rule for putting pressure on the decision-making process.

⁴⁵⁵ M. Dembinski (note 70), p. 46.

⁴⁵⁶ European Policy Centre, „Legal Analysis“ (note 55), p. 119; T. Dodd; R. Ware; A. Weston (note 31), p. 28.



other 5 states continue trade with the target state even though the „spirit of mutual solidarity“ prohibits them to do that.⁴⁵⁸

All in all, the structure and procedures of the CFSP are not always respected by the Member States in the conduct of their foreign policies despite their legal nature. The conflicting views as to how best to implement a foreign policy and which objectives to pursue make it very hard to agree on common objectives, such as human rights, to be pursued commonly in the global arena.

4. Internal structure with a view to human rights issues

It was already mentioned in Chapter 3 that certain institutional arrangements had been made to ensure the coherence of the Union's external activities. This part will investigate the „case of human rights“ and the internal organizational structure set up to ensure that human rights play a role in the policy-formulation process of the CFSP.

All the bodies involved in the CFSP, the Council, the Commission and the Parliament, have, since the 1980s, created special institutions to prepare their respective human rights initiatives.⁴⁵⁹ Most human rights issues that are discussed in the Parliament are prepared by the Subcommittee on Human Rights in conjunction with the Committee on Development and Cooperation and the Committee on External Economic Relations.⁴⁶⁰ As regards the Commission, a Unit on Human Rights and Democratization acts under the auspices of DG I A. In 1988, when it was installed, it formed a unit of the General Secretariat of the Commission, but was transferred to DG

⁴⁵⁷ E. Regelsberger, „EPZ und GASP - attraktiver Verbund mit Schlupfloechern“, in: E. Regelsberger (ed.) (note 47), pp. 179-192, p. 189.

⁴⁵⁸ M. Dembinski (note 70), p. 46.

⁴⁵⁹ M. Fouwels (note 56), p. 316.

⁴⁶⁰ E. Boumans, M. Norbart, „The European Parliament and Human Rights“, in: *NQHR*, No.1, 1989, Vol. 7, pp. 37-55, p. 39.



IA in 1993.⁴⁶¹ Its task is to inform the different Directorate-Generals about human rights issues and to co-ordinate their action.⁴⁶² Within the Council structure, there are several working groups established to provide the political committee and the COREPER with the relevant information on current issues and to prepare the issues for consideration. In 1994, the working groups of the political committee and the COREPER were fused because of the common institutional structure introduced at Maastricht.⁴⁶³ In practice, this co-ordination lacks efficiency and led the Council in 1995 to introduce a unified process for the preparation of the decisions.⁴⁶⁴ A human rights working group within the Council has been given the task of co-ordination among the different working groups instead of preparing issues for decision-making (as do the other working groups).⁴⁶⁵

The general battle for competences between the Commission and the Council, the different committees of the Council and the working groups raises doubts as to the conviction to pursue one common aim - human rights, for example - jointly. As long as these institutions are more interested in securing their power, efficiency will be lost and rapid co-operation will be impossible.⁴⁶⁶ According to Fouwels,⁴⁶⁷ the human rights working groups of the Council and of the Commission lack resources and respect in the institutional arrangements and are therefore not capable really to influence human rights decisions. She sees the situation in the Parliament to be slightly better, although

⁴⁶¹ Annual Memorandum on the activities of the Twelve in the field of human rights, 15.5.1991, *European Political Cooperation Bulletin 1991*, Luxembourg, Office for Official Publications 1994, Vol.7, pp. 236-237.

⁴⁶² M. Fouwels (note 56), p. 316.

⁴⁶³ P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 266.

⁴⁶⁴ *ibid.*, p. 266.

⁴⁶⁵ M. Fouwels (note 56), p. 316.

⁴⁶⁶ P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 304.

⁴⁶⁷ M. Fouwels (note 56), p. 317.

improvement is still needed. One important change would certainly be to re-transfer the Commission's human rights working group to the General Secretariat of the Commission and to extend the powers of the Council's human rights working group beyond mere co-ordinating functions.

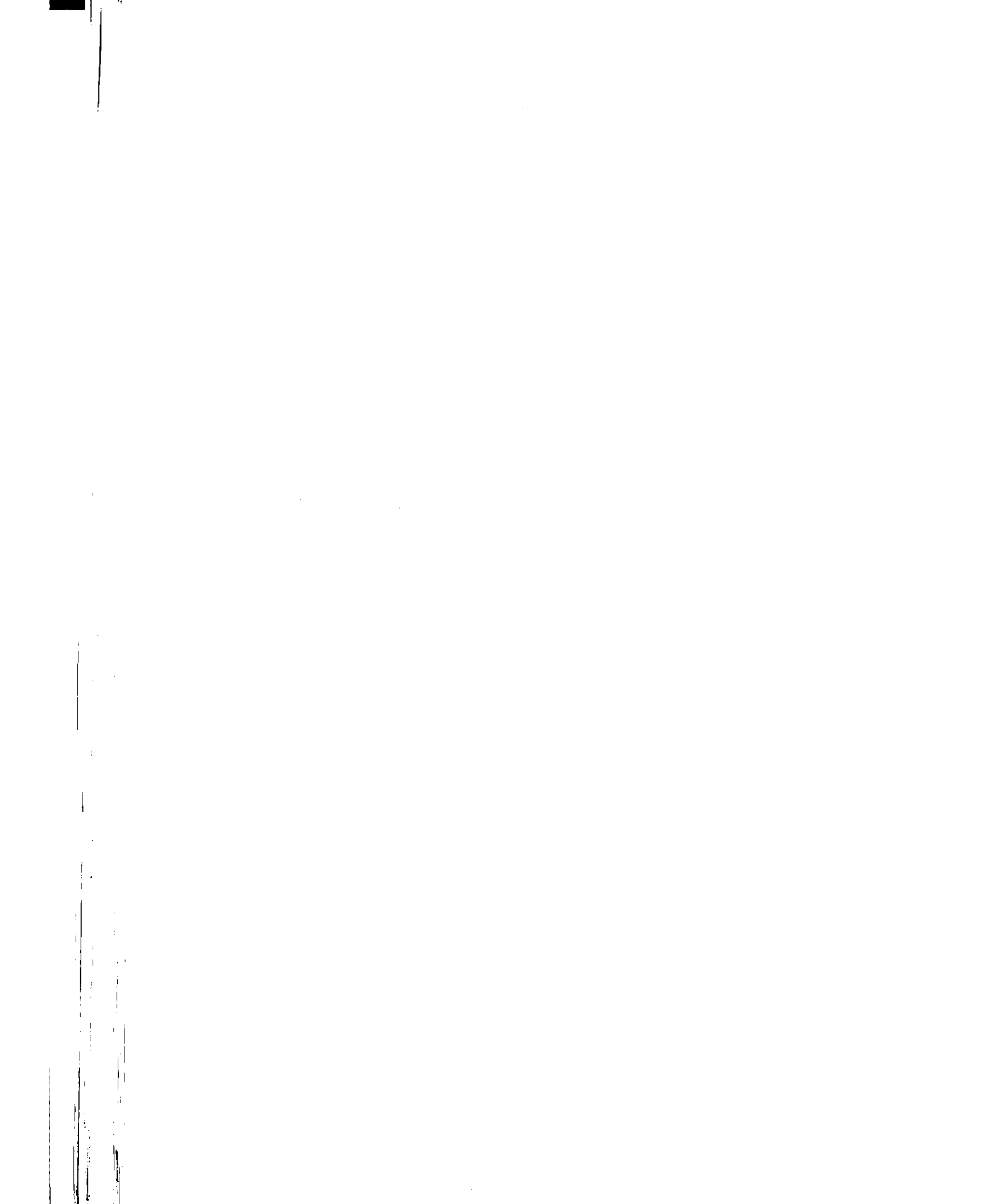
This section has examined some of the reasons for the insubstantial engagement of the EU in human rights and the sometimes disappointing results. These results do not mean, however, that improvements are impossible, but on the contrary should incite strategies for action. The next big section (II.) focuses on the 'China-case' and tries to give points of reference for future action of the Union.

II. Guidelines for action

In this part, the focus will be exclusively on China and the investigation centers around the question of the right way to deal with this economically and strategically important country. Certainly, the tailoring of a strategy for one target country does not resolve the problem that an overall strategy has not yet been developed. The intention, however, is to start with a particular case and develop more comprehensive conclusions on another occasion.

1. Assessing the human rights situation of a country

If the Union wants to build up a strategy for China including CFSP and Community tools, it has to have some information as to the human rights situation in the country and some reference points for assessment as to whether a human rights violation has taken place and whether an immediate response is needed. As regards monitoring of



the situation, the EU, according to Martine Fouwels,⁴⁶⁸ has been mainly inspired by the joint reports of the heads of mission in Beijing, and thus not by international NGOs. The scope of the paper does not allow an own assessment of the real human rights situation in China which would require a far deeper analysis of country and population, but restricts itself to considering theoretical indicators of the general human rights situation with the aim of contributing to the elaboration of a China strategy. Inspiration is taken from the well-elaborated evaluation of EC positive measures by Wolfgang Heinz, Hildegard Lingnau and Peter Waller⁴⁶⁹, as well as the draft evaluation of the Phare and Tacis democracy programmes.⁴⁷⁰ Indicators of a bad human rights performance and substantive lack of democratic institutions are:

- one-party rule or dictatorial regime. No democratic elections.
- only limited competition for political power, for example no regular elections or manipulations of the elections.
- restriction of the political participation of the citizens.
- no functioning opposition.
- the parliament is not in charge of drafting or authorizing laws.
- No investigation in cases of human rights abuses and no penalties for the culprits.
- no possibilities for the citizens to pursue their rights either through institutions at communal level or through national courts.

⁴⁶⁸ „The European Union’s Common Foreign and Security Policy and Human Rights“, in: *NQHR*, Vol. 15/3, 1997, pp. 291-324, p. 319.

⁴⁶⁹ W. Heinz, H. Lingnau, P. Waller, *Evaluierung von Positivmassnahmen der Europaeischen Kommission zur Foerderung von Menschenrechten und Demokratie (1991-1993)*, Deutsches Insitut fuer Entwicklungspolitik, Berlin Mai 1995, p 24ss.

⁴⁷⁰ „Final Report. Draft. Evaluation of the Phare and Tacis Democracy Programme. 1992-1997“, unpublished paper, p. 14 main criteria of formal democracy, p. 17 main features of substantive democracy.



- human rights violations by public authorities such as police forces or armed forces.
- discrimination of NGOs working in the fields of human rights.
- press censorship and discrimination or press monopoly.
- intolerance of religious or ethnic groups, oppression.

These indicators basically describe the political system of an authoritarian regime. They do not tell the policy-makers when to take action. Certainly, no economic interest should prevail in the case of gross and persistent violations of basic human rights by the state authority, such as the use of force towards the peaceful activities of the population, economic policies that lead to massive starvation, disappearances and ethnic cleansing. But what should be done in relation to political prisoners, labour camps, child labour, the death penalty, press censorship, restrictions of the freedom of expression and the absence of a right to political participation?

Almost everyone of the above listed indicators is satisfied with respect to China and the above mentioned human rights violations occur there frequently. How can the Union make use of its instruments without imposing its Western system on a „cultural relativist“ China and without capitulating to economic interests? The action to be taken with regard to China will be discussed in the following part. Here, a general analysis as to how the target country might develop in the next years, which of course also belongs to a comprehensive strategy, should be given first. What are the most likely developments in China? Dieter Senghaas⁴⁷¹ assumes that China still lacks a civil society that can be addressed by external programmes. He thus regards the support for its establishment as a first step and as a condition for change. According to him, economic actors can become „quasi groups“ which

⁴⁷¹ „Wie geht es mit China weiter?“, *Berichte des Arbeitsbereiches Chinaforschung im Institut für Weltwirtschaft und internationales Management*, Nr. 7, Juli 1996, Universität Bremen.



build interest groups which then openly articulate their opinions and finally exercise influence in the political process. He states that the monopoly of the Communist Party cannot be sustained for long, as it is forced to enter into competition with these new actors. In the next years, China will display a mixture of authoritarian system and a growing civil society. It will be crucial, he asserts, how the Communist Party reacts to these internal developments. In the economic sphere, the development of China is likely to persist and even increase (see above, trade figures). The IMF's forecast for China's growth in 1998 was 7 percent, but they are now pessimistic about that prediction.⁴⁷² China's population of 1.2 billion will continue to increase to 1.6 billion, but will be trumped by India with 1.64 billion by 2050.⁴⁷³ The armament of China has already been mentioned elsewhere.⁴⁷⁴ In terms of energy, China is already the second largest consumer and third largest producer worldwide.⁴⁷⁵

2. The range of measures applicable to China in theory and practice

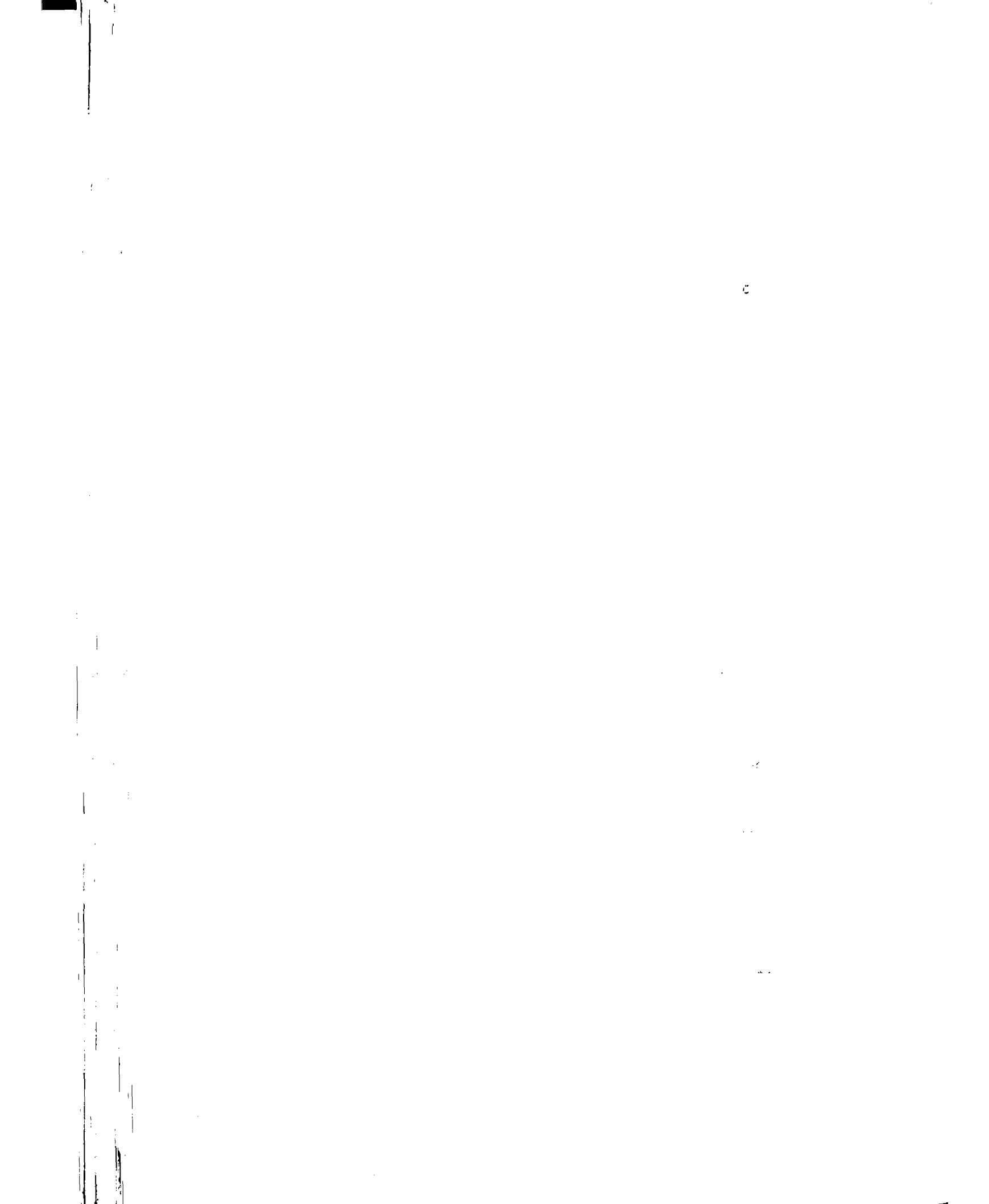
Before assessing the type of measures suitable to deal with China as regards human rights, the Chinese arguments against any active human rights policy discussed in Chapter 2 will be examined to provide the theoretical base for future action.

⁴⁷² International Herald Tribune, 28.4.98, „IMF Is Cautious on China Growth“.

⁴⁷³ Statistisches Bundesamt, „Mitteilung fuer die Presse“, <http://www.statistik-bund.de/presse/deutsch/pm/p6260220.htm>, p.3.

⁴⁷⁴ note 400.

⁴⁷⁵ Sir L. Brittan in a speech, European Report No.2288, 4.2.98, p. V-4.



a. How can the Chinese position be constructively criticized?

aa. Confucianism and Human Rights

Confucius relied to a large extent on order and discipline, but according to Amartya Sen⁴⁷⁶ he was no more authoritarian than Plato or Augustine. The question is, he states, not whether these tendencies are very strong in Chinese or Asian societies, but whether other, more liberal elements are absent from them. Buddhist thought, for example, is also widespread in Asian countries and is much more egalitarian and admits liberal ideas. Moreover, according to Sen, the authoritarian rulers of some Asian countries champion Confucianism in a way that might support their arguments but is not always faithful to Confucian. Certainly, he was not a democrat, but it is too easy to equate him with the authoritarian ruler who does not respect freedom or allow dissent.⁴⁷⁷ Confucian, for example, was not a supporter of the tight regulation as regards the freedom of the people to organize, discuss, meet express themselves which exists in many Asian states. He recognized the importance of virtue and believed that law or coercion was not the right way to organize society.⁴⁷⁸ Thus the freedom of speech was a significant feature of the Analects. It included „expression“, „careful speech“ and „silence“. The first component meant the act of speaking out and scrutinizing the government, whereas the second mainly referred to the rulers and warned them not to lay down arbitrary orders; the third, finally, concerned the right to abstain from expression if so wished.⁴⁷⁹ If consensus-finding is such an important element of Confucian thought, why do Asian governments then need such extensive regulation with many types of prohibitive laws? Another weak point in the current

⁴⁷⁶ A. Sen (note 11), p. 36.

⁴⁷⁷ *ibid.*, p. 36.

⁴⁷⁸ Yash Ghai (note 193), p. 18.

⁴⁷⁹ D. Gangjian, S. Gang, „Relating Human Rights to Chinese Culture. The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence“, in: M. C. Davis (ed.) (note 18), pp. 35-56, p. 42.



championing of Confucianism for political ends is that elements of individualism were, for example, present in the notion of benevolence which the Analects proclaimed. Every person was said to have his own ability to reach benevolence, liberty was inherent in the human person and co-ordination of internal and external elements could only be achieved through a centering on the human being.⁴⁸⁰ These liberal ideas have recently gained firmer ground in China as expressed in conferences and intellectual discussions.⁴⁸¹ Moreover, rulers in Confucian times were meant to be benevolent and to act according to moral codes. John F. Copper⁴⁸² in this context talks about the „well-developed concept of humanism“ in Chinese history and compares it to the modern ideology of human rights. According to him political freedoms, in the sense of individual freedoms and protection from unrestrained rulers, as well as economic rights can be discerned. The crucial question for him is whether and how these concepts of traditional China have survived communism. Further, there also was resistance against political authority in Confucian thought based on the idea of seeking justice. According to the Analects one could refuse to serve non-benevolent rulers and choose not to cooperate with them. Confucius even attacked despotic actions by rulers and advocated a right of active resistance against non-benevolent rulers, albeit on the condition that such resistance was non-violent.⁴⁸³

⁴⁸⁰ *ibid.*, p. 39.

⁴⁸¹ International Herald Tribune, „Liberal Thought Blooms In a New Beijing Spring“, 20.4.98, p. 1 and 11. Mr. Mao, the economist, said at a forum on a book review of one of the harshest critics of socialism that respect for individual's rights, including the right to pursue one's self-interest are very important elements of a society.

⁴⁸² J. F. Copper, „Defining Human Rights in the People's Republic of China“, in: Wu, Yuan-li; M., Franz; Copper, J. F.; Lee, Ta-ling; Chang, Maria Hsia; Gregor, A. James (eds.) (note 170), pp. 9-17, p. 9.

⁴⁸³ H. H. Sunoo, *China of Confucius: A Critical Interpretation*, Heritage Research House, Inc., Virginia Beach 1985, p. 23; Mencius later suggested to also use violent means to resist oppressive rule, D. Gangjian, S. Gang, „Relating Human Rights to Chinese Culture. The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence“, in: M. C. Davis (ed.) (note 18), pp. 35-56, p. 49, 47ss.



It was mentioned above that in the Confucian order, there was no place for rights, because the ruler had the duty to be benevolent towards his citizens, and the citizen the duty to pursue social order. This agenda is said to lead to harmony, stability and honor, whereas rights lead to the collapse of community.⁴⁸⁴ Despite the humanistic aspects of duties their emphasis also perpetuates an unequal social setting as the subordinated has the obligation to accept these social distinctions.⁴⁸⁵ Rather than imposing duties on every person, they serve to deny the lower classes their rights and to maintain the privileges of the ruling classes. This inversion of the concept of duties can be rather dangerous if used to maintain intolerant rule.⁴⁸⁶

To conclude, Confucian was authoritarian, but did not praise unthinking obedience to authority. Through the concept of justice, benevolence and duties of the rulers, humanistic elements can be discerned in his philosophy provided the necessary will to see these elements prevails.

The *feudal system* in China basically relied on Confucian thought to maintain order and social class distinctions by enforcing the laws. It is not surprising that the notion of human rights was not included in its legal texts (one monolithic code), but that, on the contrary, the legal rules mainly relied on criminal law, i.e. on prohibitions and punishments. The law was not made to protect individuals, but to suppress.⁴⁸⁷ Additionally, the way in which the economy was organized as agriculturally autonomous could not promote freedom and equality.⁴⁸⁸ Even though, as has been shown above, humanist elements can be found in traditional China within the concept

⁴⁸⁴ Yash Ghai (note 193), p. 19.

⁴⁸⁵ *ibid.*, p. 18s.

⁴⁸⁶ M. Ng, „Are Rights Culture-bound?“, in: M. C. Davis (ed.) (note 18), pp. 59-71, p. 66, she even advocates that moral rules were first and foremost imposed on the rulers.

⁴⁸⁷ Chenguang, W., „Introduction: An Emerging Legal System“, in: Chenguang, W., Xianchu, Z. (eds.) (note 21), pp. 1-30, p. 5s.

