



European University Institute
Department of Law

**The Constituent and Instrumental Role of Human Rights in
Development Policy. A case study of European Union (EU) relations
with the group of African, Caribbean and Pacific (ACP) states**

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Department of Law

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LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific
<i>AJIL</i>	<i>American Journal of International Law</i>
AU	African Union
AUSAID	Australian Government Overseas Programme
BMZ	German Federal Ministry for Economic Cooperation and Development
CAP	Common Agricultural Policy
CARDS	EU Assistance to the Western Balkans (Albania, Bosnia and Herzegovina, Croatia, Serbia, Montenegro, former Yugoslav Republic of Macedonia)
CARDS CBC	CARDS Cross Border Cooperation
CBO	Community-Based Organisation
CDF	Comprehensive Development Framework
CGD	Centre for Governance and Development (Kenya)
CIDA	Canadian International Development Agency
CIS	Commonwealth of Independent States
CLARION	Centre for Law and Research International (Kenya)
<i>CMLR</i>	<i>Common Market Law Review</i>
CSO	Civil Society Organisation
CSP	Country Strategy Paper
CSS	Country Support Strategy
DAC	Development Assistance Committee (OECD)
DANIDA	Danish International Development Agency
DCECI	Development Cooperation and Economic Cooperation Instrument
DCI	Development Cooperation Ireland
DFID	Department for International Development (UK)

DG	Directorate General
DP	Democratic Party
DPS	Development Policy Statement
DRC	Democratic Republic of the Congo
EAC	East African Community
EC	European Community
EC Bull.	EC Bulletin
ECHR	European Convention on Human Rights
EC Treaty	European Community Treaty
ECOSOC	Economic and Social Committee
EIDHR	European Initiative for Democratisation and Human Rights
ECR	European Court Reports
<i>EFAR</i>	European Foreign Affairs Review
<i>EJDR</i>	<i>European Journal of Development Research</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>ELJ</i>	<i>European Law Journal</i>
ENPI	European Neighbourhood and Partnership Instrument
EP	European Parliament
EPA	European Partnership Agreement
EPZ	Export Processing Zones
ERBD	European Bank for Reconstruction and Development
ERSWEC	Economic Recovery Strategy for Wealth and Employment Creation
EU	European Union
FMA	Fund Management Agent
FRA	Fundamental Rights Agency
GAERC	General Affairs and External Relations Council
GATT	General Agreement on Tariffs and Trade
GJLOS	Governance, Justice, Law and Order Sector
GNI	Gross National Income

GNP	Gross National Product
GSP	Generalised System of Preferences
GTZ	German Technical Cooperation
<i>Harvard Hum. Rts. Ybk.</i>	<i>Harvard Human Rights Yearbook</i>
HIPC	Highly Indebted Poor Countries initiative
HL	House of Lords
<i>HRQ</i>	<i>Human Rights Quarterly</i>
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
IFIs	International Financial Institutions
<i>ILM</i>	<i>International Legal Materials</i>
ILO	International Labour Organisation
IMF	International Monetary Fund
INGO	International Non-Governmental Organisation
IPA	Pre-Accession Instrument
IQSG	Inter-service Quality Support Group
ISPA	Instrument for Structural Policies for Pre-Accession
<i>JCMS</i>	<i>Journal of Common Market Studies</i>
JHA	Justice and Home Affairs
JICA	Japan International Cooperation Agency
KANU	Kenya African National Union
LDCs	Least Developed Countries
LDP	Liberal Democratic Party
LFA	Logical Framework Approach
LFM	Logical Framework Matrix
LSCR	Legal Sector Reform Donor Coordinating Committee

MDGs	Millennium Development Goals
MEDA	Euro-Mediterranean Partnership
MoJCA	Ministry of Justice and Constitutional Affairs (Kenya)
NAO	National Authorising Officer
NAK	National Alliance Party of Kenya
NARC	National Rainbow Coalition (Kenya)
NDP	National Democratic Party (Kenya)
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NILR	<i>Netherlands International Law Review</i>
NIP	National Indicative Plan
NIS	Newly Independent States
NORAD	Norwegian Agency for International Development
<i>NQHR</i>	<i>Netherlands Quarterly Human Rights</i>
NZAID	New Zealand International Aid and Development Agency
OCTs	Overseas Territories and Countries
ODA	Official Development Assistance
ODI	Overseas Development Institute
OECD	Organisation for Economic Cooperation and Development
OHCHR	Office of the High Commissioner for Human Rights
OJ	Official Journal of the European Communities
OSCE-ODIHR	Organisation for Security and Cooperation in Europe - Office for Democratic Institutions and Human Rights
PCM	Project Cycle Management
PHARE	EC Assistance to Accession Countries (Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia and Romania)
PHARE CBC	PHARE Cross Border Cooperation
PRSP	Poverty Reduction Strategy Paper
PSC	Political and Security Committee

RIP	Regional Indicative Programme
RSP	Regional Strategy Papers
SAP	Structural Adjustment Policy
SCR	Common Service for External Relations
SDC	Swiss Agency for Development and Cooperation
SIA	Sustainability Impact Assessments
SIDA	Swedish Agency for International Development
STPP	Short Term Priorities Programme (Kenya GJLOS)
SWaps	Sector-Wide Approaches
TACIS	EU Technical Assistance to Eastern Europe and Asia
TEU	Treaty on European Union
TI	Transparency International
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNODC	UN Office on Drugs and Crime
UNTS	United Nations Treaty Series
US	United States
USAID	US Agency for International Development
USSR	Union of Soviet Socialist Republics
<i>Vand. J. Transnat'l L.</i>	<i>Vanderbilt Journal of Transnational Law</i>
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WTR	World Trade Review
YBEL	Yearbook of European Law

INTRODUCTION: THE CONSTITUENT AND INSTRUMENTAL ROLE OF HUMAN RIGHTS IN DEVELOPMENT. A CASE STUDY OF EUROPEAN UNION (EU) RELATIONS WITH THE GROUP OF AFRICAN, CARIBBEAN AND PACIFIC (ACP) STATES

1. Introduction

This thesis explores the impact of international human rights law on the changing trends in international development policy and practice. The subject matter is analysed through a case study of European Union development cooperation policy and its relations with the group of African, Caribbean and Pacific (ACP) states.¹ Whilst there is a burgeoning literature on this subject, known as the ‘nexus between human rights and development’,² the discovery of the convergence or union between human rights and development may have come of some surprise to non-jurists and to those within in the field of development. According to professionals engaged in this domain, development is usually defined and identified with economic growth, trade, capital flows and the transfer of technology.³ As Johan Galtung argues, both concepts (‘human rights’ and ‘development’) have evolved in distinct historical contexts, therefore, any connection or compatibility has more to do with Western history and culture than anything else.⁴ Furthermore, as Sano states, whilst both human rights and development were institutionalised in the global system in the post-World War II climate, both have different roots and have emerged in different contexts.⁵ In light of these claims, an obvious point of departure should consider what is meant by the terms ‘development’ and ‘human rights’ and briefly describe the interlinkages between these previously distinct domains. To this end, the idea of a

¹ The ACP group is an international organisation by virtue of the Georgetown Agreement on the Organisation of the African, Caribbean and Pacific Group of States, signed on 6th June 1975. This group has negotiated association agreements with the EU since 1975 (then EEC)). The EU-ACP Partnership Agreement (Cotonou Agreement) was signed by seventy-seven ACP States in 2000. [Cotonou Agreement, ACP-EC Partnership Agreement, signed on 23rd June 2000 in Cotonou, Benin, [2000] OJ L 317/3.] In May 2003, East Timor signed the Cotonou Agreement. Cuba joined the ACP group in 2000, however, it has not acceded to the Cotonou Agreement and it is the only ACP country that has not signed this Agreement. Babarinde, O., ‘The Changing Environment of ACP-EU Relations,’ p. 17 from Babarinde, O. and Faber, G., (eds.), *The European Union and the Developing Countries. The Cotonou Agreement*, (Leiden, 2005).

² Alston, P. and Robinson, M., *Human Rights and Development: Towards Mutual Reinforcement*, (Oxford, 2005); Uvin, P., *Human Rights and Development*, (Bloomfield, 2004); Tomaševski, K., *Development Aid and Human Rights*, (London, 1989); Tomaševski, K., *Development Aid and Human Rights Revisited*, (London, 1993).

³ Schacter, O., *International Law in Theory and Practice*, (Dordrecht, 1991), p. 355.

⁴ Galtung, J., *Human Rights in Another Key*, (Cambridge, 1994), p. 108.

⁵ Sano, H.-O., ‘Development and Human Rights: The Necessary But Partial Integration of Human Rights and Development,’ 22 *HRQ* 3 (2000), p. 738.

gradual convergence of human rights and development will be introduced⁶ and this will be followed by a discussion of where EU development cooperation policy fits into this debate. In the remaining sections of the introductory chapter, the aims of this thesis and research questions will be outlined. A description of the methodology used, literature review and an overview of the chapters will also be presented.

1.1. Development

Development is a complex process, for which there is no easy definition. It may refer to an individual, societal, economic and sometimes a political process. In reality, development is a contemporary set of values, rather than a clearly defined operation.⁷ For the purposes of this thesis, the term ‘development’ refers to official development assistance (ODA)⁸ and by extension, to the policy and practice of OECD donors.⁹ The background to the global structure for development can be traced to a variety of events, which will be briefly described. Firstly, the emergence of official development assistance is linked to the history of the activities of the colonial powers and their overseas territories.¹⁰ One of the earliest examples is the Colonial Development Welfare Act, which was passed by the UK government in 1945.¹¹ Secondly, the institutional structures for development at the international level emerged from the nascent global structures as the Second World War drew to a close. At a meeting convened by forty-four Allied Nations in 1944, the UN Monetary and Financial Conference took place at Bretton Woods, New Hampshire, USA. This led to the establishment of the International Bank for Reconstruction and Development (IBRD), which later became one of the constituent parts of the World Bank and the International Monetary Fund.¹² The UN Charter of 1945 pledged “to employ international machinery for the promotion of economic and social

⁶ The convergence between human rights and development is explored in more detail in chapter one of this thesis.

⁷ Henkin, L., *The Age of Rights*, (New York, 1990), p. 191.

⁸ Fuhrer, H., *The Story of Official Development Assistance*, (Paris, 1996), p. 4.

⁹ In this thesis, the term ‘donors’ refers to the members of the Development Assistance Committee (DAC) of the OECD that engage in official development assistance (ODA). These members include the fifteen Member States of the European Union, the European Commission, Australia, New Zealand, Switzerland, Norway, USA, Canada and Japan. For a list of the countries which receive ODA, see DAC List of Aid Recipients, 1st January 2003. Source: <http://www.oecd.org/dataoecd/35/9/2488552.pdf>

¹⁰ Fuhrer, *op. cit.*, (1996), p. 4.

¹¹ Previous Acts were passed in 1929 and 1940. Quoted in Fuhrer, *op. cit.*, (1996), p. 4.

¹² The World Bank and IMF began operating in 1946.

advancement of all peoples.” This commitment was given practical effect through the institutions and programmes that were created under the auspices of the United Nations, such as the Food and Agriculture Organisation (FAO) in 1945, UNICEF and UNESCO in the following year¹³ and the establishment of the UN Expanded Programme for Technical Assistance in 1949.¹⁴ The first use of the term ‘development’ or indeed its corollary, ‘underdevelopment’, is attributed to President Truman of the US in his inaugural speech in 1949. In Point Four of this speech, President Truman called for attention to be given to underdeveloped countries, inspired by the belief that “we should make available to peace-loving peoples the benefits of our store of technical knowledge in order to help them realize their aspirations for a better life.”¹⁵ This became known as the Point Four Programme and was followed by the adoption of the Act for International Development by the US Congress in 1950. Much of the enthusiasm for development assistance was derived from the success of the Marshall Plan, which had assisted in the reconstruction and economic recovery in Europe following World War Two.¹⁶ A further rationale for development assistance for the US was the struggle against Communism and the provision of economic support for the countries on the periphery of the Communist bloc was viewed as a means of achieving this aim. The practice of development assistance was institutionalised through the creation of the OECD Development Assistance Committee (DAC) in 1961, which grew from a forum for consultation among aid donors known as the Development Assistance Group.¹⁷ In 1969, the DAC defined Official Development Aid (ODA) as certain types of concessional financial resources that contain a grant element.¹⁸

1.2. Human Rights

The concept of human rights is deeply contested. For the purposes of this thesis, the role of human rights in development cooperation necessarily raises questions relating to the

¹³ In the same year, the International Labour Organisation (ILO) (created in 1919) became a special agency associated with the UN.

¹⁴ This was expanded in 1959 through the creation of Special Fund for technical assistance.

¹⁵ See Point Four of the Inaugural Address of President Harry S. Truman on 20th January 1949.

¹⁶ This was launched by the US Secretary of State, George C. Marshall, in an address at Harvard University on 5th June 1947.

¹⁷ Fuhrer, *op. cit.*, (1996), p. 8.

¹⁸ See <http://www.oecd.org/dac>

universal application of human rights and whether they remain vulnerable to charges of cultural imperialism. Within the long-standing debate, traditionally known as cultural relativism versus universalism, human rights have been rejected by some commentators, and declared irrelevant or meaningless in most developing countries that do not have a cultural heritage of individualism.¹⁹ Whilst proponents of ‘universalism’ counter these claims by arguing that antecedents of human rights can be found in most cultures,²⁰ this thesis does not seek to argue that human rights are absolute, timeless, universal or unchanging values. In contrast, these ideological conflicts can be reconciled by viewing the articulation of human rights law as the result of a historical process.²¹ Therefore, rather than assessing the conceptual foundations of human rights, the term human rights can be interpreted as those which can be measured in conformity with international law.²² From this perspective, this thesis simply acknowledges the post-1945 triumph of human rights as the language of legitimacy in international affairs and seeks to establish the extent to which human rights have become entwined in development discourse and practice. This perspective – of human rights as the contemporary language of legitimacy – draws from the views of Donnelly, who states that: “...the historical contingency and particularity of human rights is compatible with the conception of human rights as universal rights...” and furthermore, whilst acknowledging the “special connection between human rights and the rise and consolidation of “liberalism” in the modern West...” he argues that this particularity does “not preclude their near-universal applicability in contemporary international society.”²³

Human rights can therefore be recognised as a historical product, but also as a concept of universal validity.²⁴ They have been incorporated in regional instruments, including: the European Convention on Human Rights, which was adopted by the Council of Europe in 1950; the European Social Charter 1961 which supplements the European Convention;

¹⁹ Khrushalami, Y., ‘Human Rights in Asia and Africa,’ p. 331, from Snyder and Sathirathai, *op. cit.*, (1987); See also Pollis, A. and Schwab, P., ‘Human Rights: A Western Construct With Limited Applicability,’ from Pollis, A. and Schwab, P., (eds.), *Human Rights: Cultural and Ideological Perspectives*, (New York, 1980).

²⁰ See An-Na’im, A.A., and Deng, F.M., (eds.), *Human Rights in Africa. Cross-cultural Perspectives*, (Washington DC, 1990).

²¹ Alves, J. A. Lindgren, ‘The Declaration of Human Rights in Postmodernity,’ 22 *HRQ* 2 (2000).

²² See Tomuschat, C., *Between Idealism and Realism*, (Oxford, 2003); Shute, S., and Hurley, S., (eds.), *On Human Rights: Oxford Amnesty Lectures*, (New York, 1993).

²³ Donnelly, J., *Universal Human Rights in Theory and Practice*, (2nd ed.), (Ithaca and London, 2003), p. 2.

²⁴ Donnelly, J., ‘Human Right and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights,’ p. 355, from Snyder, F.E. and Sathirathai, S., (eds.), *Third World Attitudes Toward International Law: An Introduction*, (Dordrecht, 1987).

the American Convention on Human Rights, adopted by the Organisation of American States in 1969; and the African Charter on Human and Peoples' Rights which was adopted by the Organisation of African Unity in 1981. These values received almost universal approval at the Vienna Conference on Human Rights in 1993.²⁵

All human rights are universal, indivisible and interdependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. 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 all states, regardless of their political, economic and cultural systems, to promote and to protect all human rights and fundamental freedoms.²⁶

The essential universality of human rights appears to have political support from developing countries. In the final Declaration at the Vienna World Conference, the African, Latin American and Asian and Pacific States indicated support for the principle of universality.²⁷ This support can be found in their respective regional preparatory meetings. In the Tunis Declaration (November 1992), African States stated that the “the universal nature of human rights is beyond question; their protection and promotion are the duty of all states.” Similarly, the San José Declaration (January 1993) of the Latin American and Caribbean Countries included references to the ‘universality’ of human rights as one of the ‘guiding principles’ of international human rights. However, the Declaration of the Asian and Pacific States was more cautious and although the universal nature of human rights was recognised in the Bangkok Declaration, it was stated that this should be considered in the context of “various historical, cultural and religious backgrounds.”²⁸

²⁵ Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights, 48th Sess., 22nd plen. mtg., part 1, UN Doc. A/CONF.157/24 (1993), reprinted in *ILM* (1993) 1661. These declarations are quoted in UN, *World Conference on Human Rights, Vienna Austria, June 1993: Information Pack*, (New York, 1993).

²⁶ Final Declaration of the UN World Conference on Human Rights, Vienna, June 1993, Part II, para 3.

²⁷ *Ibid*

²⁸ *Ibid*.

Therefore, whilst recognising that the concept of ‘human rights’ is deeply contested,²⁹ this thesis refers specifically to international human rights law, which was first codified in the Universal Declaration of Human Rights in 1948.³⁰ During the drafting negotiations of this Declaration, the classical Western liberal view of two categories of rights triumphed, despite the ‘indivisibility’ and ‘universality’ of human rights.³¹ ‘First generation’ rights comprise of civil and political rights that are now at the core of most human rights treaty regimes. ‘Second generation’ rights refer to matters of social and economic significance such as the right to work, the right to an adequate standard of living and the right to education. First and second generation rights are both enshrined in international law through the International Covenant on Civil and Political Rights (1966)³² and the International Covenant on Economic, Social and Cultural Rights (1966),³³ respectively. The international machinery for human rights was established in the bodies created under the UN Charter including the Commission on Human Rights and the bodies created under the international human rights treaties.³⁴

In recent decades, there has been growing support for ‘third generation’ rights such as the right to development, to a healthy environment and to peace.³⁵ For the advocates of third generation rights, rapid globalisation threatens existing human rights structures, rendering individual States, acting alone, unable to satisfy the obligations imposed by human rights covenants.³⁶ The exponents of third generation rights advocate the need for concerted action on behalf of all the actors on the social scene, such as the State, the individual, public and private firms, and the entire international community.³⁷ This new set of ‘solidarity’ rights would firstly impose joint obligations upon all States, secondly, impose

²⁹ As mentioned above, there is insufficient space to delve into the theory and evolution of human rights law. Amongst the wide-ranging literature in this area, some of the texts that have informed this author include: Tomuschat, *op. cit.*, (2003); Donnelly, *op. cit.*, (2003); Bobbio, N., *The Age of Rights*, (Cambridge, 1996); Henkin, L., *The Age of Rights*, (New York, 1990).

³⁰ Universal Declaration of Human Rights, *adopted* 10th December 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, U.N. Doc. A/810 (1948), *reprinted in* 43 *AJIL* 127 (Supp. 1949) [*hereinafter* UDHR].

³¹ Jhabvala, F., ‘Sovereignty and International Standards: Human Rights,’ p. 301, from Snyder and Sathirathai, *op. cit.*, (1987), pp. 295-296.

³² International Covenant on Civil and Political Rights, *adopted* 16th December 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., No. 16, U.N. Doc. A/6316 (1966), 999 UNTS 171 (*entered into force* 23rd March 1976). [*hereinafter* ICCPR].

³³ International Covenant on Economic, Social and Cultural Rights, *adopted* 16th December 1966, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess. No. 16, U.N. Doc. A/6316 (1966), 993 UNTS 3 (*entered into force* 3rd January 1976). [*hereinafter* ICESCR]

³⁴ At present there are seven treaty bodies. See <http://www.ohchr.org>

³⁵ Dixon, M., *Textbook on International Law*, (3rd ed.), (London, 1990), p. 312.

³⁶ See Rich, R., ‘The Right to Development: A Right of Peoples?’, pp. 39-41 from Crawford, J., (ed.), *The Rights of Peoples*, (Oxford, 1992).

³⁷ Vasak, K., ‘A 30 year struggle: the sustained efforts to give force of law to the Universal Declaration of Human Rights,’ *UNESCO Courier*, (November 1977), p. 29.

obligations upon all the actors in the international arena and thirdly, they would be the rights of ‘peoples’ as well as of individuals. The right to development has been declared one of the emerging ‘third generation’ or ‘solidarity’ rights.³⁸ However, unlike first and second generation rights, third generation rights are not contained within an international human rights convention. According to Bobbio, there is also some support emerging for ‘fourth generation’ rights in the area of biological research and genetic identity.³⁹

1.3. The Gradual Convergence of Human Rights and Development

Whilst the global institutional structure of both human rights and development are products of the post-World War II climate, there was little convergence between development and human rights law until the end of the 1980s. Firstly, this arose from the widespread view in mainstream development thinking of development as a linear process of economic growth. Although the trends in economic thinking varied considerably until the 1980s, there was a widespread assumption that a trade-off between human rights and development was justified. In this respect, it was propagated that the fulfillment of respect for human rights should ‘wait’ until a certain level of economic development had been achieved and this argument was used to justify the suspension of civil and political rights in the interests of development.⁴⁰ This assumption was also based on the perception that development (particularly economic development) was a precondition for the achievement of human rights. For example, the ‘trickle down’ approach claimed that the fruits of development would eventually reach the less well-off in society. In this light, the fulfillment of socio-economic rights was viewed as something that depended on the outcome of economic development and growth.⁴¹

These assumptions within mainstream development thinking were compounded by Cold War rivalries between the super powers, the US and the USSR. Whilst the former championed the so-called ‘first generation’ civil and political rights based on individual

³⁸ Ibid., pp. 29 and 32.

³⁹ Bobbio, *op. cit.*, (1996), p. xi.

⁴⁰ Donnelly, *op. cit.*, (2003), pp. 196-198.

⁴¹ Ibid.

liberty and freedom from arbitrary interference of the State, the latter promoted the ‘second generation’ economic and social rights associated with protection of the material, social and cultural welfare of individuals. Although the US had already introduced human rights conditionality in its foreign policy in the 1970s,⁴² the dichotomy between first and second generation rights ensured that the subject of economic and social rights would be avoided in US policy. In addition, during the Cold War, development aid from the super powers to developing countries in Africa was motivated by geostrategic concerns. The bargaining power of African countries was relatively strong at this time, which guaranteed that their internal human rights situation was beyond discussion and any scrutiny of their human rights record by foreign donors would have been considered as an infringement of domestic sovereignty.

Although the convergence between these previously distinct domains was far from inevitable, there was a gradual consensus on the interlinkages between human rights and development within UN circles from the late 1980s onwards. This represented a break with the previous trade-off between human rights and development. Firstly, human rights became considered as a constituent element of the changing normative definition of development in UN circles. This was largely due to the emergence of support (albeit limited) for ‘third generation rights’ through the 1986 Declaration on the Right to Development. The Preamble of the 1986 Declaration on the Right to Development describes development as “a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.”⁴³ Since the UN Declaration on the Right to Development (1986), development has become firmly entrenched within the realm of UN rights rhetoric and academic circles. However, it should be noted that the right to development belongs to the group of ‘third generation’

⁴² US Foreign Assistance Act of 1961 Public Law 87-195, 22 USC 2151n. Section 116 of the 1961 Act prohibits US foreign economic assistance to any country in which the government engages in a “consistent pattern of gross violations of internationally recognised human rights.”

⁴³ See Declaration on the Right to Development, *adopted* 4th December 1986, G.A. Res. 41/128, GAOR, 41st Sess., 97th plen. mtg., U.N. Doc. G.A./Res/41/128 (1986). [*hereinafter*, the Right to Development].

rights, which in contrast to civil and political rights and economic, social and cultural rights, does not have the support of an international treaty for their protection.

Secondly, within mainstream development thinking, human rights were no longer viewed as incompatible with economic growth after the end of the Cold War and to some extent, they were considered as instrumental for the achievement of development objectives. For example, several World Bank studies revealed that there was a positive link between respect for human rights (defined as civil and political rights) and economic growth. This led to a new emphasis on governance reform within the policies of the international financial institutions, thus signaling the end of a long-standing trade-off between human rights and development. Equally, during the 1990s, human rights also became aligned with alternative approaches in development thinking, in particular, the human development approach through the notion of capabilities and freedoms.⁴⁴

Finally, with the end of the Cold War, human rights became part of the ‘language of legitimacy’ in international affairs.⁴⁵ By this time, sub-Saharan Africa had lost much of its geostrategic significance and it became easier for external donors to raise sensitive issues relating to human rights. At this time, many OECD donors introduced political conditionality, which linked the disbursement of aid to respect for human rights, democracy and the rule of law. It also became acceptable to promote human rights *per se* as specific values through technical and financial assistance. Moreover, the previous dichotomy between economic, social and cultural rights, on the one hand, and the civil and political rights, on the other hand, also became less pronounced, although it should be acknowledged that the debate still continues over whether a hierarchy exists between both sets of rights. For example, the Vienna Conference and the Vienna Declaration and Programme of Action in 1993 referred to the link between human rights, democracy and development. This Declaration recognised that both sets of human rights were interdependent and mutually reinforcing and that resource constraints should not be used by nations to justify the failure to implement human rights.⁴⁶

⁴⁴ Sen, A., *Development as Freedom*, (Oxford, 1999); Ul Haq, M., *Reflections on Human Development*, (Delhi and Oxford, 1999).

⁴⁵ Donnelly, *op. cit.*, (2003), p. 185. See chapter two of this thesis.

⁴⁶ Vienna Declaration and Programme of Action, *op. cit.*, para. 31.

1.4. Contextualising EU Development Cooperation Policy within the Nexus between Development and Human Rights

This thesis situates an analysis of European Union development policy within the context of the convergence of human rights and development. The case study of EU development policy and its relations with African, Caribbean and Pacific (ACP) countries was chosen as a means of gaining a practical insight into the debate on the integration of human rights in development policy. Within the EU-ACP framework, there is a strong legal basis for human rights conditionality and moreover, EU development policy is purported to be guided by the principles of human rights, democracy and good governance.⁴⁷ Against the background described above, this thesis seeks to examine, on the one hand, the extent to which human rights have entered the EU development agenda at the macro policy level and on the other hand, to critically assess the practical application of human rights at a more micro level by considering the practice of human rights conditionality, political dialogue and technical and financial measures to support human rights. Whilst much of the literature on human rights and development focuses on the legal aspects of human rights conditionality, this thesis seeks to ascertain a more holistic view of the extent to which human rights have shaped EU development cooperation policy and the way in which the EU's commitment to promoting respect for human rights as a general objective of development policy is translated into practice.

Whilst the EU provides official development assistance to a range of countries and regions worldwide,⁴⁸ the scope of this thesis deals exclusively with the relationship between the European Community and its Member States with the seventy-nine members of the African, Caribbean and Pacific (ACP) group. The case study of EU development cooperation policy and more specifically, cooperation with the ACP states is justified for the following reasons. Firstly, the EU has a strong legal basis for human rights in the

⁴⁷ Article 177(2) of the EC Treaty. Consolidated Version of the Treaty Establishing the European Community in Foster, N., *Blackstone's EC Legislation 2005-2006*, (16th ed.), (Oxford, 2005).

⁴⁸ For the list of countries and regions, see EC Annual Report on External Assistance 2004, *op. cit.*, Section 7 of the Financial Tables, Figure 3, pp. 152-154.

*acquis communautaire*⁴⁹ and it also has a relatively well-developed human rights policy in the context of developing countries. What does the legal framework for the EU's human rights policy in developing countries consist of? Since the Maastricht Treaty of 1992, there has been a firm legal basis for human rights as an objective of development within the first pillar of the European Community legal order.⁵⁰ The legalistic approach to the role of human rights is a distinctive feature of EU development cooperation policy. Article 177(2) of the EC Treaty states that "Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

Within the context of EU relations with the group of ACP states, human rights, democratic principles and the rule of law are defined as the 'essential elements' within Article 9 of the Cotonou Agreement. There are also detailed provisions for consultations and suspension in the event of alleged violations of the essential elements clause (Article 96). Good governance is included as a fundamental element and serious cases of corruption may give rise consultations and restrictive measures (Article 97). The EU's human rights policy is further elaborated upon in soft-law documents such as Communications of the Commission. This policy also includes measures to promote human rights (human rights activities, mainstreaming and political dialogue), along with the EU's 2001 policy of mainstreaming human rights in its relations with third countries.⁵¹ In light of the strong legal and normative basis for human rights conditionality, political dialogue and measures to promote human rights, the EU-ACP model provides an appropriate framework for analysing the practical links between human rights and development. A further insight into the EU's human rights policy in developing countries can be gained from secondary legislation, particularly the EU's

⁴⁹ Articles 177-181 (ex 130u-130y), of the EC Treaty. This thesis deals exclusively with first pillar competences of the EU and the aid managed by the European Commission including EC Community Funds and the European Development Fund (EDF). Although development policy is a Community competence, the term EU development policy is used in this thesis (rather than EC development policy) for the purposes of simplification as this study also deals with EU unilateral regulations and the relationship with the ACP countries under the EU-ACP Partnership Agreement of 2000. [The scope of this thesis is limited to the first pillar, notwithstanding the fact that human rights conditionality cuts across pillar one and pillar two (Common Foreign and Security Policy (CFSP)) decision-making. See Bulterman, M., *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?*, (Oxford and Gronigen, 2001), p. 6.]

⁵⁰ Article 177(2) was inserted in the EC Treaty by virtue of the Treaty on European Union, signed in Maastricht on 7th February 1992, entered into force on 1st November 1993. [hereinafter, the Maastricht Treaty].

⁵¹ Communication from the Commission to the Council and the European Parliament, 'The European Union's role in promoting human rights and democratisation in third countries', COM (2001) 252 fin., 8th May 2001.

thematic Regulations, which provide a legal basis for activities in the area of human rights and democratisation in developing countries. These Regulations provide funding from the EU budget and are designed to complement the funding provided for human rights democratisation through the association and cooperation agreements with developing countries.⁵²

Secondly, the case study of EU development cooperation policy is relevant due to its growing importance as a development agency – at least in quantitative terms – as exemplified by the large volume of aid managed by the European Commission. The combined resources of EU Member States and the European Community development aid amounts to more than half of global official development assistance.⁵³ One fifth of EU development aid is managed by the European Commission, which includes European Community development funds and the European Development Fund (EDF) for the African, Caribbean and Pacific countries.⁵⁴ The amount allocated for the ACP countries in the 9th European Development Fund (EDF) is €13.5 billion.⁵⁵ Furthermore, in 2005, the Council of the European Union agreed to set a new collective target of 0.56% of GNI by 2010.⁵⁶

With regard to funding for human rights and related elements such as democratisation, the rule of law and good governance, the EU (including the Member States) also rate highly from a global perspective. According to Youngs, it is difficult to obtain comparable figures for ‘political aid’, however, he shows that the overall amount for EU

⁵² Council Regulation (EC) No. 975/1999 of 29th April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, [1999] OJ L 120, 8th May 1999.

⁵³ European Commission, ‘External Assistance Reform: Four Years On (2000-2004),’ April 2004, p. 1. Source: European Union, ‘Annual Report 2004 on the European Community’s Development Policy and External Assistance,’ (Luxembourg, 2004), p. 17. See also OECD European Community’s Aid at a Glance. Source: <http://www.oecd.org/dataoecd/61/24/1875307.gif>

⁵⁴ The European Commission manages the Community budget, the European Development Fund (EDF) and assistance under the Overseas Association Decision to the Overseas Countries and Territories. Council Decision 822/2001 on the association of the overseas countries and territories with the European Community [2001] OJ 314/1.

⁵⁵ Internal Agreement between Representatives of the Governments of the Member States, meeting within the Council, on the Financing and Administration of Community Aid under the Financial Protocol to the Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States signed in Cotonou (Benin) on 23rd June 2000 and the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the EC Treaty applies, [2000] OJ L317, 15th December 2000, pp. 355-372.

⁵⁶ Europa Press Release, ‘European Commission welcomes Council’s decision to set new ambitious targets for Development Aid’, IP/05/598, 24th May 2005. This will amount to €20 billion of the ODA of the European Commission and the EU Member States collectively. See Luxembourg Presidency Conclusions, GAERC, 2660th Sess., 23rd-24th May 2005, p. 22. The ten new Member States that acceded to the EU in May 2004 agreed to 0.17% GNI by this date, whilst the other fifteen Member States agreed to reach the threshold of 0.51%.

support to human rights and democracy amounted to \$900 million in 2001, in comparison to \$633 million from USAID.⁵⁷ The precise figures for European Commission spending on democracy and human rights are equally difficult to obtain. According to the EU's Annual Report of 2005, the amount allocated to 'government and civil society' (which includes human rights) amounted to €597.40 million for the ACP and other Least Developed Countries (LDCs).⁵⁸ This funding is supplemented by additional EU budget lines such as the European Initiative for Democratisation and Human Rights, which has amounted to over €100 million each year since 2001, although it should be noted that this amount covers funding for both developing and non-developing third countries.⁵⁹ Alston and Weiler have made a comparison between the sizeable amount of funding available under this budget line and the budget of the UN Office of the High Commissioner for Human Rights (including both the general UN budget and voluntary contributions).⁶⁰

Despite the large volume of development aid disbursed by the EU, the European Commission has come under sustained attack for problems relating to quality and efficiency in the context of aid delivery. One of the strongest indictments was made by the UK International Development Secretary, Clare Short, who stated that "the [C]ommission is the worst development agency in the world".⁶¹ Whilst significant reforms have taken place within the Commission, particularly through the reforms of 2000, some commentators argue that EU development policy still falls short of its potential.⁶² For example, Arts and Dickson have called for a more substantive and less symbolic approach to development policy.⁶³ In light of the significant volume of funding allocated to this domain, a case study of the role of human rights in EU-ACP cooperation is imperative to shed light on whether these criticisms are still valid today.

⁵⁷ Youngs, R., 'European Approaches to Democracy Assistance: Learning the Right Lessons,' 24 *Third World Quarterly* 1 (2003), p. 128.

⁵⁸ European Union, 'Annual Report 2005 on the European Community's Development Policy and External Assistance', (Luxembourg, 2005), p. 156. The overall ODA commitment to the 'government and civil society' sector was €1,453.45 million, whilst actual payments amounted to €616.25 million.

⁵⁹ See Chapter Four for a more detailed breakdown of EU human rights funding in developing countries.

⁶⁰ This was made by Alston, P. and Weiler, J.H.H., 'An 'Ever Closer Union' in Need of a Human Rights Policy,' 9 *EJIL* (1998), p. 390. For the two-year period 2004-2005, OHCHR requested \$56.8 million from the UN regular budget and it received \$60 million in donations in 2004. Source: <http://www.ohchr.org/english/about/fundraising.htm>

⁶¹ 'Aid that doesn't help', *Financial Times*, 23rd June 2000.

⁶² Arts, K., and Dickson, A., (eds.), *EU Development Policy: From Model to Symbol*, (Manchester, 2004), p. 14.

⁶³ *Ibid.*

Thirdly, and more specifically, the EU-ACP case study has been chosen due to the unique and elaborate institutional structure that has developed to facilitate joint decision-making and management on behalf of the Parties. In addition, the EU's relations with the ACP countries constitute the most consolidated system of cooperation between the Community and developing countries. The long-standing nature of cooperation provides a useful framework for examining the way in which human rights have shaped relations between these Parties from the early Lomé Conventions until the present day Cotonou Agreement of 2000.⁶⁴ The contractual nature of EU-ACP cooperation also allows for an assessment of the gap between the rhetoric and practice of the EU's 'partnership approach', for example, to determine the extent to which the inclusion of human rights provisions was negotiated on an equal basis within the joint EU-ACP institutional framework. This can be viewed in contrast to cooperation with other developing countries, for example, with the Asia and Latin American (ALA) countries, which is granted on the basis of a unilateral regulation and is, thus, void of any contractual or partnership element.⁶⁵ Moreover, the focus on the ACP group is instructive due to the presence of forty-eight countries from sub-Saharan Africa. Much of the mainstream development policy and practice, in particular, those of the international financial institutions, were developed in response to the situation of countries in sub-Saharan Africa, including the basic needs strategies of the 1970s, structural adjustment in the 1980s and political conditionality in the 1990s. Furthermore, the EU has invoked human rights conditionality in ACP countries on various occasions, in contrast with its reluctance to do so in other third countries. Therefore, in light of these unique features, the EU-ACP case study provides an excellent forum for examining the nexus between human rights and development.

2. Aim of this Thesis and Research Questions

⁶⁴ The EU has pursued technical and financial cooperation with the ALA countries since 1976, however, the legal basis for cooperation with the ALA countries is a unilateral regulation, which can be revoked at any time by the EU (Council Regulation EEC 443/92 of 25th February 1992). In contrast, the joint EU-ACP Cotonou Agreement has been agreed until 2020.

⁶⁵ For further reading, see Wiessala, G., *The European Union and Asian Countries*, (London and New York, 2002); Youngs, R., *The European Union and the Promotion of Democracy: Europe's Mediterranean and East Asian Policies*, (Oxford, 2002); Van Dijck, P., and Faber, G., (eds.), *The External Economic Dimension of the European Union*, (The Hague, 2000).

This thesis aims to establish the extent to which human rights have infiltrated and shaped the changing trends in international development thinking and practice. More specifically, this thesis aims to situate EU development cooperation policy and relations between the EU and the group of ACP states within the broad framework of the ‘nexus between human rights and development’. To this end, an inquiry into the origins of human rights in EU development policy is considered at a macro level from the early decades of EU development policy to the Cotonou Agreement of 2000. In this regard, this thesis traces the emergence of human rights through the modest references in Lomé III to the introduction of a fully-fledged human rights clause in Lomé IV-bis. Furthermore, this study seeks to discern whether the introduction of human rights has influenced the move from a technical agenda to a more political one within the EU’s general development strategies and policy statements. Some of the key research questions that will be addressed include: does the history of EU-ACP development cooperation policy follow key trends in international development thinking? Does EU policy in this domain diverge from mainstream trends? How have human rights shaped the overall trends in EU development policy and cooperation with the group of ACP states?

This thesis also seeks to examine the gap between rhetoric and practice in the EU’s human rights policy in development cooperation. In particular, it assesses whether there is internal coherence between the normative and operational framework for the application of human rights in EU-ACP relations. Before embarking on an analysis of internal coherence, however, an essential starting point involves a discussion of the legal and normative framework for human rights in EU development policy. In this regard, this thesis considers the main components of the EU’s human rights policy within the Treaty establishing the European Communities, the human rights clause in the EU-ACP partnership agreement and secondary legislation in the area of human rights in relation to developing countries.

In examining the EU’s human rights policy, the central research questions focus on the following three areas. Firstly, in the context of negative conditionality, what are the substantive and procedural requirements for the use of the human rights clause in the

event of alleged violations of human rights? Are these procedures in conformity with international law? Are there specific normative criteria for the identification of violations? What is the role of relevant EU institutions in the decision-making procedure under the human rights clause for the operationalisation of Articles 96 and 97? Does the EU undertake *ex ante* conditionality (i.e. is respect for human rights a prerequisite for accession to the Cotonou Agreement)? Secondly, in relation to political dialogue, are there specific guidelines on the role of human rights in dialogue between the EU and ACP states? Are there specific modalities for political dialogue on the subject of human rights? Thirdly, with regard to technical and financial assistance in the area of human rights, what is the normative scope for the promotion of human rights through the Cotonou Agreement? How are human rights defined within the human rights clause and is there a legal obligation to promote human rights within EU-ACP relations? Is the definition of human rights within the human rights clause in line with the policies of other OECD donor definitions of human rights? What is the relationship between human rights and other related elements including democracy and good governance? Within the Cotonou Agreement, are human rights conceptualised as a distinct objective or as a subset of wider governance and democratisation policies? How do the legal Regulations for unilateral human rights activities in developing countries contribute to our understanding of the legal and normative framework for the promotion of human rights in development, particularly, Council Regulation 975/1999? Can a distinctively ‘EU’ human rights policy in development be identified at a normative level?

In order to assess the level of internal coherence between the EU’s normative and operational framework, a critical analysis of the practical application of human rights in EU-ACP relations will be carried out. In this context, it will be considered whether the EU’s rhetoric on the promotion of a positive approach to human rights in development is consistent in practice. This will focus on the practice of negative conditionality, political dialogue and the EU’s technical and financial measures to promote respect for human rights. Firstly, in the context of negative conditionality, it will be considered whether the positive approach advocated by the EU is followed in practice, particularly with regard to the consultation procedures and new provisions relating to political dialogue in the

Cotonou Agreement. Does the EU exhaust all possibilities for dialogue before embarking on restrictive measures? If restrictive measures are taken under Article 96, does the EU continue to engage in political dialogue during and after the consultation process? Secondly, within the context of political dialogue, how does the dual function of political dialogue function, both in connection with Article 96 and also independently of the consultation procedures? How do the provisions on political dialogue work in practice, for example, is this dialogue separate from the consultation procedure in EU-ACP cooperation in the event of alleged violations of human rights? Which actors are involved in political dialogue? What is the potential contribution of the enhanced provisions for political dialogue in the revised Cotonou Agreement of 2005, which provide for a more systematic and more structured approach to dialogue (independent of the consultation procedure)? Is enhanced political dialogue possible in practice due to the sensitive nature of human rights dialogue? Is it necessary to introduce a more formal approach to political dialogue or is a more fluid and flexible approach more beneficial in the long-term? Finally, in relation to technical and financial assistance, what type of direct funding is provided for the promotion of human rights in EU-ACP relations both within the context of the Cotonou Agreement and the EU's unilateral human rights Regulations? How is the funding delivered and which actors are involved? Are human rights implemented as a separate objective or as part of overall reform in the area of democratisation and good governance? Are there clear gaps between the EU's commitment to a positive approach to the funding of human rights activities and practical implementation? Beyond the quantitative assessment of the types of activities funded, have human rights become embedded in EU-ACP relations? For example, are human rights promoted indirectly for example through the mainstreaming policies? Do the EU's development aid instruments lend themselves easily to the adoption of 'human rights-based' approaches to the conceptualisation, planning and evaluation of development activities?

A case study of EU-Kenya cooperation is undertaken to obtain a further insight into the aims of this research and the functioning of the human rights clause in practice. Some of the key issues that will be raised in this regard include the question of how human rights have penetrated EU development policy trends in Kenya. Are human rights considered as

an integral part of development cooperation at a macro level? With regard to internal coherence, has recourse been made to the conditionality procedures within EU-Kenya cooperation and were these measures in line with the standards laid down in international law and within the EU's legal framework? With regard to political dialogue, to what extent are human rights incorporated in dialogue between the EU and Kenya? Is Article 8 dialogue undertaken on a formal or informal basis in practice? Is it feasible to adopt a more structured approach to political dialogue in line with the 2005 Revision of Cotonou or is it more appropriate to ensure a fluid and flexible approach to the conduct of dialogue. To what extent are human rights regarded as an instrumental part of EU development cooperation policy, in other words, are the EU's development aid instruments used in practice for the promotion of human rights and are human rights integrated in the processes of development? Are the EU's policy guidelines on mainstreaming human rights utilised in practice? Are human rights indicators used in the operationalisation, planning and evaluation of development activities? What is the contribution of the separate EU budget line for human rights in Kenya? What lessons can be drawn from the experience of other actors such as bilateral government agencies and non-governmental organisations in the integration of human rights in development policy in Kenya?

Apart from outlining the aims and most pertinent research questions, it is equally important to briefly indicate the limits of the scope of inquiry. Firstly, it should be stated that in line with the works of Tomaševski, this thesis is not concerned with the extent to which developing countries have fulfilled their obligations with regard to human rights law,⁶⁶ instead, it analyses the extent to which human rights have infiltrated the donor policy agenda. Secondly, this thesis is not intended to act as a vehicle for the promotion of 'human rights in development'. In contrast, this thesis acknowledges the complex interlinkages between human rights and development at various levels and seeks to contribute to the current state of the art of the literature by undertaking empirical analysis to determine what it means to promote human rights in development. Therefore, the tone of this thesis is reflective, rather than advocacy-oriented.

3. Methodology

This thesis combines a theoretical and empirical analysis of the nexus between human rights and development at the international level and at the EU level. The methodology used in this thesis is adapted to satisfy the objective of this thesis as outlined above. The primary aim of this thesis is to analyse the way in which human rights have infiltrated and shaped development policy over the past five decades. From a theoretical perspective, the changing trends in development cooperation policy are analysed utilising a wide-ranging literature. An interdisciplinary approach to the study of human rights and development is adopted, drawing not only from human rights law but also from the relevant disciplines of development economics and political science. Nevertheless, it should be noted that the human rights aspects of development policy remain the central focus of this thesis and at the fore of the case study analysis.

With regard to the more substantive aspects of this thesis, namely, the case study on EU-ACP cooperation, a legal analysis of the EU's human rights policy in development is undertaken. This deals with the relevant EC treaty provisions, the EU-ACP bilateral treaty framework and an analysis of the procedural and substantive aspects of the human rights clause in EU-ACP cooperation agreements. As mentioned above, this thesis focuses on the dual purpose of the human rights clause, which can be described as two sides of the same coin,⁶⁷ by moving beyond the conditionality aspects of the clause to consider the objective of promoting human rights through EU-ACP relations. This will necessarily involve a detailed analysis of the financial instruments governing the delivery of EU development assistance including the European Development Fund (EDF) and the institutional and organisational structure of EU development cooperation with the ACP states. This thesis also utilises appropriate official sources of the European Union, encompassing treaty law and secondary legislation. In examining the 'building blocks' of the EU's human rights policy in development, this thesis considers not only 'hard law'

⁶⁶ See Tomaševski, *op. cit.*, (1989); Tomaševski, K., *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*, (London, 1997).

but also ‘soft law’ sources such as European Commission Communications and guidelines. Although these soft law documents constitute a “grey zone between law and politics,”⁶⁸ they are useful for the purposes of this thesis as they elaborate on the scope and direction of EU activity in this domain.

This thesis draws from empirical research that was carried out to obtain a better insight into the practical application of the human rights clause. This involved qualitative interviews with relevant individuals in the EU institutions in Brussels including individuals within the European Parliament and the European Commission including the relevant Directorate Generals (DGs) for External Relations and Development.⁶⁹ In addition, research was also undertaken within the European Commission Delegation in Nairobi, Kenya, as well as international organisations such as UNDP, bilateral donors, international, national and local NGOs and civil society organisations.⁷⁰

4. Literature Review

Although human rights have only become part of the consensus among development donors since the end of the Cold War, there is already a burgeoning literature on the so-called ‘nexus between human rights and development’. The publication of Tomaševski’s *Development Aid and Human Rights* (first published in 1989 and revised in 1993) was among the first monographs to explicitly make the case for integrating human rights within development cooperation. Since the publication of Tomaševski’s works on human rights and development, this body of literature has grown at a steady pace.⁷¹ This thesis aims to situate the EU-ACP relationship broadly within the literature on the nexus between human rights and development and to make a distinctive contribution by building on existing work undertaken on the role of human rights in the EU’s external

⁶⁷ Bulterman, *op. cit.*, (2001).

⁶⁸ Malanczuk, P., *Akehurst’s Modern Introduction to International Law*, (7th rev. ed.), (London and New York, 2000), p. 54.

⁶⁹ Interviews were carried out with individuals from the European Commission (DG Development, EuropeAid, External Relations and Legal Service) and the European Parliament (EU-ACP Joint Secretariat and Human Rights Committee). See Annex II of this thesis for the list of interviews.

⁷⁰ Research trip to the EU Commission Delegation, Nairobi, Kenya, October 2004. See *ibid.*

⁷¹ See fn. 2 above.

relations and by providing new insights into the dual function of the human rights clause in practice.

Most of the seminal works in this field have focused on the legal aspects of integrating human rights in EC cooperation agreements and the international legal aspects of human rights conditionality. For example, Bulterman's study examines the legal aspects of the use of the human rights clause for the purpose of taking restrictive measures in third countries.⁷² This work builds on previous research on the human rights clause, which focuses mainly on the rules within international treaty law for the application of the human rights clause⁷³ and highlights the links between internal and external human rights policies of the EU.⁷⁴ In addition, Fierro has undertaken an extensive analysis of human rights conditionality within the broad framework of EU external relations.⁷⁵ One of the themes raised in her research concerns the question of whether the human rights clause merely provides a legal basis for negative measures or whether there is also room for a 'positive' interpretation of the clause.⁷⁶ If this were the case, it would not only provide a legal basis for conditionality measures but also for the promotion of human rights in external relations. Whilst there is little ambiguity on the legal basis for the promotion of human rights in EU development cooperation policy and in EU-ACP relations,⁷⁷ these findings are relevant as they may indicate a move towards the use of the human rights clause as an instrument for a more dynamic human rights policy and a move away from the conceptualisation of the human rights clause exclusively in negative terms.

More recently, Bartels has added to the on-going scholarship in this field by undertaking a comprehensive analysis of the EU's human rights clauses in trade and cooperation agreements and this research is largely confined to the negative application of the human rights clause.⁷⁸ The findings of this research are relatively controversial as Bartels'

⁷² Bulterman, *op. cit.*, (2001).

⁷³ Hoffmeister, F., *Menschenrechts und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft*, (Berlin, 1998).

⁷⁴ Bulterman, *op. cit.*, (2001), p. 7.

⁷⁵ Fierro, E., *The EU's Approach to Human Rights Conditionality in Practice*, (The Hague, 2003).

⁷⁶ This refers to the 'model human rights clause' as set out in Annex 1 of Communication from the Commission to the Council and the European Parliament on 'The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries,' COM (1995) 216 fin., 23rd May 1995.

⁷⁷ Article 177(2) of the EC Treaty; Article 9 of the Cotonou Agreement (2000).

⁷⁸ Bartels, L., *Human Rights Conditionality in the EU's International Agreements*, (Oxford, 2005).

analysis of the construction of these clauses exposes several shortcomings in the drafting of these clauses. In addition, he questions the extent of the EU's competence to include human rights clauses in agreements with third countries. Furthermore, Bartels argues that the purpose of the human rights clause is to provide a legal basis for restrictive measures and claims (in contrast with Fierro) that it would be incorrect to assume that the human rights clause necessarily provides a legal basis for the promotion of human rights.⁷⁹ As mentioned above, there is little ambiguity on the role of human rights in EU development cooperation policy, therefore, these findings do not contradict the scope of inquiry of this thesis. Nevertheless, the findings of this study are extremely relevant for an understanding of the normative components of the human rights clause and as a reminder of the contested nature of the scope of the human rights clause in EU external relations.

In contrast to these studies, which have focused predominantly on the legal aspects of the human rights clause from the perspective of conditionality, this thesis focuses on the dual function of the human rights clause in EU-ACP relations. On the one hand, the clause provides a legal basis for restrictive measures and on the other hand, it provides a legal basis for political dialogue and measures to support human rights. An analysis of the two-fold function of the human rights clause in EU-ACP relations has already been undertaken in the literature. At a first glance, the scope of inquiry of this thesis, which focuses almost exclusively on the first pillar aspects of the EU's relations with the ACP countries,⁸⁰ is similar to Arts' publication in 2000.⁸¹ In contrast to the objective of this thesis, however, Arts' central research question focuses on the international law aspects of human rights in EU-ACP cooperation. In particular, she considers whether EU practice has contributed to the shaping of international law in this domain and whether there has been cross-fertilisation of general international law by EU practice in this area.⁸²

Equally, there are several reasons why further research is needed in this area. Firstly, since the publication of Arts' monograph in 2000, the Cotonou Agreement has come into

⁷⁹ Ibid., p. 147.

⁸⁰ The EU is divided into three pillars: the first pillar deals with European Community competences, the second pillar deals with CFSP and the third pillar covers issues relating to Justice and Home Affairs (JHA). The second and third pillars are intergovernmental in nature.

⁸¹ Arts, K., *Integrating Human Rights and Development Cooperation: The Case of the Lomé Convention*, (The Hague, 2000).

⁸² Ibid., pp. 6-7.

effect, which contains stronger provisions vis-à-vis the role of human rights in EU-ACP relations. This includes new provisions on political dialogue and the consultation procedure preceding suspension under Article 96 and, more controversially, the introduction of good governance as a ‘fundamental element’ of cooperation. The Cotonou Agreement was also revised in 2005 and these amendments have an impact on the key areas addressed in this thesis. Secondly, almost five years have elapsed since the EU’s Communication on the role of human rights in third countries in 2001, therefore, it is appropriate and timely to undertake a critical assessment of the practical application of the EU’s human rights policy in development cooperation. Thirdly, the additional EU budget lines that support human rights activities in developing countries are also under review, therefore, on-going research is essential to monitor the changing trends and focus of EU action in this sphere. The principal thematic Regulations relating to the consolidation of human rights and democracy in third countries are due to expire at the end of 2006⁸³ and it is almost certain that the structure of these regulations will change following the introduction of the new Financial Perspective for 2007-2013.

Finally, this thesis seeks to add to the existing scholarship in this field through a minor case study of EU-Kenya cooperation, which provides a further insight into the complex dynamics of the EU’s human rights policy at the individual country level. Original empirical research was undertaken at the European Commission Delegation to facilitate this study, which seeks to merge the various themes raised in this thesis. This is achieved by analysing both the extent to which human rights have infiltrated the development agenda of the European Commission in Kenya and the gap between rhetoric and practice in the implementation of human rights in development. More specifically, focus will be placed on the level of internal coherence between the EU’s normative human rights policy in developing countries and the action taken at field level in the ACP countries.

⁸³ This relates to the separate EU budget line (Chapter 19.04), which provides funding for human rights, democratisation and the rule of law in third countries known as the European Initiative for Democratisation and Human Rights (EIDHR).

5. Overview of this Thesis

This thesis is divided into six chapters. Firstly, the background to the debate on human rights and development is explored through an analysis of the nexus between human rights and development at the international level (Chapter One) and the general consensus among OECD donors on the integration of human rights in development (Chapter Two). Both of these themes are then merged in a case study of EU development cooperation policy and its relations with the group of ACP states. This case study is divided into three chapters focusing on the following themes: firstly, the emergence and consolidation of human rights is considered from a broad perspective through the changing trends in EU development policy and cooperation with the ACP states (Chapter Three); secondly, the application of human rights in EU-ACP cooperation is examined at a more micro level through the practice of human rights conditionality, political dialogue and activities for the promotion human rights (Chapter Four); and thirdly, a targeted case study of cooperation with Kenya is undertaken to obtain a greater insight into the dynamics of human rights conditionality and activities to promote human rights at an individual country level (Chapter Five). The final chapter of this thesis assesses the legacy of human rights on international development thinking and, by drawing together the most pertinent findings of the case study, it seeks to determine the impact of human rights on EU-development cooperation policy and the future of EU-ACP relations (Chapter Six).

5.1. Chapter One: Human Rights in the History of Development

In the first chapter of this thesis, the convergence of human rights and development is viewed through the spectrum of the changing trends in international development thinking. Firstly, this chapter examines the series of transformations in the definition of development from modernisation theories in the post-World War II climate to challenges in the 1970s from dependency theorists in developing countries. This will lead on to a discussion of the subsequent dominance of the World Bank's neoliberal economic policies and the structural adjustment policies in the 1980s and at the same time, it will

examine alternative strategies such as basic needs and participatory approaches that were promoted during this period. Throughout these decades, it will be shown that human rights and development lived relatively separate lives; however, this situation began to change at the end of the Cold War. This chapter will then move on to discuss the way in which human rights became compatible with development thinking in the 1990s, focusing in particular on the recognition of human rights as a constituent part of the changing normative definition of development and as instrumental for the achievement of development. In this regard, it will consider the impact of the end of Cold War rivalries on the new role for human rights and development and it will also discuss economic studies that began to question the necessary trade-off between human rights and development. This chapter also considers other levels of convergence including the new emphasis on creating an enabling environment for growth through good governance reform in the policies of the international financial institutions (IFIs).

Whilst the 1990s witnessed the gradual convergence of human rights and development, this chapter endeavours to ascertain the extent to which the language of human rights has become embedded in mainstream international development thinking and policy. In this context, this chapter considers the two dominant trends in mainstream development thinking at present, namely, the sustainable human development approach promoted by many UN agencies including UNDP, on the one hand, and the neoliberal approach of the Washington international financial institutions such as the World Bank, on the other hand. Whilst the former embraces the role of human rights in development, the latter remains more reluctant to embrace the rhetoric of human rights due to its non-political mandate. Regardless of whether human rights-based methodologies have been adopted by the IFIs, some general conclusions will be drawn on the extent to which human rights have infiltrated the World Bank and IMF policies through the poverty reduction strategy papers (PRSPs), which have been used since 1999. The PRSPs are significant as they provide a framework for national development strategies and compliance with the conditions laid down in these documents is essential for the approval of debt relief funding, loans and other funding from the IFIs.

5.2. Chapter Two: Human Rights and the Practice of OECD Donors: Key Concepts and Critical Insights

After the end of the Cold War, human rights, democracy and development became part of the contemporary language of international legitimacy.⁸⁴ The promotion of human rights through donor policies has been carried out since the early 1990s following the end of the Cold War and largely spurred on by the World Bank publication on development in sub-Saharan Africa in 1989, which urged donors to introduce conditionality based on reform in the area of human rights, good governance, and democracy.⁸⁵ Furthermore, along with the adoption of negative conditionality, donors have followed the OECD recommendations of 1993 and increasingly included human rights in the design and allocation of development aid. The second chapter of this thesis seeks to inquire into the role of human rights in OECD donor policy and defines key concepts relating to human rights conditionality and measures to promote human rights. The analysis of core concepts allows us to view points of convergence and divergence within OECD donor policies and, subsequently, to determine whether there is a level of consensus on the practical application of human rights.