⁴⁸⁸ *ibid.*, p. 6.



of „li“, the law or „fa“ did not include significant humanist elements. The socialist rule after 1949 established a completely new legal system, breaking with the traditional Chinese law. The reason for this move was the realization by the end of the 19th century (already), that the old law despite its merits (emphasis on the educational function of law, mixed system of codification and precedents, stabilizing function of law), represented too big an obstacle for modernization in the 20th century.⁴⁸⁹

bb. Socialism

In Chapter 2 the emergence of a socialist understanding of human rights was discussed. Among the first features was that the main alleged advantage of the socialist system is that the ruling classes determine the content of politics and law and thus respect the rights of the poor. This ruling class, in the struggle for democratic dictatorship, is assisted by the State and the Party in achieving this aim. The State and the Party are even the vanguard of the proletariat, and only they know and have the power to implement what is good for the people to lead them to socialism. Nevertheless, the ruling class is not the class that determines how the power in the country is exercised, nor what the content of politics is. The system of the socialist state does not allow real participation of the people in Government. As already discussed, the Chinese state consists of the NPC, elected in „democratic“ vote and based on a one-party system. The government (and the Courts) are organs of the Congress and directly accountable to it. If, in a socialist country, the world is better because the ruling class is the working class and determines the content of politics, the question raised is HOW they can determine it when the government is not representing the people's will, but is governed by Party politics.

⁴⁸⁹ *ibid.*, p. 8.



Secondly, the individual has to subordinate himself or herself to the community. This high value given to the community can be criticized in various ways. First of all, when the community argument is used to oppose Western liberal and individualistic concepts of human rights by Asian states including socialist China, they do not take into account that Western liberalism embodies notions of communitarianism in the sense that public interest plays a role in the limitation of a right or that liberal thought admits variations from one country to another. In a second place, their argument is dangerous because they seem inclined to assert that that the *state* is the community and that individuals consequently have to serve the interest of the state (instead of the community).⁴⁹⁰

Thirdly, the insistence on the economic and social situation of the country is unconvincing for several reasons. It is submitted by China that the right to subsistence as the prime economic right enjoys precedence over all other rights. The „achievements“ in attaining the right to life for everybody during Mao's Great Leap Forward, when millions of people starved to death, are not considered by the Chinese government,⁴⁹¹ and the Chinese government seems to judge its progress in satisfying the right to subsistence by the fact of the regime's survival. Additionally, the right to life should also concern a person's well-being. But how can the Chinese government justify the inhumane treatment of its political prisoners kept for many years without formal trial and subject to torture?

Fourthly, the right to life is equated by China with the need to obtain stability at all costs⁴⁹² thus an individual right is transmuted into a right of the nation. However, the Chinese argument in this respect is unconvincing. It is championing stability, but a stability at any costs and as a *prerequisite* for human rights.⁴⁹³ But why are human

⁴⁹⁰ Yash Ghai (note 193), p. 18.

⁴⁹¹ Institute of Current China Studies, „CCP Sets Its Own Standards of Human Rights“, Inside China Mainland, No.3, March 1995, Vol.17, Taipei, Taiwan R.O.C., p. 26.

⁴⁹² *ibid.*, p. 25.

⁴⁹³ *ibid.*, p. 24.

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rights and stability mutually exclusive and why does stability trump human rights? No convincing argument can be found for that assumption except that it is in line with the Communist Party's concern to remain in power. On the other hand, the „democratic mission“ of the US seems to include strategies whereby political turmoil is accepted by supporting anti-government forces in order to reach the aim of democratization.⁴⁹⁴ However, it is questionable whether it would not be better if such engagement took into account the consequences for the population and the global economy and either abstained from such policies or at least offered aid in the transition phase from „turmoil to democracy“. It is doubted whether the American Government is ready for that, and furthermore, whether it is the right approach.

Finally, Anne Bayefsky, in her article,⁴⁹⁵ challenges the affirmation of „cultural sovereignty“ and of human rights being a domestic issue made by Asian governments. She sees it as being „new excuses for old strategies“ because cultural sovereignty is nothing more than the old principle of non-interference whose goal is to be intolerant without being subject to international scrutiny. China itself gave rise to a contradiction in its own argumentation when it stated in its White paper that Chinese human rights stand up well to international comparisons, although it had previously rejected any international standards being applied to China because of its.⁴⁹⁶ Yash Ghai,⁴⁹⁷ explains that the result of the modern approach to human rights, i.e. linking them to global issues, was that it highlighted the achievements of the UN system in the field of international protection of human rights. One of these achievements is the fact that human rights are no longer seen as being exclusively within the domestic jurisdiction of states, but are viewed as being subject to international scrutiny, and, in the case of

⁴⁹⁴ D. K. Mauzy (note 185), p. 220, 214.

⁴⁹⁵ „Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies“, in: *Ratio Juris*, No.1, 1996, Vol. 9, pp. 42-59.

⁴⁹⁶ G. Luoji (note 176), p. 4.

⁴⁹⁷ (note 193), p. 3.





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some fundamental rights, also a legitimate condition for bilateral negative action. The legitimacy of the interest in another state's human rights performance, he goes on, has also been pushed by the acceptance by third states as to the role of external aid in the establishment of human rights and democracy and the public support of such activities.⁴⁹⁸ Nevertheless, he acknowledges, the assertion that human rights are a matter of international concern is not uncontested among, especially, some Asian states. They argue that state sovereignty is a paramount principle of international law and, thus, that it has to be respected also in the field of human rights.⁴⁹⁹ All in all, through the development of international human rights law, individuals have also become (partial) subjects of international law. Thus regulated, state-individual relations might concern one part of state sovereignty (the internal one), but the internationalization of human rights has had the result of legitimizing this „infringement“.

cc. The universality debate

One unfortunate point about the value dispute which dominates the universality debate is that it only really started or revived by ASEAN in regional conferences in preparation for the Vienna World Conference on Human Rights. The Asian countries realized they had more force when they spoke together, that they shared the common idea of blocking aid conditionality and trade sanctions (aiming at the 'export of Western values') and finally had assumed more relative global power through their undeniable economic success.⁵⁰⁰ Even if it is accepted that Asian values are different,

⁴⁹⁸ *ibid.*, p. 4.

⁴⁹⁹ White paper 1991, p. 84; A. Kent (note 10), p. 48, individuals are seen as only subject to municipal law.

⁵⁰⁰ G. Robinson, „Human rights in Southeast Asia: rhetoric and reality“, in: D. Wurful and Bruce Burton (eds.), *Southeast Asia in the „New World Order“: The Political Economy of a Dynamic Region*, St. Martins Press, New York 1996, pp. 74-99, p. 84-92; D. K. Mauzy (note 185), p. 220, 217; Despite their common approach the proponents of cultural relativism, especially



does it forcibly mean that international human rights are not applicable in Asia or, less strongly, necessarily subject to different interpretations? According to Sen⁵⁰¹, the thesis that Asian values are less supportive of freedom and that *thereby* claims for respect of civil and political rights are not appropriate in Asian countries, cannot be upheld. Political freedom and democracy, he states, are certainly not ancient features of Chinese culture and political life, but this does not mean that components of the concept of liberty are absent in Asian countries, even if ideas and doctrines contrary to liberty are supported. Last but not least, Sen says, the argument that the enforcement of civil and political rights in Asia is a form of Western hegemony is unconvincing because the people of Asia can demand liberty themselves, even if it was first championed in the West. The interpretation of human rights by Asian governments is based on their interest in authoritarian rule, but not on the fact that the *Asian society* does not know of, support or desire human rights.⁵⁰² The official view of Asian countries that is expressed on international conferences or bilateral debates reflects the view of the ruling elite which alone has the power to get the international attention. The expediency of their rule and the need to justify authoritarian regimes makes this ideology necessary for the leaders.⁵⁰³ Richard Robison⁵⁰⁴ argues that, „Asian values have been manufactured by leaders“. The background to this manufacturing is that the opening up of China in the 1980s was a move of necessity in order to get China out of an economic crisis, but made it unavoidable that China's human rights record was put under international scrutiny as well. The problem of the Chinese Communists then was that if they really responded to the international claims for respect of human rights,

China, Singapore, Malaysia and Indonesia, never specified what their common values were, A. Pollis, „Towards a New Universalism; Reconstruction and Dialogue“, in: *NQHR*, No.1, 1989, Vol.16, pp. 5-23, p. 18.

⁵⁰¹ A. Sen (note 11).

⁵⁰² A. Bayefsky (note 187), p. 43.

⁵⁰³ Yash Ghai (note 193), p. 6.

⁵⁰⁴ R. Robison, „The politics of Asian values“, in: *The Pacific Review*, No.3, 1996, Vol. 9, pp. 309-327, p. 312.

they would lose their hold on power.⁵⁰⁵ The question of course remains, how the Chinese government can claim to represent the values of its people if they do not have the possibility to express their opinions in freedom either through public statements or through elections?⁵⁰⁶

Last, but not least, it must not be forgotten that Chinese socialism is founded on Western (Marxist) values and in full support of Western values in this respect.⁵⁰⁷ It can therefore be called into question that Asian countries reject all Western values as being hegemonic and not applicable to their societies.

It was assumed that after Vienna the consensus found concerned the universal *nature* of human rights, but that their implementation depends on the social, cultural and economic situation of every country. The task of any human rights policy is now to promote human rights in a way that a common *core* interpretation can be found which preserves the „universal nature“ of the human right in question against the politics of an authoritarian regime. It should be realized that a common formulation of the universal *nature* does not solve the practical problems, but in a way is only a symbolic (and terminological) improvement. A challenging interpretation of universal human rights can in fact lead to the result that no universal values truly remain.

dd. Economic, social and cultural rights

Above, Chanda Muzaffar was cited to support the argument that economic and social rights must have precedence over civil and political rights, but he does not stop at that point. He argues that, despite the importance of economic and social rights in Asian

⁵⁰⁵ Institute of Current China Studies, „CCP Sets Its Own Standards of Human Rights“, Inside China Mainland, No.3, March 1995, Vol.17, Taipei, Taiwan R.O.C., p. 23s.

⁵⁰⁶ According to D. K. Mauzy (note 185), p. 218 it is „a thorny question in the Asian values debate.“

⁵⁰⁷ J. Donnelly, R. E. Howard, „Introduction“, in: J. Donnelly, R. E. Howard (eds.) (note 9), pp. 1-28, p. 1.

countries, civil and political rights should not be disregarded, as some Asian governments tend to do. On the contrary, the people must have the right to ask for the accomplishment of social and economic rights in using their freedom of expression. Only in this way can the right to development, which Asian governments constantly claim, be achieved.⁵⁰⁸ In line with the accusations of many Asian NGOs, the main reason for this behaviour is that Asian governments spare no expense in order to maintain their authoritarian rule⁵⁰⁹ or evade possibilities to be held accountable for respect of human rights. What they really want is economic development in the sense of the right to development for developing *states*, but not for their people. This is „understandable“ to the extent that it increases their resources, but intolerable in the context of the human rights ideology.⁵¹⁰

The Asian assumption that economic and social rights have precedence over civil and political rights can also be challenged from another perspective. What is the reason that a communitarian approach must prefer economic and social rights? Are the foundations of this set of rights more firmly established in Asian society than (missing) liberal elements? Yash Ghai⁵¹¹ argues that there is no ground for the assertion of a close (historical) link between Asian society and economic development. Should governments, he states, argue that the community element of Asian societies requires economic development, this is mistaken, because economic rights are rights of the individual and not of the community (see above).

As concerns socialist argumentation, the fact that Marx emphasized economic and social rights to reach emancipation of the people did not mean that civil and political rights cannot play an important role for self-realization.⁵¹² It is interesting to note that

⁵⁰⁸ Ch. Muzaffar (note 228), p. 69.

⁵⁰⁹ see note 503.

⁵¹⁰ Yash Ghai (note 193), p. 20.

⁵¹¹ *ibid.*, p. 19s.

⁵¹² A. Kent (note 10), p. 12.

socialist China incorporated civil and political, as well as economic and social rights, i.e. the majority of the rights of the UDHR, in all its Constitutions since 1954, even if, at that time, Red China was not a member of the UN.⁵¹³

ee. No possibility for citizens to pursue their rights

On the one hand, the preamble⁵¹⁴ of the current Constitution is progressive in its inclusion of the Communist Party in the enumeration of addressees. On the other hand it becomes clear that the Constitution is designed to provide duties but not rights, even if a whole section on the fundamental rights (and duties) of citizens can be found in its basic provisions. For a Chinese to pursue his „legal“ rights encounters the slight problem that, first, the Constitution cannot be invoked before courts⁵¹⁵, and, second, that there is no institution for overseeing the Constitution. The NPC is the official organ for doing so, but it only convenes once a year and does not have the power to cancel unconstitutional acts.⁵¹⁶ Moreover, in contrast to the official position, the provisions of the Constitution have not always been transferred into domestic laws on which citizens can rely; or worse, if there is domestic law, it sometimes even seems to contradict the constitutional provisions.⁵¹⁷ When domestic law exists which concords with the constitutional provisions, the legal infrastructure is in most cases not sufficient to support a legal claim by an ordinary citizen. Thus, law is ignored and the citizen is

⁵¹³ *ibid.*, p. 45.

⁵¹⁴ „The people of all nationalities, all State organs, the armed forces, all political parties and public organizations and all enterprises and institutions in the country must take the Constitution as the basic standard of conduct, and they have the duty to uphold the dignity of the Constitution and ensure its implementation.“

⁵¹⁵ Wan Chenguang, „Introduction: An Emerging Legal System“, in: Wan Chenguang, Zhan Xianchu (eds.) (note 21), pp. 1-30, p. 18; Deutsche Presse-Agentur, 30.3.98, „China's civil rights promises do not save dissident from labour camp“.

⁵¹⁶ G. Luoji (note 176), p. 10.

⁵¹⁷ *ibid.*, p. 9.



deprived of its rights. Last, but not least, Art. 51 of the Constitution provides for extensive limitation of the individual freedoms once national interest are at stake.⁵¹⁸

The judicial system of China is very confusing as it is based on a mixture of courts, procuratorates and public security organs as has been described above. In theory, the courts are bound by the constitutional principles such as equality before the law, independence, open trials, presumption of innocence.⁵¹⁹ In practice, there is much internal and external interference in the process of adjudication. Internally, it is the presidents and the division chiefs who have an influence on the outcome of the final judgments. Externally, the Party, governmental organs and officials, corruption and other organizations influence the outcome of the judgment. Even lawyers sometimes use the way of corruption to influence the judge's ruling and by that contribute to the ongoing violation of the independence of the judiciary.⁵²⁰

ff. „In China, there are no human rights violations“

External critique can be blocked by simply referring to the national sovereignty and the illegitimacy of those acts, no matter what the actual situation in the country is. Another possibility is to say that the values proclaimed by such a critique are not applicable in the country under scrutiny, regardless of the internal situation. Yet another approach is to counter the critique by saying that the internal situation might not concord with the

⁵¹⁸ It declares: „when exercising their freedoms and rights, citizens should not violate the interest of the state, society and the collective and the lawful freedoms and rights of other citizens.“, The Constitution of the People's Republic of China, in: A. P. Blaustein, G. H. Flanz (eds.) (note 178).

⁵¹⁹ Z. Guobin, „Constitutional Law“, in: Chenguang, W.; Xianchu, Z. (eds.) (note 21), pp. 31-74, p. 59.

⁵²⁰ Chenguang, W., „Introduction: An Emerging Legal System“, in: Chenguang, W., Xianchu, Z. (eds.) (note 21), pp. 1-30, p. 25s; International Herald Tribune, 28.4.98, „Increasingly, Chinese Are Telling It to the Judge“, p. 2 the courts are seen as corrupt, exposed to interference from local governments and staffed with poorly equipped judges. One outcome is that the courts are very unpredictable. Nevertheless, the new Chinese generation more and more tries to pursue its rights through the court system.



view of the external critic, but perfectly concords with the socialist view of human rights. Or, last but not least, that the internal respect of human rights is at its fullest completion, there simply are no violations. The criticized country gradually accepts more and more of the international system of human rights, the closer it gets towards last assumption. One could say, it has „walked into the trap“ of human rights argumentation because the last two arguments require a comparison with the international system of human rights and in using the system as an external comparison, it must as a first step accept it. In this sense, the argument put forward by Chinese officials that there are no human rights violations could be seen as less threatening.

Chinese officials often state that there is no press censorship in China, but this is for the simple reason that the Chinese government owns all newspapers and publishing houses and there is therefore no need for censorship.⁵²¹ The assertion that prison conditions are good and prisoners held in a satisfactory environment is constantly expressed by Chinese officials. The 1991 White paper does not mention, though, the high amount of simple administrative detention with little chance for appeal, and the little possibilities for the individual of legal defence. Prisoners are still often held in labour camps and their work serves as a source of revenue. It is not clear whether the formal adherence to the Torture Convention in 1988 showed practical results as it is claimed by NGOs that torture is still common practice in many prisons, not to mention the use of the death penalty. Chinese territory is inhabited by 1.2 billion people out of which 10% belong to different minorities split in 56 nationalities. The Tibetan, Mongolian and East Turkistan minorities still pose problems of integration.⁵²² Another example of ongoing human rights violations despite different assertions is the area of religious freedom in China. The Human Rights Watch/Asia report on state control of

⁵²¹ G. Luoji (note 176), p. 7.

⁵²² Report of the Committee on Foreign Affairs and Security (note 227), p. 11ss.



religion in China⁵²³ affirms that state control over religious organizations has increased in the last years, but that systematic imprisonments combined with violence appear to be less frequent. The conditions for registration of an religious organization, which is necessary for the organization to conduct its activities are constantly narrowed down and made more difficult to satisfy. In doing so, China is in violation of Art. 18, 19 and 20 of the UDHR.

In terms of national laws, some improvements have been made, but severe violations of human rights are still to be found according to Amnesty International.⁵²⁴ For example the law on „re-education through labour“ has still not been abrogated and several new laws are even designed to limit fundamental freedoms. The amendments to the Criminal Law have changed some provisions on „counter-revolution“, but enhanced the range of offences against national security.⁵²⁵

gg. Evaluation

It is submitted that all the arguments brought to the fore by China can be encountered in a constructive way by investigating their real aims, but one contradiction in all Western engagement in human rights remains, and that is hypocrisy. As long as Western governments do not implement a coherent human rights policy in their internal boards, they cannot expect others to do so. As regards the Union, it is essential to create an internal legal base for it to conduct a comprehensive human rights policy. This could comprise the long-demanded adherence to the European Convention or a general legal basis for the conduct of its policy. Again in the external sphere, the

⁵²³ „China. State Control of Religion“, Vol.9, No.10 (C), October 1997.

⁵²⁴ AI, „China. Concerns and Recommendations Asia-Europe Meeting 3-4 April 1998, London“, International Secretariat, February 1998, p. 2.

⁵²⁵ see also European Parliament, „Resolution on the Commission communication on a long term policy for China-Europe relations“, (A4-0198/97), OJ C 200/158ss, p. 160, par. O.

attempt to issue a Regulation for the Community as concerns the management of aid is a first step in that direction, although it still only has to do with the external dimension. The current decline of morality and order in Western states does not speak in favour of their system either. Additionally, as long as Western governments and the Union base their conditionality only on violations of civil and political rights, and thus show a preference for this set of rights, it will be hard to explain why other countries should not have preference for the other set of rights.

If it is agreed, which in a way is the only realistic possibility, that there is scope for the interpretation of rights (limited by the core meaning of the right), but not for discussion about the nature of human rights (universal), nor the objective of the human rights movement, the social and economic context of China has to be defined before the policy is implemented.⁵²⁶ As was said above, China sees human rights discourse as impacting on the very foundations of its political system. The question is not how to decrease state power in a special constellation as in Western states, but how to introduce a human rights component to the *whole execution* of authoritarian state power. Moreover, even if the human rights record of most Western states is not as laudable as often assumed, severe violations of basic human rights occur infrequently in the West, as opposed to the situation in China. The Chinese state is a main violator of human rights, but certain powers of civil society should not be underestimated as well. They distinguish the part of the civil society which has not even become aware of its rights from the part which uses the loopholes in human rights protection for its own purposes. The economic situation of the Chinese people differs a lot from the countryside to the cities and within the cities from normal cities to those within the Special Economic Zones. Under the pressure of economic reform, the formerly guaranteed right to work could no longer be maintained in modern China and poverty has spread throughout the country. As the system moves more towards a (socialist)

⁵²⁶ see Yash Ghai (note 193), p. 21s.

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market economy, the previous forms of social security (the iron rice bowl) have also to be modernized and some new form of social security has to be introduced.⁵²⁷ China has to recognize that the right to life has got two equally important pillars: the economic right to subsistence and the right to physical security.⁵²⁸ The first seems to be threatened because of the pressure of market forces and the second has not yet taken hold, because political reform was always intended to come after economic reform and stability.

b. The type of action the EU should take with regard to China

From the previous section the conclusion can be suggested that China is different, Chinese people are different; values diverge and political realities are distinct. Nevertheless, the Western and Asian sides are not irreconcilable. But HOW should Western governments deal with these distinctions?

Dijk proposes to take universal value patterns as a starting point, instead of the (political) attitudes of certain single states, in order to measure conformity with the international rules.⁵²⁹ This certainly addresses the root of much arbitrary action in the field of human rights as regards small and big, strategically important and unimportant, trading and non-trading states and so on. But it does not help to overcome the inherent tendency of states to act selectively in their external political relations and nor does it provide the missing catalogue of such value patterns. One solution could be to favour initiatives under the auspices of the United Nations and to object to single actions by states towards third countries. Given the not always active role of the UN, this might not be the best solution for human rights. Moreover, also the UN Commission,

⁵²⁷ A. Kent (note 10), p. 235.

⁵²⁸ *ibid.*, p. 231.

⁵²⁹ P. van Dijk (note 105), p. 120.



because of its political composition, does not always provide independence and impartiality⁵³⁰, whilst the Treaty bodies come closer to this aim. Unfortunately, China has not yet *ratified* either of the two Covenants and thus is not subject to scrutiny by either of the bodies. Human rights law has entered the stage of many states' foreign policies in the international sphere. The Economist has noted⁵³¹ that many states have turned „liberals“ and are optimistic about „humanitarian“ interventions in third states. These states should not end their involvement in human rights protection abroad. They should apply human rights law as forming universal values, but respect variations in the implementation process.

The EU faces a big challenge in implementing an effective CFSP and in promoting human rights beyond the year 2000 whilst, at the same time, maintaining and increasing the economic links with China. After having taken into account the various arguments of the Chinese side and their counter-arguments, the EU, has to act in defence of human rights in some way or other. One point is important in this respect, and that is that even if the proponents of human rights do not agree with the Asian or Chinese standpoint expressed, they will achieve little if they push for their conception of human rights without paying respect to the fact that the different ideology has evolved over years in a more or less self-contained regime and cannot be changed over night.⁵³² As regards the EU however, the problem centers around the *limited action* in the field of human rights as soon as economic interests are at stake. The Union as a whole should find a way to develop a strategy towards China that covers all its instruments, first and second pillar, with the aim of best serving the human rights protection in China. The next part asks whether the policy of engagement through dialogue and economic contacts has so far merely been a pretext for economic interests or whether some

⁵³⁰ *ibid.*, p. 120.

⁵³¹ The Economist, „A suitable target for foreign policy“, 12.4.1997, p. 15-25.

⁵³² Take China as it is and do not assume it has to become like the West. Realities in China are different than the US might assume, Ming Wan (note 147), p. 250s.

convincing arguments can be found to support the thesis that China is the 'human rights exception'.

aa. Engagement or disengagement?

Human rights activists plea for a coercive human rights policy towards China. This certainly is understandable given the disastrous human rights record of the country and the few substantive changes for the people in the last few years.

It has been shown that the China policy of the EU in 1998 has taken a unfavourable turn towards abstention from the last negative action applied towards China: a resolution at the UN Commission in Geneva. „Constructive engagement“ and the „Comprehensive Partnership“ are the new rhetoric, which proclaim that dialogue is important and has already shown considerable progress in human rights, as is the further integration of China in the world community through increased bilateral and multilateral economic contacts. Cooperation instead of confrontation is the rule.⁵³³ The only laudable innovation is that the EU also decided to step up co-operation in the human rights field and to look for niches for such an engagement.

Negative measures of the Union are declarations and démarches, a common position, a criticizing resolution, dialogue about contentious issues, deferment of meetings, withdrawing of the political dialogue, suspension of aid and trade relations.⁵³⁴ They are deemed adequate in the event of grave and persistent human rights violations or serious interruptions of democratic processes.⁵³⁵ Sanctions in the case of violations of human rights can range from the suspension of preferential treatment (trade, aid) to the reduction of exchange processes (commercial or financial) to the total ban on imports

⁵³³ There are two forms of confrontation, a political one and an economic one applying economic sanctions, M. Brenner (note 3) , p. 8; None of them is advocated towards China.

⁵³⁴ The last two belong to the term „punitive conditionality“, K. Tomasevski (see note 75).

⁵³⁵ Resolution of the Council and of the Member States (note 108), p. 122, par. 6.

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and/or exports of some or all goods and services.⁵³⁶ The suspension of non-preferential economic relations by the Union proceeds according to Art. 228a TEC, and so far Art. 228a TEC has mainly been used in relation to UN resolutions.⁵³⁷ According to Jan Schroeder⁵³⁸ Art. 228a TEC refers to an „Embargo“ which he defines as being a „peace time intervention by a sovereign entity in the external economic relations of its subjects. The adopted measures are motivated by foreign and security policy considerations and of discriminatory character regarding the respective target country“. On the other hand, he defines „economic sanctions“ as measures taken „in reaction to actual or presumed violation of international law“ and thus narrower in scope. In the field of aid, according to the relevant procedures, the Union can modify aid programmes, postpone the signature of a co-operation agreement or suspend co-operation altogether.⁵³⁹

Second pillar negative measures have been applied towards China on a small scale. Five of the only eight démarches issued towards China condemned specific human rights violations, whilst the other three concerned religious freedom, Tibet and the general human rights situation. The two declarations concerned the general human rights situation and a dissident, Jing Sheng.⁵⁴⁰ The situation at the UN Commission and the political dialogue have already been discussed. The dialogue has so far only been

⁵³⁶ P. Willaert, C. Marquéz-Ruiz, „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.) (note 48), pp. 253-314, p. 258; I. Eland, „Economic Sanctions as Tools of Foreign Policy“, in: G. A. Lopez, D. Cortright (eds.) (note 75), pp. 29-42, p. 39ss.

⁵³⁷ P. Gilsdorf, P. Jan Kuiper, in: H. v. d. Groeben, J. Thiesing, C.-D. Ehlermann (eds.) (note 33), Art.228a, No.8; see also P.J. Kuiper, „Trade Sanctions, Security and Human Rights“, in: Marc Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*, Nijhoff, Dordrecht 1993, pp. 388-422.

⁵³⁸ *Community Embargoes and Liability for Embargo Damages*, Master of Law thesis, European University Institute, Florence September 1996, p. 10, 6.

⁵³⁹ For the practice in the years after the Treaty of Maastricht, European Commission (note 35), p.27, pt.40; European Commission, *General Report on the activities of the European Union 1995*, Luxembourg, Office for official publications of the EC 1996, p. 21, pt.17; European Commission (note 68), p. 375, pt. 1099.

⁵⁴⁰ M. Fouwels (note 56), p. 319.

interrupted once, and that was by the Chinese side in 1996. Would negative first pillar measures, as sketched out above, be of use towards China?

The unchallenged advantage of negative measures (economic sanctions) is the ability to exert pressure on governments at the right moment and in the right sector and the ability to set limits to state behaviour in the international context. But negative measures have not been criticized without due reason. It is exactly the aforementioned component of them which leads to the first drawback of them: the infringement of sovereignty. Authoritarian states, and especially China, are extremely reluctant to accept any interference from the outside world in their internal affairs. The area of domestic policy is seen as out of concern of other states (White paper, Bangkok Declaration, reaction to the Resolution of the EP in June 1997). Even if international human rights law has come to the tentative conclusion that appeals to human rights as well as cut off of aid is not a forbidden interference in the internal affairs of a state, this is not shared by all states of the world community. Strong interference, therefore, takes the risk that contact with the accused state as a whole will be lost.⁵⁴¹ Another disadvantage of negative measures is that they do not address the real causes of human rights violations, but only touch a small part of the bigger problem and are rarely effective to achieve the given aim.⁵⁴² The cut-off of aid in response to violations of human rights endangers long term projects and risks penalizing the population instead of the government⁵⁴³ as does the suspension of preferential trade relations. Such a suspension would be more relevant towards China as aid programmes are only in the first stage of being developed,⁵⁴⁴ but also more unlikely as trade forms the most

⁵⁴¹ What would, of course, counteract the aim of the EU to raise its profile in Asia in general, and China especially. See Communications COM (94) 314 final; COM (95) 279 final; COM (98) 181 final.

⁵⁴² P. Alston (note 40), p. 155 for the case of trade sanctions.

⁵⁴³ D. J. Marantis (note 89), note 58.

⁵⁴⁴ Under the ALA regulation 443/92, OJ L 52, 27.2.1992, technical assistance is given to Asia and the Latin American countries. Art. 1 states that the Community „shall attach the utmost importance to the promotion of human rights, support for the electoral process of

important pillar of EU-China relations (see above). This is, of course, one of the reasons, why human rights have always come after stability and trade in discussions. Due to the negative effects on the population, a possible result of sanctions can be that the affected people unite in a common front against the imposing state and support is then mobilized for the suppressing regime contrary to the aim of the negative measure.⁵⁴⁵ As long as there is no support from the Chinese society, it does not make sense to push for human rights and intervene, and Ming Wan⁵⁴⁶ assumes that until now there has not been enough support from Chinese civil society for coercive action because of fear of chaos and anarchy. The often criticized direction of negative measures, as applied by Western donors, against the disrespect of civil and political rights, instead of economic, social and cultural rights, indeed addresses the current situation in China, as these rights are hardly respected and Chinese politicians officially declare civil and political rights to come after a certain standard of economic and social rights has been acquired. It is however debatable to what extent the social and economic situation of the Chinese people is better than that concerning civil and political rights. No matter what the economic situation of a country, it cannot use arguments of this type in order to neglect civil and political rights.⁵⁴⁷ Another important factor against the use of negative measures is that they are closely related to foreign policy considerations which opens the way for arbitrary action towards certain countries low on the „foreign policy scale“ (like Nigeria, Haiti) or high on the

democratization (and) of good governance“. Civil society and Governance, as well as the social Infrastructure projects only covered 11 mio ECU out of the total of 2504 mio ECU in 1991-1995 given to Asia. The disbursements were even lower, see, COM (98) 40 final, p. 37s.

A new budget line is being discussed under B7-7 to support human rights and democracy activities in Asia, but has so far not been adopted, Interview with an EU official of DG I B.

⁵⁴⁵ J. Galtung, On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia, in: *World Politics*, No.3, April 1967, Vol.19, pp. 378-416, he was the first to talk about the „rally around the flag effect“.

⁵⁴⁶ Ming Wan (note 147), p. 251s.

⁵⁴⁷ Vienna Declaration and Programme of Action, UN Doc. A/49/668, 25.6.1993, para. 5.

„economic scale“ (like China).⁵⁴⁸ As states' external relations are driven by self-interest, a decision to apply economic sanctions can be a sign of minimal interest in the given country.⁵⁴⁹ Given the lack of criteria, action in the field of negative measures will never become just.⁵⁵⁰ Finally, sanctions only show their intended effect if the government is willing and capable to respond to pressure. Sanctions have little effect on strong undemocratic regimes and no effect on countries without suitable institutions which can react to and improve the situation.⁵⁵¹ To sum up, negative measures, especially trade sanctions, may be of help in a very narrow range of situations, but the use of negative measures is a sign of the previous failure of preventive measures to promote human rights and democratic institutions.⁵⁵²

As regards China, negative measures were applied after the Tiananmen massacre in 1989: a considerable range of economic agreements and technology transfer was interrupted through action within multilateral fora and important future agreements were placed on hold, but important diplomatic relations were in most places kept in place. Individual governments also condemned the Chinese government's behaviour.⁵⁵³ The Group of Seven issued a Declaration on 15th July in which it announced to suspend bilateral ministerial and high-level contacts, arms trade, to request the

⁵⁴⁸ G. A. Lopez, D. Cortright, „Economic Sanctions in Contemporary Global Relations“, in: G. A. Lopez, D. Cortright (eds.) (note 75), pp. 3-16, p. 12 they talk about arbitrariness in the field of economic sanctions and big power coercion; As a decision to apply economic sanctions requires unanimity, all Member States have to find a common stand, K. Tomasevski (note 433), p. 49; Art. 228s TEC.

⁵⁴⁹ P. Alston (note 40), questions this assumption, p. 169.

⁵⁵⁰ To reach this aim, human rights should be de-politicized, but so far no document has reached this aim, K. Tomasevski (note 433), p. 48.

⁵⁵¹ D. J. Marantis (note 89), p. 13.

⁵⁵² K. Tomasevski (note 433), p. 9; on p. 12 she asks the question why a country that fullfills all the conditions attached to aid should need aid? But aid then serves to reach the conditions, if it is applied as a „positive sanction“. Positive sanctions are the combination of threat of economic sanctions, high-level diplomacy and a series of technological and economic incentives, G. A. Lopez, D. Cortright, „Economic Sanctions in Contemporary Global Relations“, in: G. A. Lopez, D. Cortright (eds.) (note 75), pp. 3-16, p. 4.

⁵⁵³ K. Tomasevski (note 1), p. 115.

postponement of loans by the World Bank, and to grant Chinese students an extension of their visas if they so wished.⁵⁵⁴ The US continued to discuss China's Most Favoured Nation (MFN) status, the UN Human Rights Commission took China under scrutiny and international NGOs also exercised their influence.⁵⁵⁵ The EU responded to the brutal repression by decreasing ministerial and other contacts on a high level, the postponement of co-operation programmes, the reduction of cultural exchanges and initiatives⁵⁵⁶ and the Member States imposed an embargo on trade in arms which is still in force.⁵⁵⁷ Multilateral economic sanctions were already gradually lifted from December 1990, but this development was followed by an increase in moral sanctions on a governmental basis.⁵⁵⁸ The European Council decided already in October 1990 to normalize slowly relations, despite the ongoing human rights violations, and the European Parliament issued a resolution in 1992 on the eligibility of China for co-operation programmes.⁵⁵⁹

During the first 12 months of negative measures, China reacted with counterattacks towards the international community and stressed the principle of non-interference in internal affairs, till it agreed on entering into discussion about the events.⁵⁶⁰ In this stage, Chinese reaction took multiple forms: it released prisoners of conscience who

⁵⁵⁴ A. Kent (note 10), p. 190; Ness, P. van, *Analysing the impact of international sanctions on China*, Working Paper 1989/4, Canberra, department of International Relations, The Australian National University, p. 2-11.

⁵⁵⁵ A. Kent (note 10), p. 213s.

⁵⁵⁶ see recommendations by the European Council, Bull. EC, No.6, 1989, Vol.22, pt.1.1.24, p. 17 and pt.2.3.2 statement of the twelve; M. Fouwels (note 56), p. 318.

⁵⁵⁷ For 1997, see European Parliament (note 525), p. 159, par.F.

⁵⁵⁸ A. Kent (note 10), p. 217, 216: by June 1991 most economic sanctions had been lifted; Japan was the first donor, the World Bank the second to lift the suspension of aid, K. Tomasevski (note 1), p. 115.

⁵⁵⁹ M. Fouwels (note 56), p. 318.

⁵⁶⁰ A. Kent (note 10), p. 213; Sanctions are usually deemed to reach their intended effect after three years, although in the first year the target's response is the highest, G. A. Lopez, D. Cortright, „Economic Sanctions in Contemporary Global Relations“, in: G. A. Lopez, D. Cortright (eds.) (note 75), pp. 3-16, 9.



had been detained after 1989 or altered the sentence of others, invited human rights delegations from foreign countries, and seemed to develop a sense of obligation to respond to the critics and to elaborate a theoretical foundation for its human rights policy, which finally led to the White paper.⁵⁶¹ It might seem as if the sanctions have shown considerable result in China, but the content of the White paper reveals serious shortcomings in China's human rights performance. Its implications were discussed above, it may be remembered that the White paper affirmed human rights to lie within the internal affairs and that China had a different understanding of human rights. Violations of human rights were still taking place in China after the release of the sanctions, and still are, and the internal effects on the population must not be underestimated as well.⁵⁶²

In conclusion, the drawbacks of negative measures, discussed in theory above, have proved to be present in practice with regard to China. However, the graveness of the brutal repression of the democracy movement demanded a rapid and strong response by governments having adhered to the international bill of rights and supporting the idea of an international human rights regime. A weak response was not among the possible solutions, perhaps sanctions were even lifted too soon and replaced by „bilateral moral“ initiatives, which, too often bow to economic interests. It is impossible to assess fully the impact of sanctions in this paper. Taking account of the often negative assessments of the results of sanctions,⁵⁶³ it is proposed to agree basically with the positive approach of the Union in practice. Long-term political change in China will presumably not be achieved with a purely coercive policy in trade and aid. In theory, though, the concept of negative measures should be upheld towards

⁵⁶¹ A. Kent (note 10), p. 221s.

⁵⁶² see *ibid.*, p. 186ss.

⁵⁶³ G. A. Lopez, D. Cortright, „Economic Sanctions in Contemporary Global Relations“, in: G. A. Lopez, D. Cortright (eds.) (note 75), pp. 3-16, p.6ss and other contributions in that book; K. Tomasevski (note 433), p. 221; Cuba 1962 and Iraq 1990 are usually cited as negative examples.



China. In the diplomatic field they are a potentially effective way of exerting pressure on China and exposing it to the outside world as „the bad man“.⁵⁶⁴ The approach of the Union in 1998 does not convince in this respect. With regard to economic sanctions in trade and aid, they should be announced as the last option, because any other policy cannot get rid of the accusation of arbitrariness. Last, but not least, the practical positive approach through continuation of economic contacts and creating a closer network has one important limit: trade and aid must not be used in areas, where human rights violations of the Chinese government are indirectly supported as for example buying goods made with child or prison labour⁵⁶⁵ or directing aid to sectors where the corrupt political apparatus profits and in the field of exportation of hazardous goods.⁵⁶⁶ To appear credible abroad and at home, the pursued policy must be congruent in this respect.

The ultimate argument for a positive approach is stability in China as none of the Western donors' would be prepared to act in a Chinese internal crisis and nobody is able to predict what would happen in such a case. Moreover, it is more than doubtful that the Western world would be prepared to open its gates to 1.2 billion Chinese immigrants.

⁵⁶⁴ China is very keen on NOT being exposed as the bad man and responds to pressure in this respect, lecture of Dr. Juergen Wickert of the Friedrich Naumann Stiftung at the EUI., 4.5.98, „The role of NGOs in democracy promotion“.

⁵⁶⁵ P. Alston (note 434), p. 155, the likeliness of complicity should heavily outweigh pragmatic arguments against the cessation of trade. In such cases the ethical responsibility of the exporting state prevails. The GSP could be used as a means to investigate in the forced labour and eventually suspend trade benefits. It has happened to Burma (Myanmar) in 1997, European Report No.2228, 31.5.97, p.V-10.

⁵⁶⁶ K. Tomasevski (note 1), p. 79, trade must not be used in a way to cause damage to the population.

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bb. A positive policy, especially development and economic co-operation

Positive measures in development co-operation include: the holding of elections, the setting-up of new democratic institutions and the strengthening of the rule of law; the strengthening of the judiciary and the administration of justice; promoting the role of NGOs and other institutions which are necessary for a pluralist society.⁵⁶⁷ Economic co-operation aims at creating and reinforcing a network of business and other economic links between the EU and its partners and building an environment more favourable to investment and development.

Positive measures show important advantages in the conduct of state-to-state relations. Having the example of the Tiananmen massacre in mind, human rights promotion in a positive „system“ of measures follows a *preventive* approach, addressing the roots of the problem instead of waiting for unwanted results and „repairing“ the afterwards.⁵⁶⁸ They tend to include the needs of the people among their primary objectives as since Lomé IV, Art. 5, positive measures are „centered on man“ and are not first and foremost targeted on governments.⁵⁶⁹ This focus on man pays account to the situation of the population and implies the fact that change can only come from the inside⁵⁷⁰ and cannot be imposed from the outside solely through coercive measures. Rather, support from the civil society is needed for measures to become effective. Alongside the emphasis on man, the development towards more consensus and co-operation in the execution of the project through policy dialogue⁵⁷¹ between the two partners is to be observed. The persons who know their country and deal with its administration every

⁵⁶⁷ Resolution of the Council and of the Member States (note 108), p. 122.

⁵⁶⁸ Minister Spranger, „Entwicklungspolitik im Zeichen der Zeitenwende“, Frankfurter Allgemeinen Zeitung vom 19.4.97, <http://www.bundesregierung.de/bmz/aktuell/zeitenwende.html>, p. 5.

⁵⁶⁹ D. J. Marantis (note 89), p. 14.

⁵⁷⁰ P. Alston (note 40), p. 169.

⁵⁷¹ The flexible mechanism to identify areas for funding and priorities for implementation.



day should be included in the policy formulation.⁵⁷² Due to their character as supporting measures and the outcome of policy-dialogue, positive measures in development co-operation generally do not infringe upon the sovereignty of the given state as do negative measures.⁵⁷³ Finally, positive measures are, as a matter of fact, more distinct from foreign policy considerations and enable the donor governments to act more rationally and inarbitrarily.

However, positive measures to integrate China in the world community, leaving apart the highly praised constructive dialogue on human rights for now, also show considerable limits in dealing with an authoritarian state. W. Heinz, H. Lingnau, P. Waller⁵⁷⁴ distinguish between four types of political systems which are subdivided in 8 categories. On the top end are authoritarian regimes and on the low end functioning democracies. China would fall under the first type and its first sub-category of a „closed system“. Typical features are the complete control of social, political and cultural life by one political party and the low respect of human rights. The possibilities and limits of positive measures aimed at promoting democracy and human rights in a third country depend on this over-all political context. The fields of action and the measures to take are determined by the political situation, that means that positive measures are most likely to succeed in those countries with governments committed to an improvement of human rights, such as countries in transition to democracy or, of course, established democracies. If the political will is lacking, as in China, the usefulness of positive measures in the field of human rights and democracy promotion

⁵⁷² Marantis (note 89), p. 21.

⁵⁷³ This, of course, is debatable because the whole field of decentralised cooperation has not been included. Constellations can very well be found in which the support of an anti-regime NGO with the aim of enhancing the democratization of the country can heavily infringe upon the sovereignty of the recipient country. This happened for example in Mexico, where the EU wanted to support a specific NGO before the elections, but was hold back by resistance of the Mexican government which saw its sovereignty infringed, Interview with an EU official of DG IB.

⁵⁷⁴ W. Heinz, H. Lingnau, P. Waller (note 469), p. 20s: authoritarian regime, countries in transition to democracy, formal democracies, functioning democracies.

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is doubtful and should be subjected to a careful examination. As long as the Chinese government and parts of the population⁵⁷⁵ reject the notion of human rights as either being a Western interference and the imposition of a liberal tradition, or as foreign to their structure of society and remain closed in their relations to the outside world, positive measures must inevitably have limited effect.

Nevertheless, positive measures to promote human rights and democratic principles can be applied in authoritarian systems and be successful if they find the space to enter the country. They have to focus on supporting NGOs, independent journalism and vulnerable groups.⁵⁷⁶ To find these niches is difficult in China as the government opposes the development of an active civil society. As an example of the hindrance of the development of civil society, which could challenge the Chinese official position, the suppression of NGOs can be cited. For example, China has classified reporting by independent NGOs as constituting „counterrevolutionary activities“ and as the publicizing of „state secrets“. This reaction is in line with the Chinese law, as counterrevolutionaries who sabotage the people’s democratic dictatorship or disclose state secrets can legally be condemned.⁵⁷⁷ But acting according to the „rule of law“ in this case does not necessarily mean that China also respects human rights. The initial attempts to co-operate with China through different programmes all aimed at different aspects of commercial and economic life, mainly in the field of rural and urban development.⁵⁷⁸ The Commission Communication (95) 279 final⁵⁷⁹ proposes to

⁵⁷⁵ The Chinese society agrees with the government that things are improving and that any reform has to proceed slowly for the paramount aim of stability, Ming Wan (note 147), p. 251; But private voices which challenge the official position become stronger and stronger, M. Davis, „Chinese Perspectives on Human Rights“, in: M. C. Davis (ed.) (note 18), pp. 3-24, p. 12; Yash Ghai (note 193), p. 13.

⁵⁷⁶ W. Heinz, H. Lingnau, P. Waller (note 478), p. 74.

⁵⁷⁷ M. Posner, Candy Whittome, „The Status of Human Rights NGOs“, cited in: H. J. Steiner, P. Alston (eds.) (note 5), p. 468.

⁵⁷⁸ European Commission Delegation in China, „EU-China Co-operation, Running Programmes“, 4.10.96, <http://www.ecd.or.cn:vhost/ecd/co/>. It lists programs in „Human Resources Development“, „Support to Economic and Social Reforms“, „Business and Industrial Cooperation“, „Rural and Urban Development“; European Commission (note 397), adds a fifth

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improve the human resources development (China-Europe International Business School and other initiatives for vocational training), the economic and social reform through an exchange programme for lawyers, and business co-operation in order to support the business environment in China, to develop new skills, and to give incentives for closer ties between Chinese and European firms. Projects in rural and urban development should be kept at the same level.⁵⁸⁰ Projects in the field of human rights and democracy promotion like support for elections, parliamentary support, help with constitutions (legislative projects), reform of the police and other state forces to improve compliance with human rights (executive projects) and support for the rule of law (judicial projects) have not been (fully) exploited yet. The same is true for projects in support of civil society (support for NGOs, for independent journalism and vulnerable groups). In 1998 it has been decided, though, to start co-operation including initiatives to strengthen the rule of law (seminars and training of specialized personnel like judges, prosecutors and lawyers) and civil and political rights (local governance), as well as the promotion of economic and social rights (poverty alleviation, with emphasis on women, disabled, aged or children).⁵⁸¹ A first legal seminar was held in February 1998, the local governance programme is ready for signature by the EU and China, and terms of reference for the third programme are expected to be sent to China soon.⁵⁸²

To conclude, a positive policy towards China in the field of human rights is in the long term preferable to negative measures and has good prospects to find more and more

programme category „protection of the environment“; European Commission, „A Strategy to Help Build a Civil Society“, <http://europa.eu.int/en/comm/dg01/pol43.htm>, the instruments to implement these programs are financial and technical cooperation, economic cooperation and decentralized cooperation with NGOs.