This chapter, firstly, discusses the legal basis for human rights conditionality in international treaty law and addresses criticisms raised including the alleged infringement of national sovereignty. This chapter will then move on to discuss key concepts such as negative and positive conditionality, including *ex ante* and *ex post* conditionality. Secondly, the core terminology relating to donor activities to promote respect for human rights through technical and financial assistance will be examined. This is essential for examining the normative components of EU development policy, which will be undertaken in subsequent chapters. This chapter draws on existing works that have inquired into the definition of human rights in donor policies, for example, to establish whether there are strong variations between broad or narrow conceptions of human rights

⁸⁴ Donnelly, *op. cit.*, (2003), p. 185.

⁸⁵ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth, A Long-Term Perspective Study*, (World Bank, 1989).

norms as highlighted in the literature.⁸⁶ This chapter also analyses the interlinkages between human rights and the wider agenda of political conditionality in the area of democracy and good governance. It should be noted that the focus of this analysis is highly specific and only addresses the inter-connection between human rights and other elements of political conditionality at a conceptual level, therefore, it does not engage in all aspects relating to political conditionality.⁸⁷

A critical assessment of the practical application of human rights in donor policy and practice is undertaken in the next part of this chapter. Some of the major issues raised in the literature will be discussed. This relates, firstly, to the often haphazard and *ad hoc* nature of negative conditionality and secondly, it will be considered whether there is any evidence that donors prioritise certain rights over others in the context of measures to promote human rights. For example, is there a hierarchy between ‘first generation’ rights (civil and political rights) and ‘second generation’ rights (economic, social and cultural rights)? Thirdly, it will consider the extent to which bilateral donors have adopted the methodology of human rights-based approaches in their policies and programming activities. Finally, it will be shown that the debate on the role of human rights in donor policies is extremely relevant in light of the on-going work of the OECD Task Force, which was set up in 2004 as a means of establishing consensus or guidelines on the role of human rights in development.⁸⁸ An insight into this process will be provided to highlight the current position of human rights in DAC donor policies.

5.3. Chapter Three: The Emergence and Consolidation of Human Rights in EU Development Cooperation Policy and Relations with the Group of ACP States.

The third chapter of this thesis traces the emergence and consolidation of human rights in EU development cooperation policy and relations with the group of ACP states. Firstly,

⁸⁶ This is highlighted in Crawford, G., *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality*, (Houndmills, 2001); Stokke, O., (ed.), *Aid and Political Conditionality*, (London, 1995).

⁸⁷ For further reading on political conditionality more generally see *ibid*.

the overall framework of EU development policy will be discussed from its origins in the provisions for association with the overseas territories of the Member States in the Treaty of Rome in 1957 to the introduction of a legal basis for development policy in the EC Treaty following the Maastricht Treaty. The general institutional structure for EU development policy will also be discussed within the EU internal institutions. This will include an analysis of the overall management of EU aid, decision-making procedures and financial instruments. More specifically, this chapter analyses the role of human rights in EU-ACP relations. This will involve an historical overview of EU-ACP cooperation, which was formally established in the Lomé Conventions from 1975 to 2000 and at present under the Cotonou Agreement. This will also encompass an analysis of the position of EU-ACP relations within the EU legal order and explore the organisational and decision-making role of the joint ACP-EU institutions. An analysis of the factors that led to the introduction of the human rights clause in the Lomé Conventions, a practice which has been solidified in the most recent Cotonou Agreement, will be carried out. The legal basis for this clause will be discussed, including the consultation and suspension measures provided for in the agreement.

The introduction of the human rights clause into the Lomé Conventions has often been described as heralding a new political era of EU-ACP relations. Whilst the early Lomé Conventions were characterised as non-political, technical and based on development needs⁸⁹ and, furthermore, purported to be infused with the spirit of “ideological neutrality,”⁹⁰ it will be shown that the introduction of human rights conditionality in EU policy through Council Resolution of 1991⁹¹ and the fourth Lomé Convention made its mark on the changing nature of EU development policy. Throughout this chapter, an attempt will be made to illustrate the way in which human rights have infiltrated EU development policy as a whole, for example, through the introduction of a legal basis in the EC treaty, the introduction of human rights clauses in bilateral and trade agreements,

⁸⁸ Interview with Mr. Sebastian Bartsch, OECD, Human Rights and Development Task Force, 13th May 2005 and follow-up interview on 30th September 2005.

⁸⁹ Brown, W., ‘From Uniqueness to Uniformity? An Assessment of EU Development Aid Policies,’ from Arts and Dickson, *op. cit.*, (2004); Brown, W., *The European Union and Africa: The Restructuring of North-South Relations*, (London and New York, 2002), p. 4.

⁹⁰ Brown, *ibid.*, (2002).

⁹¹ Council of Ministers, Resolution of the Council of the Member States of the Member States meeting in the Council of Human Rights, Democracy and Development, 28th November 1991, 24 Bull. EC No.11, 1991.

policy documents and development policy strategies. Finally, some general observations will be made on the extent to which the integration of human rights in EU development policy mirrors the general trends in development policy, particularly to establish whether human rights are regarded as constituent and instrumental aspects of development.

5.4. Chapter Four: The Application of Human Rights in EU-ACP Relations: Human Rights as Instrumental for Development?

The fourth chapter of this thesis seeks to ascertain the extent to which the EU lives up to the Maastricht Treaty obligation of promoting human rights as a general objective of development cooperation. More specifically, it addresses the question of internal coherence between the EU's normative and operational framework for the integration of human rights policy in development. In particular, it assesses the EU's normative policy commitment to the promotion of a 'positive approach' to the role of human rights – in other words, an approach based on support for human rights, rather than negative sanctions.⁹² On the one hand, an inquiry into the gap in internal coherence merits attention due to the EU's commitment to coherence, consistency and complementarity, the so-called 3C's.⁹³ On the other hand, however, and more specifically for the purposes of this thesis, an inquiry into the promotion of a 'positive approach' allows us to ascertain the extent to which human rights are promoted as instrumental for achieving development. In other words, are human rights promoted, or indeed mainstreamed, in EU development policy as an integral part of development strategies – or are human rights promoted as a standalone objective.

To this end, the first part of this chapter analyses the EU's normative framework for human rights in relations with the EU-ACP states through the provisions in the EU-ACP treaty, secondary legislation and relevant policy documents to determine the definition and scope of the EU's human rights policy in developing countries. In examining the gap

⁹² As mentioned above, an evaluation of the efficiency and effectiveness of EU support for human rights is beyond the scope of this thesis.

⁹³ European Commission, Communication on Complementarity between Community and Member State Policies on Development Cooperation, COM (1999) 218.

between the EU's rhetoric on a 'positive approach' and practice in the application of human rights in EU-ACP cooperation, the second part of this chapter focuses on the practical application of the human rights clause in EU development policy. This encompasses the domain of human rights conditionality, political dialogue and activities to promote human rights. In the context of negative conditionality, a brief survey is carried out of the EU's recourse to the consultation and suspension measures since the introduction of the human rights clause. The legal analysis of the human rights clause has been the subject of numerous studies.⁹⁴ Therefore, in considering the practical application of human rights conditionality, this thesis avoids any significant overlap with the key publications in this area by focusing on the extent to which a positive approach to conditionality is taken by the EU by exhausting all possibilities for dialogue prior to resorting to restrictive measures in each of the cases of human rights conditionality in EU-ACP relations to date. This will be analysed within the context of Lomé IV and more recently, through the use of Article 8 of the Cotonou Agreement on political dialogue and the consultation procedures within Article 96.

The role of human rights in political dialogue between the EU and the ACP states will also be discussed. Provisions on political dialogue were introduced in Article 8 of the Cotonou Agreement and these were enhanced in the Revision of Cotonou in 2005, which provided more detailed modalities for the conduct of political dialogue. As a consequence, this chapter will discuss the use of these provisions to date, highlighting the dual role of Article 8, which on the one hand, acts as a channel for general dialogue in the area of human rights and on the other hand, provides a means of avoiding restrictive measures by undertaking dialogue prior to the initiation of consultations under Article 96 of the Cotonou Agreement. This analysis will seek to establish how this dialogue works in practice and the extent to which the provisions on political dialogue contribute to the EU's 'positive approach' to the role of human rights in development.

⁹⁴ Article 9 of the EU-ACP (Cotonou) Agreement states that human rights constitute an essential element of cooperation. Article 96 allows for the suspension of development aid in light of alleged violations of the essential elements of the partnership. See Bulterman, *op. cit.*, (2001); Brandtner, B. and Rosas, A., 'Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice', 9 *EJIL* (1998); Hoffmeister, *op. cit.*, (1998); Fierro, *op. cit.*, (2003).

Following this, an analysis of the operationalisation of the clause for the promotion of human rights will be carried out. This will consider the practical implementation of the EU's approach to human rights activities (or "positive measures" as they are euphemistically described)⁹⁵ and will encompass an analysis of direct financial measures funded by the European Development Fund (EDF) and the EU budget through separate thematic Regulations and indirect measures such as the integration of human rights as cross-cutting themes in country strategy papers, the policy of mainstreaming human rights and the extent to which human rights are taken into consideration in the project management cycle from the identification of projects through to the evaluation phase.⁹⁶ In the final section, conclusions will be drawn on the level of internal coherence between the EU's normative and operational framework for human rights in development. In this regard, it will consider the impact of potential reforms such as the European Commission's proposal for the creation of a Fundamental Rights Agency.

5.5. Chapters Five: The Dynamics of Human Rights in EU-Kenya Cooperation from Lomé to Cotonou

In the fifth chapter of this thesis, an in-depth case study of EU-Kenya cooperation will be undertaken, however, it should be noted that this case study does not purport to be exhaustive on all aspects of EU-Kenya cooperation, but simply focuses on the issues that impact upon the debate on human rights and development. The case study of EU-Kenya cooperation was chosen as a means of determining whether the broad patterns established in the history of EU-ACP cooperation can be traced at the individual country level. In this way, this analysis aims to transcend the themes developed in the previous chapters EU-ACP chapters by analysing both the impact of human rights on the changing trends in EU-Kenya cooperation policy and the gap between rhetoric and practice in the EU's 'positive approach' to the role of human rights in development. As mentioned above, the inquiry into the extent to which the EU adopts a positive approach also provides an insight into whether human rights are promoted as a tool for achieving development (i.e.

⁹⁵ This analysis draws from Arts, *op. cit.*, (2000); Crawford, *op. cit.*, (2001); Youngs, *op. cit.*, (2003).

⁹⁶ COM (2001) 252, *op. cit.*

as instrumental), for example, through mainstreaming approaches or whether human rights are simply promoted as an objective, *per se*, of EU development cooperation policy.

To this end, the evolution of EU-Kenya cooperation will be examined, firstly, through post-colonial arrangements leading to the Lomé Convention and in subsequent decades through the Lomé/Cotonou partnership. In this regard, this chapter will seek to establish both the similarities and divergences with the key trends in EU development policy, in particular, the move from the allegedly technical, neutral and apolitical approach to development in the early Lomé Conventions to the more explicitly political framework in later decades. This will link in with the changing trends in economic development in Kenya, ranging from Kenya's early national development planning following independence and critics of this policy such as Mboya.⁹⁷ It will also discuss Kenya's geopolitical significance in the 1970s, its willingness to embrace donor recommendations including economic liberalisation, as well as dependency critics within Kenya such as Colin Leys.⁹⁸ Following this, the new emphasis on structural adjustment in the 1980s will be analysed and an assessment of the extent to which human rights featured in EU-Kenya cooperation during these decades will be carried out.

This chapter will, subsequently, discuss the emergence of human rights conditionality in donor development policies at the end of the Cold War under the one-party regime of Daniel Arap Moi. It will be shown that human rights issues became increasingly intermingled with development relations under the Moi regime, which resulted in the EC's *de facto* suspension of aid in 1991 in line with other donors, which was a contributing factor in the (re-) introduction of multi-party democracy in Kenya shortly afterwards. The case of Kenya is instructive with regard to negative conditionality as it set a precedent in Africa as one of the earliest cases of donor conditionality following President Mitterand's La Baulle speech on Africa in 1989.⁹⁹ The European Commission's actions represented an example of *de facto* conditionality due to the absence of the firm

⁹⁷ Mboya, T.J., *Freedom and After*, (London, 1963).

⁹⁸ On dependency, see Leys, C., *Underdevelopment in Kenya. The Political Economy of Neo-Colonialism*, (London, 1975).

⁹⁹ Tomaševski, *op. cit.*, (1997), p. 181.

legal basis for the suspension of agreements; therefore, it provides an interesting insight into the often informal dynamics of human rights conditionality.¹⁰⁰

The extent to which the debate on human rights and development infiltrated the EU-Kenya development agenda during 1990s will be examined, necessarily overlapping with literature relating to democracy and good governance reform, as well as the changing face of civil society in Kenya.¹⁰¹ Throughout this decade, foreign donors continued to express concern over Kenya's human rights obligations and it will be shown that this decade witnessed the disengagement of many donors from direct cooperation with the government of Kenya and consequently, these donors sought to channel funds through non-governmental and civil society actors. Due to the unique nature of the EU-ACP Conventions, the close relationship between both contractual partners is an integral element of cooperation, therefore, the extent to which the European Commission followed this trend, for example, through the funding of non-governmental actors and activities such as election monitoring and civic education will be examined. Furthermore, this section will also seek to determine whether there was any evidence of a positive approach to cooperation (i.e. were efforts made to restore links through political dialogue)?

The following section of this chapter explores the clear change in donor policy following the 2002 elections, which brought about the end of the thirty-nine year period of KANU rule and witnessed the re-engagement of many donors in Kenya. This turn of events led to the election of the NARC coalition government which spoke the language of donors – including the language of human rights. The changes brought about with the NARC government will be analysed through the perspective of EU-Kenya cooperation. In this context, the practical application of the human rights clause since the introduction of the Cotonou Agreement will be examined. With regard to the broad trends in EU-ACP cooperation, the extent to which human rights inform the overall EU-Kenya country strategy will be considered. This section also considers the conduct of political dialogue

¹⁰⁰ A legal basis for human rights conditionality was introduced in Lomé IV-bis in 1995.

¹⁰¹ Mute, L.M., Kioko, W. and Kichamu, A., (eds.), *Building an Open Society. The Politics of Transition in Kenya*, (Nairobi, 2002); Mutunga, W., *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya 1992-1997*, (Harare, 1999).

since the entry of the NARC government into power to assess the practical application of Article 8 provisions. As mentioned above, the analysis of the practical application of the human rights clause and provisions relating to political dialogue has been supplemented by an insight into the complex dynamics of EU-Kenya cooperation through interviews carried out with both donors and civil society actors in Kenya.

An inquiry will be undertaken into the extent to which human rights are prioritised in the EU's activities in Kenya and the use of direct funding for human rights-related initiatives either from the EDF or from other EU budget lines. This section will include coordinated donor initiatives funded from the EDF, including the GJLOS (Governance Justice, Law and Order) project and the DGSP (Democratic Governance Strengthening Programme). The extent to which human rights are promoted indirectly through mainstreaming or rights-based approaches will also be explored both in the context of the EU and also drawing from the experience of other donors and non-governmental organisations. Furthermore, it will also be examined whether the new emphasis on good governance in the Cotonou Agreement has had any impact in practice in order to assess whether the changing trends in development cooperation can be traced to the individual country level.

In the final section of this chapter, conclusions will be drawn on the extent to which human rights have infiltrated EU-Kenya cooperation and the gap between rhetoric and practice on the EU's 'positive approach' to the integration of human rights in development. Furthermore, some observations will be made on the question of whether human rights appear to be promoted as a standalone objective or whether human rights are mainstreamed as an integral part of the EU-Kenya development cooperation strategy.

5.6. Chapter Six: Conclusions on the Legacy of Human Rights in International Development Policy and the Experience of EU-ACP Cooperation

The final chapter of this thesis provides key conclusions on the findings of this thesis, focusing on the theme of the legacy of human rights norms in international development

thinking, policy and practice. This theme will be addressed in relation to both mainstream development policy, as enshrined in the neoliberal economic policies of the international financial institutions, along with the so-called ‘alternative mainstream’ strategies advanced, such as the UN human development approach.¹⁰² Whilst some commentators have argued that the debate on human rights and development is merely ‘window-dressing’, the final chapter will draw together the main findings of this thesis, which indicate that there is sufficient theoretical and practical evidence to suggest that the human rights and development agendas have become inextricably linked. Nevertheless, these findings do not dispute the inconsistencies in the practical application of human rights in development, both in the context of negative conditionality, which continues to be carried out on a fragmented and *ad hoc* basis in some cases, and also in the context of measures to promote human rights, which vary considerably on a case by case basis.

This chapter will also consider the legacy of human rights as constituent and instrumental aspects of EU development policy, in general, and the relationship with the African, Caribbean and Pacific countries, in particular. In assessing the role of human rights as a constituent element of EU-ACP relations, conclusions will be drawn on the normative framework for the promotion of human rights and the changing priorities of EU development policy, particularly in light of the experience of EU cooperation with Kenya.

Furthermore, it will be considered whether it is possible to determine if human rights are promoted as an instrumental aspect of development. In this regard, some observations will be made on the extent to which the EU lives up to the Maastricht Treaty commitments of promoting human rights as a ‘general objective’ of development cooperation. This will benefit from the lessons learned in relation to human rights conditionality, political dialogue and measures to support human rights. In particular, conclusions will be drawn on the level of internal coherence between the EU’s normative and operational framework for the promotion of human rights in development, focusing on the extent to which the EU’s commitment to a positive approach to human rights is

¹⁰² Nederveen Pieterse, J., ‘My Paradigm or Yours? Alternative Development, Post-Development, Reflexive Development,’ 29

adopted in practice. Moreover, an attempt will be made to determine whether the EU's positive approach is based on the objective of promoting human rights as a standalone objective, *per se*, or whether human rights are mainstreamed as an integral facet of development policy strategies. This analysis enables an understanding not only of the extent to which the high rhetoric of the EU is matched in practice, but also an insight into the practical application of human rights as an instrumental part of development policy and practice.

CHAPTER ONE: HUMAN RIGHTS IN THE HISTORY OF DEVELOPMENT

1. Introduction

The first chapter of this thesis analyses the role of human rights in the changing trends of international development thinking and the influence of these trends on the policy and practice of the international financial institutions (IFIs) and the UN. An analysis of the IFIs, including the World Bank and the IMF, is instructive due to the increasing importance of these actors on the development scene from the 1980s onwards, particularly in the area of economic conditionality and increasingly through more policy-oriented conditionality in the area of good governance. Furthermore, compliance with the conditions laid down by these institutions for the receipt of concessional loans is often regarded as a signal for other donors to follow. An analysis of UN policy provides an illustration of the alternative mainstream development approaches and its attempts to highlight the perceived shortcomings of the policies of the IFIs.

The early trends in international development cooperation policy are firstly assessed from the emergence of development aid in the early 1950s and 1960s. This will involve an overview of the predominant modernisation theories, which emphasised the importance of industrialisation and national state planning as the means of achieving economic growth. This will be followed by an analysis of the challenges to the modernist approach in the 1970s from the ‘dependency’ school and from governments of developing countries which called for a fairer international economic system through the New International Economic Order (NIEO). It will subsequently be shown that development strategies underwent a significant reconsideration in the 1980s as exemplified in the World Bank’s neoliberal economic policies, which emphasised the importance of free-market economics, decentralisation, privatisation and the role of the private sector (the so-called ‘Washington Consensus’). Furthermore, the perceived failure of previous development models led to the introduction of economic conditionality, which provided for the structural adjustment policies of the International Monetary Fund (IMF) and the

World Bank. Although the neoliberal adjustment policies of the international financial institutions were implemented as a means of creating macro-economic stability, these policies led to severe cuts in social sector spending and came under strong criticism as a result of their negative social and economic impact. In light of the compelling counter evidence, there was a pressing need to provide a new rationale for aid, both for the internal and external legitimacy of donors.

What is significant about the history of development as outlined above is the absence of human rights to a large degree in both development discourse and practice. The following section discusses the eventual convergence between human rights and development in the late 1980s and early 1990s and the underlying tenets of this approach, namely the human development approach. This will encompass an analysis of the changing (normative) definition of development in UN circles. The policies of the IFIs will be considered to assess whether the convergence between human rights and development was also reflected in the policies of these institutions, in particular, in the context of good governance policies, insofar as they relate to human rights objectives. The analysis also covers the (modest) way in which the individual and human-centred conception of development has made its mark on the new poverty reduction strategies within the World Bank and other donor agendas through to the present emphasis on development compacts.

Although the convergence between human rights and development is represented as a *fait accompli* in much of the literature, the final section of this chapter considers the extent to which human rights have infiltrated current mainstream trends in development thinking and practice or whether they continue to live separate lives to some degree.

2. The Early Decades of Development Thinking and the Primacy of Economic Growth

2.1. Modernism and Developmentalism in the Post-World War II Period

It has often been stated that the paradigm of ‘developmentalism’ is rooted in the theories of modernisation, in which development is conceived as an inevitable, transformative process that follows a pre-determined linear path.¹⁰³ This conception was influenced by nineteenth century social science, which drew from the Darwinian biological evolutionary metaphor for growth and contemporary assertions regarding social evolution.

Evolution sorted history, producing an imperial panorama which dehistoricized non-western peoples, or rather, which granted a history only from the perspective of the imperial lighthouse. From the point of view of the centre, the global space appeared transformed into a time sequence, with Europeans as the only contemporaries, the sole inhabitants of modernity. Empire, then, was a time machine in which one moved backward or forward along the axis of progress.¹⁰⁴

It could be contended that the dominant post-war economic policies were influenced by the modernist paradigm of developmentalism. For example, leading economists, such as Rostow, emphasised the inevitable and pre-determined path of national growth.¹⁰⁵ In the 1950s and 1960s, the notion of ‘national developmentalism’, which relied upon governments as the central actor was prevalent in economic development thinking.¹⁰⁶ These theories of economic growth emphasised the role of state intervention, a strong public sector, macro-economic planning and investment, along with industrialisation which would provide the impetus for the economy’s ‘take-off’,¹⁰⁷ rather than a reliance upon pure market forces.¹⁰⁸

¹⁰³ For more on the literature relating to modernisation and the theory of development see, for example, Nederveen Pieterse, J., *Development Theory: Deconstructions and Reconstructions*, (London, 2001); Apter, D.E., *Rethinking Development: Modernization, Dependency and Postmodern Politics*, (Beverly Hills, CA, 1987).

¹⁰⁴ Nederveen Pieterse, *op. cit.*, (2001), p. 8.

¹⁰⁵ Rostow, W.A., *The Economic Stages of Growth: A Non-Communist Manifesto*, (Cambridge, 1960). See also Lewis, W.A., *The Theory of Economic Growth*, (London, 1955); Huntington, S., *Political Order in Changing Societies*, (New Haven CT, 1968); Smelser, N.J., ‘Towards a Theory of Modernization,’ from Etzioni, A. and Etzioni, A., (eds.), *Social Change*, (New York, 1964).

¹⁰⁶ For example, see Mason, E.S., *Economic Planning in Underdeveloped Areas: Government and Business*, (New York, 1958); Lewis, W.A., *Development Planning: The Essentials of Economic Policy*, (London, 1966); Lewis, J.P., ‘Government and National Economic Development,’ 118 *Daedalus* (1989).

¹⁰⁷ Rostow, *op. cit.*, (1960).

¹⁰⁸ Little, I.M.D., *Economic Development*, (New York, 1982), p. 191.

The economic theories of this period emphasised the benefits of ‘trickle down economics’, coined in the phrase “a rising tide lifts all boats”. Two exponents of this view were the Nobel Prize Winners, Arthur Lewis and Simon Kuznets, who both argued that although inequalities may emerge in the early stages of development, this was an essential and inevitable result. According to Kuznets, this inequality would be reversed in the later phases of development as incomes rose.¹⁰⁹ It was also widely propagated that in order to achieve economic growth, traditional communities and values would be inevitably affected in the name of ‘progress’.¹¹⁰

2.2. The Emergence of Development Aid

At the end of the Second World War and in the post-colonial climate of newly sovereign states, modernism found a new expression in the form of development aid. According to Macrae, it was the “political correlate to the economic theory of modernisation that dominated the emerging development theories of the 1950s”.¹¹¹ In this way, contemporary economic thinking provided a justification for aid, in other words, the transfer of resources from the developed to the developing world. The development paradigm was shared by two dominant ideologies and dialectically opposing groups, namely liberal internationalists and political realists.¹¹² The former, so-called ‘liberal internationalists’, argued that developing countries should assist in the problems of underdeveloped countries and supported the creation of the Bretton Woods institutions.¹¹³ In the 1960s, developing countries began to receive funds from the International Bank for Reconstruction and Development and later from the World Bank. Through these institutions, a plethora of new instruments were designed to provide ‘technical assistance’ to developing countries through expatriate aid,¹¹⁴ thus, leading to the creation of an

¹⁰⁹ Lewis, *op. cit.*, (1955); Kuznets, S., ‘Economic Growth and Income Inequality,’ 15 *American Economic Review* (March 1955).

¹¹⁰ This is reminiscent of the views of Schumpeter. Schumpeter, J.A., *Capitalism, Socialism and Democracy*, (London, 1943); Schumpeter, J., ‘The March into Socialism’, *American Economic Association*, New York, 30th December 1949.

¹¹¹ Macrae, *op. cit.*, (2001), p. 11.

¹¹² *Ibid.*, p. 13.

¹¹³ The Bretton Woods institutions for international monetary management were created in 1944 at the meeting of the delegations of forty-five nations meeting at the United Nations Monetary and Financial Conference and became operational in 1946. See section 3.1 below on the international financial institutions.

¹¹⁴ For example, the creation of UN Special Funds for Technical Assistance in 1949 and 1959.

international policy elite in the post-war decades such as the World Bank and the Organisation for Economic Cooperation and Development (OECD).¹¹⁵

The political realists believed that the transfer of resources to developing countries lay in their national self-interest, particularly in order to control communism though support for the ‘peripheral states’ and during the Cold War, aid was used by both Eastern and Western powers as a tool of realpolitik to foster strategic alliances. In this way, a political rationale was derived in support of development aid, which had previously been supported on the basis of economic arguments.¹¹⁶ Similarly, the success of the Marshall Plan and the Truman Doctrine in Europe provided a positive example of the success of aid for reconstruction and reconciliation. In this way, the common theme of “developmentalism” was thus shared by diverse schools of thought, both of which were “grounded in the assumption that the outcome of development is known, inevitable.”¹¹⁷

2.3. Questioning the Modernist Agenda

In the 1970s, there were strong challenges to the modernist developmental paradigm, which were given some impetus from dependency theories. During this period, there were increased calls from developing countries on the international scene, mostly through the UN fora, for the creation of a New International Economic Order (NIEO). This led to increased references to basic needs, participatory development and human rights, which ultimately made their way onto the mainstream agenda in subsequent years. During this period, the mainstream theories of modernisation were strongly challenged by ‘dependency’ theorists, which reflected widespread opposition to the hegemony of the dominant approach of capitalist economics.¹¹⁸ Although far from comprising a homogenous group, dependency theorists (particularly in Latin America) challenged the assumptions of modernist approaches, in particular, the necessary interconnection

¹¹⁵ Macrae, J., *Aiding Recovery? The Crisis of Aid in Chronic Political Emergencies*, (London, 2001), p. 15.

¹¹⁶ *Ibid.*, p. 12.

¹¹⁷ *Ibid.*, p. 13.

¹¹⁸ For more on this subject see Escobar, A., *Encountering Development: The Making and the Unmaking of the Third World*, (Princeton NJ, 1992); Wallerstein, I., *The Modern World System*, (New York, 1974); Amin, S., *Accumulation on a World Scale*, (New York/London, 1974).

between capitalism and economic growth¹¹⁹ and argued that the causes of underdevelopment or maldevelopment¹²⁰ lay in the structure of the world economy.¹²¹ These theories presented the dependency of the developing world centred upon the relationship between the developed world (core) and marginal developing countries (periphery). According to Dos Santos:

By dependence we mean a situation in which the economy of certain countries is conditioned by the development and expansion of another economy to which the former is subjected. The relation of interdependence between two or more economies, and between these and world trade, assumes the form of dependence when some countries (the dominant ones) can expand and be self-sustaining, while other countries (the dependent ones) can do this only as a reflection of that expansion, which can have either a positive or a negative effect on their immediate development.¹²²

While dependency theorists countered the dominant linear and pre-determined path of mainstream approaches and brought a valuable critique of the structure and inequalities of the world economy, their position was not free from contradictions and deficiencies.¹²³ For instance, it could be argued that the dependency school's own position somehow replicated the notion that the path of development was known, as the majority of these theories were derived from a Marxist critique of capitalism.¹²⁴ According to Friedmann, on the subject of alternative development, "like the mainstream doctrine to which it stands in dialectical opposition, alternative development is not primarily a set of technical prescriptions, but an ideology" ... "Centred on people rather than profits, it faces a profit-

¹¹⁹ Jones, P., 'Postdependency? The Third World in an Era of Globalism and Late Capitalism,' 22 *Alternatives* 2 (1997), p. 209.

¹²⁰ Amin, S., *Maldevelopment: Anatomy of a Global Failure*, (London, 1990).