⁵⁷⁹ A long term policy for China-Europe relations, p. 14ss.

⁵⁸⁰ *ibid.*, p. 16.

⁵⁸¹ Background note on China and Human Rights, February 1998, unpublished paper, p. 2.

⁵⁸² *ibid.*, p. 3.

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niches to enter Chinese society. This is not to say, however, that negative measures should not be included in that approach at all for there are cases where they are the only credible solution. Thus, a policy of „positive sanctions“⁵⁸³ would be the best approach. Assuming that there is a positive effect as a result of aid and economic measures in the target country, what about the effects of preferential and free trade with a third country, such as China?

cc. Constructive engagement: change through increased trade ?

Some comments on ‘change through trade’ will be cited first to serve as an introduction to this subsection:

„It’s time for members of (the US) Congress to stop bashing China and to recognize that the best way to promote human rights in China is to promote free trade“.⁵⁸⁴

The European Parliament⁵⁸⁵ is convinced that „human rights tend to be better understood and better protected in societies open to the free flow of trade (...)“.

„Take It From LBJ: China Ought to Be Engaged“.⁵⁸⁶

„Bashing China Is No Answer: ‘Can One Eat Liberty?’“.⁵⁸⁷

What is the rationale behind such an argumentation? First and foremost, towards the end of the nineties, China, like no other country, is full of uncertainties. Parallel with the immense economic growth, China invests a lot of money in military armament and displays its determination to conduct a „policy of power“ towards Taiwan and the

⁵⁸³ see note 552.

⁵⁸⁴ J. A. Dorn (note 417).

⁵⁸⁵ „Resolution on the Commission communication on a long term policy for China-Europe relations“ (note 525), p. 160, par.U.

⁵⁸⁶ International Herald Tribune, 1./2.11.97, editorials.

⁵⁸⁷ International Herald Tribune, 11.11.97, p. 9.

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Southeast Chinese sea.⁵⁸⁸ The emergence of China as a regional power and Chinese aggression in some fields is said to be best encountered through co-operation.⁵⁸⁹ Despite the further link of global trade and finance, geo-political strategies still have an important role to play in inter-state relations.⁵⁹⁰

Secondly, the recognition that the structure of the world economy is one of the main reasons for the underdevelopment of third world countries has led to an enhanced emphasis on trade besides aid and on creating a New International Economic Order (NIEO).⁵⁹¹ Simultaneously, the focus of foreign policy has moved from sanctions to commercial aspects in the 1990s, and generally away from aid to trade and investment.⁵⁹² The debate centres around the proponents of the market who claim that a free market leads to political change in China, and the sceptics or human rights activist who highlight the costs of free trade. First, in tying China to the Western world, trade will make it more difficult for China to follow its hard line in human rights and democracy and its harsh stand will slowly be watered down.⁵⁹³ This view is based on the assumption that international free trade brings advantages for all participants⁵⁹⁴ and in doing so leads to wealth and peace for all states.⁵⁹⁵ Secondly, international

⁵⁸⁸ J. Haacke, p. 166.

⁵⁸⁹ The Economist, 25.10.97, „Greeting the Dragon“, p. 15; Zeit, 24.10.97, „Einbinden statt Eindämmen“, America has already fought three wars to prevent regional hegemony in Asia (World War, Korean, Vietnam). Proponents of containment and proponents of engagement fight a war of arguments against each other. None of them are able to predict how China will develop in the next years.

⁵⁹⁰ The Economist, 25.10.97, „How America Sees China. Friend or Foe?“, p. 30; K. Tomasevski (note 433), p. 50 with regard to Eastern European countries.

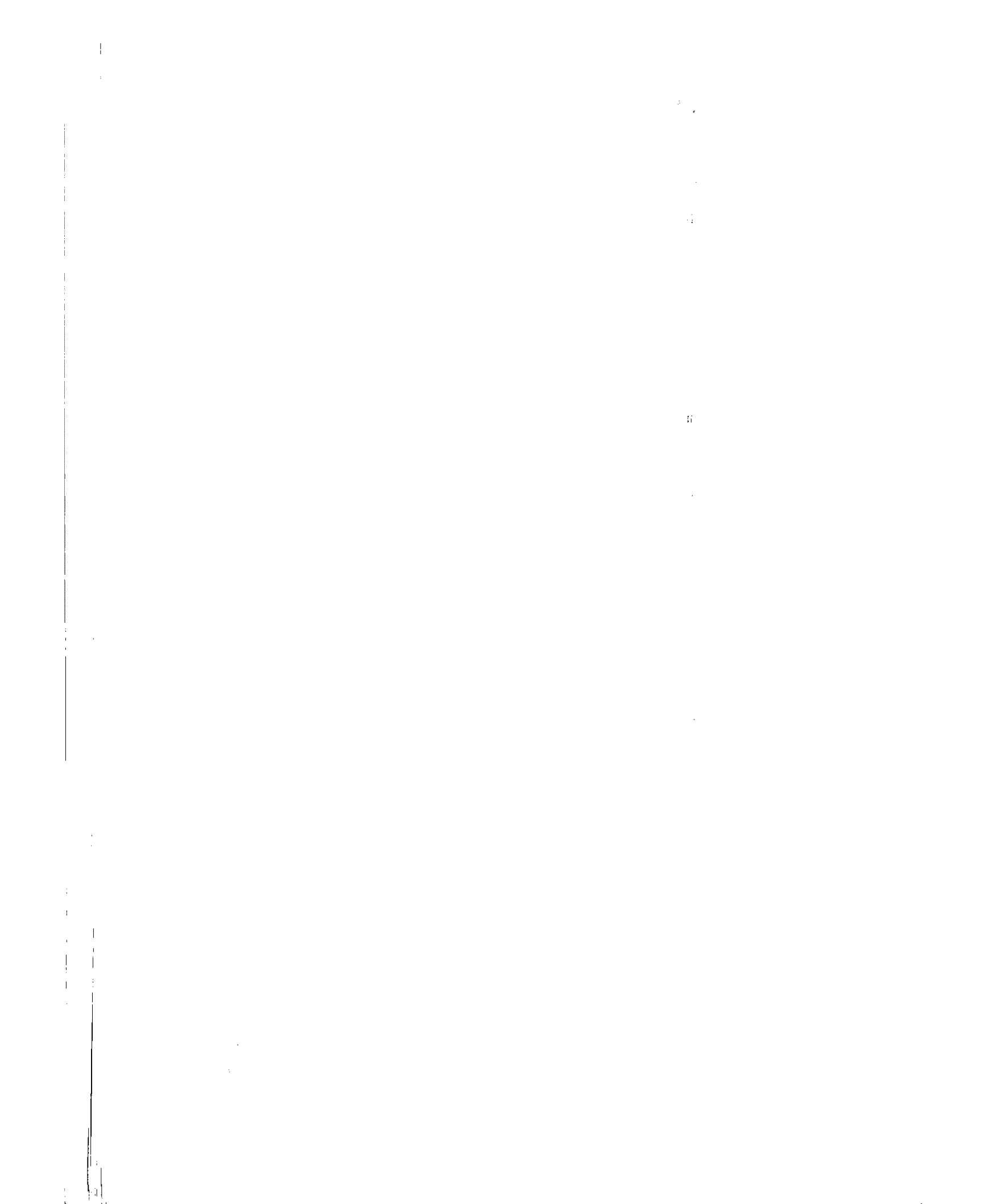
⁵⁹¹ K. Tomasevski (note 1), p. 77; P. Alston (note 40), p. 157.

⁵⁹² K. Tomasevski (note 433), p. 146s.

⁵⁹³ The Economist, 25.10.97, „How America Sees China. Friend or Foe?“, p. 23.

⁵⁹⁴ M. Brenner (note 3), p. 10.

⁵⁹⁵ For theories to explain international cooperation in trade, see S. Strange, *State and Markets. An Introduction to International Political Economy*, Pinters, London 1988, p. 174ss she names three main schools on international trade: (neo-) mercantilist (realist), neo-classical or liberal (pluralist) and Marxist (structuralist); R. Gilpin, *The Political Economy of International Relations*, Princeton University Press, Princeton 1987, p. 12ss three main issues dominate the



political theory is then concerned with looking at the domestic ramifications of free trade and asking what the significance of a world market economy is for domestic policies.⁵⁹⁶ Assumed that domestic policies also adhere to the concept of a market economy, the discussion consequently centres around the assumption that economic liberalization will incite internal forces that push for political change.⁵⁹⁷ It goes beyond the scope of the paper to offer a solution to the complicated relationship between market liberalization and democracy or human rights. Focus will therefore be directed towards the main facets of the discussion on the relationship between democracy and the market. The supporters of the market have a logical and a historical explanation at hand.⁵⁹⁸ The logical explanation contends that as in a market economy decision-making is decentralized, property is privately owned, and the freedom of contract is established by law, these market forces or rights lead to transparency and predictability which enhances an independent judiciary and thus the separation of powers. A free market also leads to the strengthening of civil society which can challenge state authority. Both elements are necessary for democracy. The historical argumentation looks at the West and submits that the emergence of the market was followed by democracy, because the market stimulates social formations such as the emergence of a middle class and the reorganization of labour that pressure for democracy. Neither of the two explanations is alone capable of explaining the assumption in question. The market does not always generate equal rights for everybody, nor does the historical evidence

discussion within international political economy: first, whether a highly independent world economy promotes harmony or causes conflict among states; second, what is the relationship between economic change and international political change; and third, what is the significance of a world market economy for domestic economies.

⁵⁹⁶ *ibid.*, p. 14.

⁵⁹⁷ M. Brenner (note 3), p. 11; see also Committee on External Economic Relations, „Opinion on a Communication from the Commission concerning a long-term policy for China-Europe relations“ (note 525), p. 24, the Union's engagement in China is based on two pillars: integration in the WTO and assistance in its economic and social reforms; Funabashi, Y.; Oksenberg, M.; Weiss, H. (note 163), p. 87.

⁵⁹⁸ Yash Ghai (note 193), p. 31.

of the West fit for Asia in all respects, because in Asia the market is shaped by the state, whereas the historical pattern was the other way round in the West.⁵⁹⁹

Another aspect of the same discussion is that trade leads to economic growth and this growth on the one hand is linked to economic reforms⁶⁰⁰, and on the other hand will lead to the trickling-down of the wealth to the poorer segments of the population.⁶⁰¹ Aristotle's hypothesis was that democracy could only develop in a relatively wealthy society.⁶⁰² Trickle-down theories of growth are very promising and of course support the theory of change through trade, but the effects of prosperity on democracy are still not well developed.⁶⁰³ It is impossible to go into detail of this broad discussion here, this section only aims at establishing a complete picture of the arguments brought forward to support free trade. Growth, its supporters would argue, gives rise to a new middle class which wants to preserve and strengthen its rights and thus pushes for democracy and human rights to be respected in the country. But such an effect is unlikely to occur in China as a whole (except in the Special Economic Zones) because

⁵⁹⁹ *ibid.*, p. 32; K. Tomasevski (note 433), p. 149, „A free market is by definition amoral and trade regulation is always subject to powerful interest groups.

⁶⁰⁰ International Herald Tribune, 28.4.98, „China: Gradual Economic Reform Presupposes Growth“ growth is seen as a prerequisite for economic reforms; On the other hand, growth is enhanced by economic reforms, N. Bajpai, T. Jian, J. D. Sachs, Economic reforms in China and India: Selected issues in industrial policy, Development Discussion Paper No. 580, April 1997, Harvard Institute for International Development, Cambridge (Massachusetts), Abstract; see also R. L. Barsh, „Democratization and Development“, in: *Human Rights Quarterly*, No.1, 1992, Vol.14, pp. 120-134.

⁶⁰¹ R. Gilpin (note 595), p. 23, a consequence of a market economy is that it affects the distribution of wealth within the society; K. Tomasevski (note 1), p. 180, 183, she defines the trickle-down approach as „growth first, distribution later“. Distribution will occur spontaneously after a certain level of development has been reached. Governments seek to gain this economic development *before* human rights can be respected. According to her, this approach implicitly negates human rights as a means of development.

⁶⁰² Barro, R. J., *Determinants of Economic Growth. A cross country empirical study*, Development Discussion Paper No. 579, April 1997, Harvard Institute for International Development, Cambridge (Massachusetts), p. 33 the Aristotle hypothesis: "From Aristotle down to the present, men have argued that only in a wealthy society in which relatively few citizens lived in real poverty should a situation exist in which the mass of the population could intelligently participate in politics and could develop the self-restraint necessary to avoid succumbing to the appeals of irresponsible demagogues".

⁶⁰³ *ibid.*, p. 33, p. 34ss about the indicators to support that thesis.

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of China's internal „immigration“ policy. The big disparities between rural and urban wealth as regards income, and the enormous problems with unemployment in the cities have incited China to restrict rural migration with tight controls. In doing so, it ferments disparities between land and city and prevents the trickle-down effect of growth. The policies of urban interests and state enterprises have thus far prevailed.⁶⁰⁴ Thus, in practice, wealth through trade has often not reached the poor, but enriched the already wealthy parts. The hope that economic reforms will eventually lead to political reforms is not a proven theory either.⁶⁰⁵ It may be said, though, that increases in various measures of the standard of living tend to generate a gradual rise in democracy.⁶⁰⁶ Despite these uncertainties about the effects of trade and economic liberalization, the thesis of engagement of China instead of confrontation cannot be dismissed easily for the above mentioned geo-political reasons and the historical evidence.

Thirdly, the globalization of the market and the increasing interlinkage has further implications: major powers often claim they have to act like this because globalization forces them to follow the pace of increasing trade, and consequently, human rights are conspicuously missing from the globalization agenda.⁶⁰⁷

As regards the economic opening-up of China, the last years have shown considerable improvement.⁶⁰⁸ While the „open-door“ policy only really began in 1978⁶⁰⁹ and

⁶⁰⁴ International Herald Tribune, 28.4.98, „China: Gradual Economic Reform Presupposes Growth“.

⁶⁰⁵ Barro, R. J. (note 602), p. 32ss quoting Friedman, Lipset, Toqueville.

⁶⁰⁶ *ibid.*, p. 34.

⁶⁰⁷ P. Alston, „The Myopia of the Handmaidens: International Lawyers and Globalization“, in: *EJIL*, No.3, 1997, Vol. 8, pp. 435-448, p. 439, this new agenda and new rules are set by the US according to Serge Sur or by bankers, lawyers, businesspeople, public-interest activists and criminals according to Anne-Marie Slaughter, p. 440.

⁶⁰⁸ Funabashi, Y.; Oksenberg, M.; Weiss, H. (note 163), p. 42.

⁶⁰⁹ Hu Yuanxiang, *Legal and Policy Issues of the Trade and Economic Relations between China and the EEC. A Comparative Study*, Kluwer, Deventer et al. 1991, p.3s.

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exposed communist China for the first time to external influences, by 1998 it has brought about a high level of international exchanges.⁶¹⁰ China's policy was centered on promoting exports and attracting foreign investment.⁶¹¹ The non-state sector is the main driving force of China's impressive growth whose successes can be explained by the fact that it largely operates under market conditions.⁶¹² The big disagreement is between the sequence of reforms: are economic or political ones to come first? One could also talk of the China-Russia debate in this respect. Deng followed a strategy of economic opening but maintaining the strict rule of the Party. Through this, according to Heinrich Weiss, he has elevated the living conditions of the Chinese people to a big extent and promoted the evolution of a middle class.⁶¹³ In view of these economic reforms taking place in China, a strong case could be made in favour of 'change through trade'. However, economic reforms do not automatically lead to political reforms and as long as the Chinese state shapes the market through tight control, a policy that alone promotes free trade will not necessarily help build the forces in the whole country needed for democracy and human rights. Such internal forces are, for example, decentralization of decision-making, respect of private property, a range of choices for the competitors and freedom of contract.⁶¹⁴ Democracy, then, has elements, such as free and fair elections, freedom of expression and public debate, the rule of law and the accountability of elected officials, that restrain state power and prevent it from following harmful economic policies.⁶¹⁵ All in all, there is room for

⁶¹⁰ see trade with EU, European Commission (note 397); An open door policy is the only way for developing countries to catch up with the developed world. It not only allows the country to specialize and use its comparative advantages, it also benefits the country through increased access to foreign capital, information, and advanced technology, Bajpai, N.; Jian, Tianlun; Sachs, J. D. (note 600), p. 20.

⁶¹¹ H. Weiss (note 230), p. 48.

⁶¹² N. Bajpai, T. Jian, J.D. Sachs (note 600), Abstract., p. 22 Differing from the rest of China, the economies of the SEZs depend on market forces rather than the plan.

⁶¹³ H. Weiss (note 230) , p. 49.

⁶¹⁴ Yash Ghai (note 193), p. 31.

⁶¹⁵ International Herald Tribune, 29.4.98, „Asia Needs Social Protections“; „Final Report“ (note 470), p. 14, 17.

hope that the new Premier Zhu Rongji will continue with reforms and also let them expand to the political field.⁶¹⁶ However, whilst a policy of free trade might be able to ensure that China's economic growth continues, it is not sufficient to enhance leaders to introduce political reforms. Economic liberalization is one possibility to induce political change, but it is certainly not the panacea.⁶¹⁷ It always bears the risk of adhering to double standards with regard to weaker countries⁶¹⁸ and trade is conceptually hostile to human rights and development policies in disregarding the rights and interests of the people while protecting the economic interests of the international actors at stake.⁶¹⁹

dd. Dialogue

In February 1998, the Foreign Ministers of the EU declared not to table or support a Resolution on China, but to rely on the political dialogue established (see above) between the two sides. In the language of development co-operation this positive measure to promote human rights runs simultaneously with other positive EC initiatives.⁶²⁰ In the case of China, dialogue is the main (and only) focus and leaves little room for any other attempts to promote democracy and human rights.

It is not clear from the rhetoric whether this dialogue is effectively used or only taken as a means by the Chinese side to dissipate concerns of the Western world, and has to be seen as a sign of the limited readiness of the EU to engage in an argument over

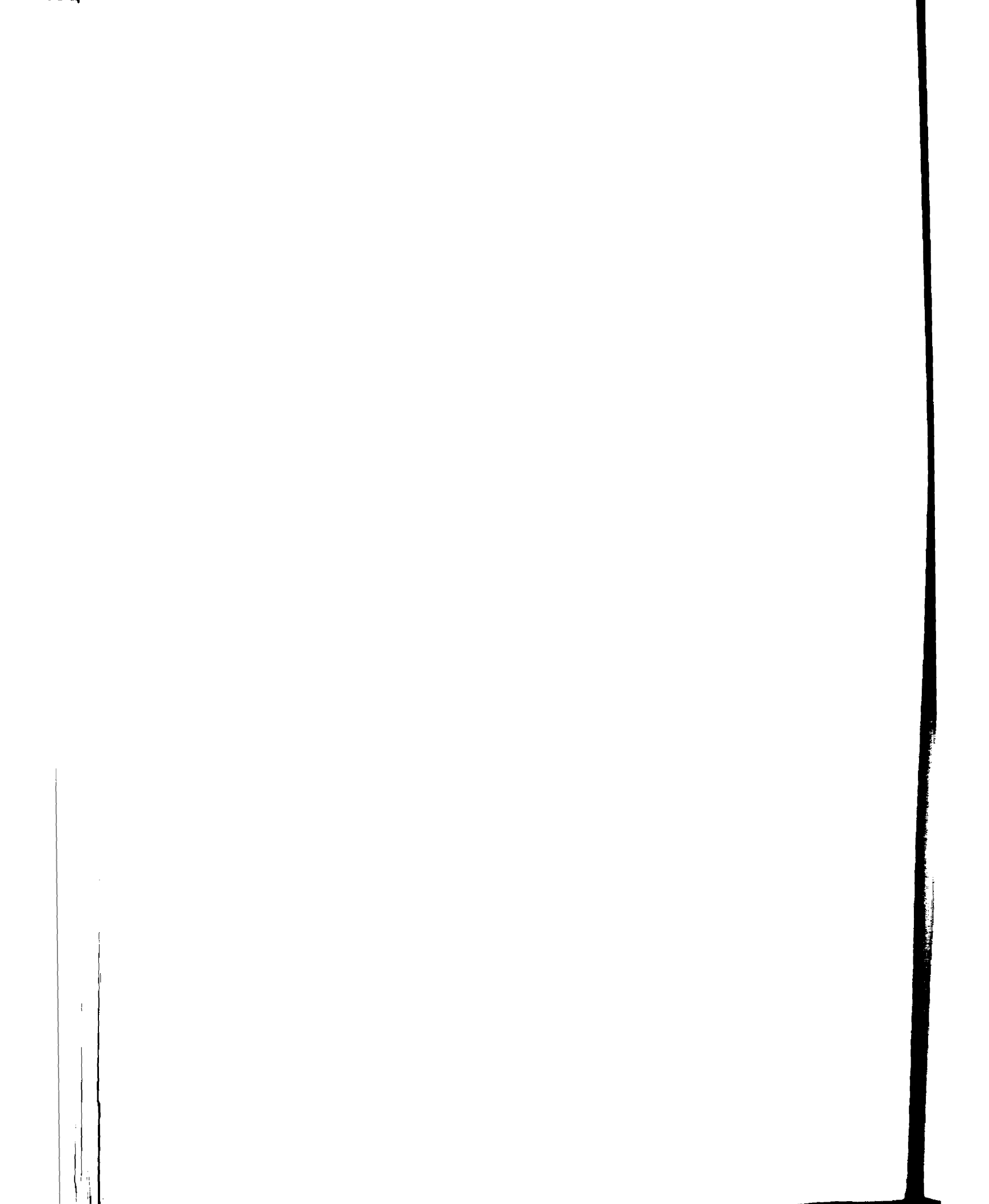
⁶¹⁶ International Herald Tribune, 28.4.98, „China: Gradual Economic Reform Presupposes Growth“.

⁶¹⁷ see M. Brenner (note 3).

⁶¹⁸ R. B. Lillich, F. C. Newman, „The Carter Administration's Human Rights Initiatives“, in: R. B. Lillich, F. C. Newman (eds.) (note 39), pp. 824-871, p. 869.

⁶¹⁹ K. Tomasevski (note 1), p. 77s.

⁶²⁰ Resolution of the Council and of the Member States (note 108), p. 122, an „open and constructive dialogue between (the Community and its Member States) and the governments of developing countries“.



human rights with the Chinese authorities. However, the declared intention is to make it possible for China to become a member of the world community. Political dialogue can encourage trust on the Chinese side and create surroundings in which human rights issues can be addressed. According to Chandra Muzaffar, the positive elements of a dialogue outweigh the imposition of human rights via the human rights clause and thus the EU should develop a variety of dialogue options instead of insisting upon conditionality. It must not be forgotten that the West can also learn from the Asian countries.⁶²¹ Abdullahi Ahmed An-Na'im, a promoter of cross cultural dialogue as well as an internal cultural discourse, believes strongly in the Western doctrine of universalism but sees the appropriate method to incorporate it in non-Western societies as dialogue and discourse.⁶²² However, as long as irreconcilable views, such as „Asian values are no more than an excuse for a authoritarian government to retain power“ (from a human rights advocate), and „Western views and values do not suit the Asian society and are a modern form of hegemony“ (from the Eastern side) are supported by the opposing sides, a useful exchange is hardly imaginable.⁶²³ It is submitted that dialogue is important, but should be used with other methods in a complementary instead of an exclusive way.