¹²¹ Snyder, F.G., 'Law and Development in Light of Dependency Theory,' 14 *Law & Soc. Rev.*, (1980), p. 723. See for example, Frank, G.A., *Capitalism and Underdevelopment in Latin America*, (New York, 1967); Amin, *op. cit.*, (1974); Dos Santos, T., 'The Structure of Dependence,' reprinted in Seligson, M. and Passé-Smith, J., *Development and Underdevelopment*, (Boulder, 1993); Leys, C., 'Underdevelopment and Dependency: Critical Notes', reproduced in *Journal of Contemporary Asia* (1977); Wallerstein, *op. cit.*, (1974).

¹²² Dos Santos, *op. cit.*, (1993), p. 194.

¹²³ Jones, *op. cit.*, (1997), pp. 210-211.

¹²⁴ Apter, *op. cit.*, (1987), p. 25.

driven development as its dialectical other. Actual development will always be the historical outcome of the ideological and political conflicts between them.”¹²⁵

2.4. The New International Economic Order

During this period, developing countries had recourse to various international fora in order to express their dissatisfaction during a decade of global economic downturn following the oil crises of 1973/74 and 1979. An early example of collective action among developing countries was the Bandung Conference of 1955 at which developing countries and members of the Non-Aligned Movement (NAM) raised demands regarding decolonisation and development.¹²⁶ Due to the large presence of developing countries on the international arena following decolonisation, attempts were made to address concerns regarding the World Bank and IMF policies at the United Nations in the 1970s. In this regard, the establishment of a New International Economic Order was initiated and several UN resolutions mirrored these developments. For example, in 1974, the Declaration on the New International Economic Order (NIEO) was adopted by the United Nations General Assembly.¹²⁷ This was followed by the Charter on Economic Rights and Duties of States,¹²⁸ both of which should be seen in light of decolonisation.¹²⁹ In the context of ECOSOC, these events led to the creation of the United Nations Conference on Trade and Development (UNCTAD) in 1968.¹³⁰ The Generalised System of Preferences (GSP) was established to facilitate the access of products from developing countries to the European Community markets.¹³¹ The motivation for its creation was influenced by the United Nations Conference on Trade and Development. However,

¹²⁵ Friedmann, J., *Empowerment: The Politics of Alternative Development*, (Cambridge, 1992), pp. 8-9.

¹²⁶ See Rist, G., *The History of Development: From Western Origins to Global Faith*, (London and New York, 1997), pp. 82-83. According to Rist, the demands that were included in the final communiqué of the conference were largely identical to the values expressed in the UN Charter, such as respect of equal sovereignty of states and non-interference in internal affairs, respect for human rights and international obligations.

¹²⁷ Declaration on the Establishment of a New Economic Order, adopted 1st May 1974, GA Res. 3201 (S-VI), 6 (SPECIAL) UN GAOR, 6th Spec. Sess. Supp. No. 1, at 3, UN Doc. A/9559 (1974), reprinted in 3 *ILM* (1974) 715.

¹²⁸ Charter of Economic Rights and Duties of States 1974, adopted 12th December 1974, GA Res. 3281, UN GAOR, 29 Sess., Supp. No. 31 at 50, UN Doc. A/9631 (1975), reprinted in 14 *ILM* (1975) 251.

¹²⁹ Orford, A., ‘Globalization and the Right to Development,’ p. 131, from Alston, P., (ed.), *Peoples Rights*, (Oxford, 2001), p. 131.

¹³⁰ *Ibid.*, p. 129.

¹³¹ The GSP forms part of the EC’s Common Commercial Policy (CCP), rather than development cooperation policy. Article 133 (ex Article 113) EC Treaty governs the conclusion of treaties within the framework of the common commercial policy and also provides the legal basis for the GSP. See section 2.5.5.3 of chapter four of this thesis on EU development cooperation policy.

despite these achievements, significant reform of the IMF, World Bank and GATT were largely unsuccessful.¹³²

The mainstream theories of development economics were strongly challenged from the 1960s and 1970s onwards.¹³³ In particular, the clear trade-off between equity and growth, which was inherent within theories of developmentalism, was criticised by several development economists.¹³⁴ From the perspective of development economists, several studies were undertaken to demonstrate that economic growth alone was insufficient to achieve equality. For example, the Kuznets theory, which was described earlier in this chapter, indicated that inequality was inevitable during the early stages of development but would be reversed automatically as income rose. This theory was countered by the research of Adelman and Morris, published in 1973, who argued that the trend in inequality would not be reversed unless it was assisted by specific policies.¹³⁵ Similarly, the following quote of Hirschman demonstrated the increasing climate of skepticism regarding the assumptions of previous development thinking.

...When it turned out that the promotion of economic growth entailed, not infrequently, events involving serious retrogression in other areas, including the wholesale loss of civil and human rights, the self confidence that our sub-discipline exuded in its early stages was impaired.¹³⁶

2.5. Legacy of the 1970s: Basic Needs and the Changing Trends in Development Policy

Partly reflecting the criticism voiced regarding the dominant approach in economic thinking and policy, focus on the assessment of 'basic needs' became an integral part of

¹³² Orford, *op. cit.*, (2001), p. 129.

¹³³ Wallerstein, *op. cit.*, (1974); Amin, *op. cit.*, (1974).

¹³⁴ Taylor, L., *et al.*, 'The Links between Economic Growth, Poverty Reduction and Social Development: Theory and Policy,' p. 437, from Mehrotra, S. and Jolly, R., (eds.), *Development with a Human Face: Experiences in Social Achievement and Economic Growth*, (Oxford, 1998). See also Chenery, H., *et al.*, *Redistribution with Growth*, (London, 1974).

¹³⁵ Adelman, I. and Morris, C.T., *Economic Growth and Social Equality in Developing Countries*, (Stanford, CA, 1973).

¹³⁶ Hirschman, A., *Essays in Trespassing: Economics to Politics and Beyond*, (Cambridge, 1981), p. 385.

the new development strategy of the IFIs.¹³⁷ The basic needs strategy highlighted some of the lasting legacies of the radical dependency theories on mainstream approaches.¹³⁸ The identification of basic needs was achieved through methods of quantitative analysis and the collection of empirical data, and standards were set in terms of minimum physiological requirements in relation to food, clothing, shelter and water.¹³⁹ The ethos of basic needs was summed up in the words of a leading economist in this field, Paul Streeten, who stated that the aim of basic needs was to “improve the lot of the absolute poor”.¹⁴⁰ In this regard, the basic needs agenda did not seek to address issues of distribution relating to power and resources which are necessary to prevent ill-health, disease and under-nourishment,¹⁴¹ nor did it deal with the impact of structural adjustment policies and individual access to basic services in the context of privatisation.

The basic needs strategy was met with enthusiasm from IFIs, development agencies and non-governmental organisations as it provided a new impetus and continued justification for development. However, a strong critique of the basic needs terminology is offered by Rist who argues, among other things, that the concept does not challenge the basic assumptions of economics, namely, that one must choose between scarce resources to provide for ‘insatiable needs’.¹⁴² Furthermore, he conveys the idea that the notion of a shortage of goods is not a natural phenomenon, but rather a structural one.¹⁴³ According to Rist, “the ever-worsening conditions of life in the South meant that a morality of urgency took precedence over rigour of analysis; the time seemed to have come for action rather than reflection.”¹⁴⁴

3. The Washington Consensus, Structural Adjustment and Basic Needs

¹³⁷ Streeten, P., *First Things First: Meeting Basic Needs in Developing Countries*, A World Bank Publication, (Oxford, 1981).

¹³⁸ Macrae, *op. cit.*, (2001), p. 14.

¹³⁹ For further details see, Hopkins, M., ‘A Basic-Needs Approach to Development Planning’, World Employment Programme, Working Paper 3, (Geneva, 1977); Khan, A.H., ‘Basic-Needs Target: An Illustrative Exercise in Identification and Quantification’, from Ghai *et al* (eds.), *The Basic Needs Approach to Development: Some Issues Regarding Concepts and Methodology*, (Geneva, 1977).

¹⁴⁰ Streeten, *op. cit.*, (1981), p. 25.

¹⁴¹ *Ibid.*

¹⁴² Rist, *op. cit.*, p. 167.

¹⁴³ *Ibid.*, pp. 167-168.

¹⁴⁴ *Ibid.*, p. 169.

3.1. The World Bank and the International Monetary Fund (IMF)

The Bretton Woods' Institutions, namely, the World Bank¹⁴⁵ and the International Monetary Fund (IMF), were created in 1944 as agencies of United Nations system.¹⁴⁶ These international financial institutions were created as political entities and the division of control and voting power reflects the authority accorded to a minority of economically advanced states.¹⁴⁷ According to the Articles of Agreement of the International Bank for Reconstruction and Development (IBRD), the Bank is mandated to "assist in the reconstruction and development of territories of its members" ... "promote the long range balanced growth of international trade and the maintenance of equilibrium in balance of payments ... thereby assisting in raising productivity, the standard of living and conditions in [members'] countries."¹⁴⁸ The IBRD was also created "to promote private foreign capital by means of guarantees or participation in loans and other investments made by private investors".¹⁴⁹ It commenced its loan facility in 1960. The IMF was created as a regulatory body with the objective of promoting economic growth, international monetary cooperation and countering protectionist policies and recession.¹⁵⁰ Although it was created as a separate agency, compliance with IMF macro-economic conditions, are considered to be a prerequisite for eligibility for loans from the World Bank. This principle has become known as "cross-conditionality", however, there is some evidence that this practice may have become less rigidly enforced.¹⁵¹

3.2. The Washington Consensus

¹⁴⁵ The World Bank is comprised of several institutions, including the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Corporation (IFC), the International Centre for the Settlement of Disputes (ICSIC) and the Multilateral Investment Agency (MIGA).

¹⁴⁶ The 'Bretton Woods Institutions' and the term 'international financial institutions' will be used interchangeably in this thesis.

¹⁴⁷ Darrow, M., *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law*, (Portland, 2003), p. 1.

¹⁴⁸ Articles of Agreement of the International Bank for Reconstruction and Development, 27th December 1945, 60 Stat 1440, TIAS No. 1502, 2 UNTS 134, amended 17th December 1965, 16 UST 1942.

¹⁴⁹ Article 1, *ibid*.

¹⁵⁰ Darrow, *op. cit.*, (2003), p. 25; According to the Articles of Agreement, the objectives of the IMF include: "to promote international monetary cooperation; to facilitate the expansion and balanced growth of international trade; to promote high levels of employment and real income; to promote exchange stability; to eliminate foreign exchange restrictions;"

See Article I of Articles of Agreement of the International Monetary Fund, 27th December 1945, 60 Stat. 1401, 2 UNTS 39, amended 1st April 1978, 29 UST 2203.

¹⁵¹ World Bank Development News, 18th and 19th July 2000.

Despite the incorporation of basic needs into the policies of the IFIs and development agencies as outlined in section 2.5, international development thinking remained dominated by neoliberal economic development thinking, as exemplified in the policies of the international financial institutions. In the context of economic development thinking, the 1980s were dictated by the World Bank and IMF strategies of macro-economic structural adjustment and the privatisation of public sector activities. Increasing skepticism regarding the central role of governments, (particularly regarding excessive planning, unprofitable public undertakings and wasted resources) led to an emphasis on market economies and privatisation. Although aid was couched in technical and functional terminology,¹⁵² the political dimension of this approach was based on neoliberal approaches to economics, which encouraged the “removal of government interference in financial markets, capital markets, and of barriers to trade.”¹⁵³

In contrast with the previous emphasis upon national economic growth and state-controlled development, the notion of ‘rolling back the state’ and embracing the free market became the staple tenets of World Bank and IMF policies.¹⁵⁴ In this way, the neoliberal regime of the 1980s constituted a break with the traditional emphasis on the state as the key agent in economic development which was prevalent in Keynesian economic theory. During this period, economic thinking was influenced by the laissez-faire approaches of politicians such as Thatcher, Reagan and Kohl. Also known as the Washington Consensus, the new criteria provided a framework for the imperatives of the new international development aid architecture of the leading international financial institutions.¹⁵⁵

3.3. Economic Conditionality: Stabilisation and Structural Adjustment Policies

¹⁵² See Griffin, K., ‘Foreign Aid after the Cold War,’ 22 *Development and Change* 4 (1991).

¹⁵³ Stiglitz, J.E., *Globalisation and Its Discontents*, (New York, 2002), p. 59.

¹⁵⁴ Pender, J., ‘From Structural Adjustment to ‘Comprehensive Development Framework’,’ 22 *Third World Quarterly* 3 (2001), p. 399; Krugman, P., ‘Dutch Tulips and Emerging Markets’, 74 *Foreign Policy* 4 (1995).

¹⁵⁵ This term was coined by John Williamson, in Williamson, J., ‘What Washington Means by Policy Reform’, (1989) from Williamson, J., (ed.), *Latin American Adjustment: How Much Has Happened?*, (Washington DC, 1989). This consensus included the following criteria: fiscal discipline, reform of public expenditure, financial liberalisation, unified exchange rates, foreign direct investment, privatisation, deregulation and property rights. See also Williamson, J., ‘Democracy and the “Washington Consensus”,’ 21 *World Development* 8 (1993), pp. 1332-1333.

In attempting to understand the rationale behind the introduction of structural adjustment policies, some observers have pointed to the crises created by the oil shocks of 1973 and 1978-79, which led to huge price increases by the Organisation of Petroleum-Exporting Countries (OPEC).¹⁵⁶ For some developing countries, the effects of this period were devastating,¹⁵⁷ however, this benefited some oil-exporting developing countries in the short-term, which led to a surplus in the availability of 'petrodollars', thus raising their credit-worthiness. This led to a huge increase in the amount of loans from the IFIs and increased the indebtedness of many African countries.¹⁵⁸ Following the second shock and as a result of severe recession, developed countries reduced their demand for raw commodities, which furthermore exposed the strong dependence of developing countries upon changes in the global markets.¹⁵⁹ On the other hand, this crisis was compounded by the rise in interest rates which was introduced by Western countries to reduce inflation following the oil shocks.¹⁶⁰

In light of the low number of World Bank projects which were being funded in sub-Saharan Africa due to the unsuitability of the macro-economic framework in the 1970s, the Bank sought to provide alternative routes for the provision of loans, and thereby, provide a rationale for its continued existence. In this context, the President of the World Bank, Robert McNamara, suggested that it would consider the eligibility of countries that were willing to conform to specific policy prescriptions.¹⁶¹ Economic reform was linked to World Bank and IMF loans through conditionality, which was implemented through the framework of stabilisation policies and structural adjustment policies.¹⁶² In this context, the IMF reforms centred upon stabilising macro-economic factors through short-term measures such as devaluation, deflation, fiscal restraint and the advocating of a reduction in imports and the expansion of exports. These reforms were immediate and were implemented in tandem with World Bank loans, which were allocated in the form of

¹⁵⁶ Milward, B., 'What is Structural Adjustment?', from Mohan, J., *et al* (eds.), *Structural Adjustment: Theory, Practice and Impacts*, (London, 2000), p. 25.

¹⁵⁷ Zack-Williams, A.B., 'The Long Road to Structural Adjustment', p. 17, from Mohan *et al*, *op. cit.*, (2000).

¹⁵⁸ Milward, *op. cit.*, (2000), p. 25.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ Robert McNamara speaking at UNCTAD Conference, Manila, April 1979. Quoted in Milward, *op. cit.*, (2000), p. 27.

¹⁶² For evidence of growth of adjustment loans see Sparr, who has shown that from 1980 to 1982, the figure for structural adjustment loans was \$190m. This figure rose consistently during the following decade and for the period 1990-91, it had reached \$10,025m. Sparr, P., (ed.) *Mortgaging Women's Lives: Feminist Critiques of Structural Adjustment*, (London, 1994).

project loans and structural adjustment. Structural adjustment policies imposed economic conditionality through loans to recipient states, which sought to promote economic growth through policy and institutional reform, along with the alleviation of discrepancies in the balance of payments.¹⁶³ They were largely concerned with the supply side of the economy and linked in with IMF concerns regarding the necessity of improving balance of payments problems, enhancing efficiency and expanding exports.¹⁶⁴ The underlying theory of structural adjustment was derived from neo-classical economic theories and the general strategy of development was influenced by World Bank officials, such as Ernest Stern, who argued that structural adjustment would lead to improved efficiency and policy reform.¹⁶⁵

Structural adjustment programmes also incorporated more market-based approaches to the organisation and delivery of public services, and coincided with, or formed an integral part of overall government policies on deregulation, privatisation and trade liberalisation. In this way, the ‘rolling back of the state’ was a visible part of structural adjustment. For example, it was stated by the World Bank that “the state should not intervene where markets can work even moderately well.”¹⁶⁶ However, according to Mohan *et al*, structural adjustment is not a static policy and in this way, changes in international development thinking can be mirrored over the past two decades. For example, although there is a strong emphasis on the scaling back of the state, this position has been influenced by new trends in governance, which emphasise the interrelationship of a network of actors including the state, the market and the private sector.¹⁶⁷

3.4. Structural Adjustment with a Human Face

The underlying rationale of structural adjustment was aimed at creating an ‘enabling environment’ for economic growth, however, the social impact of these programmes did not go undocumented. For example, as noted above, the privatisation of public services

¹⁶³ Milward, *op. cit.*, (2000), p. 41.

¹⁶⁴ Darrow, *op. cit.*, (2003).

¹⁶⁵ Woodward, D., ‘Structural Adjustment Policies: What are they? Are they Working?’, CIIR Briefing Papers (1993), p. 4.

¹⁶⁶ World Bank, *Adjustment in African: Reforms, Results and the Road Ahead*, (World Bank, 1994), p. 183.

constituted a key element of the Washington consensus. According to the World Bank, the “best remedy for reform of inefficient public enterprises is privatisation within a competitive environment.”¹⁶⁸ However, this necessarily “implies that services, which were traditionally deemed to be public services such as the provision of water, energy or education”¹⁶⁹ would be removed from the public domain and issues such as access and distribution are left to the mercy of market forces. Furthermore, governments may have been less inclined to adopt economic and social policies due to reductions in social expenditure as a result of public sector reform. It has also been convincingly argued that, by their nature, structural adjustment programmes lead to labour displacement and have a direct impact on employment, working conditions and labour relations in the public sector,¹⁷⁰ while the consequences of these policies were not always compensated by pure market mechanisms.¹⁷¹

The first major publication to highlight the negative impact of structural adjustment came in the form of UNICEF’s *Adjustment with a Human Face* in 1987.¹⁷² From the outset, it should be noted that UNICEF did not challenge the premises or underlying philosophy of the approaches of the international financial institutions. Instead, it sought to expose the socio-economic impact of structural adjustment upon the individual, in other words, the ‘human face’ of development. The social impact of structural adjustment was acknowledged to some extent by the World Bank,¹⁷³ which responded, at least at a rhetorical level, by incorporating a ‘social’ dimension into its policies in order “to shield the poor from the full impact of the cost of adjustment.”¹⁷⁴ There is a significant amount of literature dealing with the negative impact of structural adjustment upon human rights, therefore, this chapter will not deal with this subject in detail.¹⁷⁵ The UNICEF

¹⁶⁷ Mohan, *op. cit.*, (2000), p. xvii.

¹⁶⁸ World Bank, Operational Directive 8.60 on Adjustment Lending Policy, (December, 1992), paras. 30-31.

¹⁶⁹ Feyter, K., de ‘Contracting for Human Development: International Law and Development Revisited,’ 10 *Asia Pacific Law Review* 1 (2002), p. 70.

¹⁷⁰ Sarafi, H., ‘Trade Unions in the Context of Structural Adjustment: Transition to a Market Economy,’ IRRA 10th World Congress, Study Group No. 16, Industrial Relations in the Public Sector, Washington D.C., 4th June 1995.

¹⁷¹ Stiglitz, *op. cit.*, (2002), p. 59.

¹⁷² Cornia, G.A., Jolly, R. and Stewart, F., (eds.), *Adjustment with a Human Face: Protecting the Vulnerable and the Promotion of Growth*, (Oxford, 1987).

¹⁷³ World Bank, *op. cit.*, (1994).

¹⁷⁴ Mehrotra, S. and Jolly, R., (eds.), *Development with a Human Face: Experiences in Social Achievement and Economic Growth*, (Oxford, 1998), p. 11. See World Bank, *World Development Report 1990*, (New York, 1990).

¹⁷⁵ See for example, Skogly, S.I., ‘Crimes Against Humanity – Revisited: Is there a Role for Economic and Social Rights’, 5 *International Journal of Human Rights* 1 (2001); Conklin, M., and Davidson, D., ‘The IMF and Economic and Social Human Rights: A Case-study of Argentina 1958-1985,’ 8 *HRQ* 2 (1986).

publication, among others, contributed to the reconceptualisation of development in terms of the individual. However, for the purposes of this chapter, which is concerned with the extent to which human rights have become integrated in donor policy, it should be noted that these criticisms were not framed in ‘human rights’ terms.

3.5. The Economic Impact of Structural Adjustment

As discussed above, the structural adjustment programmes impacted upon the economic conditions within developing countries through the imposition of policy-based lending. Following almost a decade of structural adjustment, the joint World Bank and UNDP evaluation of the structural adjustment was largely positive with regard to its implementation.¹⁷⁶ Nevertheless, these findings were rejected in the report of the UN Economic Commission for Africa from the same year.¹⁷⁷ In 1991, the influential work of Mosely et al¹⁷⁸ argued that even if economic performance has improved in certain countries, this had not resulted in greater inward investment, which was also a primary concern of the World Bank. In its subsequent assessment of 1994, the World Bank acknowledged the low levels of investment in countries which had undertaken the adjustment reforms,¹⁷⁹ however, they reaffirmed that the model would continue to be implemented and stated that “adjustment is the necessary first step on the road to sustainable, poverty-reducing growth”.¹⁸⁰ Once again, these findings were countered by Schatz and other commentators who have argued that structural adjustment policies have led to a negative outcome, contrary to the results of the Bank.¹⁸¹ Although structural adjustment led to growth and macro-economic stability in some countries, these policies have also been subjected to major criticism.¹⁸² According to Bradlow and Grossman, the

¹⁷⁶ World Bank/UNDP, *Africa's Adjustment and Growth in the 1980s*, (Washington DC, 1989).

¹⁷⁷ UNECA, *Statistics and Policies: Preliminary Observations on the World Bank Report, 'Africa's Adjustment and Growth in the 1980s'*, (Addis Ababa, 1989); See also UNECA, *African Alternative Framework to Structural Adjustment Programmes for Socio-Economic Recovery and Transformation (AAF-SAP)*, (Addis Ababa, 1989).

¹⁷⁸ Mosely, P., Harrigan, J. and Toye, J., *Aid and Power: The World Bank and Policy Based Lending*, Vol. 1, (London, 1991).

¹⁷⁹ Corbo, V., Fisher S. and Webb S.B., (eds.), *Adjustment Lending Revisited: Policies to Restore Growth*, A World Bank Symposium, (World Bank, 1992).

¹⁸⁰ World Bank, *op. cit.*, (1994), p. 15.

¹⁸¹ Schatz, S.P., ‘Structural Adjustment in Africa: A Failing Grade So Far’, 32 *Journal of Modern African Studies* 4 (1994), pp. 679-92; Schatz, S.P., ‘The World Bank's Fundamental Misconception in Africa’, 32 *Journal of Modern African Studies* 2 (1994), pp. 239-47.

¹⁸² See for example, Bradlow, D. and Grossman, C., ‘Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF’, 17 *HRQ* (1995).

“many countries that have undergone Bank and IMF-funded adjustment programs have experienced, in addition to macroeconomic stability and increased growth rates, widening income disparities, declining standards of human welfare and deteriorating environments.”¹⁸³

4. The United Nations and the Changing Normative Definition of Development

4.1. Challenging the Traditional Human Rights/Development Trade-off

As we have seen above, the issue of human rights was largely absent from international development policy in the first three decades after World War II. Moreover, it was widely recognised that a trade-off between development and human rights was justified in the interests of achieving economic growth. On the one hand, this trade-off indicated that the achievement of basic needs associated with economic, social and cultural rights should ‘wait’ until a sufficient level of development had been achieved.¹⁸⁴ On the other hand, the development/rights trade-off assumed that economic reform should take priority over civil and political rights and the achievement of economic growth may require, or even serve, undemocratic means.¹⁸⁵ This latter argument justified restrictions on the exercise of civil and political rights in the interests of development.¹⁸⁶ This partly helps to explain why many authoritarian regimes were supported by donors during the 1980s,¹⁸⁷ despite the rhetoric of donors concerning human rights conditionality within foreign policy.¹⁸⁸ From the late 1980s onwards, however, this situation began to change. The following section analyses the changing normative definition of development in UN circles and the contribution of this change to the gradual convergence of human rights and development.

¹⁸³ Ibid., (1995), p. 421.

¹⁸⁴ Donnelly, *op. cit.*, (2003), p. 196-199.

¹⁸⁵ Lal, D., ‘The Poverty of Development Economics,’ Hobart Paperback 16, IEA, London, 1983, p. 33.

¹⁸⁶ Donnelly, *op. cit.*, (2003), p. 198.

¹⁸⁷ Abrahamsen, R., *Disciplining Democracy: Development, Discourse and Good Governance in Africa*, (London, 2000), p. 30.

¹⁸⁸ This is illustrated in Tomaševski, K., *Development Aid and Human Rights*, (London, 1989); Tomaševski, K., *Development Aid and Human Rights Revisited*, (London, 1993). Support for undemocratic regimes is also explained by Cold War geopolitical rivalries, which were described in the introductory chapter of this thesis, section 1.3.

4.2. The Declaration on the Right to Development (1986)

During the 1970s and early 1980s, growing support for the existence of the right to development was manifest in some academic work and among human rights activists. This link was first recognised at the international level by the UN Commission on Human Rights in 1977,¹⁸⁹ which led to the establishment of the working group of government experts in 1981.¹⁹⁰ In 1978, the Declaration on the Preparation of Societies for Life in Peace explicitly stated that ‘all peoples have the right to determine the road to their development’.¹⁹¹ In the same year, the UNESCO Declaration on Race and Racial Prejudice referred to ‘the right of every human being and group to full development.’¹⁹² In 1981, the right to development was recognised in the African Charter on Human and Peoples’ Rights.¹⁹³ The Declaration on the Right to Development was adopted in 1986 at the UN General Assembly by 146 votes to 1.¹⁹⁴ The Right to Development was defined as the right to ‘participate in, contribute to and enjoy economic, social and cultural and political development’, in which States have the primary responsibility for creating national and international conditions for its realisation.¹⁹⁵

In this Declaration, the international community recognised that the human person should be the subject and object of the development process, rather than economic growth.¹⁹⁶ The human person became the active participant and beneficiary of the Right to Development. (Article 2(1)). Under Article 2(3), States were accorded both the right to development and also the duty to formulate appropriate national development policies that aim toward the constant improvement of the well-being of the entire population and of all individuals (Article 2(3), Article 3). The duty-holders consist of all people, both individually and collectively (Article 2(2)), along with demands for a more concerted

¹⁸⁹ UN Human Rights Commission Resolution 4 (XXXIII) of 21st February 1977, para. 4.

¹⁹⁰ UN Human Rights Commission Resolution 36 (XXXVII) of 11th March 1981.

¹⁹¹ UNGA Resolution 33/73 of 15th December 1978, A/RES/33/73.

¹⁹² UNESCO, Final Report of UNESCO Expert Meeting on Human Rights, Human Needs and the Establishment of a New International Economic Order, UNESCO Doc. SS. 78/ Conf. 630/12 (1978), pp. 90-93.

¹⁹³ The African Charter on Human and Peoples’ Rights, *concluded* at Banjul, 26th June 1981, OAU Doc. CAB/LEG.67/3 Rev. 5 (1981), *reprinted* in 21 *ILM* (1982) 59. “1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.”

¹⁹⁴ Declaration on the Right to Development, *adopted* by the UN General Assembly, 4th December 1986, GA Res. 41/128 (Annex), UN GAOR, 41st Sess., Supp. No. 53, at 186, UN Doc. A/41/53.

¹⁹⁵ Preamble of the Declaration on the Right to Development.

effort from all the actors on the social scene. According to Article 3(3), States have the duty to co-operate with each other in ensuring development and eliminating obstacles to this process.

The Right to Development should be seen in the context of post-colonialism and the attempts to create a New International Economic Order (NIEO) as mentioned above. It belongs to the so-called 'third generation' rights,¹⁹⁷ which do not have an international treaty for their protection, in contrast to civil and political rights, and economic, social and cultural rights.¹⁹⁸ Although there is no shortage of rhetorical support for the right to development,¹⁹⁹ third generation rights should be regarded as an emerging, rather than an existing part of international law.²⁰⁰

Although it is a highly contested issue and by no means universally accepted,²⁰¹ the right to development is significant for the following reasons. Firstly, it further contributed to the changing normative definition of development in terms of an individual and human-centred process. This has been most clearly illustrated in the definition of development in the Preamble as a 'comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.' Secondly, the right to development was reaffirmed as a universal and inalienable right at the Vienna Conference and Programme of Action in 1993.²⁰² Although the value of this Declaration

¹⁹⁶ Ibid., see Preamble and Article 1.

¹⁹⁷ Third generation rights include the right to development, a healthy environment and peace. Dixon, M., *Textbook on International Law*, (3rd ed.), (London, 1990), p. 312. See Vasak, K., 'A Thirty-Year Struggle,' *The UNESCO Courier* (November 1977). The term 'generations' may be unhelpful in the sense that it implies the succession of one generation of rights over another or that human rights belong to the period in which they found expression. However, this term will be retained and it will be understood in the sense that the articulation of human rights has taken place on a temporal basis. On this point see Flinterman, C., 'Three Generations of Human Rights,' from Berting, J., *et al.*, (eds.) *Human Rights in a Pluralist World*, (Westport, 1990).

¹⁹⁸ International Covenant on Civil and Political Rights, adopted 16th December 1966, G.A. Res. 2200 (XXI), UN GAOR, 21st Sess., No. 16, UN Doc. A/6316 (1966), entered into force 23rd March 1976 and International Covenant on Economic, Social and Cultural Rights, adopted 16th December 1966, G.A. Res. 2200 (XXI), UN GAOR, 21st Sess., No. 16, UN Doc. A/6316 (1966), entered into force 3rd January 1976.

¹⁹⁹ See for example, UN Doc. E/CN.4/1334, para. 78; Vienna Declaration and Programme of Action, UN GAOR, World Conference on Human Rights, 48th Sess., 22nd Plen. Mtg., part 1, UN Doc. A/CONF.157/24 (1993), reprinted in *ILM* (1993) 1661.

²⁰⁰ Brownlie, I., *Principles of International Law*, (5th ed.), (Oxford, 1998), p. 583.

²⁰¹ For evidence of the controversial nature of this subject, see: Donnelly, J., 'Third Generation Rights,' pp. 119-150 from Brölmann, C., Lefeber, R. and Zieck, M., (eds.), *Peoples and Minorities in International Law*, (Dordrecht, 1993); Alston, P., 'The Right to Development at the International Level,' from Dupuy, R.J., (ed.) *The Right to Development at the International Level*, Workshop of the Hague Academy of International Law, 16th – 18th October 1979, (The Hague, 1980).

²⁰² Vienna Declaration and Programme of Action, *op. cit.*, (1993).

is simply rhetorical, the legacy of this right can be found in the explicit recognition of human rights and development as interdependent and mutually reinforcing by the international community, and the acknowledgement that resource constraints should not be used by nations to justify a failure to implement human rights.²⁰³

International human rights law provides a strong framework for positive measures in the area of human rights. For example, a central aspect of the UN Charter is based upon ‘promoting and encouraging respect for human rights and for fundamental freedoms for all.’²⁰⁴ According to Article 55 UN Charter, the UN shall promote ‘universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.’ Furthermore, in Article 56, all UN Member States ‘pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.’ However, following the declaration of the UDHR, activities in the area of development and human rights were included under the competences of separate UN agencies and for this reason, the human rights and development agendas were separated. For example, human rights issues were dealt within the context of General Assembly, ECOSOC and UNHCHR, whilst responsibility for development issues lay with bodies and agencies such as UNDP, UNCTAD and the World Bank.

Therefore, although the convergence of human rights and development aid may have come as surprise to both lawyers and development professionals, it could be argued that the changing conceptual boundaries of the definition of development in recent decades facilitated the convergence of these previously distinct spheres of interest. In the following section, it will be argued that this convergence was also facilitated to a large extent by the changing conception of development by UN agencies, including UNDP and Office of the High Commission for Human Rights (OHCHR), which redefined development in terms of the realisation of individual needs and set human rights as both the framework and objective of development activities, in sharp contrast with the traditional emphasis upon national economic growth.

²⁰³ Ibid., para. 31.

4.3. UNDP and the Human Development Index

In line with the correlation between economic growth and development in mainstream economic literature, developing countries have been traditionally classified on the basis of income per capita and gross national product (GNP). For example, in order to benefit from World Bank loans, developing countries are categorised according to income.²⁰⁵ In 1990, aggregate indicators based on the human development index (HDI) were put forward by the United Nations Development Programme, to rival the traditional measure of GNP per capita.²⁰⁶ In this way, the definition of developing countries could be determined by alternative variables and indicators, which include life expectancy at birth, adult literacy rate and the school enrolment ratio and income per capita. It is not clear whether the HDI constituted a radical breakthrough in the collection of statistical information, as some of these criteria were already being used, however, this index provided a revolutionary counterpoint to dominant development indicators based exclusively upon economic growth.²⁰⁷ The Human Development Report of 1990 reflected the new conceptualisation of development in terms of the individual.

Human development is a process of enlarging people's choices. ... But human development does not end there. Additional choices, highly valued by many people, range from political, economic and social freedom to opportunities for being creative and productive, and enjoying personal self-respect and guaranteed human rights ... According to this conception of human development, income is clearly only one option that people would like to have, albeit an important one. ... Development must, therefore, be more than just the expansion of income and wealth. Its focus must be people.²⁰⁸

4.4. Theoretical Underpinnings of the Human Development Index

²⁰⁴ Article 1(3) of the Charter of the United Nations, signed 26th June 1945, entered into force 24th October 1945, T.S. No. 993, (1969).

²⁰⁵ See World Bank, *World Development Report 2002. Building Institutions for Markets*, (Washington DC, 2002).

²⁰⁶ The HDI first appeared in UNDP, 'Human Development Report 1990,' (UNDP, 1990).

²⁰⁷ Sen, A., *Development as Freedom*, (Oxford, 1999), p. 318, 41n.

4.4.1. The Constitutive and Instrumental Role of Human Rights in Development

The advent of the HDI was strongly influenced by the writings of Ul Haq and Amartya Sen who were both involved in the drafting of the 1990 Human Development Report.²⁰⁹ In particular, it could be argued that the seminal work of Amartya Sen provided an impetus for the reconceptualisation of development.²¹⁰ Sen's earlier work challenged traditional assumptions on the cause of famines. Using the oft-cited comparison of China and post-democratic India, Sen highlighted the interconnections between civil and political rights and economic needs.²¹¹ For example, China experienced a catastrophic famine between 1958 and 1961, leading to the death of almost thirty million people. Without free press or alternative political parties, he argues that there could be no early warning. Therefore, famines are social, rather than natural disasters and for this reason, they do not occur in democracies.²¹²

...democracy can serve to enhance the political attention that vulnerable people get. The rulers have to listen to expression of needs, frustrations, complaints that people may have... This is one reason why no substantial famine has ever occurred in a democratic country. For one thing elections are not so easy to win after a famine. Famines have thus, been confined to countries governed by colonial rulers, by one-party regimes or by military dictators.²¹³

In this respect, Sen argues that the freedom of the press and an adequate opposition in the political system are essential for averting famines. At the same time, however, Sen recognises that without social and economic reform, endemic hunger may prevail even

²⁰⁸ UNDP, 'Human Development Report 1990,' (UNDP, 1990), p. 10.

²⁰⁹ The group was chaired by Ul Haq and included Paul Streeten, Meghnad Desai, Gustav Ranis, Keith Griffin and Amartya K. Sen. See Sen, A. and Anand, S., 'The Concept of Human Development', Background Paper for the Human Development Report, (New York, 1990).

²¹⁰ For example, Sen, A., *Resources, Values and Development*, (Cambridge Mass., 1984); Sen, A., 'Development As Capability Expansion,' 19 *Journal of Development Planning* (1989), pp. 41-58; Sen, A., 'Development as Capability Expansion', from Griffin, K., and Knight, J., (eds.), *Human Development and International Development Strategy for the 1990s*, (London, 1990). These ideas were elaborated on in the seminal publication Sen, A., *Development As Freedom*, (Oxford, 1999). Sen's contribution is highlighted, however, see also Ul Haq, M., *Reflections on Human Development*, (Delhi, 1998).

²¹¹ Sen, *op. cit.*, (1999), chapter 7, (especially pp. 180-183). See also Sen, A., *Poverty and Famine. An Essay on Entitlement and Deprivation*, (Oxford and New York, 1981).

²¹² *Ibid.*, p. 180-183.

within democracies. For example, although there has not been a famine in democratic India, one third of the population goes hungry at night. According to Sen, “[t]he quiet presence of non-acute, endemic hunger leads to no newspaper turmoil, no political agitation, no riots in the Indian parliament. The system takes it in his stride.”²¹⁴

Sen argues that famines result from inequalities built into the mechanisms for distributing food, rather than a lack of food.²¹⁵ Consequently, more attention should be given to individual entitlements and access to food, rather than the absence of food. According to Sen, entitlements are defined as “the commodities over which she can establish her ownership and command. People suffer from hunger when they cannot establish their entitlement over an adequate amount of food.”²¹⁶ As shown in the analysis of famines, there has been an over-emphasis on food production and output per head rather than examining the individual entitlements and access to food.²¹⁷ In this respect, Sen criticises the traditional Malthusian perspective of food-to-population ratio, which has dominated the question of food aid.²¹⁸ Furthermore, he argues that increased emphasis should be placed on the inequalities built into the mechanisms for distributing food, rather than focusing on a lack of food.

Furthermore, Sen explicitly challenges the view that civil and political rights are a ‘luxury’ that developing countries cannot afford.²¹⁹ This contrasts with the views in some developing countries that socio-economic needs should be satisfied before the realisation of civil and political rights, and indeed the idea that these concepts are not mutually compatible (for example, as witnessed at the Vienna Conference on Human Rights in 1993).²²⁰ These arguments are premised on the view that political rights would impact negatively upon the realisation of economic needs²²¹ and have been expressed for example by the former Prime Minister of Singapore, Lee Kuan Yew, who favours a “hard state,” in which economic growth and the fulfillment of economic needs should take

²¹³ Sen, A., ‘A System that works best for all?’ from an essay re-published in *The Australian*, January 2000.

²¹⁴ Sen, *op. cit.*, (1984), p. 500.

²¹⁵ Sen, *op. cit.*, (1981).

²¹⁶ Sen, *op. cit.*, (1999), p. 162.

²¹⁷ *Ibid.*, p. 209.

²¹⁸ Malthus, T., *An Essay on the Principle of Population*, (London, 1798).

²¹⁹ Sen, A., ‘Freedoms and Needs,’ *New Republic* (January 1994), p. 1.

²²⁰ *Ibid.*

priority over the rights of individuals.²²² In contrast, rather than suspending human rights until a certain level of development has been achieved, Sen emphasises the interlinkages between development and rights, and insists that the latter are essential for the conceptualisation and formulation of economic needs – for example, through discussion, the exchange of information and the exercise of civil and political rights (particularly, the freedom of expression).²²³

Sen's work contributed to the reconceptualisation of development economics through the concept of 'capability'. Sen's critique of the pure market mechanism calls for a reconceptualisation of poverty as the absence of capabilities and entitlements.²²⁴ His ideas also challenge assumptions relating to the scarcity of 'public goods', as the terms 'entitlements' and 'capabilities' emphasise the individual's choice and freedom to exercise control over resources, among other things.²²⁵ Capabilities are defined as something "that a person has, that is, the substantive freedoms he or she enjoys to lead the kind of life he or she has reason to value."²²⁶ Indeed, for Sen, development is defined as the expansion of freedoms, which is broader than traditional measurements based on income or GNP. Freedoms are not only regarded as a requirement for development, but instead as "simultaneously instrumental, constitutive, and constructive for development."²²⁷ In Sen's view, freedoms are defined as political freedoms; economic facilities; social opportunities; transparency guarantees; protective security.²²⁸

As well as going beyond traditional welfare economics which emphasises the concept of utility, Sen also discusses the idea of rights having priority over other social goals, taking into consideration the views of liberal theorists including Rawls and Dworkin and more

²²¹ Ibid., p. 3.

²²² Ibid (1994); Sen, *op. cit.*, (1999), p. 15.

²²³ Ibid., (1994), pp. 10-11.

²²⁴ Sen, *op. cit.*, (1999), p. 120.

²²⁵ Sen's work is also influenced by Nussbaum's ideas on capabilities based on the Aristotelian conception of functionings. On this issue, see Nussbaum, M., 'Capabilities and Human Rights,' 66 *Fordham Law Review* (1997), pp. 273-300; Nussbaum, M., 'Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan,' 111 *Ethics* (2000b), pp. 102-140; Taylor, C., 'Explanation and Practical Reason,' from Nussbaum, M. and Sen, A., (eds.), *The Quality of Life. Studies in Development Economics*, (Oxford, 1993).

²²⁶ Sen, *op. cit.*, (1999), p. 87.

²²⁷ Uvin, P., 'On the Moral High Ground: The Incorporation of Human Rights by the Development Enterprise,' XVII *Fletcher Journal of Development Studies* (2002), p. 7. See in particular, Sen, *op. cit.*, (1999), pp. 8-10, pp. 16-17.

²²⁸ Sen, *op. cit.*, (1999), p. 10 and p. 53.

libertarian defenders of the supremacy of rights, such as Robert Nozick.²²⁹ In contrast to liberal theorists who have expressed the idea of liberty taking priority over other social goods, Sen does not view rights and socio-economic needs as competing objectives. Rather than entering into this debate, he argues that, “the critical issue, I would submit, is not complete precedence, but whether a person’s liberty should get just the same kind of importance (no more) that other types of advantages – incomes, utilities and so on – have.”²³⁰

Furthermore, Sen argues that there is an interconnection between both rights and development, which is both instrumental and constitutive.²³¹ In this way, freedom should be used as a variable in determining development and as essential for the fulfillment of economic needs. It should be noted however, that Sen does not adopt a human rights approach to development, but instead highlights the intrinsic value of integrating human rights and development. In this way, he advocates the role of a broad spectrum of rights, including civil and political freedoms and also the economic entitlements of individuals.

4.4.2. Additional Variables in Economics

Economists such as Amartya Sen and Jean Drèze²³² have also challenged the widespread doctrine that growth should necessarily lead to inequality. In this way, they have rejected the classical models of economics which demonstrate that markets and economic efficiency necessarily follow the rule of Pareto Efficiency, which can be defined as “a situation in which the utility (or welfare) of no one can be raised without reducing the utility (or welfare) of someone else”.²³³ Similarly, this also challenges the Arrow-Debreu

²²⁹ An in-depth discussion of this issue is undoubtedly beyond the scope of this thesis. For further reading, see Rawls, J., *A Theory of Justice*, (Cambridge Mass., 1971); Rawls, J., *Political Liberalism*, (New York, 1993), Lecture Eight. For a critique of Rawls, see Hart, H.L.A., ‘Rawls on Liberty and Its Priority,’ 40 *University of Chicago Law Review* (Spring 1973). See also Dworkin, R., *Taking Rights Seriously*, (London, 1978). For a conservative libertarian view of personal rights, see Nozick, R., *Anarchy, State and Utopia*, (New York, 1974) and for a revised view, Nozick, R., *The Examined Life*, (New York, 1990).

²³⁰ Sen, *op. cit.*, (1999), p. 64.

²³¹ *Ibid.*, p. 494.

²³² Drèze, J. and Sen, A., *Hunger and Public Action*, (Oxford, 1989); Sen, *op. cit.*, (1999).

²³³ Quoted in Sen, *op. cit.*, (1999), p. 217. See Sen., A., ‘The Impossibility of a Paretian Liberal,’ 78 *JPE* (1970).

theorem which states “it is not possible to enhance someone’s utility without reducing someone else’s.”²³⁴

Sen has moved beyond traditional welfare economics, which is premised on the concept of ‘utility’. This concept was based on Jeremy Bentham’s theory of justice and also influenced by the dominant welfare approaches such as those which had been put forward by John Stuart Mill. In this way, Sen challenges:

the equation of rational behaviour with self-interested utility maximisation; the use of self-interested utility maximisation as a predictor of individual behaviour; and the use of choice information as an indicator of individual preference and value.²³⁵

In contrast, Sen argues that ‘utility’ should be replaced by ‘individual freedoms,’²³⁶ in other words, by using freedoms as a variable in economics²³⁷ and by stating that “...a competitive market equilibrium guarantees that no one’s freedom can be increased any further while maintaining the freedom of everyone else.”²³⁸ His critique of the pure market mechanism calls for an increased role for the consideration of inequality and distribution and a reconceptualisation of poverty as the absence of capabilities and entitlements.²³⁹ This goes beyond and indeed, challenges welfare approaches, which assess utility and outcomes exclusively on income and growth per capita, as these fail to take issues of distribution and the role of rights and freedom into consideration.²⁴⁰

According to Sen, ‘freedom’ is an essential and constitutive component of development, which challenges the traditional definitions of development in terms of economic growth

²³⁴ Ibid (1999). For example, Arrow, K.J., ‘An Extension of the Basic Theorems of Classical Welfare Economics’, from Neyman, J., (ed.), *Proceedings of the Second Berkeley Symposium of Mathematical Statistics*, (Berkeley, CA. 1951); Debreu, G., *A Theory of Value*, (New York, 1959).

²³⁵ Overseas Development Institute, ‘Economic Theory, Freedom and Human Rights: The Work of Amartya Sen,’ Briefing Paper, November 2001, p. 1.

²³⁶ Sen, *op. cit.*, (1999), p. 117.

²³⁷ Ibid., p. 118.

²³⁸ Ibid., p. 117.

²³⁹ Ibid., p. 120.

²⁴⁰ Ibid., p. 62.

indicators and income per capita.²⁴¹ Equally, freedoms play an instrumental role in the process of development by providing the means to achieve development objectives.²⁴² The instrumental freedoms include political freedoms, economic facilities, social opportunities, transparency guarantees and protective security.²⁴³ Although the instrumental freedoms referred to by Sen are more expansive than the principles contained within human rights law, there are considerable overlaps between the human rights and substantive freedoms identified. For example, political freedoms refer to the freedom of speech, the right to hold elections and participation. Although Sen does not explicitly refer to socio-economic rights, social facilities promote access to education and health facilities. The instrumental freedoms are interconnected and serve to enhance individual capabilities and to achieve human development as an end. For example, political freedoms support economic security, whilst social facilities may contribute to economic participation.²⁴⁴

4.5. The End of the Cold War: Linking Aid and Human Rights Measures

The changing normative definition of development in terms of human rights also became more palatable during the 1990s as this period coincided with the end of the Cold War. During the era of Cold War superpower rivalry between the US and the USSR, human rights occupied a central place in the ideological conflicts between East and West. Following the fall of communism in Central and Eastern Europe, respect for human rights, democratic principles, the rule of law and free markets emerged as the universal signs of external legitimacy.²⁴⁵ This became known as the “third wave of democratisation”²⁴⁶ During this period, aid no longer served the geostrategic function that it had during the Cold War, and it became acceptable to integrate political conditionality

²⁴¹ Sen, *op. cit.*, (1999), p. 5.

²⁴² Sen’s freedom-based approach to economics is premised on the role of individual agency in development. It is beyond the scope of this thesis to deal with the issue of agency, however, for further reading see Sen, *op. cit.*, (1999), pp. 11, 18-19 and chapter eight.

²⁴³ *Ibid.*, p. 10.

²⁴⁴ Sen, *op. cit.*, (1999), p. 11. For further reading on the relationship between human rights, capabilities and freedoms, see Sen, A., ‘Human Rights and Capabilities,’ 6 *Journal of Human Development* 2 (2005); Alexander, J., ‘Human Rights and Moral Pluralism,’ 8 *International Journal of Human Rights* 4 (2004); See also Sen, A., ‘A Theory of Human Rights,’ 32 *Philosophy and Public Affairs* 4 (2004).

²⁴⁵ Crawford, G., *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality*, (Houndmills, 2001), pp. 12-13.

²⁴⁶ Huntington, S.P., *The Third World: Democratization in the Late Twentieth Century*, (Norman, 1991).

within aid policies. This development had a dual effect as the good governance and democratisation agenda was used both to encourage reform in developing countries, however, it also provided a justification for decreasing aid to Africa due to its loss of strategic importance at the end of the Cold War, thus illustrated by the declining levels of aid to this region.

Due to the perceived lack of strategic and economic importance, donors began to decrease aid to former allies such as Kenya, Somalia, Liberia, Chad, and DRC (formerly Zaire) and this was accompanied by a rise in aid from the West to former Soviet countries, which was made conditional upon democratisation and good governance criteria. In this way, the new political dimension of aid allowed donors to shift aid priorities and justify reductions in aid to Africa.²⁴⁷ For example, this led to an increase in EU aid to transition countries, which encouraged both a move to liberal democracy and open markets. The promotion of ‘democratisation’ included measures to promote human rights and this became a key feature of donor external assistance. According to the Preamble of the European Bank for Reconstruction and Development, human rights are defined as “those which, in accordance with international standards, are essential elements of multiparty democracy, pluralism and market economies.”²⁴⁸

Apart from measures which individual donors have undertaken to promote human rights in development cooperation, donors also co-operate in a variety of international fora, such as coordination with the World Bank, therefore, obligations arise in this regard to encourage measures concerning the promotion of good governance and the rule of law as discussed above. Similarly, through cooperation in multilateral organisations, individual donors have reaffirmed the interlinkages between human rights and development at various UN conferences, for example in 1993 and 1995.²⁴⁹

Furthermore, the members of the Development Assistance Committee of the OECD were also urged to ensure greater selectivity in the allocation of funding to include positive

²⁴⁷ Abrahamsen, *op. cit.*, (2000), p. 34.

²⁴⁸ EBRD, ‘Procedures to Implement the Political Aspects of the Mandate of the European Bank for Reconstruction and Development’, Memorandum BDS91-16, 28th May 1992, p. 4.

conditionality in the area of human rights, the rule of law and democratic reform. For example, in 1990, “[a]llocation decisions henceforth will be more influenced than in the past by a country’s record on human rights and democratic practice.”²⁵⁰ In addition, the OECD also stressed the “vital connection between open, democratic and accountable political systems, individual rights and the effective and equitable operation of economic systems with substantial reductions in poverty.” Finally, the 1995 OECD guidelines to DAC donors clearly illustrated the importance of human rights measures.

[...] to advance the complex agenda of participatory development, good governance, human rights and democratisation, their own countries [i.e. DAC members] must accept a number of responsibilities. They have an obligation to be fully informed and sensitive about the particular circumstances in each partner country; they must be constructive and creative in seeking appropriate and effective ways to nurture improved practice; and, not least, they must work for coherence in the policies and practices of their own governments, individually and collectively.²⁵¹

Within the Council of Europe, this notion of conditionality was described in a more positive manner by Uwe Holtz as an “additionality”. “Conditionality should not be restricted to purely economic considerations. It should be supplemented by the concept of another, a new conditionality, an ‘additionality’, which should take into account the preparedness to realize human rights and social justice, protect the environment and cut defence spending.”²⁵²

4.6. The Legacy of UN’s Reconceptualisation of Development: Human Rights-Based Methodologies

²⁴⁹ See section 4.5 below.

²⁵⁰ OECD, ‘Development Cooperation: 1990 Report,’ (Paris, December 1990), p. 12.

²⁵¹ OECD, ‘Participatory Development and Good Governance,’ Development Cooperation Guideline Series, (Paris, 1995).

²⁵² Conclusions of Dr. Uwe Holtz, member of the German Bundestag, ‘Democracy and Development in Africa.’ Report of the Colloquy held in Dakar (Senegal) on 25th and 26th March 1991’, Council of Europe, Strasbourg, Doc. SXB.CONF (III) 11, p. 72, cited in Tomaševski, *op. cit.*, (1993), pp. 9-10.

As it was shown above, the concept of individual or ‘human centred’ development influenced the changing conception of development in the 1990s. Following the creation of the human development index, the UN Development Programme has reiterated the relationship between human rights and development in several policy documents²⁵³ and also within the subsequent annual human development reports of UNDP, in particular, the report of 2000, in which its conception of human development is described as “the enhancement of capabilities with the concept of basic freedoms.”²⁵⁴ Similarly, further tangible examples of this convergence can also be seen in the consideration of human rights within the United Nations Development Assistance Framework (UNDAF),²⁵⁵ and the HURIST programme which involves joint cooperation between the Office of the High Commissioner for Human Rights (OHCHR) and UNDP.²⁵⁶ Finally, along with the responsibility for the further implementation of the right to development, which has been allocated to the OHCHR, it has also continued to advance the interconnection between the human rights and development agenda²⁵⁷ and steps have also been taken in context of UNICEF’s programming strategies.²⁵⁸

The human centred conception of development has assumed a prominent position in the declarations at various UN conferences in the 1990s.²⁵⁹ In particular, the Final Declaration and Programme of Action of the Vienna World Conference on Human Rights 1993 stated that “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing” and, furthermore, that “the international community should support the strengthening and promoting of democracy and respect for human rights and fundamental freedoms in the entire world.”²⁶⁰ In this way, donor countries affirmed their commitment to the promotion of positive measures

²⁵³ UNDP, ‘Integrating Human Rights with Sustainable Development,’ UNDP Policy Document, (New York, January 1998).

²⁵⁴ UNDP, *Human Development Report 2000*, (UNDP, 2000), p. 19.

²⁵⁵ ‘The Incorporation of Economic, Social and Cultural Rights into the United Nations Development Assistance Framework (UNDAF) Process, Comments adopted by the Committee on Economic, Social and Cultural Rights, 15th May 1998. Source: http://www.unhchr.ch/html/menu2/6/cescrnote.htm#note_18a

²⁵⁶ Source: <http://www.unhchr.ch/development/hurist.html>

²⁵⁷ OHCHR, ‘Development and Human Rights: The Undeniable Nexus,’ Speech of Mary Robinson, UN High Commissioner for Human Rights (UNHCHR), Geneva, 26th June 2000; OHCHR, ‘Human Rights, Poverty Reduction and Sustainable Development: Health, Food and Water,’ A Background Paper, World Summit on Sustainable Development, Johannesburg, 26th August – 4th September 2002.

²⁵⁸ See for example, ‘UNICEF: A Human Rights Approach to UNICEF Programming for Children and Women,’ 17th April 1998.

²⁵⁹ Vienna World Conference on Human Rights, *op. cit.*, (1993); Fourth World Conference on Women, Beijing (1995); ‘Copenhagen Declaration on Social Development’ from UN World Summit for Social Development, A/CONF.166/9 (1995), [the Copenhagen Declaration]; World Food Summit, Rome (1996).

²⁶⁰ Vienna Declaration and Programme of Action, *op. cit.*, (1993).

within development cooperation and efforts in this regard have intensified in recent years.²⁶¹ Similarly, there is a certain level of consensus within the UN system, as seen in the adoption of the Statement of Common Understanding on the Human Rights Based Approach to Development in 2003.²⁶² Furthermore, many non-governmental organisations such as Oxfam and CARE have also incorporated human rights as an integral aspect of their work.²⁶³

Finally, the human centred conception of development is also visible from the declaration of the Millennium Development Goals (MDGs) in September 2000. However, it should be noted that these goals were not framed in human rights terms.²⁶⁴ It has been stated that the human rights community has also been reluctant to engage in the debate on MDGs.²⁶⁵ Alston uses the metaphor of ‘ships passing in the night’ to describe this reluctance despite the overlapping interests and objectives, particularly in the area of socio-economic rights.²⁶⁶

5. The Role of Human Rights in the Policies of the International Financial Institutions (IFIs): Good Governance and an Enabling Environment for Growth

In light of the changing normative definition of development in UN circles during the 1990s, the following section will examine whether parallel changes occurred in the policies of the IFIs at this time and evaluate the current position of human rights in the mandate and policy documents of these institutions. As mentioned above, the international financial institutions play a predominant role on the international

²⁶¹ For example, in the context of UK aid, see DFID, ‘Strategies for Achieving the International Development Targets: Human Rights for Poor People’, DFID Consultation Paper, February 2000.

²⁶² The Human Rights Based Approach to Development: Towards a Common Understanding Among the UN Agencies, from Report of the Second Interagency Workshop on the Implementation of a Human Rights Based Approach in the Context of UN Reform’, (Stamford, 5th – 7th May 2003), pp. 17-19. Source: http://www.undg.org/documents/4128-Human_Rights_Workshop_Stamford_Final_Report.doc

²⁶³ For example, OXFAM and CARE. However, IRC and GOAL are among those organisations which have not followed suit.

²⁶⁴ The eight Millennium Development Goals aim to: (1) eradicate extreme poverty and hunger; (2) achieve universal primary education; (3) promote gender equality and empower women; (4) reduce child mortality; (5) improve maternal health; (6) combat HIV/AIDS, malaria and other diseases; (7) ensure environmental sustainability and (8) develop a global partnership for development.

²⁶⁵ Alston, P., ‘Ships Passing in the Night. The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals,’ 27 *HRQ* 3 (2005).

²⁶⁶ *Ibid.*, p. 790.

development agenda as approval for IMF and World Bank loans is often viewed as a signal for donors to follow.

5.1. The IFIs and Human Rights

The Member States of the World Bank and IMF are bound individually and collectively by human rights obligations under international law. A detailed investigation of the human rights obligations of the IMF and World Bank are beyond the scope of this chapter, however, there is a wide range of existing literature on this subject.²⁶⁷ In contrast, one of the concerns of this chapter involves tracing the changing contours of the World Bank's approach to development to ascertain the extent to which human rights have been included in the Bank's policies and the extent to which this signifies a shift from a functional/economic approach to the incorporation of a broader range of political elements, as epitomised in the 'good governance' agenda from the late 1980s onwards.