3. Outlook

a. Concrete action towards China

Visible action by the EU in human rights towards China requires the quick implementation of the newly designed co-operation programme. This covers initiatives

⁶²¹ Ch. Muzaffar (note 228), p. 74.

⁶²² see A. A. An-Na'im, „Toward a Cross-Cultural Approach to Defining International Standards of Human Rights“, in: A. A. An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives*, University of Pennsylvania Press, Philadelphia 1992.

⁶²³ D. J. Marantis (note 89), p. 28, partners should not insist on irreconcilable views.

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to strengthen the rule of law, civil and political rights (local governance), as well as the promotion of economic and social rights (poverty alleviation, with emphasis on women, disabled, aged or children).⁶²⁴ In general, positive support for the improvement of the human rights and democratic situation in China can follow two lines: one is to aim at reform of the state sector, the other one to foster the emergence of an active civil society. Such efforts rely on a long-term positive engagement in China. This does not mean, however, that a short-term negative policy cannot be applied at all. Even if the EU follows a policy of positive sanctions, negative action should include China as it includes any other country in the world violating human rights. This implies for the intended co-operation programme that a human rights clause should be included in the Financing Agreement that is to be signed by the two sides. Additionally, at the next review of the trade and co-operation agreement between China and the EU, the possibility of including the human rights clause should be discussed and implemented.⁶²⁵ The next paragraphs are going to highlight the areas for positive action first and then refer to situations where trade and its implications for democracy cannot be used as a justification to abstain from a negative policy anymore.

As regards the state sector in China, one of the most urgent areas for reform is the Chinese legal system. This concerns the Constitution as well as state laws. The Constitution has been discussed above and was criticized because despite mentioning most of the rights of the human person as laid down in the UDHR, its provisions are unenforceable. Guo Luoji⁶²⁶ explains it with regard to the missing body for constitutional oversight that should, according to him, be created first. He does not deem it useful to improve the provisions of the Constitution first and then look for a

⁶²⁴ Background note on China and Human Rights, February 1998, unpublished paper, p. 2; Agence France Presse, 24.2.98, „China welcomes EU decision on human rights“.

⁶²⁵ Report of the Committee on Foreign Affairs and Security (note 227), p. 6, par.30; European Report No. 2228, 31.5.97, p. V-10.

⁶²⁶ G. Luoji (note 176), p. 10ss.



better implementation procedure, but advocates the opposite approach. First the existing Constitution should be made enforceable before new provisions are created.⁶²⁷

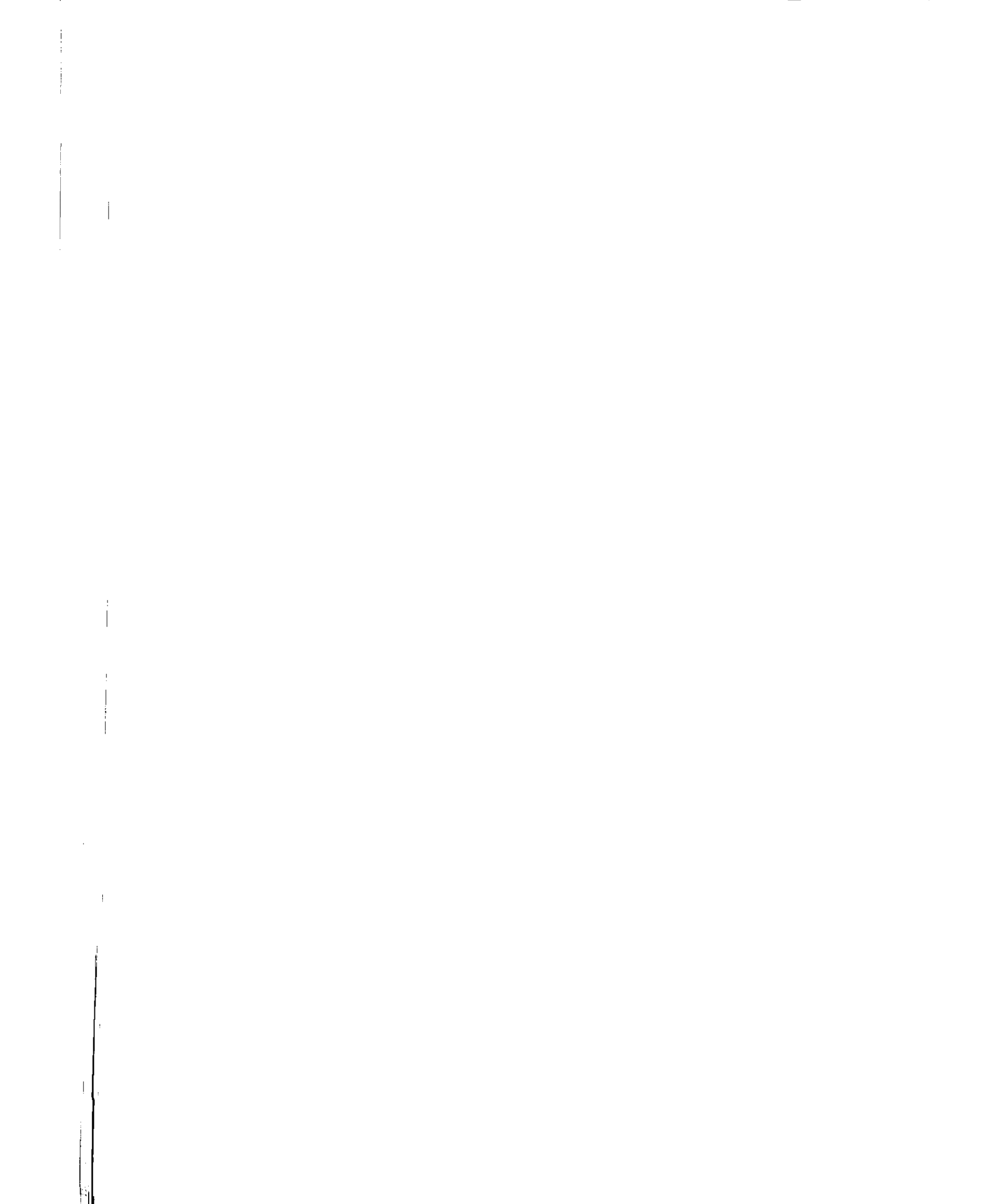
Secondly, the court system has to be reformed to ensure the independence of the judges and free it from external influences. A first step in doing so is to train judges and lawyers as proposed by the EU. The respect of the constitutional principles cited above has to be ensured to enhance the predictability of judgments and to improve access to courts for ordinary citizens. Along similar lines is the reform of the parliamentary institutions needed to guarantee a control of administrative action.⁶²⁸

Thirdly, the basic prerequisites for democracy and their foundations have to be supported and advanced by the EU. The internal developments that are necessary to provide the foundations for the evolution of a market economy which is likely to lead to democracy have already been mentioned above. They are the decentralization of decision-making, private property, the range of choices, predictability, freedom of contract. Moreover, increased economic growth can provide the citizens with the material background to fight for their rights and to participate in democracy provided the wealth spreads through the country. Basic elements of democracy are: competition for state power through regular, free and fair elections; the right and possibility for political participation; civil rights and freedoms such as freedom for expression, freedom of information, the right to assembly, and the rule of law.⁶²⁹ The EU can pursue these aims by trading fairly with China, avoiding prison-labour and child-labour goods, pushing for respect of labour law in the Chinese firms (social clause discussion), for the further liberalization of the market and for the decrease of state power, supporting human resources development and teaching programmes, as well as local governance programmes.

⁶²⁷ *ibid.*, p. 10.

⁶²⁸ Funabashi, Y.; Oksenberg, M.; Weiss, H. (note 163), p. 89.

⁶²⁹ W. Heinz, H. Lingnau, P. Waller (note 469), p. 17.



The decision of the Foreign Ministers in 1998 not to table a resolution was commented on by an EU diplomat and he admitted that there still are serious shortcomings in the prison administration, that there was a need for administrative review and that torture has yet to be abandoned. In view of the countless political prisoners still detained in China, the prison administration is an important issue and the EU together with the international community should push further for permission for prison visits by international bodies such as the Committee on Arbitrary Detention or the Red Cross. With regard to 'administrative review' the diplomat was probably pointing to the case of administrative detention ordered by the police or local authorities without any form of judicial review.⁶³⁰ Torture is still widespread in China despite the ratification of the Convention against Torture by China in 1988. By law, prison administrators are obliged not seriously to mistreat prisoners, but in practice cases are seldom regarded „serious“.⁶³¹

60 offenses carry the death penalty in Chinese law and it is carried out in annual high numbers. For example in 1996 Chinese courts imposed the death penalty in 6,100 cases and 4,367 executions were confirmed. In comparison, Amnesty reported that Ukraine had the second highest number of executions with 167.⁶³² Yash Ghai states that torture, the right to life and slavery are the human rights that obviously belong to the core set of rights, but beyond that there is much disagreement.⁶³³ At least in view of violations of these rights, the Union should also pursue a negative policy of sanctions. Moreover, it has to refrain from positive action as soon as this action can be

⁶³⁰ Report of the Mission des Juristes Francais, „Justice répressive et droits de l'homme en RPC“, October 1991.

⁶³¹ Report of the Committee on Foreign Affairs and Security (note 227), p. 12; J. van der Klaauw, „Human Rights News“, in: *NQHR*, No.1, 1998, p. 90, criticizes that no concrete programmes have been developed in this respect.

⁶³² Amnesty International, „China“, 26.8.97, Seminar Materials Professor Alston, International Human Rights Law, Autumn Term 1997, p. 1.

⁶³³ Yash Ghai (note 193), p. 24.



regarded as in complicity with the authoritarian regime. This can occur in the field of trade as in the field of aid.⁶³⁴

The emergence of an active civil society should be promoted through, first, poverty alleviation and then support of NGOs active in the field of human rights, as well as of an independent media.⁶³⁵

b. Overall strategy

An all-inclusive strategy for the Union and its human rights policy is still missing and also the major Commission document „The European Union and the External Dimension of Human Rights Policy“ in this respect remains rather vague on how to achieve more consistency, transparency and impact. The chapter on the ‘multidimensional overall strategy’ including human rights, security, development, the environment, conflict prevention and electoral assistance fails to develop criteria for a more coherent external face of the Union.⁶³⁶ This relates to positive as well as to negative action. Additionally, the Union still has not solved the problem of a human rights catalogue and the amendment of the treaty to give competence to the Community to adhere to the European Convention. Both steps were demanded by the European Parliament in its Report on Respect for Human Rights in the European Union,⁶³⁷ but they were not taken up by the Intergovernmental Conference 1996. The European Parliament, on this occasion, issued a list of fundamental human rights, including civil and political liberties and economic and social rights.

⁶³⁴ J. van der Klaauw (note 631), p. 90, deplores that despite new initiatives to promote human rights in China, the issue of the death penalty is dealt with nowhere.

⁶³⁵ Funabashi, Y.; Oksenberg, M.; Weiss, H. (note 163), p. 89.

⁶³⁶ Commission in its Communication „The European Union and the External Dimension of Human Rights Policy“, COM (95) 567, p. 19ss.

⁶³⁷ EP doc. A4-112/97, 8.4.97; EuZW 1997, p.421.



Conclusion

The question posed in this paper centres around the crucial issue of whether the current EU human rights policy towards China is a serious attempt to promote human rights and democracy as prescribed by the treaty and international obligations, or a mere excuse. Was the aim of Art. F II, J.1 TEU, 130u TEC fulfilled and the Union's identity on the international scene asserted? The tension between engagement and pressure in human rights will remain important over the next few years. Cooperation with China is surely necessary not least in view of the unpredictable geo-political situation of this big country, but also because through co-operation ways can be found to enter the Chinese society and to enhance change that comes from within.⁶³⁸ According to Abdullahi Ahmed An-Na'im cross-cultural dialogue and internal discourse are the means to reach acceptance of the universal doctrine of human rights of the West.⁶³⁹ It seems as if the Union has adhered to his theory by relying on free trade, bilateral dialogue (cross-cultural dialogue) and new aid co-operation in its relations to China:

1. Free trade might be a first step to reach the Chinese population and incite internal discourse, and thus be an argument for the delinking of human rights and trade, although the 7 % growth of China is far from spreading throughout the country, but likely to remain in the hands of the few. Only if such a delinking is embedded in an overall human rights strategy towards China, can human rights be more than merely pure rhetoric in bilateral relations. Still one dubious point remains: how can the EU justify that the inclusion of the human rights clause in *trade* (framework) agreements

⁶³⁸ The word „cooperation“ has been used in the multilateral area (UN system) by some nations to refuse criticism of their human rights record and promote non-selectivity. They have done so in sponsoring resolutions on „international cooperation“ in human rights, but meaning in substance „non-intervention“ in the internal affairs of a state. Or cooperation has been inverted to mean „don't release information critical of a state's human rights record without state permission“, A. F. Bayefsky (note 187), p. 47s, 54.

⁶³⁹ see note 622.

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has become a rule towards third countries, with the fact that the EU-China agreement does not contain the clause? Nor are any other trade measures applied to China in defence of human rights. Given the recent Australia case, where the EU and Australia could only agree on a political declaration instead of a binding agreement confirms the picture of a world where big states can get away with more than little states. Thus, free trade cannot be the only message delivered to China; It has to be coupled with other measures.

2. Bilateral dialogue can promote cross-cultural understanding if it is used for that purpose and not subordinated to other foreign and economic policy considerations. It is in this latter respect that the multilateral dialogue in treaty, as well as Charter fora, will be less likely to be used for national purposes. It is even more deplorable that the Union decided not to engage in this form of multilateral dialogue at the UN Commission in Geneva in 1998.

3. And finally, aid programmes can be used to support the internal discourse on human rights and certainly are an important factor in empowering a civil society.

The human rights situation in China is still very bad and this is no time for euphoria.⁶⁴⁰ China is still a one-party power with old men ruling who have not been elected by the people in free, democratic elections. Until such an election takes place, the Chinese government cannot claim to represent its people. And until the people of China cannot express their opinion freely and participate in political and economic life, there is no reason to refrain from action in support of the weakest parts of the population and their human rights. But changes have occurred in the last years as well and one must not close one's eyes before them. It is the task of the West to maintain the momentum of the changes and to support them. It cannot escape from its obligation to make its human rights engagement visible. That must include, if necessary, the exertion of

⁶⁴⁰ see Opinion of EP Foreign Affairs Committee (note 227), pp. 11-12; European Parliament (note 525).

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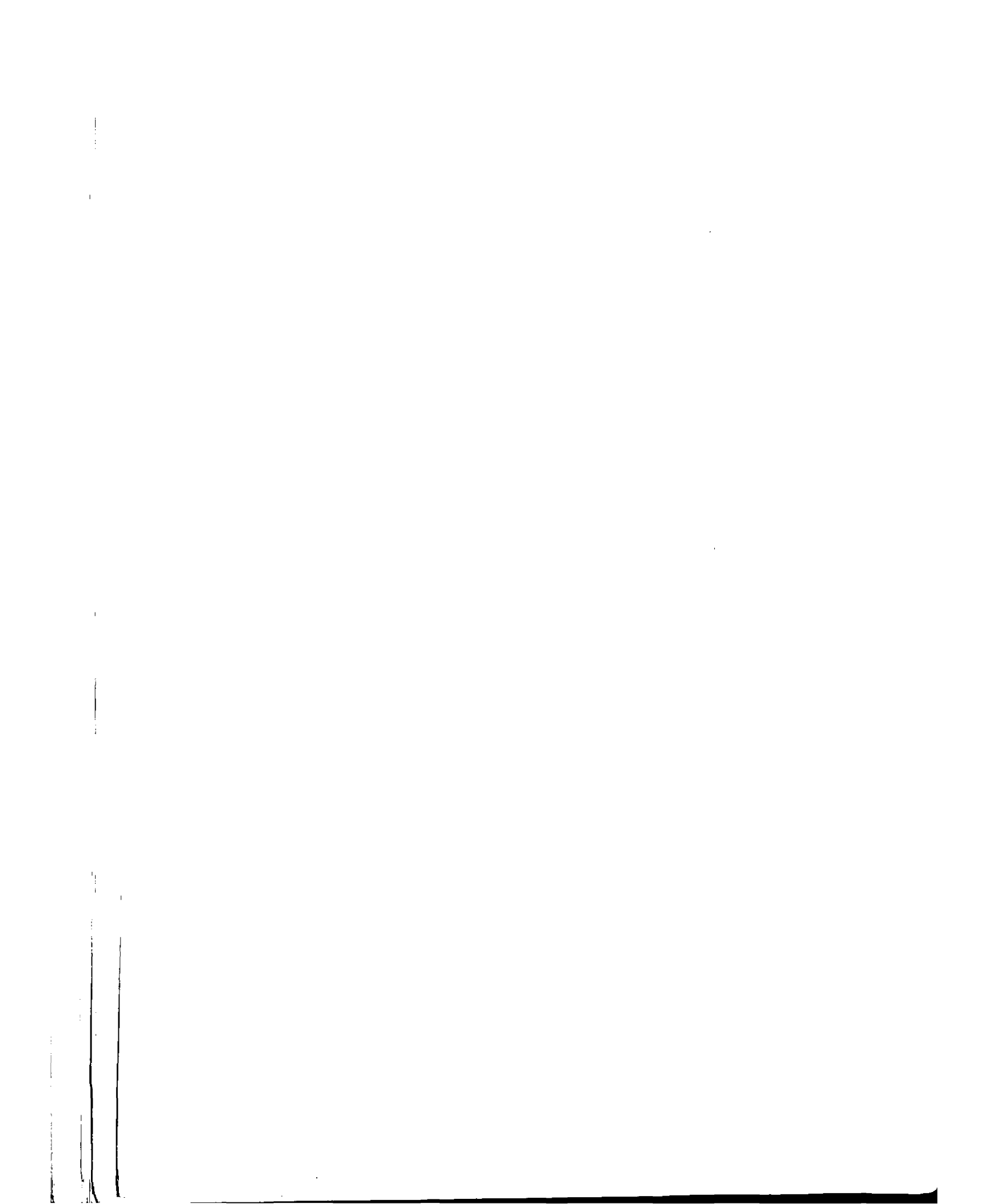
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pressure, not least for the purpose of remaining credible in the West; always taking into account that China is a country in a transition phase that needs a strong government to hold internal forces together. No Western nation can prescribe another nation how to move from a planned economy to a market economy or from a suppressive regime to a more open one. At the moment, the main concern of the Communist Party is to retain power and there still are no clear alternatives to one party rule in China.⁶⁴¹

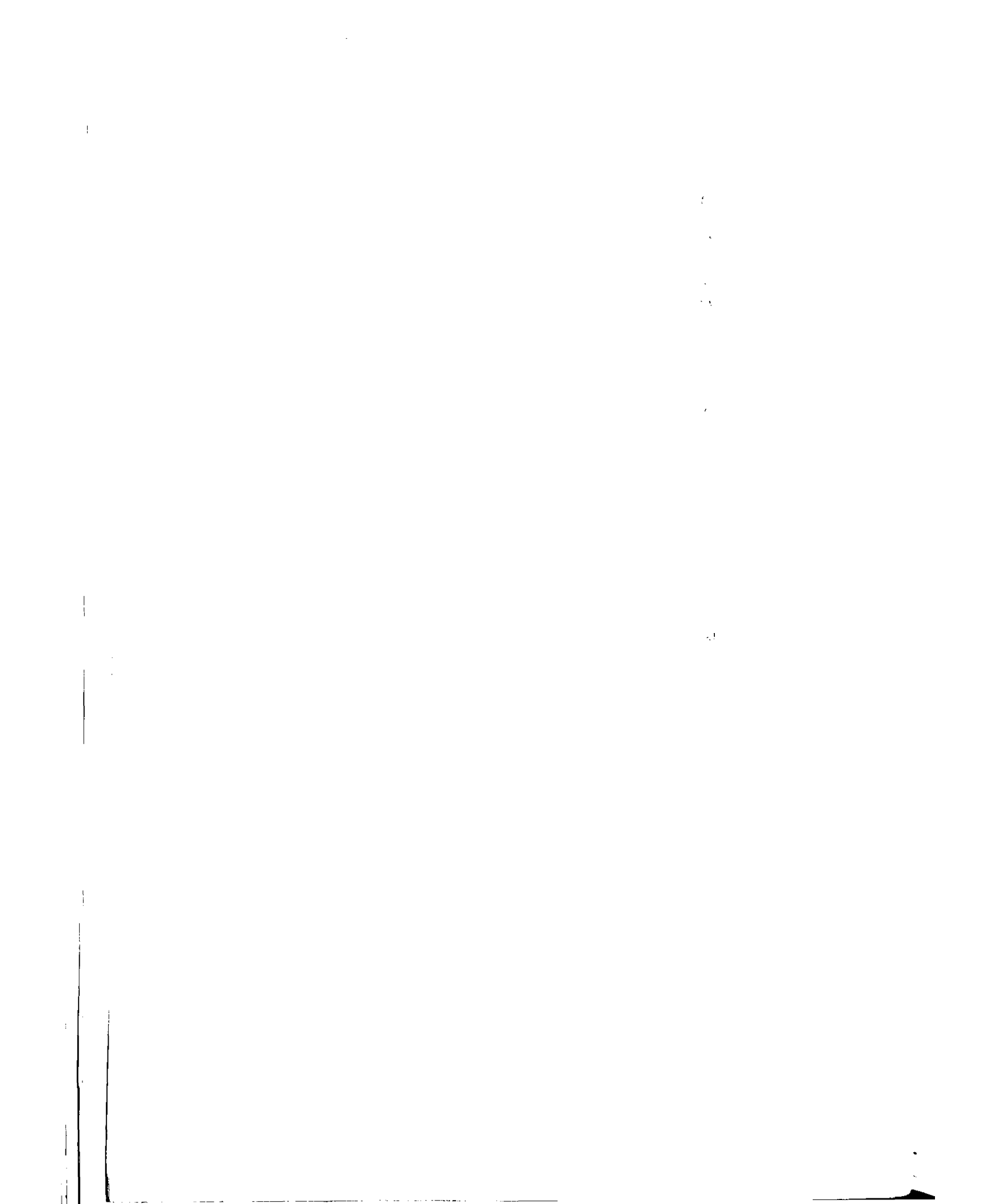
The implications of the China-case for the Union are that the CFSP has proven to still be a considerably weak procedure which does hardly guarantee the pursuit of a common line in controversial cases such as China. That might rationally explain why so little use of the new CFSP instruments has been made so far. With Amsterdam, the EU should make use of the new majority vote possibilities in the CFSP and pursue a more active human rights policy. But also first pillar measures have not been used sufficiently towards China in the field of human rights, not least because of economic interests. Perhaps it is not even desirable that the Member States in the framework of the CFSP always act jointly in issues that by nature breed confrontation such as finding a consensus on the right policy towards China. It remains to be seen whether the new flexibility provisions introduced by the Amsterdam Treaty represent a helpful step in the right direction. The Union needs coherent criteria to perform a credible human rights policy (that starts at home) and a consistent external face that could be achieved by acknowledging legal personality to the Union as a first step and improving co-ordination between the different procedures of the pillars.

⁶⁴¹ Ming Wan (note 147), p.251.