The World Bank is a specialised agency of the UN, which has often refused to comment directly on the issue of human rights due to the absence of a 'human rights mandate' in its Articles of Agreement²⁶⁸ and thereby, its inability to interfere in the political affairs of recipient countries. According to these Articles of Agreement, 'neither the Bank nor its officers shall be influenced in their decisions by the political character of the member...concerned.'²⁶⁹ Although human rights are outside the scope of its direct mandate, the World Bank has recognised that human rights are an integral part of development and stated that its poverty reduction programmes indirectly contribute to the realisation of economic, social and cultural rights.²⁷⁰

²⁶⁷ Darrow, *op. cit.*, (2003); Skogly, S., *The Human Rights Obligations of the World Bank and the International Monetary Fund*, (London, 2001); Bradlow, D., 'The World Bank, the IMF and Human Rights,' 6 *Transnational Law and Contemporary Problems* 1 (1996); Skogly, S., 'The Position of the World Bank and the International Monetary Fund in the Field of Human Rights,' from Hanski, R. and Suksi, M., *An Introduction to the International Protection of Human Rights*, (1997), pp. 193-205; Rajagopal, B., 'Crossing the Rubicon: Synthesising the Soft International Law of the IMF and Human Rights,' 11 *Boston University International Law Journal* 81 (1993).

²⁶⁸ Tomaševski, *op. cit.*, (1993), pp. 61-62.

²⁶⁹ *Ibid.*, p. 65.

²⁷⁰ See World Bank, *Human Rights and Development: The Role of the World Bank*, (Washington, 1998), p. 3.

In line with its neutrality clause and in the absence of a human rights mandate in its Articles of Agreement, the IMF has also refused to take human rights issues into consideration in the implementation of its policies. For example, it rejected the report of the UN Special Rapporteur on economic, social and cultural rights which highlighted the negative impact of certain structural adjustment programmes upon human rights and which also suggested that alternatives could be found instead of the severe adjustment process.²⁷¹ In addition, the IMF has also stated that ‘social issues’ (including human rights) should be dealt with directly by providing for economic growth.²⁷²

The lack of attention afforded to human rights by the international financial institutions has been dealt with in the literature,²⁷³ along with the adverse impact on environment and social issues. Therefore, as mentioned above, a thorough critique of WB and IMF policies in this area is beyond the scope of this chapter. However, for the purposes of this thesis, the changing nature of conditionality within the World Bank, which has incorporated governance dimensions, can be strongly contrasted with previous policies, which demonstrated the centrality of economic growth in the developing world.²⁷⁴

In the context of the World Bank, Ibrahim Shihata, the General Counsel of the Bank, first raised the issue of the interconnection between respect for human rights and the successful implementation of development activities in 1988. “Human rights violations in specific cases also have broader implications related to the country’s stability and prospective credit worthiness or to its ability to carry out Bank-financed projects, or to the Bank’s ability to supervise them, which obviously are factors that the Bank must take into account to the extent they prove relevant in the circumstances of the case.”²⁷⁵

²⁷¹ Written statement submitted by the IMF on the realization of economic, social and cultural rights, UN Doc. E/CN.4/Sub.2/1992/57 of 14th September 1992; Osunsade, F.L. and Gleason, P., *IMF Assistance to Sub-Saharan Africa*, International Monetary Fund, Washington DC, 1992; Gold, J., ‘Political Considerations are prohibited by Articles of Agreement when the Fund considers requests for the use of resources,’ IMF Survey, 23rd May 1983. See Decision No. 6056-(79/38) Guidelines on Conditionality, IMF, Washington, adopted 2nd March 1979.

²⁷² See Capdevila, G., ‘IMF Not Taking into Account Human Rights Issues’, Dawn, 13th August 2001. Source: <http://www.globalpolicy.org/soecon/bwi-wto/imf/2001/0813hr.htm>

²⁷³ See for example, Culpeper, R., Berry, A. and Stewart, F., (eds.), *Global Development Fifty Years After the Bretton Woods Institutions*, (Basingstoke, 1997); Caufield, C., *Masters of Illusion: The World Bank and the Poverty of Nations*, (New York, 1996); Rich, B., *Mortgaging the Earth: The World Bank, Environmental Impoverishment and the Crisis of Development*, (London, 1994).

²⁷⁴ Pender, *op. cit.*, (2001), p. 388. See for example, World Bank Report, *Accelerated Development in Sub-Saharan Africa*, (Washington D.C., 1981); World Bank, *Adjustment in Africa: Reforms, Results and the Road Ahead*, (Washington D.C., 1994b).

The political dimensions of development first appeared on the World Bank agenda in the 1989 study on Sub-Saharan Africa, in which the Bank stressed the importance of good governance and respect for rule of law and human rights as a condition for aid.²⁷⁶ In this report, it was stated that “underlying the litany of Africa’s development problems is a crisis of governance,” and governance was defined as “the exercise of political power to manage a nation’s affairs.”²⁷⁷ In this way, political reform was recognised by the World Bank as a necessary complement to economic reform. According to the Bank, “history suggests that political legitimacy and consensus are a precondition for sustainable development.”²⁷⁸ As a result of this approach, donors were urged to introduce more selectivity in the allocation of funds in order to give priority to countries on the basis of performance. In this regard, it was stated that, “countries with weak performance should receive much less assistance, limited where possible to programs important to long-term development (such as research, health, education).”²⁷⁹

According to some commentators, the good governance agenda also implied a role for human rights in World Bank strategies. “Solutions to the crisis of governance were necessarily found in the core of human rights: accountability of the government, rule of law, independent and effective judiciary, transparency of decision-making and freedom of information, institutional pluralism and freedom of association and participation.”²⁸⁰ In the World Development Report of 1991, it was stated that the aim of development was ‘to increase the economic, political and civil rights of all people across gender, ethnic group, religions, races, regions and countries.’²⁸¹ The IMF has also issued documents on the issue of good governance in recent times,²⁸² however, it should be noted that this only

²⁷⁵ Shihata, I.F.F., ‘The World Bank and Human Rights,’ *The Bank’s World*, February 1988, p. 15.

²⁷⁶ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth. A Long-Term Perspective Study*, (Washington DC, 1989), pp. 13 and 192.

²⁷⁷ *Ibid.*, p. 60.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.*, p. 183.

²⁸⁰ Quoted in Tomaševski, (1993), p. 62. Landell-Mills, P. and Serageldin, I., ‘Governance and the Development Process’, *Finance and Development* (September 1991), pp. 14-17.

²⁸¹ World Bank, *1991 Annual Report*, Washington DC, 1992, p. 31.

²⁸² IMF, ‘Good Governance: The IMF’s Role,’ (1997). Source: <http://www.imf.org/external/pubs/ft/exrp/govern/govindex.htm>

applies to the economic aspects of governance, rather than political issues and was introduced as a means of furthering the objective of macro-economic stability.²⁸³

5.2. An Enabling Environment for Growth

From the late 1980s and early 1990s, the political dimensions of development aid became apparent in the policies of the World Bank. This debate centred on the topic of good governance and the role of state institutions in providing a suitable environment for the implementation of structural adjustment programmes and market friendly economies. There were several reasons for the inclusion of policy conditionality within neoliberal approaches to development,²⁸⁴ which ultimately required the governments of developing countries to respect certain criteria relating to good governance, democratic principles and more significantly in the context of this thesis, to human rights. Firstly, the perceived shortcomings of aid and in particular, the disappointing results of structural adjustment programmes provided a new impetus to focus on the political dimensions of aid – such as the ‘good governance’ agenda of international financial institutions.²⁸⁵

Secondly, there was a growing recognition that the neoliberal emphasis on ‘rolling back the frontiers of the state’ was not enough to stimulate growth. This was influenced by the criticism of economists such as Paul Krugman who argued that there were limits to what could be achieved exclusively through market mechanisms.²⁸⁶ In this regard, he stated that “the widespread belief that moving to free trade and free markets will produce a dramatic acceleration in a developing country’s growth represents a leap of faith, rather than a conclusion based on hard evidence.”... “trade liberalisation and other moves to free up markets are almost surely good things, but the idea that they will generate a growth takeoff represents a hope rather than a well-founded expectation.”²⁸⁷ He was also

²⁸³ See IMF, ‘The Role of the IMF in Governance Issues: Guidance Note’, Approved by the Executive of the Board, 25th July 1997; IMF, ‘Partnership for Sustainable Growth’, Interim Declaration, 19th September 1996. Source: <http://www.imf.org/external/np/sec/nb/1997/nb9715.htm#12>

²⁸⁴ In the context of the IFIs, the term ‘policy conditionality’ is used instead of political conditionality due to their non-political mandate.

²⁸⁵ Abrahamsen, *op. cit.*, (2000), p. 37.

²⁸⁶ Krugman, P., ‘Dutch Tulips and Emerging Markets,’ 74 *Foreign Policy* 4 (1995), p. 33.

²⁸⁷ *Ibid.*

strongly critical of the results of structural adjustment, particularly, following the Mexico crisis between 1994 and 1995,²⁸⁸ which forced the World Bank to reinvent its strategy. In addition, the East Asian ‘miracle’ forced a rethinking of dominant assumptions as economic growth was achieved through the strong interventionist states, rather than the prescriptions of the Washington Consensus. Furthermore, the subsequent crisis in these countries also led to increased demands for democratic participation on behalf of the people, and to another re-evaluation of dominant thinking.

The Bank’s policy was also influenced by the theories of neo-institutionalism following the appointment of Stiglitz as a chief economist 1997. Stiglitz emphasised the importance of alternatives to the Washington Consensus that would allow for democratic, broad-based participation, equitable and sustainable development, and greater development dialogue in order to rid development of its neo-colonial mentality.²⁸⁹ This policy allowed for neoliberal economic thinking to be accompanied by a renewed interest in the role of institutions, in contrast with neo-classical theories, thus recognising the links between the political process and economics and the failure of states to provide institutional infrastructure for the market economy.²⁹⁰ It also differed from the liberalist tendencies of the 1980s, as there was an increased emphasis on the necessity of state intervention and good governance. In this way, he argued that development thinking has become more overtly political, in contrast with the allegedly ‘non-political’ and technical nature of economic policies in the previous decade.²⁹¹ This is in line with theories of neo-institutionalism and the theory of rational social choice. According to Darrow, these changes signified a new approach to the governance of development, which accommodates both market-based approaches with role of State and networks of other actors, such as civil society groups.

It should be noted that the new emphasis on the state did not represent a break with neoliberal thinking, however, it recommended that the ‘good governance state’ had a role

²⁸⁸ Ibid, p. 35.

²⁸⁹ See Stiglitz, J.E., *Globalisation and Its Discontents*, (New York, 2002). Quoted in Pender, *op. cit.*, (2001), p. 403.

²⁹⁰ Stiglitz, J., ‘Development Thinking at the Millennium’, p. 6 and 8-9. Source: http://www-lgsb.columbia.edu/faculty/jstiglitz/download/2001_Development_Thinking_at_the_Millennium.pdf

²⁹¹ Stiglitz, *op. cit.*, (2002), p. 161.

to play in providing an enabling environment for the smooth functioning of the market, along with accountable and transparent decision-making procedures.

5.2.1. Development Compacts and Policy Conditionality

As shown above, development has undergone a series of transformations. Since the middle of the 1990s, mainstream contemporary development thinking has become dominated by the idea of ‘development compacts’, which claim to provide a new framework for conditionality.²⁹² With respect to the international financial institutions, this has been described as moving beyond strict *ex ante* conditionality, which has been criticised for failing to achieve its objectives by ‘buying reforms’.²⁹³ As a result, conditionality has become more a policy-oriented process. Unlike the previous conditionality policies which were criticised as a result of the negative impact on the social sector, the new policy framework combines governance conditionality with efforts to achieve the Millennium Development Goals (MDGs) and benchmarks in the area of social sector expenditure.²⁹⁴ This has been described as a new development partnership or ‘development compact’, as it is purported to incorporate the shared objectives and common goals (principally, good governance and poverty reduction) of both development donors and developing countries.²⁹⁵

This new policy orientation is illustrated, for example, through the introduction of poverty reduction as a central theme of the Comprehensive Development Framework,²⁹⁶ which provides the overall strategy for the World Bank activities and also in the World Development Report 2000-2001.²⁹⁷ It should also be noted that the UN has also begun using this terminology. For example, the Independent Expert on the Right to

²⁹² UN Economic and Social Council, ‘Economic, Social and Cultural Rights. The Right to Development: Study of Existing Bilateral and Multilateral Programmes and Policies for Development Partnership,’ Sub-Commission on the Promotion and Protection of Human Rights, 56th Sess., 3rd August 2004, E/CN.4/Sub.2/2004/15.

²⁹³ *Ibid.*, p. 11.

²⁹⁴ ‘UN Millennium Declaration,’ Resolution adopted by the General Assembly, A/Res/55/2, 2000; UN, ‘Road Map Towards the Implementation of the United Nations Millennium Declaration,’ Report of the Secretary General, A/56/326, Annex: Millennium Development Goals, 6th September 2001.

²⁹⁵ *Ibid.*, pp. 2, 6-14.

²⁹⁶ Wolfensohn, J.D., ‘A Proposal for a Comprehensive Development Framework,’ (1999). Source: <http://www.worldbank.org/cdf/cdf-text.htm>; World Bank, ‘Comprehensive Development Framework: Questions and Answers,’ Source: <http://www.worldbank.org/cdf-faq.htm>

Development, Arjun Senghupta has also drawn on this idea of development compacts in recent times.²⁹⁸

5.2.2. WB/IMF Poverty Reduction Strategy Papers and Human Rights

At the end of 1999, the Poverty Reduction Strategy Paper (PRSP) process was launched as a new framework for the disbursement of IMF and World Bank loans.²⁹⁹ The PRSP process is part of the Comprehensive Development Framework (CDF) as developed by the former President of the World Bank, James Wolfensohn.³⁰⁰ The PRSP process is alleged to have moved beyond structural adjustment by emphasising issues such as: country ownership of development; partnership-based development (including civil society); long-term development; results-oriented and targeted approaches; poverty reduction; good governance; and the role of the private sector.

The idea that development has multiple goals and that policies and processes for meeting them are complex and intertwined has provoked an intense debate on the wisdom of traditional development thinking ... [This report] emphasises the need to reach beyond economics to address social issues in a holistic fashion.³⁰¹

The negative impact of structural adjustment on socio-economic rights as a result of reductions in social spending has received significant attention in the literature.³⁰² According to the UN Commission on Human Rights, socio-economic rights should not be subordinate to structural adjustment programme requirements.³⁰³ Furthermore, the UN Committee on Economic, Social and Cultural Rights has made reference to this issue in

²⁹⁷ World Bank, *World Development Report 2000-2001*, (Washington DC, 2000).

²⁹⁸ See Fifth Report on the Right to Development presented to the Working Group of the Human Rights Commission, E/CN.4/2002/WG.18/6; Third Report, E/CN.4/2001.WG.18/2, 2nd January 2001.

²⁹⁹ World Bank, 'Poverty Reduction Strategy Papers: Internal Guidance Note,' January 2000.

³⁰⁰ See Wolfensohn, 'The Other Crisis,' Annual Meetings Address, 6th October 1998. Mr. James Wolfensohn is the former president of the World Bank. He was replaced by Mr. Paul Wolfowitz at the end of his presidency on 31st May 2005.

³⁰¹ Quoted in Pender, *op. cit.*, (2001), pp. 407-8. World Development Report 2000-2001, *op. cit.*, (2000), p. 14.

³⁰² See for example, Skogly, *op. cit.*, (2001).

³⁰³ UN Commission Resolution 2000/82 on the effects of structural adjustment policies and foreign debt on the full enjoyment of all human rights, particularly economic, social and cultural rights.

several General Comments.³⁰⁴ For example, General Comment No. 2 on international technical assistance (Article 22 of the ICESCR) refers to the need “to protect the most basic economic, social and cultural rights [which] become more, rather than less, urgent. State parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment ... Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, *inter alia*, international cooperation.”³⁰⁵ Dialogue in this area led to the appointment of a UN independent expert in 1998 on the effects of structural adjustment policies on the full enjoyment of all human rights, particularly, economic, social and cultural rights, and whose mandate was later extended to include the impact of foreign debt.³⁰⁶

On the one hand, the PRSP process is a significant development as it represents an attempt to integrate governance reform conditionality into national development plans, including respect for civil and political rights, the rule of law and good governance (including institution building, accountability, transparency and anti-corruption measures).³⁰⁷ The good governance criteria, particularly, anti-corruption measures and financial management aspects are essential to pave the way for the creation of a solid macro-economic framework.³⁰⁸ Furthermore, from a human rights conditionality perspective, it is no longer possible to assert that human rights considerations are overlooked in World Bank policies.³⁰⁹

On the other hand, the extent to which PRSPs represent a break with the past is open to question. Firstly, it is clear that despite a change in terminology, structural adjustment

³⁰⁴ For example, General Comment No. 4 (on the right to adequate housing), para. 19; No. 11 (primary education), para. 3; No. 12 (the right to adequate food), para. 41; No. 13 (the right to education), para. 60; No. 14 (the right to the highest attainable standard of health), para. 64; and No. 15 (the right to water), para. 60.

³⁰⁵ UN Committee on Economic, Social and Cultural Rights, General Comment No. 2, para. 9.

³⁰⁶ UN Commission on Human Rights, ‘Economic, Social and Cultural Rights. Effects of Structural Adjustment Policies and Foreign Debt on Human Rights, Particularly Report of the Economic, Social and Cultural Rights,’ Report of Mr. Bernards Mudho, Independent Expert, 61st Sess., 5th January 2005, E/CN.4/2005/42, p. 10.

³⁰⁷ Taillant, J.D., ‘Human Rights and the International Financial Institutions,’ Prepared for the Sustainable Justice 2002, Implementing International Sustainable Development Law, Montreal, Canada, 13th – 15th June 2002.

³⁰⁸ Stiglitz, J.E., ‘The World Bank at the Millennium,’ 109 *Economic Journal* (1999), p. 459.

³⁰⁹ Kaufmann, D., Kraay, A. and Mastruzzi, M., ‘Governance Matters III: Governance Indicators for 1996-2002,’ (2002). Source: <http://www.worldbank.org/wbi/governance/govdata2002>

still continues within new PRSP process.³¹⁰ “The PRSP outlines the country’s plans to foster growth and reduce poverty through three-year economic adjustment programs that include macroeconomic, structural and social policies.”³¹¹ This point is reiterated by Stewart and Wang, among others, who argue that the PRSPs continue to promote the previous policies of structural adjustment and the privatisation of basic services.³¹² In this regard, they note that all of the final PRSPs contain the following prescriptions: a) reduction of tariff barriers, trade liberalisation; b) the removal or reduction of price controls; c) user fees to cover the cost of social services, including health and water services and an increased role for the private sector in the provision of social services; d) privatisation of state owned enterprises and industries; e) fiscal restraint to attain macro-economic stability; e) governance and public sector reform, including anti-corruption policies and decentralisation.³¹³

Therefore, in light of the above findings, the question of whether the poverty reduction strategy papers are consistent with the human rights rhetoric is an important issue. Although it is recognised that the PRSPs integrate strong provisions on good governance conditionality,³¹⁴ along with an increased emphasis on the provision of social services and a commitment to the Millennium Development Goals (MDGs), the socio-economic impact of structural adjustment is rarely taken into consideration.³¹⁵ With regard to the issue of the privatisation of social services, it could be argued that donors should be concerned with issues relating to access to basic services from a socio-economic rights perspective. It should be noted that Stewart and Wang point to notable exceptions within the PRSP strategies of Uganda, Malawi, Mongolia, which include provisions on exemptions from user fees for social services in specific circumstances.³¹⁶ Other limitations of the PRSPs have also been highlighted. This includes the fact that despite

³¹⁰ Manzo, K., ‘Africa in the Rise of Rights-Based Development,’ 34 *Geoforum* (2003), p. 447.

³¹¹ Quoted *ibid.*

³¹² See Stewart, F. and Wang, M., ‘Do PRSPs Empower Poor Countries and Disempower the World Bank, or is it the Other Way Round,’ *QEH Working Paper Series*, Working Paper No. 18, University of Oxford, (May 2003), p. 19; Stewart, F. and Wang, M., ‘PRSPs within the Human Rights Perspective,’ from Alston, P. and Robinson, M., *Human Rights and Development: Towards Mutual Reinforcement*, (Oxford, 2005). The negative impact of previous structural adjustment policies has been given considerable attention in the literature – see section 3.4 above.

³¹³ Stewart and Wang, *op. cit.*, (2003), pp. 19-20.

³¹⁴ Kaufmann, *et al*, *op. cit.*, (2002).

³¹⁵ Stewart and Wang, *op. cit.*, (2003), p. 20. The authors point to certain exceptions, including the PRSPs of Uganda and Burkina Faso in which social impact has been taken into consideration.

³¹⁶ *Ibid.*, p. 20.

the emphasis on participation, the role of national governments and civil society remains weak in most cases.³¹⁷ In addition, the uniformity of the content of PRSPs calls into question the concept of ‘country-owned’ strategies as this does not adequately reflect national differences. For this reason, the PRSPs continue to be perceived in some cases as a Bank-owned project.³¹⁸ Furthermore, although the PRSPs incorporate a human rights dimension through the emphasis on good governance structures, some commentators have claimed that the PRSP papers fail to consider alternative development approaches, such as human rights-based approaches.³¹⁹

In response to the shortcomings of the PRSP process, some prominent human rights experts have called for the strengthening of the human rights provisions in donor policies as a means of ensuring that development policies are consistent with human rights objectives.³²⁰ The Office of the High Commissioner for Human Rights has also provided guidelines for the integration of human rights in PRSPs.³²¹ These guidelines have highlighted the distinction between rights-based and needs-based approaches, which centres largely on the question of entitlements and accountability.³²² Social sector policies differ from respect for socio-economic rights. While the former provides for the organisation of social sector expenditure and the delivery of social services, the latter is concerned with non-discrimination in the area of socio-economic rights and equal access to basic services.

On the one hand, it could be argued that some aspects of the rights-based approach is largely superfluous as states are already obliged to respect economic, social and cultural rights by virtue of international law.³²³ Furthermore, guidelines already exist which assist in translating these legal norms into minimum core obligations and also for the process of identifying economic, social and cultural rights. For example, according to the Limburg

³¹⁷ Ibid., p. 22.

³¹⁸ Ibid., p. 19.

³¹⁹ Stewart and Wang, *op. cit.*, (2005), p. 3; Taillant, *op. cit.*, (2002).

³²⁰ For example, Robinson, M., ‘Bridging the Gap Between Human Rights and Development: From Normative Principles to Operational Relevance,’ Preston Auditorium, Washington DC, World Bank, 3rd December 2001.

³²¹ OHCHR, ‘Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies,’ (2002). Source: <http://www.unhchr.ch/poertyfinal.htm>; OCHCR, ‘Human Rights and Poverty Reduction,’ (Geneva and New York, 2004).

³²² See Hunt, N. and Siddiq, O., ‘Note on Human Rights and Poverty Reduction Strategy: A Discussion Paper for the UNHCHR,’ (February 2002).

Principles, the failure to reach generally accepted international human rights standards constitutes a violation of the ICESCR.³²⁴ Equally, the Maastricht Guidelines further outline the specific acts that may give rise to the violation of socio-economic rights.³²⁵ Furthermore, the question of socio-economic rights is extremely complex, particularly in the context of the privatisation of basic services, which is encouraged in the World Bank/IMF prescriptions. It is a complex area as it raises questions regarding the obligations of non-state actors in the delivery of basic services as obligations in human rights law are addressed primarily to States.³²⁶ On the other hand, one of the key contributions of ‘human rights-based’ advocacy can be found in the calls for human rights-proofing the policies and programmes of development actors. This is particularly relevant in light of the increasing convergence among donors with IMF/WB strategies and highlights the need to ensure that development policies, including structural adjustment, are consistent with human rights obligations.³²⁷ However, despite the efforts of those who promote rights-based methods to ensure that development practice is formulated and implemented in line with international human rights law and to ensure that the socio-economic impact of development policies are consistent with human rights standards, it appears that the language of rights has not infiltrated the poverty reduction strategies or the IFI discussions on development compacts.

5.7. Human Rights and the IFI’s Good Governance Agenda

As illustrated above, the role of human rights in the policy and practice of the international financial institutions is clearly limited. With the recent PRSP development frameworks, the language of rights is virtually absent and the social impact of development programmes is not conceptualised from a human rights-perspective. Many

³²³ On the nature of obligations arising from economic, social and cultural rights, see Eide/Krause/Rosas, *Economic, Social and Cultural Rights: A Textbook*, (Dordrecht, 1995).

³²⁴ Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, UN ESCOR, Commission on Human Rights, 43rd Sess., Agenda Item 8, UN Doc. E/CN.4/1987/17 (1987), reprinted in ‘The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,’ 9 *HRQ* (1987).

³²⁵ The Maastricht Guidelines on the Violation of Economic, Social and Cultural Rights,’ (cited in Van Boven, T., *et al.* (eds.), *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, SIM Special No. 20, (Utrecht, 1998).

³²⁶ The issue of economic, social and cultural rights and development aid has been dealt with in the following publications: See Feyter, K. de, and Gomex Isa, F., (eds.), *Privatization and Human Rights in the Age of Globalization*, (Oxford and Antwerp, 2005); Feyter, de, *op. cit.*, (2001), pp. 262-266. Alston and Robinson, *op. cit.*, (2005); Skogly, *op. cit.*, (2001); Eide *et al.*, *op. cit.*, (1995).

commentators have responded to these weaknesses such as the lack of participation and absence of a ‘rights’ element by advocating for the so-called “human rights-based approaches” to development.³²⁸ However, it should be noted that in line with Tomaševski,³²⁹ a human rights-based approach is not advocated in this thesis. In contrast, this chapter explores the points of convergence between development and human rights. Therefore, notwithstanding the fact that the language of human rights is not explicitly adopted by the IFIs and that a ‘rights’ element is absent from key policy frameworks such as the PRSPs, human rights are implicitly recognised as part of the good governance agenda. In this way, human rights are viewed as an indirect element of the ‘enabling environment’ prescribed by these institutions and as a prerequisite for development. Human rights are implicit in the good governance agenda of the IFIs,³³⁰ which combines the promotion of democracy, civil and political rights and free markets.³³¹ In this respect, human rights are viewed as compatible with contemporary development thinking.³³² Similarly, a number of studies have pointed to a positive correlation between respect for ‘civil liberties’ and economic performance.³³³

6. Conclusions on Human Rights in the History of Development

In this chapter, the trajectory of human rights was traced through the history of international development policy and viewed primarily through the spectrum of the UN multilateral institutions and the international financial institutions. In the first section of this chapter, the changing trends in economic development thinking and strategies were traced through the initial stages of development aid following World War II. During this period, it was shown that development was equated exclusively with economic growth

³²⁷ On the subject of ‘human rights-proofing’ development activities see Tomaševski, *op. cit.*, (1993); Skogly, *op. cit.*, (2001); Darrow, *op. cit.*, (2003).

³²⁸ For an insight into this debate, see Robinson, *op. cit.*, (2005); Häuserman, J., ‘A Human Rights Approach to Development’, (London, 1998).

³²⁹ See foreword of Tomaševski, *op. cit.*, (1993), in which she describes human rights-based approaches as a contradiction in terms due to the fact that more than half of development aid is spent in the donor country for example, on consultants and secondly, due to the fact that development aid often serves *realpolitik* interests.

³³⁰ Freeman, M., ‘Development and Globalization: Economics and Human Rights,’ from Freeman, M., (ed.), *Human Rights: An Interdisciplinary Approach*, (Cambridge, 2002), p. 151.

³³¹ *Ibid.*

³³² Donnelly, *op. cit.*, (2003), p. 200.

and that the emphasis was placed on national state planning and the public sector. This also fits with the modernist conception of development, which conveyed development as a unilinear and inevitable process. In the 1970s, there were strong challenges to the developmentalist paradigm, which led to the inclusion of issues such as basic needs and enabled the recognition of the role of civil society in the development process. The following decade was dominated by the role of the international financial institutions, which imposed strict economic conditionality on developing countries in the form of structural adjustment programmes to improve macro-economic regulation and economic efficiency. The adverse social impact of these programmes did not go unnoticed by agencies such as UNICEF, particularly from a human rights perspective, leading to the notion of ‘adjustment with a human face.’

It was subsequently shown that during the 1990s, development moved from being a purely economic and technical agenda, to one with overt political dimensions. During this period, there was a gradual convergence between human rights and development at various levels. It was shown that human rights were recognised as an integral aspect of development through the changing normative definition of development in UN circles. The increasingly individualised conception of development (as exemplified by indicators such as HDI) and the 1986 Declaration on the Right to Development lent themselves to the convergence between human rights and development. The theoretical underpinnings of these new policy approaches can be traced to the human development approach espoused by economists such as Amartya Sen, whose work illustrated that freedoms are constitutive and instrumental aspects of development, thus, dispelling the myth of a necessary trade-off between human rights and development.

The changing normative definition led to the subsequent adoption of approaches that explicitly linked human rights and development as mutually reinforcing concepts by the UN and other donors, spurred on by the 1993 Vienna Declaration on Human Rights, which reaffirmed donor commitment to this position. Furthermore, this change in

³³³ See Isham, J., Kaufman, D. and Pritchett, L., ‘Civil Liberties, Democracy and the Performance of Government Projects,’ 11 *World Bank Economic Review* 2 (1997); Dollar, D., and Pritchett, L., *Assessing Aid: What Works, What Doesn't and Why*, (Washington DC, 1998).

direction became more palatable during this period due to the transition towards democratisation, which was underway following the fall of communism in Central and Eastern Europe. In this way, the language of human rights and the attachment of political conditionality measures provided an enhanced legitimacy for donors.

Whilst human rights and development became inextricably linked in the policies of some UN agencies during the 1990s, this chapter also considered whether parallel changes occurred within the policies of the international financial institutions. The World Bank has stated that its non-political mandate prevents it from interfering in the human rights situation of recipient countries. Nevertheless, it was shown that human rights implicitly converged through the World Bank's policies on good governance and its recommendations regarding increased selectivity in the allocation of funding, emphasising the importance of strong governance institutions. The governance agenda of the IFIs overlaps to some degree with the promotion and protection of human rights, particularly in the area of institution building, institutional reform and the promotion of the rule of law. In this way, the IFIs no longer fully adhere to a complete trade-off between human rights and development and recognise that human rights may even be instrumental for creating an enabling environment for economic growth. However, many critics claim that the IFI's conception of human rights only relates to laying the foundations for a solid rule of law framework and argue that their policies still fall short of international obligations by failing to examine the negative social impact of privatisation policies. Although human rights are absent from the mandates of the IFIs, many commentators have argued that this does not preclude them from ensuring that their programmes do not conflict with human rights obligations enshrined in international law and furthermore, that these policies should be in line with the obligation of the international community to respect these norms.

This chapter then proceeded to outline the contemporary policy approaches of the IFIs including the recent concept of development compacts, which place greater emphasis on shared objectives such as poverty reduction and good governance. The practical manifestation of these policies can be seen in the World Bank's Comprehensive

Development Framework and the Poverty Reduction Strategy Papers. Nevertheless, even within the PRSP process, the impact of structural adjustment continues to be criticised for its failure to protect human rights, particularly due to the lack of participation in decision-making and the lack of attention given to socio-economic rights. Moreover the language of rights has barely infiltrated the policies of the IFIs, thus suggesting that at least to some degree, human rights and development continue to live in separate worlds.³³⁴

Rather than taking part in the debate on human rights-based approaches, this chapter sought to explore the extent to which human rights have infiltrated mainstream development policy. In conclusion, it can be argued that the current debate on the ‘nexus between human rights and development’ should be viewed within the context of a tension between the two strands of mainstream development thinking and policy. On the one hand, human rights-based approach can be viewed as an expression of the human development approach (i.e. the mainstream alternative in development thinking), which UN agencies have embraced as a methodology or instrument for implementing the key tenets of the human development approach. On the other hand, the international financial institutions, which represent the dominant mainstream model of neoliberalism, are more reluctant to fully embrace the language of human rights. Furthermore, a holistic ‘rights’ element is absent from most of the current WB/IMF-framed strategies such as the Poverty Reduction Strategy Papers. However, notwithstanding the divergences on human rights and development in terms of interpretation and policy vis-à-vis the IFIs and the UN, this chapter has illustrated that human rights have gradually become recognised as a constituent element of the mainstream definition of development. Human rights are also increasingly regarded as instrumental for achieving development objectives. In light of this broad-based consensus, the following chapter provides an analysis of key concepts and the practical implementation of human rights in the development policies of OECD donors.

³³⁴ For example as Uvin has stated: ‘As I wrote this book, I was surprised at the amount of scepticism, if not outright hostility, that still prevails in much of the development community toward human rights’. Cited in Uvin, *op. cit.*, (2004), p. 47.

CHAPTER TWO: HUMAN RIGHTS AND THE PRACTICE OF OECD DONORS: KEY CONCEPTS AND CRITICAL INSIGHTS

1. Introduction

This chapter examines key concepts relating to the role of human rights in donor policies including both negative and positive conditionality and technical and financial assistance and offers a critical insight into the core debates in this field. For Donnelly, human rights have become a ‘hegemonic ideal’ and the accepted standard of political legitimacy in contemporary international society.³³⁵ The emergence of human rights in OECD donor policies will be considered in light of this view, highlighting in particular the recognition of human rights as an integral part of the definition of development and as an effective means of achieving development outcomes at the end of the Cold War.

After analysing conditionality procedures, the legal basis for measures to promote human rights through technical and financial assistance will be examined and the normative interpretation of human rights in donor policies will also be discussed (this includes the long-standing debate on the division between civil and political and economic and social rights). This section will also consider the interlinkages between donor measures to promote human rights and related areas including democratisation and good governance. In this respect, this chapter will strictly define the concepts of democratisation and good governance and determine, if any, the relationship between these concepts and the human rights agenda.

Moving towards practical implementation, this chapter offers a critical insight into some of the major concerns raised in the literature relating to the practical application of human rights in donor policies. In this regard, the *ad hoc* nature of human rights conditionality will be highlighted. In addition, this section will discuss the prevailing view that donors give priority to a narrow set of civil and political rights and fail to consider a broader

³³⁵ Donnelly, J., *Universal Human Rights in Theory and Practice*, (2nd ed.), (Ithaca and London, 2003), p. 185.

conception of human rights that would include socio-economic rights. In making this argument, some of the main justifications for a bias towards civil and political rights will be examined. From an overview of donor policies, it will be considered whether this claim is still relevant in light of the changing policy objectives of donors as reflected in the most recent policy documents and also drawing from the experience of the OECD Task Force on Human Rights.³³⁶

In the final part of this chapter, conclusions will be drawn on the instrumental role of human rights in OECD donor policies. This will include observations on the role of measures to promote human rights as discussed above. Equally, it will consider the extent to which human rights have become embedded in the overall framework of development, for example through human rights mainstreaming approaches and human rights-based methodologies.

2. Background to the Emergence of Human Rights in Donor Policies

Most donor countries engage in bilateral development cooperation with developing countries based on their cultural and traditional heritage, solidarity with developing countries or on the basis of former colonial ties.³³⁷ In addition, donors engage in multilateral cooperation through the United Nations, while the Member States of the European Union also channel development funds on a regional basis through the Cotonou Agreement with the African, Caribbean and Pacific (ACP) states. Although human rights conditionality had been utilised by donors in developing countries as a tool of foreign policy since the 1970s, this chapter focuses on the 1990s policy shift, which led to the endorsement of human rights as an integral part of donor development cooperation strategies, as opposed to merely a foreign policy mechanism. The chapter seeks to inquire into the constituent and instrumental role of human rights in development, drawing on

³³⁶ See chapters three to four to determine whether this is the case in practice in EU-ACP cooperation and from a broader perspective in the case of development cooperation in Kenya.

³³⁷ Official Development Assistance (ODA) is defined as: “grants or loans to countries and territories on Part I of the DAC List of Recipients (developing countries) provided by the official sector with the promotion of economic development and welfare as the main objective and which are at concessional financial terms (if a loan, then a grant of at least 25%).” <http://www.oecd.org/dac/stats/daclist>

Sen's formulation of 'freedoms' as an essential component of the definition of development and also as part of the means for achieving development.³³⁸ Therefore, it will be considered whether human rights form an essential or constituent aspect of the normative definition of development in OECD donor policies and in addition, whether human rights are considered to play an instrumental role as part of the means for achieving development.

Key to the background on the emergence of human rights is the donor policy shift that took place after the Cold War. Unlike the Cold War period, during which aid was used as a geopolitical foreign policy tool, in the post Cold War period, it was increasingly seen as legitimate to impose political conditionalities on aid recipients as a means of promoting democratisation in line with international standards. This shift towards political reform has been described as second generation conditionality, in contrast to economic conditionality, which constitutes the first generation of conditionality.³³⁹

The efforts to promote second generation conditionality which ultimately integrated human rights and development aid were spurred on by diplomatic statements from OECD donors. For example, in June 1990, the British Foreign Secretary, Douglas Hurd, stated that countries which "tend towards pluralism, public accountability, respect for the rule of law, human rights, market principles" would be prioritised in development policy,³⁴⁰ along with a speech by Francois Mitterrand (known as the La Baulle speech) which echoed this theme.³⁴¹ These events coincided with the new policy direction within the World Bank, which emphasised the need to create an enabling environment for growth through the promotion of good governance reforms.³⁴² Following these recommendations, human rights became a central tenet of development cooperation

³³⁸ See chapter one, section 4.

³³⁹ Stokke, *op. cit.*, (1995), p. 1. This shift also became known as the "third wave of democratisation." See Huntington, S.P., *The Third World: Democratization in the Late Twentieth Century*, (Norman, 1991).

³⁴⁰ ODI, 'Aid and Political Reform', Briefing Paper, ODI, London, January 1992. This policy continued under the Labour government. See Cook, R., 'British Foreign Policy', Speech at the launch of the Foreign Office Mission Statement, 12th May, Locarno Suite, FCO, London, 1997; Cook, R., 'Britain's New Approach to the World', Speech to the Labour Party Conference, Brighton, 2nd October 1997; and Cook, R., 'Human Rights: Making the Difference', Speech to the Amnesty International Human Rights Festival, London, 16th October 1998.

³⁴¹ See 'The Emergence of the 'Good Governance' Agenda: Some Milestones,' 24 *IDS Bulletin* 1 (1993).

³⁴² World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth, A Long-Term Perspective Study*, (World Bank, 1989), pp. 14, 183, 193; OECD, 'Development Cooperation: 1990 Report,' (Paris, December 1990), p. 12; OECD, 'Participatory Development and Good Governance,' Development Cooperation Guideline Series, (Paris, 1995).

policy, in tandem with democracy, the rule of law and good governance. For example, in 1990, the OECD affirmed that “[a]llocation decisions henceforth will be more influenced than in the past by a country’s record on human rights and democratic practice.”³⁴³ In addition, the OECD also stressed the “vital connection between open, democratic and accountable political systems, individual rights and the effective and equitable operation of economic systems with substantial reductions in poverty.” Furthermore, the OECD 1995 guidelines for DAC donors clearly illustrate the importance of human rights measures for achieving development objectives.³⁴⁴

The early 1990s thus witnessed a sharp rupture with the previous donor development strategies through the recognition of human rights as an integral element of the definition of development and as instrumental for achieving development outcomes. This was reaffirmed at the Vienna World Conference on Human Rights in 1993, resulting in the universal acceptance of the triad of ‘human rights, democracy and development’, albeit with some reluctance on behalf of developing countries.³⁴⁵ In addition to recognising human rights as part of the definition of development, it also became accepted that human rights would play an instrumental role in the achievement of development goals. Political conditionality was, therefore, introduced primarily in view of the changing conception of development and the perceived failure of successive development strategies.³⁴⁶ Equally, the promotion of political reform (including human rights) was viewed as an effective means of creating an appropriate environment for economic growth and development. The inclusion of human rights objectives was also welcomed as a means of improving donor policy and ensuring consistency with their international human rights obligations.³⁴⁷ The Council of Europe has described reform in this area as an ‘additionality,’ rather than conditionality, illustrating the “readiness to realise human rights and social justice, protect the environment and cut defence spending.”³⁴⁸ In this

³⁴³ OECD, ‘Development Cooperation: 1990 Report,’ (Paris, December 1990), p. 12. See also OECD, ‘Participatory Development and Good Governance,’ Development Cooperation Guideline Series, (Paris, 1995).

³⁴⁴ OECD, *op. cit.*, (1995).

³⁴⁵ Robinson, M., ‘Governance, Democracy and Conditionality: NGOs and the New Policy Agenda,’ from Clayton, A., (ed.), *Governance, Democracy and Conditionality: What Role for NGOs?*, (Oxford, 1994).

³⁴⁶ OECD, *op. cit.*, (1995).

³⁴⁷ Tomasevski, K., *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*, (London, 1997), pp. xiv and xv.

³⁴⁸ Council of Europe, Resolution 981 (1992) on the new North-South relationship adopted by the Parliamentary Assembly on 5th May 1992, para. 8.

way, it can be seen that measures to support human rights were motivated by a dual concern – on the one hand, to promote human rights as a means of creating an appropriate environment for development and on the other hand, the use of development aid to promote human rights objectives.

3. Legal Aspects of Human Rights Conditionality

3.1. Positive and Negative Conditionality

Development aid conditionality has been defined in broad terms as “donor efforts of one kind or another to influence recipient policies”.³⁴⁹ More specifically, political conditionality (as opposed to economic conditionality) has been defined as “...the linking of development cooperation to demands relating to human rights, governance and democratization.”³⁵⁰ Smith has defined political conditionality as “the linking by a State or an international organisation, of perceived benefits to another State (such as aid, trade concessions, cooperation agreements, political contacts or international organisation membership) to the fulfillment of conditions relating to the protection of human rights and the advancement of democratic principles.”³⁵¹ Within this debate, there are two main types of conditionality, loosely described as negative conditionality, which indicates, on the one hand, that aid will be suspended in the event of alleged violations of human rights and, positive conditionality, on the other hand, which is an incentive-based system and refers to aid that is allocated on the basis of the fulfillment of certain conditions. The distinction between these two types of conditionality has also been described as hard and soft conditionality³⁵² or explicit and implicit conditionality in the literature.³⁵³

³⁴⁹ Lewis, J.P., *Pro-Poor Aid Conditionality*, (Washington D.C., 1993), p. 41. See also Tomaševski, *op. cit.*, (1997), p. 9.

³⁵⁰ Arts, K., *Integrating Human Rights and Development Cooperation: The Case of the Lomé Convention*, (The Hague, 2000), p. 36, fn. 47.

³⁵¹ Smith, K.E., ‘The Evolution and Application of EU Membership Conditionality,’ p. 108 from Cremona, M., (ed.), *The Enlargement of the European Union*, (Oxford, 2003). See also Smith, K.E., ‘The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective,’ EUI Working Paper SPS No. 97/7 (1997), p. 6.

³⁵² Stokke, O., (ed.), *Aid and Political Conditionality*, (London, 1995), p. 12, fn. 7.

³⁵³ Mushi, S.S., ‘Determinants and Limitations of Aid Conditionality: Some Examples from Nordic-Tanzanian Cooperation,’ p. 239 from Stokke, *op. cit.*, (1995).

3.1.1. Negative Conditionality

Most OECD donors implement a form of negative conditionality, however, it should be noted that this topic is dealt with adequately in the literature and will not be treated in detail in this part of the thesis.³⁵⁴ Briefly, however, negative conditionality offers an avenue for the suspension of aid in the event of serious breaches of human rights or democratic principles. This takes place on an *ex ante* basis (i.e. that conditions must be fulfilled before an agreement on aid is reached) or *ex post* (i.e. conditions which must be following the conclusion of an agreement).³⁵⁵ However, as Stokke points out, the distinction between both types is not always clear-cut.³⁵⁶ Aid sanctions were first introduced in the 1970s in the case of Equatorial Guinea and Burundi.³⁵⁷ Early examples of legislation in this area include the US Foreign Assistance Act of 1975.³⁵⁸

In the absence of a treaty provision providing for the suspension of development assistance in light of human rights violations, general legal principles can be derived from international law to allow for the termination of a treaty in exceptional circumstances.³⁵⁹ These provisions include Article 60 of the Vienna Convention on the Laws of Treaties (VCLT) which allows for the suspension of a treaty in light of a material breach.³⁶⁰ According to Arts, in order to amount to a material breach, the treaty in question would need to refer to human rights among its objects and purposes.³⁶¹ Another way in which treaty law could be used to justify suspension or termination of a treaty is the principle of *clausula rebus sic stantibus* within Article 62 VCLT in the case of a fundamental change of circumstances.³⁶²

³⁵⁴ The issue of negative conditionality will be considered again in light of the case study on EU-ACP cooperation (chapters three and four), however, this thesis focuses primarily on the promotion of human rights as part of the normative definition of development and as parts of the means of achieving development objectives.

³⁵⁵ Fierro, E., *The EU's Approach to Human Rights Conditionality in Practice*, (The Hague, 2003), p. 98.

³⁵⁶ Stokke, *op. cit.*, (1995), p. 12, fn. 7.

³⁵⁷ Tomaševski, K., *Responding to Human Rights Violations 1946-1999*, (The Hague, 2000), p. 381.

³⁵⁸ US Foreign Assistance Act, section 116 as amended, 22 USC § 2151n (1994). (The 1975 Harkin Amendment introduced section 116 into the US International Development and Food Assistance Act of 1961).

³⁵⁹ The following is adapted from Arts, *op. cit.*, (2000), pp. 47-50.

³⁶⁰ Article 60(3) VCLT involving a violation of a 'provision essential to the accomplishment of the object or purpose of the treaty.'

³⁶¹ *Ibid.*

³⁶² *Ibid.* According to Arts, this would only occur in the event of specific and delimited circumstances. (ie. Article 62(1) to 'radically to transform the extent of obligations still to be performed under the treaty.')

3.1.2. Positive Conditionality

Positive political conditionality denotes the linking of aid to specific reforms in the area of human rights, democracy and the rule of law. In contrast to negative conditionality, it consists of an incentive-based system, which leads to specific benefits (including grants, loans, technical or financial assistance) upon the fulfillment of certain conditions.³⁶³ According to Fierro, positive conditionality is implicit in the policies of the EU – particularly within the human rights clause³⁶⁴ and explicit in unilateral regulations such as the Generalised System of Preferences (GSP).³⁶⁵ The GSP constitutes a formal system of exemption from WTO trading rules and most OECD members have developed similar schemes allowing for preferential access to developing countries. Some of these agreements contain an element of positive conditionality, for example, additional benefits are granted for developing countries that comply with environmental and labour standards under the EU GSP.

3.2. Human Rights Conditionality and the Question of Sovereignty

The use of human rights conditionality inevitably raises the question of sovereignty due to the recognition that States must act within the limits enshrined in Articles 2(7) and 2(4) of the UN Charter, which lay down a prohibition on intervening in the domestic affairs of another State.³⁶⁶ Some examples of Heads of States claiming an infringement of sovereignty were seen at the tenth summit of the Non-Aligned Movement in Jakarta 1992,³⁶⁷ at which it was claimed that there was no right to impose human rights conditionality on development assistance.³⁶⁸

³⁶³ Fierro, *op. cit.*, (2003), p. 100.

³⁶⁴ See chapters three and four of this thesis on EU-ACP cooperation.

³⁶⁵ At present, there are over thirteen national GSP schemes notified to the UNCTAD Secretariat. Source: <http://www.unctad.org>

³⁶⁶ According to Article 2(7) of the UN Charter: “Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state”; Article 2(4) states that, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.” The Charter of the United Nations, *signed on 26th June 1945*.

³⁶⁷ This summit was held in Jakarta, Indonesia from 1st to 6th September 1992. See Nherere, P., ‘Conditionality, Human Rights and Good Governance,’ p. 289, fn. 2, from Ginther, K., *Sustainable Development and Good Governance*, (Dordrecht, 1995).

In response to this issue, Nherere begs the question of how the concept of non-interference in domestic affairs can be reconciled with human rights.³⁶⁹ Firstly, he argues that the inclusion of seemingly contradictory elements in the UN Charter – in other words, sovereignty and human rights – indicates that the concept of sovereignty is not absolute, and cannot be used to justify non-interference in the area of human rights.³⁷⁰ Indeed, he states that limits on state activity are at the very heart of the idea of human rights.³⁷¹ In this way, human rights could be said to transcend sovereignty. He also notes that many human rights lawyers have pointed to a duty of third parties to intervene in this area.³⁷²

However, whilst one may recognise the legality of unilateral human rights activities on the basis of international law, it is indeed more controversial when dealing with other aspects of political conditionality, which embrace principles such as democracy and good governance. In dealing with the latter concepts, the legal framework is relatively weak, and as Nherere states, “there is nothing in human rights law that requires that multi-party elections be held, ...there is no norm of international law that purports to stipulate or prescribe what constitutes “good governance”.”³⁷³ Undoubtedly, there is an overlap between democratic requirements and human rights law,³⁷⁴ however, even Article 21 of the UDHR does not refer to a right to multi-party democracy,³⁷⁵ nor does the General Assembly resolution on the issue of democratic elections assist us in this regard.³⁷⁶ As a result of the perceived weakness of a universal legal basis or recognition of general principles relating to democracy and good governance, policy-makers have tended to highlight the position of human rights conditionality, and in this regard, there has been a

³⁶⁸ Ibid., p. 291.

³⁶⁹ Ibid., pp. 293-294.

³⁷⁰ Ibid., p. 294.

³⁷¹ Ibid., p. 293.

³⁷² Eide, A., ‘Linking Human Rights and Development: Aspects of the Norwegian Debate,’ p. 12, from Brecher, I., *Human Rights, Development and Foreign Policy: Canadian Perspectives*, (Halifax, 1989).

³⁷³ Ibid., (1995), p. 300. On this debate, see Franck, T.M., ‘The Emerging Right to Democratic Governance,’ 86 *AJIL* 1 (January 1992); Crawford, J., *Democracy in International Law*, (Cambridge, 1994).

³⁷⁴ For example, the freedom of thought, freedom of expression, freedom of association, right of participation and the right to choose representative government. See also section 4.2.1 below.

³⁷⁵ Article 21 of the UDHR states that: “[t]he will of the people shall be the basis of the authority of the government, this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

³⁷⁶ UNGA Res. 45/150, adopted on 18th December 1990. (‘Enhancing the Effectiveness of the Principle of Periodic General Elections’).

trend “to de-emphasize democracy”³⁷⁷ due to the lack of a firm legal basis in international law.

4. Legal Basis for Donor Support for Human Rights and Related Elements

In this thesis, the role of human rights does not simply refer to the traditional negative conception which indicates that aid will be withheld or suspended following the breach of human rights. In contrast, this chapter also focuses on donor support for specific activities in the area of human rights and related elements such as democratisation and good governance.³⁷⁸

As referred to earlier, OECD donors have merged human rights with development policy in line with international standards of political legitimacy since the end of the Cold War.³⁷⁹ There are numerous examples of this change in policy through the adoption of legislation and policy statements and most OECD countries have introduced enhanced provisions for the integration of human rights within development.³⁸⁰ Countries such as the US, which had already introduced legislation in this area in the 1970s,³⁸¹ created the US Agency for International Development Democracy Initiative in 1990 in order to intensify efforts in this domain.³⁸² In 1990, the promotion of democracy was declared as an objective of USAID and it was stated that countries that were engaged in measures to improve economic and political liberalisation would be given preference with respect to aid allocations.³⁸³ During the same period, the EU introduced the human rights clause into the fourth Lomé Convention, which allowed for consultations between parties in

³⁷⁷ Crawford, G., *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality*, (Houndmills, 2001), p. 33.

³⁷⁸ On this distinction, see also Feyter, K. de, *World Development Law*, (Antwerp, 2001), para. 350, pp. 267-268.

³⁷⁹ Donnelly, *op. cit.*, (2003), p. 185.

³⁸⁰ *Ibid.* For further examples of this, see EJDR issue devoted to this issue: Sorensen, G., (ed.), ‘Political Conditionality,’ 5 *EJDR* 1 (1993).

³⁸¹ Forsythe, D.P., *Human Rights and Development. International Views*, (Houndmills, 1989).

³⁸² Abrahamsen, R., *Disciplining Democracy: Development, Discourse and Good Governance in Africa*, (London, 2000), p. 31. See also Clough, M., *Free at Last? US Policy Toward Africa and the End of the Cold War*, (New York, 1992), pp. 57 and 59.

³⁸³ Clough, *ibid.*

light of human rights violations,³⁸⁴ and also for the promotion of human rights, democracy and the rule of law as an integral part of its programmes.³⁸⁵

4.1. Defining Human Rights

The legal interpretation of human rights in donor policies is significant as it influences the general policy orientation and practical application of human rights measures. Therefore the following section provides an introduction to the legal framework for human rights law and an insight into the debate on the divisions between first and second generations of human rights.

Human rights were first codified in the Universal Declaration of Human Rights in 1948.³⁸⁶ First generation rights comprise of civil and political rights that are now at the core of most human rights treaty regimes. Second generation rights refer to matters of social and economic significance such as the right to work, the right to an adequate standard of living and the right to education. First and second generation rights are both enshrined in international law in the International Covenant on Civil and Political Rights (1966)³⁸⁷ and the International Covenant on Economic, Social and Cultural Rights (1966),³⁸⁸ respectively. The term, ‘International Bill of Rights’, refers to the Universal Declaration and the two Covenants of 1966 collectively. This is supplemented by additional Covenants relating to the protection of the human rights of women and children, and combating racial discrimination and torture, inhuman and degrading treatment.³⁸⁹ In recent decades, there has been some support for third generation rights such as the right to development, to a healthy environment and to peace.³⁹⁰

³⁸⁴ Article 366a of the Fourth ACP-EEC Convention, *signed* on 15th December 1989, [1989] OJ L 229/3, 17th August 1989. [*hereinafter* Lomé IV].

³⁸⁵ Article 5 of Lomé IV.

³⁸⁶ Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc. A/810, 10th December 1948. [*hereinafter* UDHR]

³⁸⁷ International Covenant on Civil and Political Rights, *adopted* 16th December 1966, G.A. Res.2200 (XXI), U.N. GAOR, 21st Sess., No.16, U.N., Doc. A/6316 (1966), 999 UNTS. 171 (*entered* into force 23rd March 1976). [*hereinafter* ICCPR]

³⁸⁸ International Covenant on Economic, Social and Cultural Rights, *adopted* 16th December 1966, G.A. Res. 2200 (XXI), U.N. GAOR 21st Sess. No. 16, U.N. Doc. A/6316 (1966). (*entered* into force 3rd January 1976). [*hereinafter* ICESCR]

³⁸⁹ Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1966); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); Convention against Torture and Other Cruel and Degrading Treatment (1985); Convention on the Rights of the Child (1989).

The traditional division between civil and political rights and economic, social and cultural rights has dominated the subject of human rights in international law. Originally, the Universal Declaration on Human Rights was intended to contain a single Covenant covering both civil and political rights and also economic, social and cultural rights.³⁹¹ However, as a result of the ideological conflict regarding economic and social rights between Western and Eastern States, the General Assembly authorised the drafting of two Covenants in 1952. Although the Soviet Union and Eastern European States favoured the adoption of a single treaty, the US and Western powers preferred two separate treaties due to the apparent differences between the two sets of rights.³⁹² Western States gave priority to civil and political rights which they believed were the foundation of liberty and democracy in the ‘free world’, whilst Eastern States had greater allegiance to socio-economic rights.³⁹³ Therefore, it was a political choice, rather than a physical impossibility, to give equal regard to both sets of rights.³⁹⁴ However, since then, the fact of separation has been exploited by many governments to deny the validity of economic, social and cultural rights as human rights.

One of the principal arguments raised against the implementation of economic, social and cultural rights is that the duties are potentially limitless and unassignable. In this way, obligations regarding economic, social and cultural rights are often represented as a ‘choice’, rather than mandatory treaty obligations. The arguments by those who eschew responsibility for economic and social rights are familiar and have been summarised by Shue as follows:³⁹⁵

Realism and Responsibility: The practical consequences of everyone’s enjoying adequate nutrition and the alleged global “population explosion” would make the fulfillment of these rights impossible. “It would hurt the *future poor*.”

³⁹⁰ Dixon, M., *Textbook on International Law*, (3rd ed.), (London, 1990), p. 312.

³⁹¹ Sohn, L.B., ‘A Short History of the United Nations Documents on Human Rights,’ p. 101, from *The United Nations and Human Rights*, (New York, 1968).

³⁹² Baehr, P.R., *Human Rights: Universality in Practice*, (London, 1999), p. 33. According to Baehr, to this day, the US views economic and social rights as social policy concerns and has not ratified the ICESCR. See Alston, P., ‘US Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy,’ 84 *AJIL* (1990), pp. 365-92.

³⁹³ Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*, (Oxford, 1995), p. 9.

³⁹⁴ Donnelly, J., *Universal Human Rights: Theory and Practice*, (New York, 1989), p. 37.

³⁹⁵ Shue, H., *Basic Rights*, (Princeton, 1996).

Affluence and Responsibility: The fulfillment of basic rights would place unlimited burdens on everyone except the poorest. “It would hurt *me*.”

Nationality and Responsibility: There is no obligation to fulfil the rights of strangers, unlike the duty we may have towards within our own boundaries. “It would hurt the *local poor*.”

Furthermore, a well-known exponent of the second rate position of socio-economic rights is Maurice Cranston, who states that:

A human right is something of which no one may be deprived without a grave affront to justice...thus the effect of the Universal Declaration, which is overloaded with affirmations of so-called human rights which are not human rights at all is to push all talk of human rights out of the clear realm of the morally compelling into the twilight world of utopian aspirations.³⁹⁶

In contrast to civil and political rights, in Cranston’s view, economic and social rights rest upon the ‘liberality and kindness’ of ‘moral ideals’ and cannot be immediately guaranteed.³⁹⁷

I believe that a philosophically respectable concept of human rights has been muddled, obscured and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category. The traditional human rights are political and civil such as the right to life, liberty and a fair trial. What are now being put forward as universal rights are economic and social rights, such as the right to unemployment insurance, old-age pensions, medical services and holidays with pay. There is both a philosophical and a political objection to this. The philosophical objection is that the circulation of a confused notion of human rights hinders the effective protection of what are correctly seen as human rights.³⁹⁸

³⁹⁶ Cranston, M., ‘Human Rights, Real and Supposed,’ from Raphael, D.D., (ed.) *Political Theory and the Rights of Man*, (Bloomington, 1967), p. 52.