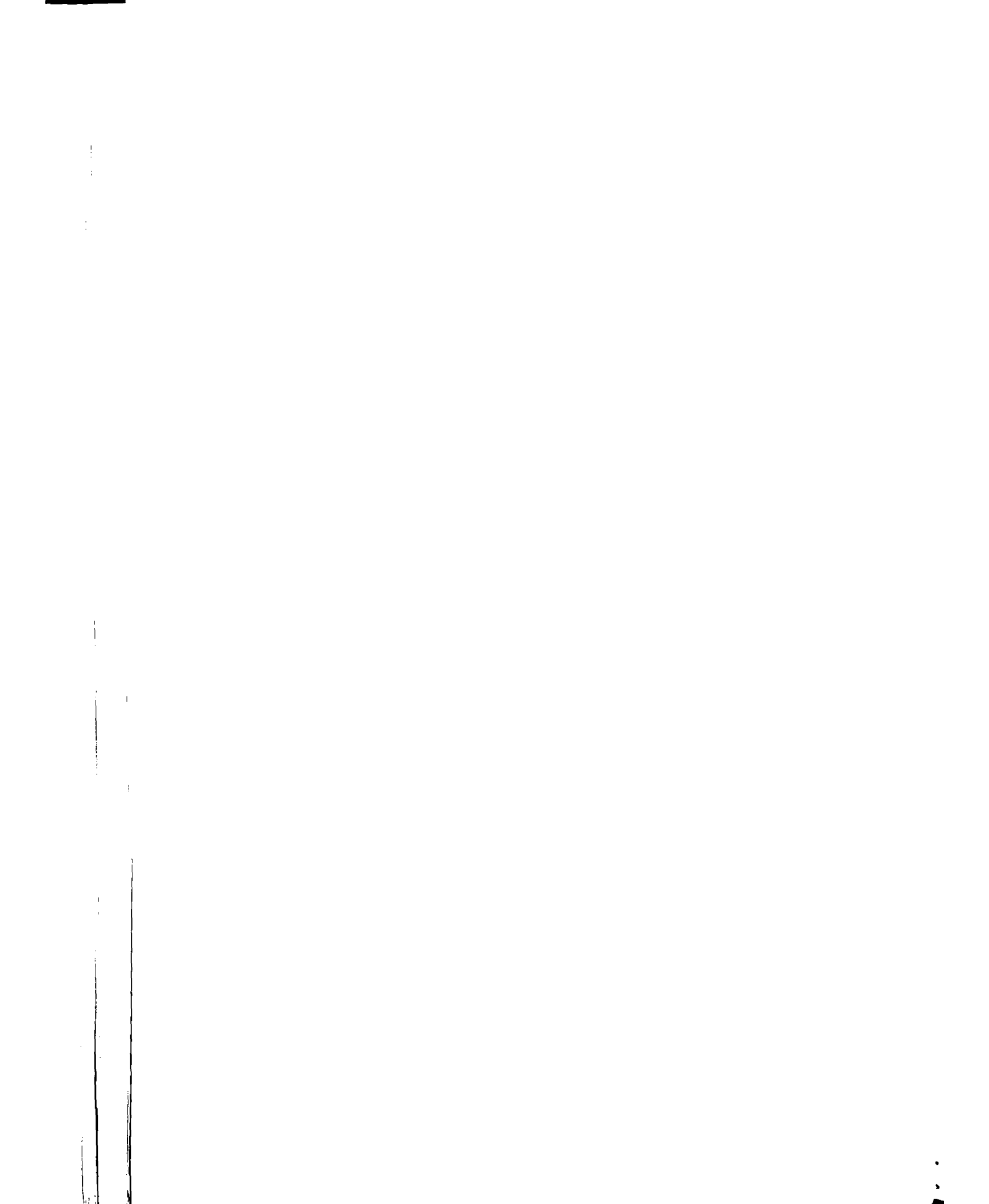


Bibliography

- Agence Europe, Documents, No.2060, 3.12.1997, p.3, par.9.
- Agence France Presse, Lexis-Nexis search, 11.3.96, „China urges EU not to take common stand in human rights UN vote“; 01.4.96, „European Union to take China to task over human rights“; 17.4.96, „EU slams China's human rights policy“; 6.3.97, „EU certain to lose anti-China human rights resolution: Chinese Foreign Minister said“; 9.4.97, „China gleeful over EU split on human rights“; 25.9.97, „EU to discuss human rights with China“; 23.2.98, „EU abandons US over human rights in China“; 24.2.98, „Amnesty attacks EU "disappointment" over human rights in China“; 24.2.98, „China welcomes EU decision on human rights“; 16.3.98, „China welcomes U.S. decision on rights resolution“; 17.3.98, „EU defends China human rights approach at human rights commission“; 30.3.98, „China dissident says EU, US misguided on China rights“; 30.3.98, „Denmark backs cooperation with China over human rights“; 31.3.98, „Danish MPs criticise softer approach to China“; 4.4.98, „Activists blast Asia-Europe Summit for playing down human rights“; 9.4.98, „China's Wei accuses West of abandoning human rights efforts“; 20.4.98, „France hails Chinese dissident release“; 23.4.98, „UN rights commission wraps up session amid pledge of deep reforms“; 24.4.98, „Amnesty slams UN Human Rights Commission for lack of action on abuse“.
- Algemeen Nederlands Persbureau English News Bulletin, Lexis-Nexis search, 13.12.96, „V. Mierlo calls for closer EU/US cooperation on human rights“; 24.9.97, „EU, China restart dialogue on human rights“.
- Alston, Philip, „Linking Trade and Human Rights“, in: *German Yearbook of International Law*, 1980, Vol.23, pp. 126-158.
- Alston, Philip, „International Trade as an Instrument of Positive Human Rights Policy“, in: *Human Rights Quarterly*, No.2, 1982, Vol.4, pp. 155-183.
- Alston, Philip, „Importance of the Inter-Play between Economic, Social and Cultural Rights, and Civil and Political Rights“, in: *Human Rights at the Dawn of the 21st Century*, Interregional meetings organized by the Council of Europe in advance of the World Conference on Human Rights, 28.-30.1.93, Council of Europe Press, Strasbourg 1993, pp.59-74.
- Alston, Philip, „The Myopia of the Handmaidens: International Lawyers and Globalization“, in: *European Journal of International Law*, No.3, 1997, Vol. 8, pp. 435-448.
- American Anthropological Association, „Statement on Human Rights“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p.198ss.



- Amnesty International, „China“, 26.8.97, Seminar Materials Professor Alston, International Human Rights Law, Autumn Term 1997.
- Amnesty International, „China. Concerns and Recommendations Asia-Europe Meeting 3-4 April 1998, London“, International Secretariat, February 1998, unpublished paper.
- An-Na'im, Abdullahi Ahmed, „Toward a Cross-Cultural Approach to Defining International Standards of Human Rights“, in: A. A. An-Na'im (ed.), *Human Rights in Cross-Cultural Perspectives*, University of Pennsylvania Press, Philadelphia 1992.
- Arts, Karin, „European Community development cooperation, human rights, democracy and good governance: at odds or at ease with each other?“, in: K. Ginther, E. Denters, P. de Waart, (eds.), *Sustainable Development and Good Governance*, Nijhoff, Dordrecht et al. 1995, pp. 259-273.
- Ayton-Shenker, Diana, „The Challenge of Human Rights and Cultural Diversity“, United Nations background note, <http://www.org/rights.dpi1627e.htm>.
- Baehr, Peter, „The Universality of Human Rights“, in: Peter R. Baehr, Fried van Hoof, Liu Nanlei, Tao Zhenghua (eds.), *Human Rights: Chinese and Dutch Perspectives*, Nijhoff, The Hague 1996, pp. 25-43.
- Bajpai, Nirupam; Jian, Tianhun; Sachs, Jeffrey D., *Economic reforms in China and India: Selected issues in industrial policy*, Development Discussion Paper No. 580, Harvard Institute for International Development, Cambridge (Massachusetts), April 1997.
- Bangkok Declaration, 1993, adopted at the United Nation's Asia Regional Meeting on Human Rights in Bangkok on 29.3.-2.4.93.
- Barnds, William, „Asia: progress and problems“, in: McColm, R. Bruce (eds.), *Freedom in the World*, Freedom House, New York 1992, pp. 29-31.
- Barro, Robert J., *Determinants of Economic Growth. A cross country empirical study*, Development Discussion Paper No. 579, Harvard Institute for International Development, Cambridge (Massachusetts), April 1997.
- Barsh, Russel Lawrence, „Democratization and Development“, in: *Human Rights Quarterly*, No.1, 1992, Vol.14, pp. 120-134.
- Bass, H.; Wauschkuhn, M.; Wohlmuth, K., *Menschenrechte, Arbeitsverhältnisse und Gewerkschaften in China - internationale Perspektiven*, Berichte des Arbeitsbereiches Chinaforschung im Institut für Weltwirtschaft und internationales Management, Nr. 6, Mai 1996, Universität Bremen. Interview mit Hang Dongfang, pp.47-62.
- Bayefsky, Anne F., „Cultural Sovereignty, Relativism, and International Human Rights: New Excuses for Old Strategies“, in: *Ratio Juris*, No.1, 1996, Vol. 9, pp. 42-59.



- BBC Summary of World Broadcasts, Lexis-Nexis search, 11.4.97, Source: Xinhua news agency, Beijing, 9.4.97, „UN official refutes Dutch- EU accusations on human rights, Hong Kong“; 11.2.98, „Vice-Premier Li Lanqing discusses human rights, Asia- EU ties during talks in Belgium“; 18.2.98, „Chinese, Dutch premiers exchange views on Sino- EU ties, human rights, Iraq“.
- Bernhardt, R., „Thoughts on the interpretation of human rights treaties“, in: F. Matscher and H.Petzold (eds.), *Protecting Human Rights: The European Dimension. Studies in honour of Gérard J. Wiarda*, Heymann, Köln 1988, pp. 65-71.
- Blaustein, Albert P., Flanz, G. H., (ed.), *Constitutions of the countries of the world*, Oceana, New York 1992.
- Bobbio, Norberto, „Sul fondamento dei diritti dell'uomo“, in: *Revista internazionale di filosofia del diritto*, 1965, pp. 302-309.
- Bonino, Emma, „La réforme de la politique étrangère et de sécurité commune: aspects institutionnels“, in: A. Mattera (ed.), *La Conférence intergouvernementale sur l'Union européenne: répondre aux défis du XXIème siècle*, Clément Juglar, Paris 1996, pp. 237-242.
- Boumans, Etienne; Norbart, Monica, „The European Parliament and Human Rights“, in: *Netherlands Quarterly of Human Rights*, No.1, 1989, Vol. 7, pp. 37-55.
- Bowring, John, (ed.), *The works of Jeremy Bentham*, Vol. II, Russel & Russel, New York 1962.
- Brenner, Michael, „Kritischer Dialog oder Konstruktives Engagement?“, in: *Internationale Politik*, No.9, 1997, Vol.52, pp. 7-12.
- Brok, Elmar, „Die europäische Verfassung und die Regierungskonferenz 1996“, in: Jean-Denis Mouton, Torsten Stein (eds.), *Vers une nouvelle Constitution pour l'Union européenne? La Conférence intergouvernementale de 1996*, pp.10-28.
- Burchill, Scott, „Liberal Internationalism“, in: Burchill, A. Linklater (eds.), *Theories of International Relations*, Scott Macmillan Press, Houndsmill 1996, pp. 28-66.
- Burchill, Scott, „Realism and Neo-realism“, in: Burchill, A. Linklater (eds.), *Theories of International Relations*, Scott Macmillan Press, Houndsmill 1996, pp. 67-92.
- Burghardt, Guenter; Tebbe, Gerd, „Die Gemeinsame Aussen- und Sicherheitspolitik der Europaischen Union - Rechtliche Struktur und politischer Prozess“, in: *Europarecht*, No.1/2, 1995, Vol.30, pp. 1-20.
- Chenguang, Wang, „Introduction: An Emerging Legal System“, in: Chenguang, Wang, Xianchu, Zhang (ed.), *Introduction to Chinese Law*, Sweet & Maxwell, Hong Kong et al. 1997, pp. 1-30.

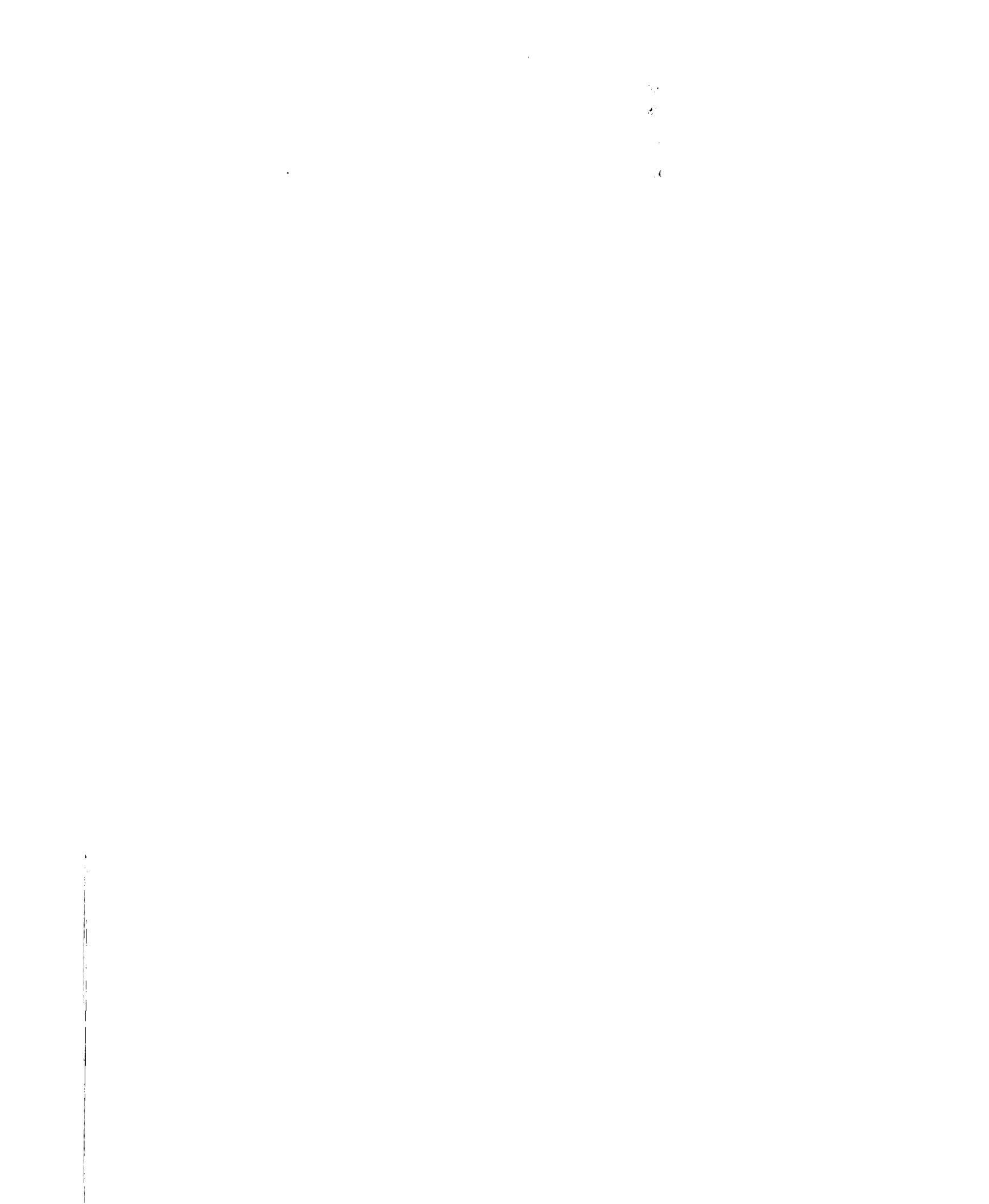
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- Clapham, Andrew, *Human Rights and the European Communities: A Critical Overview*, Nomos, Baden-Baden 1991.
- Cohen, Roberta, „People’s Republic of China: the human rights exception“, in: *Human Rights Quarterly*, No. 4, 1987, Vol.9, pp. 447-549.
- Committee on International Human Rights Law and Practice, „Report“, in: James Crawford (ed.), *International Law Association, Helsinki Conference 1996*, International Law Association, London 1996.
- Copper, John F., „Defining Human Rights in the People’s Republic of China“, in: Wu, Yuan-li; Michael, Franz; Copper, John F.; Lee, Ta-ling; Chang, Maria Hsia; Gregor, A.James (eds.), *Human Rights in the People’s Republic of China*, Westview Press, Boulder and London 1988, pp. 9-17.
- Copper, John F., „Human Rights and the Chinese Political System“, in: Wu, Yuan-li; Michael, Franz; Copper, John F.; Lee, Ta-ling; Chang, Maria Hsia; Gregor, A.James (eds.), *Human Rights in the People’s Republic of China*, Westview Press, Boulder and London 1988, pp. 56-76.
- Council of the European Union, Decision, 93/591/EU, EG, EGKS, Euratom, 8.11.93.
- Council of the European Union, doc. 9252/1/93, 27.10.93.
- Council of the European Union, „Memorandum on the activities of the Twelve in the field of human rights, 15.5.1991“, *European Political Cooperation Bulletin 1991*, Luxembourg, Office for Official Publications 1994, Vol.7, pp. 236-237.
- Council of the European Union, „Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights“, 1994, 17.1.1995.
- Council of the European Union, „Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights“, 1995, 19.6.1996.
- Council of the European Union, „Memorandum to the European Parliament on the Activities of the European Union in the Field of Human Rights“, 1996, issued 1997.
- Council of the European Union, *Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development of 28 November 1991*, Bulletin EC, No.11, 1991, Vol. 24, p.122s.
- Council of the European Union, Legal Service Document, *Commission proposal for a Council Regulation on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms*, unpublished paper.



- Cover, Robert, „Obligation: A Jewish Jurisprudence of the Social order“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p. 181ss.
- Cranenburgh, Oda von, „Development Cooperation and Human Rights: Linkage Policies in the Netherlands“, in: *Human Rights in Developing Countries Yearbook*, 1995, pp. 29-55.
- Cranston, Maurice, *What are Human Rights?*, Bodley Head, Oxford 1973.
- Dashwood, Alan A., „Position Paper“, in: A.A. Dashwood (ed.), *Reviewing Maastricht*, Sweet & Maxwell, London 1996.
- Davis, Michael, „Chinese Perspectives on Human Rights“, in: Michael C. Davis (ed.), *Human Rights and Chinese Values*, Oxford University Press, Hong Kong 1995, pp. 3-24.
- Dembinski, Matthias, „Langer Anlauf, kurzer Sprung. Die Aussenpolitik der Europäischen Union nach der Reform von Amsterdam“, HSFK Report 7/1997, Oktober 1997.
- Deng Xiaoping, „Jianchi sixiang jiben yuanze“ (Persevering in the Four Cardinal Principles), in: *Deng Xiaoping Wenxuan 1975-1982 (Selected Works of Deng Xiaoping 1975-1982)*, Renmin chubanshe 1983.
- Deng Xiaoping, Gao zichan jieji ziyouhua jiushi zou zibenzhuyi daolu (Pursuing Bourgeois Liberalism is the Same as Taking the Capitalist Road), in: 3 *Deng Xiaoping Wenxuan (Selected Works of Deng Xiaoping)*, Renmin Chubanshe 1993.
- Destler, I.M., *American Trade Politics*, Institute for International Economics, Washington DC 1995.
- Deutsche Presse Agentur, 30.3.98, „China's civil rights promises do not save dissident from labour camp“; 2.4.98, „EU and China pledge WTO push, human rights talks“; 21.4.98, „China denies Wang Dan's release was deal with U.S.“.
- Dicke, K., *Menschenrechte und europäische Integration*, Engel, Kehl 1986.
- Die Zeit, 24.20.97, „Einbinden statt Eindaemmen“.
- Dijk, Pieter van, „A common Standard of Achievement. About Universal Validity and Uniform Interpretation of International Human Rights Norms“, in: *Netherlands Quarterly of Human Rights*, No. 2, 1995, Vol.13, pp. 105-121.
- Dodd, Tom; Ware, Richard; Weston, Alison, *The European Communities (Amendment) Bill: Implementing the Amsterdam Treaty*, Research Paper No.97/112, International Affairs and Defence Section, House of Commons Library, 5.11.1997.



Donnelly, Jack; Howard, Rhoda E., „Introduction“, in: Jack Donnelly, Rhoda E. Howard (eds.), *International Handbook of Human Rights*, Greenwood Press, New York 1987, pp.1-28.

Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca 1989.

Dorn, James A., „Trade and Human Rights in China“, <http://www.cato.org/dailys/11-15-96.html>.

Dorr, Noel, „An Introduction to Human Rights: Developments since 1945“, in: Liz Heffernan (ed.), *Human Rights. A European Perspective*, Round Hall Press, Dublin 1994, pp. 1-19.

Eland, Ivan, „Economic Sanctions as Tools of Foreign Policy“, in: George A. Lopez, David Cortright (eds.), *Economic Sanctions. Panacea or Peacebuilding in a Post-Cold War World?*, Westview Press, Boulder, 1995, pp. 29-42.

Emmert, Frank, *Europarecht*, Beck, München 1996.

Europe Information Service, European Report, 18.3.98, „EU/CHINA: Brittan defends EU human rights policy“.

European Commission Delegation in China, *EU-China Co-operation, Running Programmes*, 4.10.96, <http://www.ecd.or.cn:/vhost/ecd/col/>.

European Commission Delegation in China, *The EU and China*, <http://www.ecd.or.cn:/vhost/ecd/pamphlet/pam972.html>, 15.344 million ECU.

European Commission Delegation in China, *The European Union and China*, <http://www.ecd.or.cn:/vhost/ecd/pamphlet/eeu2.htm>.

European Commission, *A Strategy to Help Build a Civil Society*, <http://europa.eu.int/en/comm/dg01/pol43.htm>.

European Commission, *Building a Comprehensive Partnership with China*, COM (98) 181 final, [http:// europa.eu.int/en/comm/dg01/chincom.htm](http://europa.eu.int/en/comm/dg01/chincom.htm).

European Commission, DG I, *Reinforcing the partnership of equals between Asia and Europe*, <http://europa.eu.int/en/comm/dg01/ase21.htm>.

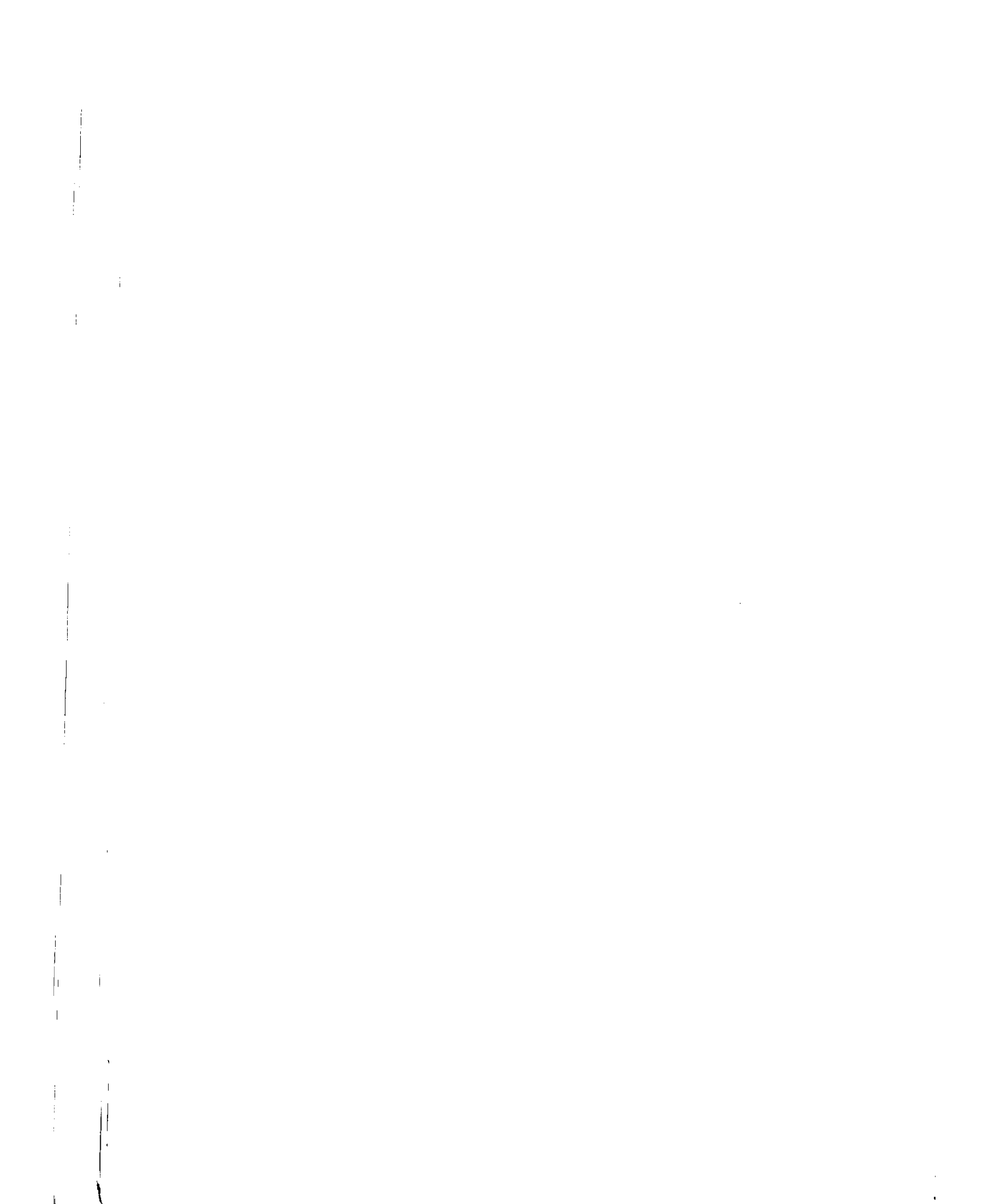
European Commission, *Report on the use of financial resources for the protection of human rights and support for the democratic process*, SEC (92) 1915 final.

European Commission, *Towards a New Asia Strategy*, COM (94) 314 final.

European Commission, *Report on the implementation of measures intended to promote observance of human rights and democratic principles*, COM (95) 191 final.



- European Commission, *A Long Term Policy for China-EU Relations*, COM (95) 279 final.
- European Commission, *The European Union and the External dimension of Human Rights Policy: From Rome to Maastricht and Beyond*, COM (95) 567 final.
- European Commission, *Report From The Commission on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995)*, COM (96) 672 final.
- European Commission, *Proposal for a council regulation concerning the development and the consolidation of democracy and the rule of law and respect for fundamental rights and fundamental freedoms*, submitted by the Commission on 24 July 1997, COM (97) 357 final, SYN 97/0191.
- European Commission, *Report on financial and technical assistance to, and economic co-operation with the developing countries in Asia and Latin America*, COM (98) 40 final.
- European Commission, *Building a Comprehensive Partnership with China*, COM (98) 181 final.
- European Commission, *General Report on the activities of the European Union 1994*, Luxembourg, Office for official publications of the EC 1995.
- European Commission, *General Report on the activities of the European Union 1995*, Luxembourg, Office for official publications of the EC 1996.
- European Commission, *General Report on the activities of the European Union 1996*, Luxembourg, Office for official publications of the EC 1997.
- European Commission, *Repertoire de la législation en vigueur*, 31eme édition, Journal officiel de la Communauté, Luxembourg 1997.
- European Commission, *Background note on China and Human Rights*, February 1998, unpublished paper.
- European Court of Justice, Aff. 26/62 du 5.2.63 Van Gend en Loos; Aff. 6/64 du 15.7.64 Costa Enel; Aff. 29/69, ECR 1969 Stauder; aff. 4/73, ECR 1974 Nold; aff. 44/79, ECR 1979 Hauer; opinion 2/94, ECR 1996, I-1759; case C-268/94 Portugal v. Council, ECR 1996, I-6177.
- European Foreign Ministers, *Statement on human rights*, adopted on 21 July 1986, meeting in the framework of European Political Cooperation and of the Council, Bulletin EC, No.7/8, 1986, Vol.19, pt. 2.4.4., p.100.
- European Parliament, Committee on Foreign Affairs, *Report of the Committee on Foreign Affairs and Security on relations between the European Union and*



the People's Republic of China, doc. A3-0011/94, Rapporteur Miss Maria Adelaide Aglietta, 7.1.94.

European Parliament, *Report on Respect for Human Rights in the European Union*, doc. A4-112/97, 8.4.97.

European Parliament, Committee on Foreign Affairs, Security and Defence Policy, *Report on improving the impact of joint actions*, doc A4-133/97, Rapporteur Enrique B. Crespo.

European Parliament, Committee on development and Cooperation, *Interim Report*, doc. A4-0175/97.

European Parliament, *Resolution on the Commission communication on a long term policy for China-Europe relations* (A4-0198/97), OJ C 200/158ss.

European Policy Centre, „Legal Analysis“, *Making Sense of the Amsterdam Treaty*, European Policy Centre, Brussels 1997.

European Report No. 2226, 24.5.97, p.V-4; No. 2228, 31.5.97, p.V-10; No. 2233, 19.6.97, p.V-3; No.2288, 4.2.98, p.V-4; No. 2294, 25.2.98, p.V-1; No. 2294, 25.2.98, p.V-2; No.2300, 18.3.98, p.V-7; No. 2301, 21.3.98, p.V-3.

European Report, 18.3.98, Lexis-Nexis search, „EU/CHINA: Brittan defends EU human rights policy“.

Fleischhauer, C.-A., „Declaration“, in: R. Bernhard (ed.), *Encyclopedia of Public International Law*, Vol.I, North-Holland, Amsterdam 1992, pp. 971-972.

Fouwels, Martine, „The European Union's Common Foreign and Security Policy and Human Rights“, in: *Netherlands Quarterly of Human Rights*, No.3, 1997, Vol.15, pp. 291-324.

Frankfurter Allgemeine Zeitung, 5.3.98 „FMC kuendigt in China Joint-venture auf“.

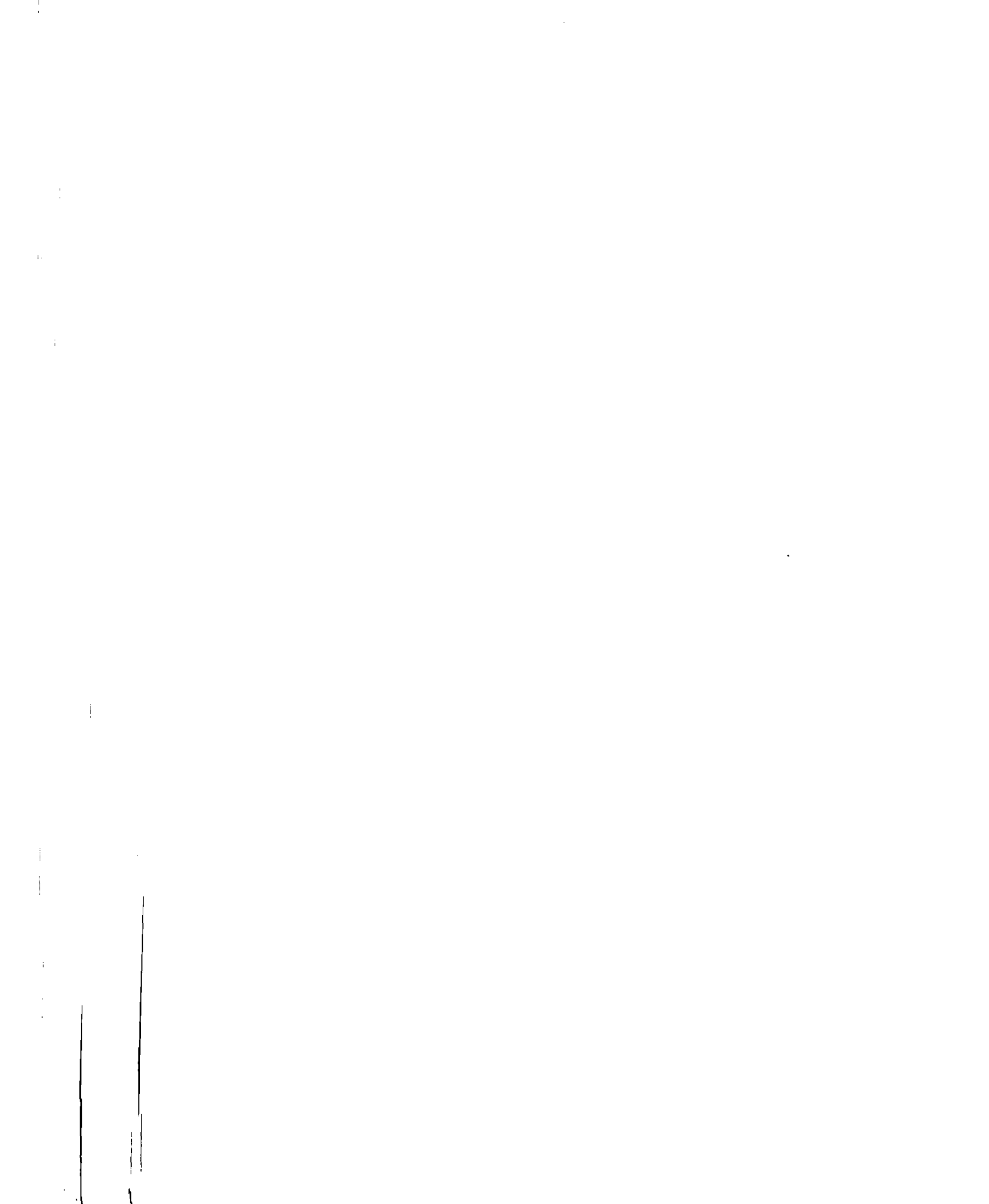
Frid, Rachel, *The Relations between the EC and International Organizations. Legal Theory and Practice*, Kluwer, The Hague et al. 1995.

Funabashi, Yoichi; Oksenberg, Michel; Weiss, Heinrich, *China auf dem Weg zur Grossmacht. Konsequenzen einer interdependenten Welt*. Ein Bericht an die Trilaterale Kommission, Arbeitspapiere zur Internationalen Politik 87, Forschungsinstitut der Deutschen Gesellschaft fuer Auswaertige politik e. v., Europa Union Verlag, Bonn 1994.

Gaja, Giorgio, "The Protection of Human Rights under the Maastricht Treaty“, in: D. Curtin, T. Heukels (eds.) *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Vol.II, Nijhoff, Dordrecht 1994, pp. 549-560.



- Galtung, Johan, On the Effects of International Economic Sanctions: With Examples from the Case of Rhodesia, in: *World Politics*, No.3, April 1967, Vol.19, pp. 378-416.
- Gangjian, Du; Gang, Song, „Relating Human Rights to Chinese Culture. The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence“, in: Michael C. Davis (ed.), *Human Rights and Chinese Values*, Oxford University Press, Hong Kong 1995, pp. 35-56.
- General Secretariat of the Council, *Schedule of Action of the European Union on Human Rights*, 18.11.94, unpublished paper.
- Ghai, Yash, „Human Rights and Governance: The Asia Debate“, in: *Australian Yearbook of International Law*, 1994, Vol.15, pp. 1-34.
- Gilpin, Robert, *The Political Economy of International Relations*, Princeton University Press, Princeton 1987.
- Grabitz, Eberhard (ed.), *Kommentar zur Europaeischen Union*, Loseblattsammlung, C.H. Beck, München.
- Groeben, Hans von der; Thiesing, Jochen; Ehlermann, Claus-Dieter, (eds.), *Kommentar zum EU/EG Vertrag*, Nomos, Baden-Baden 1997.
- Gu, Xuewu, „Militärische Aufholjagd. Die Modernisierung der chinesischen Streitkräfte“, in: *Internationale Politik*, No.6, 1997, Vol.52, pp. 11-16.
- Gucht de, Karel, „The Common Foreign and Security Policy (CFSP): Is there Room for New Perspectives in the Aftermath of Maastricht?“, in: *Studia Diplomatica*, Brüssel, Nr. 2, 1997, Bd. 50, pp. 49-83.
- Guobin, Zhu, „Constitutional Law“, in: Chenguang, Wang, Xianchu, Zhang (ed.), *Introduction to Chinese Law*, Sweet & Maxwell, Hong Kong et al. 1997, pp. 31-74.
- Haacke, Jürgen, „Chinas Mitwirkung an multilateralen Foren der Zusammenarbeit im Pazifik“, in: *Aussenpolitik*, No. 2, 1997, Vol. 48, pp. 166-176.
- Hainian, Liu, „Human Rights Perspectives in Diversified Cultures“, in: Peter R. Baehr, Fried van Hoof, Liu Nanlei, Tao Zhenghua (eds.), *Human Rights: Chinese and Dutch Perspectives*, Nijhoff, The Hague 1996, pp. 17-24.
- Heinz, Wolfgang; Lingnau, Hildegard; Waller, Peter, *Evaluierung von Positivmassnahmen der Europaeischen Kommission zur Foerderung von Menschenrechten und Demokratie (1991-1993)*, Deutsches Insitut fuer Entwicklungspolitik, Berlin Mai 1995.
- Henkin, Louis, „International Law: Politics, Values and Functions“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p. 350ss.



- High level expert group meeting convened by the InterAction Council Noordwijk Forum, chaired by Helmut Schmidt, 20-22 April 1997, Vienna.
- Hill, Christopher, „The Capability-Expectations Gap, or Conceptualizing Europe’s International Role“, in: *Journal of Common Market Studies*, No.3, 1993, Vol.31, pp. 305-328.
- Hoof, Fried van, „Asian Challenges to the Concept of Universality: Afterthoughts on the Vienna Conference on Human Rights“, in: Peter R. Baehr, Fried van Hoof, Liu Nanlei, Tao Zhenghua (eds.), *Human Rights: Chinese and Dutch Perspectives*, Nijhoff, The Hague 1996, pp. 1-16.
- Human Rights Watch/Asia, „Chinese Diplomacy, Western Hypocrisy and the UN Human Rights Commission“, Report, No.3 (C), March 1997, Vol. 9.
- Human Rights Watch/Asia, „China. State Control of Religion“, Vol.9, No.10 (C), October 1997.
- Imbert, Pierre-Henri, „L’apparente simplicité des droits de l’homme. Réflexions sur les différents aspects de l’universalité des droits de l’homme“, in: *Revue Universelle des Droits de L’Homme*, 1989, Vol.1, pp. 19-29.
- Information Office of the State Council of the People’s Republic of China, Human Rights in China, 1991, „White paper“.
- Information Office of the State Council, „The Progress of Human Rights in China“, as an update to the White paper, 27.12.95.
- Institute of Current China Studies, „CCP Sets Its Own Standards of Human Rights“, Inside China Mainland, No.3, March 1995, Vol.17, Taipei, Taiwan R.O.C.
- International Court of Justice, Advisory Opinion on „Reparation for Injuries suffered in the Service of the United Nations“, 1949, ICJ Reports, 174.
- International Court of Justice, Barcelona Traction, Light and Power Company, Limited, Second Phase Judgement, ICJ Reports 1970, p. 3ss.
- International Herald Tribune, 13.7.1995, p.1; 21.7.1995, p. 6; „Liberal Thought Blooms In a New Beijing Spring“, p.1 and 11; 25./26.10.97 „Beijing Maneuvers to Defuse Rights Issue Ahead of Jiang’s U.S. Visit“; 29.10.97 „Clouds Over Jiangs Visit“, „Business Leads Diplomacy in Relations With Beijing“, p.1; 1./2.11.97, editorials; 11.11.97, p.9; 9.4.98, „Jeans Maker to Resume Its China Business“, p.1, 4; 11./12.4.98, „U.S. Pushes Human Rights Before Clinton Visits China“; 22.4.98, „Wang Hopes to Go Home“, p.6; 23.4.98, „U. S. offers to ease sanctions on China“; 23.4.98, „2.000 ‘No-Names’ Languish in China“, p.1, 7; 25./26.4.98, „China Bans the Door-to-Door Seller, the bans threatens hundreds of dollar of investment of multinational firms; 28.4.98, „EU Overture to China and Russia“; 28.4.98, „China: Gradual Economic Reform Presupposes Growth“; 28.4.98, „IMF Is Cautious on China Growth“; 28.4.98, „Increasingly, Chinese Are Telling It to



the Judge“, p.2; 28.4.98, „Shell to Test U.S. On Iran Sanctions“; 29.4.98, „Asia Needs Social Protections“.

ISA Consult, *Final Report. Draft. Evaluation of the Phare and Tacis Democracy Program. 1992-1997*, Brighton, September 1997, unpublished paper.

Jagow, Peter von, „Das Krisenmanagement der EG/EPZ im Jugoslawienkrieg - Eine gemischte Bilanz, in: E. Regelsberger (ed.), *Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union*, Europa Union Verlag, Bonn 1993, pp. 85-93.

Janning, Josef, „Aussen- und Sicherheitspolitik nach Maastricht“, in: Werner Weidenfeld (ed.), *Maastricht in der Analyse. Materialien zur Europaeischen Union. Strategien und Optionen fuer Europa*, Bertelsmann, Guetersloh 1994, pp. 55-69.

Japan Economic Newswire, Lexis-Nexis search, 22.1.97, „EU urged to condemn China at UN human rights forum“; 23.2.98, „EU rules out UN resolution on human rights in China“.

Joerges, Christian, „European Economic Law, the Nation-State and the Maastricht Treaty“, in: Renaud Dehousse (ed.), *Europe After Maastricht. An ever closer Union?*, Law Books in Europe, Muenchen 1994, pp.29-62.

Jopp, Matthias, „Die außen- und sicherheitspolitische Identität Europas mit der Perspektive einer gemeinsamen Verteidigungspolitik“, in: R. Hrbek (ed.), *Die Reform der EU*, Nomos, Baden-Baden 1997, pp. 331-343.

Kaul, Hans-Peter, *Démarche*, in: Rudolf Bernhard (ed.), *Encyclopedia of Public International Law*, Vol.I, North-Holland, Amsterdam 1992, pp.998-999.

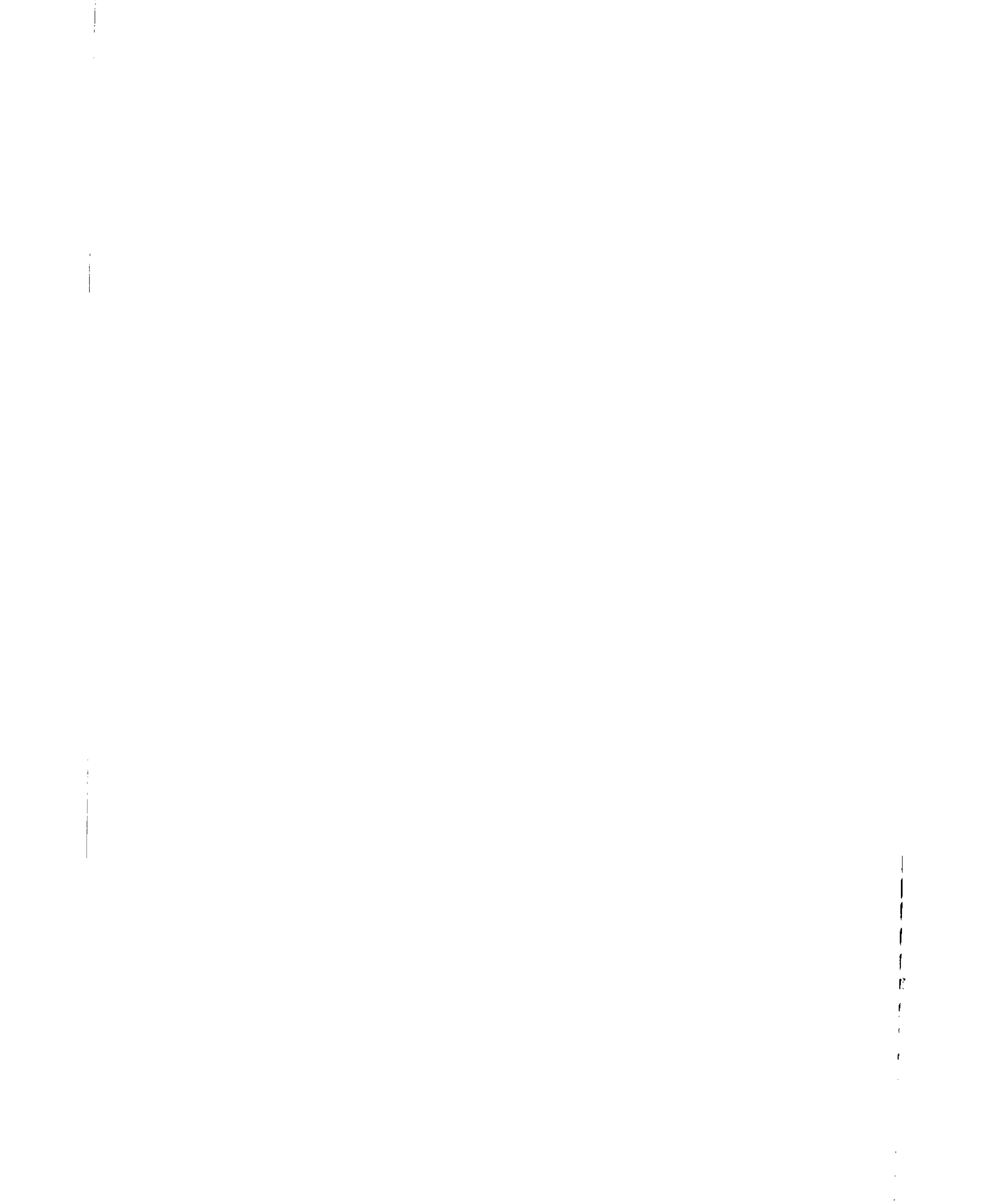
Kent, Ann, *Between Freedom and Subsistence. China and Human Rights*, Oxford University Press, Hongkong 1993.

Kissinger, Henry, „Continuity and Change in American Foreign Policy“, quoted in: Richard B. Lillich, Frank C. Newman (eds.), *International Human Rights: Problems of Law and Policy*, Little, Brown and Company, Boston et al. 1979, pp. 824-871.

Klaauw, Johannes van der, „Human Rights News“, in: *Netherlands Quarterly of Human Rights*, No. 3, 1995, Vol.13; No.1, 1996, Vol. 14; No.2, 1997, Vol. 15; No.4, 1997, Vol.15; No.1, 1998.

Klare, Karl, „Legal Theory and Democratic Reconstruction“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p. 177ss.

Koskenniemi, Martti, „The Politics of International Law“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p. 50ss.



- Koskenniemi, Martti, „International Law Aspects of the Common Foreign and Security Policy“, in: Martti Koskenniemi (ed.), *International Law Aspects of the European Union*, Kluwer 1998, pp. 27-44.
- Kuyper, P.J., „Trade Sanctions, Security and Human Rights“, in: Marc Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension*, Nijhoff, Dordrecht 1993, pp. 388-422.
- Kyodo News Service Japan Economic Newswire, 24.2.96, „U.S. to join EU in criticizing China's human rights“.
- Lange, Knut Werner, „Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union“, in: *Juristische Zeitung*, No.9, 1996, Vol.51, pp. 442-448.
- Lecheler, Helmut, „Der Rechtscharakter der 'Europäischen Union'“, in: Jörn Ipsen, Hans-Werner Rengeling, Jörg M. Mössner, Albrecht Weber, *Verfassungsrecht im Wandel*, Carl Heymanns Verlag, Köln 1995, pp. 383-393.
- Lillich, Richard B.; Newman, Frank C., „The Carter Administration's Human Rights Initiatives“, in: Richard B. Lillich, Frank C. Newman (eds.), *International Human Rights: Problems of Law and Policy*, Little, Brown and Company, Boston et al. 1979, pp. 824-871.
- Lillich, Richard B., *International Human Rights. Problems of Law, Policy and Practice*, Second Edition, Little, Brown and Company, Boston 1991.
- Liu, X.; Song, H., „China and the Multinationals -A winning Combination“, in: *Long Range Planning*, February 1997, Vol.30, pp. 74-83.
- Loh, Christine, „The Vienna Process and the Importance of Universal Standards in Asia“, in: Michael C. Davis (ed.), *Human Rights and Chinese Values*, Oxford University Press, Hong Kong 1995, pp. 145-167.
- Lopez, George A.; Cortright, David, „Economic Sanctions in Contemporary Global Relations“, in: George A. Lopez, David Cortright (eds.), *Economic Sanctions. Panacea or Peacebulging in a Post-Cold War World?*, Westview Press, Boulder, 1995, pp. 3-16.
- Louis, Jean-Victor, „Le Traité d'Amsterdam. Une occasion perdue?“, in: *Revue du Marché Unique Européen*, 2, 1997, pp. 5-18.
- Luoji, Guo, „A Human Rights Critique of the Chinese Legal System“, in: *Harvard Human Rights Journal*, Spring 1996, Vol.9, pp. 1-14.
- M2 PRESSWIRE, Lexis-Nexis search, 17.3.98, „FCO Tony Lloyd to visit Geneva“; 18.3.98, „FCO UN Commission on Human Rights“; 14.4.98, „UN Commission on Human Rights continues debate on promotion of human rights and advisory services“.

1

2

- Macleod, Ian; Henry, I. D.; Hyett, Stephen, *The External Relations of the European Communities*, Clarendon Press, Oxford 1996.
- Marantis, Demetrios J., „Human Rights, Democracy, and Development: The European Community Model“, in: *Harvard Human Rights Journal*, Spring 1994, Vol. 7, pp. 1-32.
- Marie, Jean Bernard, „Instruments Internationales relatifs aux Droits de l'Homme: Classification et état des ratifications au 1er Janvier 1997“, in: *Revue Universelle des Droits de l'Homme*, No.1-4, 1996, Vol.8, pp. 89-105.
- Marin, Manuel, Democracy cannot be imposed from the outside, in: *The Courier*, 128, 1991, pp. 50-51.
- Maritain, Jack, *The Rights of Man*, G. Bles, London 1944.
- Mathijssen, P. S. R. F., *A Guide to European Union Law*, 6th edition, Sweet & Maxwell, London 1995.
- Mauzy, Diane K., „The human rights and „Asian values“ debate in Southeast Asia: trying to clarify the key issues“, in: *The Pacific Review*, No.2, 1997, Vol.10, pp. 210-236.
- Mengozzi, Paolo, *European Community Law. From Common Market to European Union*, Graham & Trotham, London 1992.
- Menotti, Roberto, „European-Chinese Relations in the Nineties“, in: *The International Spectator*, No.4, October-December 1995, Vol.XXX, pp.71-85.
- Mills, Kurt, „Reconstructing Sovereignty: A Human Rights Perspective“, in: *Netherlands Quarterly of Human Rights*, No.3, 1997, Vol.15, pp. 267-290.
- Min, Wang, „Statement“, Minister of the Chinese Delegation at the Third Committee of the 51st Session of the General Assembly on Item 110(a), 14.11.96, press release.
- Monar, Joerg, „Das duale System von EG und EPZ/GASP im Test - vorprogrammierte Konfliktszenarien“, in: E. Regelsberger (ed.), *Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union*, Europa Union Verlag, Bonn 1993, pp. 75-84.
- Mueller-Graff, Peter-Christian, „EPZ/GASP im System der Europaeischen Union - Kohärenzgebot aus rechtlicher Sicht“, in: E. Regelsberger (ed.), *Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union*, Europa Union Verlag, Bonn 1993, pp. 53-68.
- Muzaffar, Chandra, „EU-policy: a perspective from Asia“, in: European Parliament, *Summary record of presentations made at the public hearing on the Human Rights Clause*, Committee on Foreign Affairs, Security and Defence Policy, Sub-committee on Human Rights, Committee on External Economic Relations, 1995, pp. 66-75.

- Napoli, Daniela, „The European Union's Foreign Policy and Human Rights“, in: Nannette A. Neuwahl, Allan Rosas (eds.), *The European Union and Human Rights*, Kluwer, The Hague 1995, pp. 297-312.
- Ness, Peter van, *Analysing the impact of international sanctions on China*, Working Paper 1989/4, Canberra, department of International Relations, The Australian National University.
- Ng, Margaret, „Are Rights Culture-bound?“, in: Michael C. Davis (ed.), *Human Rights and Chinese Values*, Oxford University Press, Hong Kong 1995, pp. 59-71.
- Nuttall, Simon J., „The Foreign and Security Policy Provisions of the Maastricht Treaty: Their Potential for the Future“, in: J. Monar (ed.), *The Maastricht Treaty on European Union*, European Interuniversity Press, Brussels 1993, pp. 133-138.
- Pechstein, Matthias, „Das Kohärenzgebot als entscheidende Integrationsdimension der Europäischen Union“, in: *Europarecht*, No.3, 1995, Vol.29, pp. 246-258.
- Pechstein, Matthias, „Rechtssubjektivität für die Europäische Union?“, in: *Europarecht*, No.2, 1996, Vol. 31, pp. 137-144.
- Petersen, Nikolaj, „The European Union and Foreign and Security Policy“, in: Ole Noergaard, Thomas Pedersen, Nikolaj Petersen (ed.), *The European Community in World Politics*, Pinter, London 1993, pp. 9-30.
- Petite, Michel, „The Treaty of Amsterdam: Ambition and Realism“, unpublished paper, translation of the text published in *Revue du Marché Unique Européen*, No. 3, 1997, pp. 17-52.
- Pollis, Adamantia, „Towards a New Universalism; Reconstruction and Dialogue“, in: *Netherlands Quarterly of Human Rights*, No.1, 1989, Vol.16, pp. 5-23.
- Posner, Michael; Whittome, Candy, „The Status of Human Rights NGOs“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p. 467ss.
- Regelsberger, Elfriede, „Gemeinsame Außen- und Sicherheitspolitik“, in: Werner Weidenfeld, Wolfgang Wessels (eds.), *Jahrbuch der Europäischen Integration*, 1994/5, Institut für Europäische Politik, Europa Union, Bonn 1995, pp. 219-228.
- Regelsberger, Elfriede, „EPZ und GASP - attraktiver Verbund mit Schlupflochern“, in: E. Regelsberger (ed.), *Die Gemeinsame Aussen- und Sicherheitspolitik der Europäischen Union*, Europa Union Verlag, Bonn 1993, pp. 179-192.
- Regelsberger, Elfriede; Jopp, Mathias, „Und sie bewegt sich doch! Die Gemeinsame Aussen- und Sicherheitspolitik nach den Bestimmungen des Amsterdamer Vertrages“, in: *Integration*, No.4, 1997, Vol.20, pp. 255-263.

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- Rendong, L., *Theorie und Praxis der Menschenrechte. Eine Betrachtung aus chinesischer Sicht*, Konrad-Adenauer-Stiftung, Arbeitspapiere, Menschenrechte in Ostasien, Juni 1993, Sankt Augustin, pp. 35-50.
- Renteln, Alison Dundes, *International Human Rights: Universalism versus Relativism*, Sage, Newbury Park 1990.
- Report of the Mission des Juristes Francais, „Justice répressive et droits de l'homme en RPC“, October 1991.
- Ress, Georg, „Democratic decision making in the European Union and the role of the European Parliament“, in: D. Curtin, T. Heukels (eds.), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Vol.II, Nijhoff, Dordrecht 1994, pp. 153-176.
- Ress, Georg, Editorial, in: *Juristische Schulung (JuS)*, No.12, 1992, Vol.32.
- Reuters-Financial Service, Lexis-Nexis search, 9.3.96, BC cycle, „EU turns up heat on Beijing over human rights“
- Robinson, Geoffrey, „Human rights in Southeast Asia: rhetoric and reality“, in: David Wurful and Bruce Burton (eds.), *Southeast Asia in the „New World Order“: The Political Economy of a Dynamic Region*, St. Martins Press, New York 1996, pp.74-99.
- Robison, Richard, „The politics of Asian values“, in: *The Pacific Review*, No.3, 1996, Vol. 9, pp.309-327.
- Rosas, Alan, Brandtner, Barbara, „Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice“, *EJIL*, to be published in 1998, pp.1-23.
- Schachter, Oscar, „International Law in Theory and Practice: General Course in Public International Law“, in: 178 Recueil des cours 21, 1982-V, pp. 333-342.
- Schoutheete de Tervarent, Philippe de, L'introduction d'une Politique Extérieure et de Sécurité commune. Motivations et Résultats, in: J. Monar (ed.), *The Maastricht Treaty on European Union*, European Interuniversity Press, Brussels 1993, pp. 129-132.
- Schroeder, Jan Oliver, *Community Embargoes and Liability for Embargo Damages*, Master of Law thesis, European University Institute, Florence September 1996.
- Sen, Amartya, „Human Rights and Asian Values“, in: *The New Republic*, July 1997, pp. 33-40.
- Senghaas, Dieter, „Wie geht es mit China weiter?“, *Berichte des Arbeitsbereiches Chinaforschung im Institut für Weltwirtschaft und internationales Management*, Nr. 7, Juli 1996, Universität Bremen.



- Seymour, James D., „China“, in: Jack Donnelly, Rhoda E. Howard (eds.), *International Handbook of Human Rights*, Greenwood Press, New York 1987, pp. 75-98.
- Sidorsky, David, „Contemporary Reinterpretations of the Concept of Human Rights“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p. 170ss.
- Simma, Bruno (ed.), *The Charter of the United Nations, A Commentary*, Oxford University Press, Oxford 1994.
- Simma, Bruno; Alston, Philip, „The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles“, in: *Australian Yearbook of International Law*, 1992, Vol.12, pp. 82-108.
- Simmonds, Erskine, Dossier Human rights, democracy and development, in: *The Courier*, 128, 1991, pp. 52-55.
- Sir Leon Brittan in a speech to the Capital Hill Club in Washington, 19.3.96, „Europe, the U.S. and Asia: Facing up to global challenges“, <http://europe.eu.int/en/comm/dg01/sp190396.htm>.
- Sir Leon Brittan on 21.11.97 at the Europe Insitute in Washington, „Europe and America: staying together“, <http://europe.eu.int/en/comm/dg01/spslb5.htm>.
- Sir Leon Brittan, „The EU and China: building a partnership for the future“, <http://europa.eu.int/en/comm/dg01/0216.peki.htm>.
- Slaughter Burley, Anne-Marie, „International Law and International Relations Theory: A Dual Agenda“, in: *American Journal of International Law*, No.2, 1993, Vol.87, pp. 205-239.
- Smith, Hazel, *European Union Foreign Policy and Central America*, Macmillan Press, London, 1995.
- Soetendorp, Ben, „The Evolution of the EC/EU as a Single Foreign Policy Actor“, in: Walter Carlsnaes, Steve Smith (eds.), *European Foreign Policy. The EC and Changing Perspectives in Europe*, Sage, London 1994, pp. 103-119.
- South China Morning Post, Lexis-Nexis search, 27.1.97, „Beijing set to escape human rights action; EU divided and US reluctant to take initiative“.
- Spranger, Minister fuer Entwicklungspolitik, „Entwicklungspolitik im Zeichen der Zeitenwende“, *Frankfurter Allgemeinen Zeitung* vom 19.4.97, <http://www.bundesregierung.de/bmz/aktuell/zeitenwende.html>.
- Stadler, Klaus-Dieter, „Die EG/EPZ in der UN-Generalversammlung - Meinungsfuehrerschaft im Werden“, in: Elfriede Regelsberger (ed.), *Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union*, Europa Union Verlag, Bonn 1993, pp. 107-126.



Statistisches Bundesamt, „Mitteilung fuer die Presse“, <http://www.statistik-bund.de/presse/deutsch/pm/p6260220.htm>.

Steiner, Henry J.; Alston, Philip, *International Human Rights in Context*, Clarendon Press, Oxford 1996.

Stokke, Olav, „Foreign Aid: What now?“, in: O. Stokke (ed.), *Foreign Aid toward the year 2000*, Frank Cass, London 1996, pp.16-130.

Strange, Susan, *State and Markets. An Introduction to International Political Economy*, Pinters, London 1988.

Sueddeutsche Zeitung, 23.2.96, „EU aendert China-Politik“, p.6; 23.2.96, „EU aendert China-Politik“, p.6; 29.10.97 „Verbissene Demonstration der Partnerschaft“; 29.10.97, „Ritterschlag fuer einen Bittsteller“; 31.10.97 „Die zweite chinesische Offensive“; 19./20.4.97 „China sagt Europa Besuch Zhus ab“.

Sunoo, Harold Hakwon, *China of Confucius: A Critical Interpretation*, Heritage Research House, Inc., Virginia Beach 1985.

The Economist, „A suitable target for foreign policy“ 12.4.1997, p.15-25; „How America sees China. Friend or Foe?“, 25.10.97, p.24; 25.10.97, „Greeting the Dragon“, p.15; 3.1.1998, „The Next Balance of Power. A geopolitical detective story“, pp.17-19.

The Independent, Lexis-Nexis search, 13.3.98, „China makes rights pledge“; 16.3.98, „Peking escapes censure from the UN“.

The Irish Times, Lexis-Nexis search, 21.2.98, „EU likely to stop censuring China over human rights“; 24.2.98, „EU ministers agree not to put motion on human rights“.

The New York Times, Lexis-Nexis search, 13.3.98, „On Eve of Geneva Rights Talks, China Agrees to Sign UN Pact“.

The Reuter European Community Report, Lexis-Nexis search, 10.3.96, BC cycle, „EU puts pressure on China over human rights“; „China dismisses EU, U.S. human rights criticism“; 29.3.96, BC cycle, „EU to condemn China on human rights“.

The Straits Times (Singapore), Lexis-Nexis search, 25.2.98, „China- EU accord on human-rights issue“.

Tomasevski, Katarina, *Development Aid and Human Rights Revisited*, Pinter, London 1993.

Tomasevski, Katarina, *Between Sanctions and Elections*, Pinter, London 1997.

Vienna Declaration and Program of Action, UN Doc. A/49/668, 25.6.1993; UN Doc. A/CONF.157/23, 12.7.1993.

- Wallace, Helen, „Politics and Policy in the EU: The Challenge of Governance“, in: Wallace, Helen; Wallace, William (eds.), *Policy-Making in the European Union*, Oxford University Press, Oxford 1996, pp. 3-36.
- Waltz, Kenneth, *Theory of International Politics*, McGraw Hill, New York 1979.
- Wan, Ming, „Human rights and Sino-US relations: policies and changing realities“, in: *The Pacific Review*, No.2, 1997, Vol.10, pp. 237-255.
- Weber, Max, *The Religion of China*, Hans H. Gerth (ed. and translator), The Free Press, London 1964.
- Weggel, Oskar, „Asien im Jahre 2050. Versuch einer virtuellen Umrissbestimmung“, in: *China Aktuell*, Januar 1989, Vol. XXVII, pp. 42-68.
- Weiss, Heinrich, „Zwischen Marktwirtschaft und Kommunismus. Moeglichkeiten und Grenzen chinesischer Reform“, in: *Internationale Politik*, No.6, 1997, Vol.52, pp. 48-52.
- Wessels, Wolfgang, „Von der EPZ zur GASP - Therorienpluralismus mit begrenzter Aussagekraft“, in: E. Regelsberger (ed.), *Die Gemeinsame Aussen- und Sicherheitspolitik der Europaeischen Union*, Europa Union Verlag, Bonn 1993, pp. 9-29.
- Weston, Burns, „Human Rights“, cited in: H. J. Steiner, P. Alston (eds.), *International Human Rights in Context*, Clarendon Press, Oxford 1996, p.167ss.
- White, Brian, „Analysing Foreign Policy: Problems and Approaches“, in: Michael Clarke and Brian White (eds.), *Understanding Foreign Policy: The Foreign Policy Systems Approach*, Edward Elgar, Aldershot 1989.
- Willaert, P.; Marquéz-Ruiz, C., „Vers une politique étrangère et de sécurité commune: état des lieux“, in: A. Mattera (ed.), *La Conférence intergouvernementale sur l'Union européenne: répondre aux défis du XXIeme siècle*, Clément Juglar, Paris 1996, pp. 253-314.
- Xinhua News Agency, Lexis-Nexis search, 23.2.98, „eu agrees on human rights move over china“.
- Yang, C.K., „Introduction“, in: Hans H. Gerth (ed. and translator), *Max Weber, The Religion of China*, The Free Press, London 1964, pp. xiii-xLiii.
- Yanlong, Han, „Legal Protection of Human Rights in China“, in: Peter R. Baehr, Fried van Hoof, Liu Nanlei, Tao Zhenghua (eds.), *Human Rights: Chinese and Dutch Perspectives*, Nijhoff, The Hague 1996, pp. 91-102.
- Yong, Xia, „Human Rights and Chinese Tradition“, in: Peter R. Baehr, Fried van Hoof, Liu Nanlei, Tao Zhenghua (eds.), *Human Rights: Chinese and Dutch Perspectives*, Nijhoff, The Hague 1996, pp. 77-90.

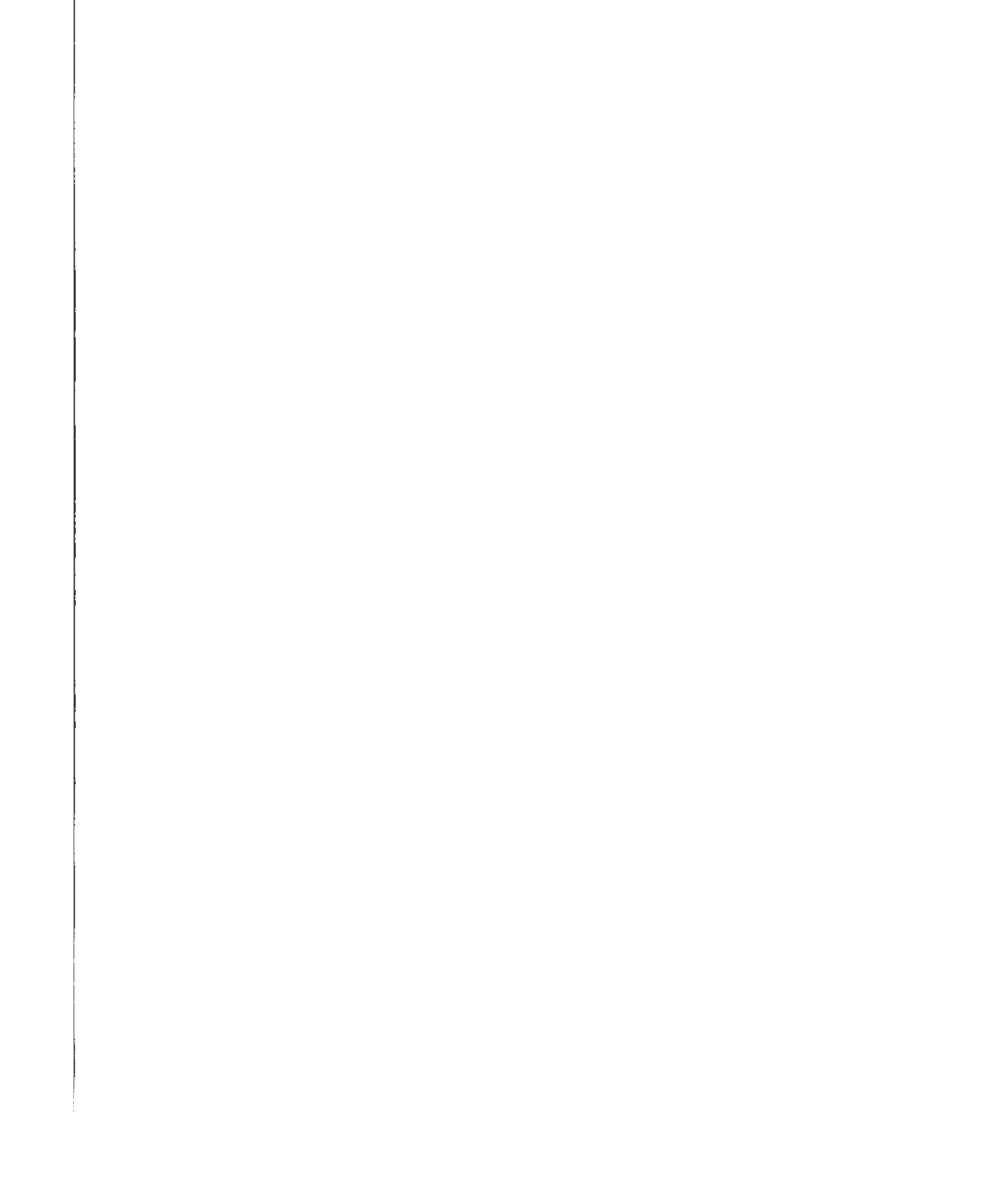
1

Yuanxiang, Hu, *Legal and Policy Issues of the Trade and Economic Relations between China and the EEC. A Comparative Study*, Kluwer, Deventer et al. 1991.

Yun, Zheng, „L'approche Chinoise des Droits de L'Homme“ , in: A. Lapeyre, F. de Tinguy, K. Vasak (eds.), *Les Dimensions Universelles des Droits de L'Homme*, Bruylant, Bruxelles 1990, pp. 265-274.

Zwamborn, M., „Human rights Promotion And Protection Through The External Relations Of The European Community And The Twelve“, in: *Netherlands Quarterly of Human Rights*, No.1, 1989, Vol.9, pp. 11-27.





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