³⁹⁷ *Ibid.*, p. 51.

The main criticisms against economic, social and cultural rights rest upon firstly, the non-binding language of the 1966 Covenant and secondly, the relative weakness of its enforcement mechanisms. The 1966 treaty on economic, social and cultural rights is governed by international law, imposing binding legal obligations on the parties to it. However, the language of the treaty is promotional rather than mandatory in character.³⁹⁹ This is illustrated by Article 2(1), under which the State is obliged to ‘*undertake steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights*’ [emphasis added]. According to Article 3, these rights are culturally relative, therefore States are not under an obligation to provide social and economic reform, but merely to encourage respect for economic and social welfare.

In comparison to the International Covenant on Civil and Political Rights, the legal obligations emanating from the ICESCR are more difficult to ascertain. According to Article 2(1) of the International Covenant on Civil and Political Rights, ‘each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant ...’ Article 2(3) places the duty on State parties to ‘ensure that any person whose rights or freedoms as herein recognized are violated shall have effective remedy ...’⁴⁰⁰ Therefore, it is not surprising that the weak language of Article 2(1) dealing with the extent of State duties has been seized upon by those persist to deny responsibility for basic subsistence rights.⁴⁰¹

However, rather than entering into the debate on ‘first’ versus ‘second’ generation rights – or rather than seeking to vindicate the position of economic, social and cultural rights from a legal, moral or ethical perspective,⁴⁰² this thesis seeks to move beyond the

³⁹⁸ Ibid., p. 65.

³⁹⁹ Dixon, *op. cit.*, (1990), p. 316.

⁴⁰⁰ Ibid.

⁴⁰¹ Craven, *op. cit.*, (1995) p. 151.

⁴⁰² For a comprehensive textual analysis of State duties under the Covenant, see Alston, P. and Quinn, G., ‘The Nature and Scope of States Parties’ Obligations under the ICESCR, 9 *HRQ* (1987). See also Leckie, S., ‘Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights,’ 20 *Human Rights Quarterly* (1998); Scheinen, M., ‘Economic and Social Rights as Legal Rights,’ from Eide/Krause/Rosas, *Economic, Social and Cultural Rights: A Textbook*,

traditional dichotomy between the generations of human rights by emphasising the interlinkages and mutually-reinforcing nature of these rights. For example, it is difficult to separate the right to life (as a civil right) and the right to adequate subsistence (as an economic and social right).⁴⁰³ Furthermore, the prohibition of slavery and forced labour, which are contained within the Conventions of the International Labour Organisation, transcends the traditional distinction between the generations of rights.⁴⁰⁴

Furthermore, the ICESCR is hampered by an assumption that, as opposed to civil and political rights, economic and social rights demand positive action, rather than simple legislative measures for their implementation. In this respect, the denial of economic, social and cultural rights often rests upon the convenient designation of these rights as exclusively 'positive' rights and civil and political rights as exclusively 'negative' rights. This was one of main objections raised during the drafting negotiations for the Covenants, namely, that civil and political rights were negative rights and immediately *justiciable*, whereas economic and social rights demanded positive action on behalf of the State and could only be realised *progressively*, depending upon the socio-economic situation of the State parties.⁴⁰⁵

However, this distinction does not hold up in practice. Both civil and political rights and economic, social and cultural rights demand positive and negative action to ensure their effective implementation. Henry Shue offers the example of the right to protection against torture, which requires not only negative action on behalf of the state *not to torture*, but can only be guaranteed by positive action such as the training, supervision, and control of the police and security forces.⁴⁰⁶ Similarly, the right to a fair trial cannot be guaranteed without an elaborate courts system.⁴⁰⁷ In the same, way, ensuring the free exercise of civil and political rights will often involve significant state intervention and the incurring of considerable public expenditure in order to establish a system of courts,

(Dordrecht, 1995); Sheehy, O., 'The International Covenant on Economic, Social and Cultural Rights: Alternative Approaches to Justiciability,' 1 *Political Science Forum* 1 (2002).

⁴⁰³ Brandtner, B. and Rosas, A., 'Trade Preferences and Human Rights,' p. 708, from Alston, P. et al, (eds.), *The European Union and Human Rights*, (Oxford, 1999).

⁴⁰⁴ *Ibid.*, p. 715.

⁴⁰⁵ Jhabvala, F., 'On Human Rights and the Socio-Economic Context,' p. 296, from Snyder, F.E. and Sathirathai, S., (eds.), *Third World Attitudes Toward International Law: An Introduction*, (Dordrecht, 1987).

⁴⁰⁶ Quoted in Donnelly, *op. cit.*, (1989), p. 33.

to train police and other public officials, and to establish a system of safeguards against potential abuse of rights by state officials themselves.⁴⁰⁸ In this light, human rights obligations are both positive and negative in nature, thus creating duties to abstain and to intervene. Eide has typified three types of government obligations: (i) the obligation to *respect*: (negative) the obligation of states to refrain from interfering with or constraining the exercise of such rights and freedoms; (ii) the obligation to *protect*: (positive) the duty of states to take steps, either legislative or otherwise, to prevent and forbid the violation of individual rights and freedoms by third parties; (iii) the obligation to *fulfil*: (positive) this requires further positive measures by states to ensure the effective realisation of such rights.⁴⁰⁹

The first two obligations, (namely, to respect and to protect) have been subject to little controversy in the literature on economic, social and cultural rights. However, concern has been expressed with respect to the third duty, the fulfillment of rights.⁴¹⁰ Nevertheless, subsequent jurisprudence from the European Court of Human Rights explicitly highlights the fact that State obligations under human rights instruments may impose positive obligations:

Fulfillment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and ‘there is...no room to distinguish between acts and omissions.’⁴¹¹

Similarly, in the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights held that State parties are legally obliged “to take reasonable steps to prevent human rights violations and to use all the means at (their) disposal to carry out a serious investigation of alleged violations committed within their jurisdiction, to identify those

⁴⁰⁷ Craven, *op. cit.*, (1995), p. 15.

⁴⁰⁸ Alston, P., ‘Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy,’ from International Commission of Jurists, *Development, Human Rights and the Rule of Law*, Report of the International Commission of Jurists held in the Hague, (Oxford, 1981), p. 31 and p. 52.

⁴⁰⁹ UN Doc. E/CN.4/Sub.2/1987/23. Quoted in Baehr, *op. cit.*, pp. 33-34.

⁴¹⁰ Sunstein, C., ‘Against Positive Rights: Why Social and Economic Rights Don’t Belong in the New Constitutions of Post-Communist Europe,’ 2 *East Eur. Constit’al Rev.* 35 (1993), p. 35.

responsible, to impose appropriate punishment and to ensure the victim adequate compensation.”⁴¹²

Therefore, in moving beyond the long-standing dichotomy between the generations of human rights, this chapter seeks to analyse the normative components of human rights in donor policies to determine the priorities of OECD donors. At the same time, it is recognised that these core principles cannot be separated from other areas such as democratisation, therefore, the analysis will encompass the inter-relationship between the integration of human rights in donor policies and other areas of political reform.

4.2. Defining Human Rights within the Wider Context of Political Reform: Democratisation and Good Governance

4.2.1. Human Rights and Democratisation

Due to the articulation of the triad of ‘human rights, democracy and the rule of law’ and good governance in the 1990s, support for human rights needs to be viewed within the wider context of political conditionality, including democratisation. To this end, the following section will consider the role of human rights within donor democratisation strategies, which intensified after the end of the Cold War. While an in-depth study of democracy and democratisation is undoubtedly beyond the scope of this thesis,⁴¹³ the first part will briefly consider mainstream definitions of democracy, whilst the second part of this section will explore the interlinkages between human rights and democratisation strategies.

⁴¹¹ *Airey*, Judgment of 9th October 1979, [1979] *ECHR Series A/32*, at 15. In this case, the obligation to provide for access to the courts was held to be within the remit of State duties.

⁴¹² *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (Ser. C) No. 4, Judgment of 29th July 1988 (1989) 28 *ILM* 291, para. 174.

⁴¹³ For further reading and general texts on democracy see: For further reading on the theory and principles of democracy, see Held, D., *Models of Democracy*, (2nd ed.), (Cambridge, 1996); Hyland, J.L., *Democratic Theory: The Philosophical Foundations*, (Oxford, 1995); Dahl, R.A., *On Democracy*, (New Haven, 1998).

At the most basic level, the term democracy signifies a political system which is ruled by the people.⁴¹⁴ At a broader level, democracy has become associated with principles such as popular control, popular authority, political equality, open and accountable government, the rule of law, participation in decision-making procedures, and an active civil society.⁴¹⁵ A mainstream definition of democracy has been provided by Diamond:

...democracy (or what Robert Dahl terms polyarchy) denotes a system of government that meets three essential conditions: meaningful and extensive competition among individuals and organised groups, especially political parties, for all effective positions of governing power at regular intervals and excluding the use of force, a highly inclusive level of political participation in the selection of leaders and policies, at least through regular and fair elections, ... and the level of civil and political liberties, freedom of expression, freedom of the press, freedom to form and join organisations sufficient to ensure the integrity of political competition and participation.⁴¹⁶

From a theoretical perspective, the relationship between democracy and human rights is a controversial one. On the one hand, the common and automatic assumption that human rights and democracy are interrelated in contemporary political discourse has been criticised by several commentators. While these authors do not ignore the apparent interlinkages between these concepts, they challenge the idea that human rights and democracy are interdependent (also known as the 'separationist thesis').⁴¹⁷ For example, in defining human rights in terms of universal principles such as the right to life, Chun argues that human rights are largely independent of democracy.⁴¹⁸ The author argues that the realisation of the right to life is not necessarily dependent upon the existence of a

⁴¹⁴ Sørensen, G., *Democracy and Democratization: Processes and Prospects in a Changing World*, (2nd ed.), (Boulder CO., 1998), p. 3.

⁴¹⁵ Beetham, D., 'Democracy and Human Rights: Contrast and Convergence,' Seminar on the Interdependence between Democracy and Human Rights', OHCHR, Geneva, 25th -26th November 2002, paras. 4, 6 and 20.

⁴¹⁶ Diamond, L., Linz, J.J. and Lipset, S.M., *Democracy in Developing Countries, Vol. 2 Africa*, (Boulder CO, 1988), p. xvi.

⁴¹⁷ Chun, L., 'Human Rights and Democracy: The Case for Decoupling,' 5 *Int. J. of Hum. Rts.* 3 (2001). See also Monshipouri, M., and Welch, C.E., 'The Search for International Human Rights and Justice: Coming to Terms with New Global Realities,' 23 *HRQ* (2001).

⁴¹⁸ Chun., *ibid.*, p. 20.

democratic system⁴¹⁹ and furthermore, that they represent ‘politically neutral’ values and are therefore ‘universally sustainable.’⁴²⁰ Nevertheless, while Chun contends that the interdependence of human rights and democracy should not be automatically assumed, it is argued that there should be a positive a re-linkage between democracy and human rights. In this way, democracy is regarded as instrumental, rather than essential for the realisation of a basic concept of human rights.⁴²¹

According to the ‘separationist’ theorists, the promotion of human rights can and should be pursued independently of democracy in order to ensure the universal appeal and legitimacy of human rights activities.⁴²² In this way, the link between human rights and democracy is perceived to be harmful to the promotion of human rights. For example, for Nathan, respect for human rights and the Western conception of democratisation should be dissociated in order to avoid claims of neo-imperialism or the “clash of civilizations.”⁴²³ According to this author, “the international human rights regime requires individual liberty, but it does not require any particular kind of political or economic system.”⁴²⁴ Similarly, it has been argued that the separationist thesis is useful as it would allow donors to focus on promoting human rights contained within international law to ensure legitimacy and avoid charges of Western imperialism.⁴²⁵ These views can be contrasted with the views of Langlois described below, who argues that human rights and democracy are interdependent.⁴²⁶

On the other hand, in contrast with the separationist thesis, most commentators highlight the explicit interlinkages between democracy and human rights. Firstly, for Beetham and Donnelly, the ideology of human rights and democracy are connected by virtue of the

⁴¹⁹ According to Chun, “[a]gainst the easy, unproven assumption of a definite correlation between democracy and human rights, I have argued that the right to life might be protected under either formal democracy or actual autocracy; and a democratic rule may respect or neglect this fundamental rights.” Ibid., p. 32.

⁴²⁰ Ibid., p. 35.

⁴²¹ Ibid., p. 33.

⁴²² For a critical discussion of this practice, see Langlois, A.J., ‘Human Rights Without Democracy? A Critique of the Separationist Thesis,’ 25 *HRQ* (2003), pp. 993-995 and 1000.

⁴²³ Nathan, A.J., ‘China: Getting Human Rights Right,’ 20 *Washington Quarterly* (1997). The “clash of civilizations” refers to the term used by Samuel Huntington, see Huntington, S.P., ‘The Clash of Civilizations,’ 72 *Foreign Affairs* 3 (Summer 1993).

⁴²⁴ Ibid., p. 137.

⁴²⁵ Monshipouri and Welch, *op. cit.*, (2001), p. 385.

⁴²⁶ Langlois, *op. cit.*, (2003), p. 1016.

fact that both can be seen as expressions of liberalism.⁴²⁷ This point is echoed by Kamenka, who states that “In [the rights of man] declarations lies the whole philosophy of liberal democracy in whose name most of the political struggles of the nineteenth century and many of the twentieth were to be fought.”⁴²⁸ This has been elaborated upon by Langlois, who states that “both share the same philosophical ontology of liberalism in the sense that the observance of human rights is implicit within the idea of a properly functioning democracy.”⁴²⁹ The idea that human rights can be implemented without democracy is rejected by Langlois (also known as the unification thesis).⁴³⁰ Firstly, he argues that both human rights and democracy are “Western-centric” concepts, what is different, however, is merely the institutional structure for the protection of human rights which has evolved in the international arena. Secondly, the separationist thesis ignores the historical and philosophical interlinkages between both human rights and democracy. Finally, he argues that the separation of these concepts reduces human rights to mere standards or norms.⁴³¹

Furthermore, from the perspective of international law, although the term democracy was avoided in the UDHR, its provisions contain references to a number of rights, which are associated with essential democratic requirements.⁴³² This overlap can be seen in the international covenants, which include the freedoms of thought, expression and association, and the right to participation in political affairs and governance, directly or through freely chosen representatives.⁴³³ Although the UN has not developed coherent principles of democracy,⁴³⁴ it appears to be recognised by the UN Human Rights Commission that democracy is only legitimate form of governance.⁴³⁵

⁴²⁷ Beetham, D., *Democracy and Human Rights*, (1999), pp. 34 and 90; See also Donnelly, J., ‘Human Rights, Democracy and Development,’ 21 *HRQ* 3 (1999), p. 68; Langlois, *op. cit.*, (2003).

⁴²⁸ Kamenka, E., ‘The Anatomy of an Idea,’ p. 5, from Kamenka, E. and Erh-Soon Tay, A., (eds.), *Human Rights*, (London, 1978).

⁴²⁹ Langlois, *op. cit.*, (2003), p. 1013.

⁴³⁰ *Ibid.*

⁴³¹ *Ibid.*

⁴³² In particular, Article 21 and Article 29(2) UDHR.

⁴³³ See Articles 18, 19, 20, 21 UDHR; Articles 1 and 8 ICESCR; Articles 1, 18, 19, 21 and 25 ICCPR.

⁴³⁴ Franck, *op. cit.*, (1992); Fox, G.H., and Roth, B.R., (eds.), *Democratic Governance and International Law*, (Cambridge, 2000); Wheatley, ‘Democracy in International Law: A European Perspective,’ 51 *ICLQ* (2002).

⁴³⁵ Tomuschat, C., *Human Rights: Between Idealism and Realism*, (Oxford, 2003), p. 53. See ‘Promoting and Consolidating Democracy’, Res. 1999/57, 27th April 1999. (In this Resolution, it is stated, “to consolidate democracy through the promotion of pluralism, the protection of human rights and fundamental freedoms, maximizing the participation of individuals in decision-making and the development of competent and public institutions, including an independent judiciary, effective and accountable legislature and public service and an electoral system that ensures periodic, free and fair elections.”); ‘Promoting and Consolidating Democracy’, Res. 2000/47, 25th April 2000. This was reaffirmed in UN Commission on Human Rights, Res. 2002/46 on Further Measures to Promote and Consolidate Democracy, 58th Sess., 23rd April 2002.

In contrast to the theory and principles of democracy, democratisation has been described as “a process of regime change that is directed towards a specific aim: the establishment and stabilization of substantive democracy.”⁴³⁶ It also refers to “a highly complex process involving successive stages of transition, endurance and consolidation. This process ultimately leads to both institutionalization and consolidation of structures and conditions conducive to structural transformation and regime change from authoritarian rule.”⁴³⁷ The clamour for democratisation at the end of the Cold War is evident from a wide-ranging literature, including the oft-quoted *End of History* thesis.⁴³⁸ With the ‘third wave of democratisation’ and recent global trends to promote democratic governance,⁴³⁹ it has been stated that “at this time in history, almost without exception, democracy of one type or another is the only legitimate form of political domination,”⁴⁴⁰ and furthermore, as “the one legitimate framework for seeking and exercising political power.”⁴⁴¹

Political conditionality in the area of democracy assistance has been defined as “aid specifically designed to foster opening in a non-democratic country or to further a democratic transition in a country that has experienced a democratic opening.”⁴⁴² As with human rights conditionality, the characteristic ‘carrot and stick’ metaphor is used to denote both negative and positive conditionality, with the former leading to the suspension of aid in the light of the failure to implement democratic reform and the latter referring to funding to promote democratisation. Democracy assistance is usually channeled through support for election monitoring, governance institutions, voter education and support for the independent media and civil society.⁴⁴³

⁴³⁶ Schmitz, H.P. and Sell, K., ‘International Factors in Democratization,’ from Grugel, J., (ed.), *Democracy without Borders: Transnationalization and Conditionality in New Democracies*, (London, 1999), p. 25.

⁴³⁷ Monshipouri, M., *Democratization, Liberalization and Human Rights in the Third World*, (Boulder CO., 1995), p. 16.

⁴³⁸ Fukuyama, F., *The End of History and the Last Man*, (London, 1992). See also Huntington, *op. cit.*, (1991). The creation of the *Journal of Democracy* in 1990 is also indicative of this resurgence of democratisation.

⁴³⁹ Schmitz and Sell, *op. cit.*, (1999), p. 23.

⁴⁴⁰ Schmitter, P., ‘Transitology: the Science or Art of Democratization,’ p. 19, from Tulchin, J. and Romero, B., (eds.), *The Consolidation of Democracy in Latin America*, (Boulder, CO., 1995).

⁴⁴¹ Diamond, L., et al, *Consolidating the Third Wave Democracies: Themes and Perspectives*, (Baltimore, 1997), p. xvii.

⁴⁴² Carothers, T., *Aiding Democracy Abroad: The Learning Curve*, (Washington DC, 1999), p. 6.

⁴⁴³ Santiso, C., ‘International Cooperation for Democracy and Good Governance: Moving Towards a Second Generation?’, 13 *EJDR* 1 (2001), p. 162.

The promotion of democracy has been a key tenet of USAID political conditionality for a number of decades. The US Foreign Assistance Act of 1961 provided a legal basis for the promotion of democracy and this practice was intensified with the creation of the National Endowment for Democracy in the 1980s, along with the Centre for Democratic Governance. Democratisation programmes stem from the earlier concern for human rights in donor policy, the most pertinent example of this being US human rights policies under the Carter administration in the 1970s.⁴⁴⁴ Similar policies can be found among all OECD donors in line with political conditionality guidelines,⁴⁴⁵ however, as noted by Crawford, donor definitions of democracy vary to some degree.⁴⁴⁶ Finally, it should be noted that unlike human rights, conditionality in the area of democratisation is more controversial as there is no normative basis in international law for the promotion of democracy.⁴⁴⁷

4.2.2. Human Rights and Good Governance

The following section will examine a third strand of donor political conditionality, namely, the good governance agenda. Before turning to the question of good governance in donor political conditionality, however, a brief introduction to the concept of governance merits discussion. The term governance has enjoyed a resurgence in recent times. Although originally considered to be a legalistic concept, the term governance is now conceived in political terms.⁴⁴⁸ In commenting on the rediscovery of the term in political contexts, Landell-Mills and Serageldin state that "...governance may be taken as denoting how people are ruled, and how the affairs of a state are administered and regulated. It refers to a nation's system of politics and how this functions in relation to public administration and law. Thus, the concept of 'governance' goes beyond that of

⁴⁴⁴ Van Canenburgh, O. 'International Policies to Promote African Democratization,' p. 94, from Grugel, *op. cit.*, (1999).

⁴⁴⁵ Stokke, *op. cit.*, (1995), pp. 21-24. Some examples include the UK Westminster Foundation for Democracy, the Swedish International Liberal Centre and the Jean Jaurès Foundation in France.

⁴⁴⁶ Crawford, *op. cit.*, (2001), p. 72. Crawford's definition of democracy comprises of free and fair elections; respect for civil and political liberties; open and accountable government and a democratic society. See Crawford, *op. cit.*, (2001), p. 18.

⁴⁴⁷ For a contrasting view on the notion of a emerging right to democratic governance, see Franck, T.M., 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992).

⁴⁴⁸ Doornbos, M., 'State Formation Processes under External Supervision: Reflections on 'Good Governance', from Stokke, *op. cit.*, (1995), p. 384.

‘government’ to include a political dimension.”⁴⁴⁹ The term governance is also conceived as a political system by Leftwich, who defines governance as “a system of political and socio-economic relations governed by agreed rules...”⁴⁵⁰ However, in his view, governance (“the structures of political and crucially, economic principles and relationships and rules by which the total productive and distributive life of a society is governed”) is broader than government (“formal institutional structure of authoritative decision-making in modern state”).⁴⁵¹

A broader, yet vaguer definition is offered in the report of the Commission on Global Governance, in which governance is defined as “...the sum of the many ways individuals and institutions, public and private, manage their common affairs.”⁴⁵² Integral to this definition, is the wide-range of actors involved in the governance system,⁴⁵³ and in this way, the debate on governance challenges traditional assumptions regarding the role of the state, with the blurring of the public-private divide,⁴⁵⁴ along with an emphasis on networks and flexibility. According to Rhodes, the new governance agenda is associated with the following characteristics: a minimal state; self-governing networks (new structures of widespread social coordination and interaction between both public and private institutions and organizations in the delivery of services, involving a reduction in the role of the formal institutions and agencies of the state (‘hollowing out the state’)); new public management; corporate governance; and socio-cybernetic systems.⁴⁵⁵

At its most basic, good governance refers to the transparent and accountable running of public administration. The narrow approach often entails conditionality in the area of civil service reform, public enterprise reform, privatisation, financial management, institutional development and pressure to reform executive institutions in order to enhance efficiency. A broader and more comprehensive definition of good governance

⁴⁴⁹ Landell-Mills, P. and Serageldin, I., ‘Governance and the External Factor,’ World Bank Annual Conference on Development Economics Paper, Washington DC, 1991, p. 6.

⁴⁵⁰ Leftwich, A., *The States of Development: On the Primacy of Politics in Development*, (Cambridge, 2000), p. 118.

⁴⁵¹ Ibid.

⁴⁵² Commission on Global Governance, ‘Our Global Neighbourhood. The Report of the Commission on Global Governance,’ (Oxford, 1995), p. 2.

⁴⁵³ Ibid., p. 3.

⁴⁵⁴ Ibid.

⁴⁵⁵ Rhodes, R.A.W., *Understanding Governance. Policy Networks, Governance, Reflexivity and Accountability*, (Buckingham, 1997), p. 47.

highlights the role of openness, accountability, transparency in the area of public administration, however, it is more associated with processes of democratisation.⁴⁵⁶ Conditionality in this area may include the reform of executive, as well as other institutions to ensure accountability through the parliament, the judiciary and civil society in its ‘watchdog’ capacity.⁴⁵⁷ The divergence between the definitions of governance is highlighted by Nelson and Eglinton as follows: “narrow interpretations focus on increased honesty and efficiency in the public sector and call for heightened attention to public administration and institutional development. ... Broader approaches to governance stress institutions, procedures, and attitudes inside and outside of government that promote openness, accountability, and predictability.”⁴⁵⁸

In distinguishing between the terms, ‘good governance’ and ‘good government’, it can be said that governance relates to an act or a manner of functioning, whereas government refers to a form of polity and the authority of those to rule or govern a state. For Stokke, the term ‘good government’ is broader than that of ‘good governance,’ as the former encompasses good governance along with respect for human rights and democracy.⁴⁵⁹ On the other hand, other commentators have interpreted governance as a broader concept, and thus, have described it as ‘the good government of society’.⁴⁶⁰

The issue of sovereignty has again been raised in this area of political conditionality in light of the lack of consensus on the precise scope and content of the term good governance.⁴⁶¹ Within the context of donor political conditionality, definitions of good governance also vary to a certain degree. In the context of international financial institutions, the interest in good governance was initially associated with the conduct of elites and bureaucrats within the public administration after the end of the Cold War.⁴⁶² The notion of ‘good governance’ became an integral part of donor conditionality, the

⁴⁵⁶ Crawford, *op. cit.*, (2001), p. 23.

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*, p. 23 citing Nelson, J.M., with Eglinton, S.J., *Encouraging Democracy: What Role for Conditioned Aid?*, (Washington, 1992), pp. 12-13.

⁴⁵⁹ Stokke, *op. cit.*, (1995), p. 24.

⁴⁶⁰ For example, Boeniger, E., ‘Governance and Development: Issues, Challenges, Opportunities and Constraints,’ World Bank Annual Conference on Development Economics paper, Washington DC, 1991.

⁴⁶¹ UNGA Res. 55/2, 8th September 2000. [UN Millennium Declaration]

impetus for which came at the end of the 1980s with the World Bank's recognition of the failure to achieve the results anticipated in structural adjustment reform,⁴⁶³ thus, emphasising the importance of accountability, transparency and the rule of law.⁴⁶⁴ In 1991, the World Bank set up a task force on good governance, and from this, it was stated that governance is "the manner in which power is exercised in the management of a country's economic and social resources for development", and 'good governance' as synonymous with 'sound development management'.⁴⁶⁵ Following this, in 1994, it was claimed that "good governance is epitomized by predictable, open, and enlightened policy-making (that is, transparent processes); a bureaucracy imbued with a professional ethos; an executive arm of government accountable for its actions; and a strong civil society participating in public affairs; and all behaving under the rule of law."⁴⁶⁶ The IMF also has provisions relating to good governance obligations of its Member States in Article IV of its statute.⁴⁶⁷ For Stokke, the World Bank definition highlights the more public administration aspects of good governance, which is ultimately due to its non-political mandate.⁴⁶⁸ For this reason, by focusing on the more economic dimensions of governance, the primary focus centres on issues such as public sector management, respect for the rule of law, accountability and transparency.⁴⁶⁹

According to the OECD Development Assistance Committee, principles of governance and human rights are included as a subset of universal requirements.⁴⁷⁰ Most OECD donors have introduced good governance conditionality, which also varies between holistic conceptions of democratic governance, to narrower definitions based on accountability in the public sector. Within EU-ACP cooperation, a legal basis is provided for consultations in light of the failure to meet good governance conditionality

⁴⁶² According to Moore, the World Bank publication on governance was written in light of the Bank's experience in sub-Saharan Africa. Moore, M., 'Declining to Learn from the East? The World Bank on Governance and Development,' 24 *IDS Bulletin* 1 (1993b), p. 42.

⁴⁶³ Stokke, *op. cit.*, (1995), p. 26.

⁴⁶⁴ Lancaster, C., 'Governance and Development: The Views from Washington,' 24 *IDS Bulletin* 1 (1993), p. 9.

⁴⁶⁵ World Bank, *Governance and Development*, (Washington, DC, 1992), p. 1.

⁴⁶⁶ World Bank, *Governance: The World Bank's Experience*, (Washington DC, 1994), p. vii. For a more recent view, see World Bank, *Assessing Aid, What Works, What Doesn't, and Why?*, (Washington DC, 1998).

⁴⁶⁷ Tomuschat, *op. cit.*, (2003), p. 55.

⁴⁶⁸ Stokke, *op. cit.*, (1995), p. 26.

⁴⁶⁹ For a view of the latest World Bank governance trends, see Kaufmann, D., 'Rethinking Governance. Empirical Lessons Challenge Orthodoxy,' Discussion Draft Paper, The World Bank, 11th March 2003.

⁴⁷⁰ Patomäki, H., 'Good Governance of the World Economy?,' 24 *Alternatives* (1999), p. 122.

requirements, which can be triggered in serious cases of corruption.⁴⁷¹ Although the term is relatively new,⁴⁷² commitment to the principles of good governance have been made within the African context, for example, in recent African Union (AU) documents, including the NEPAD Peer Review mechanism,⁴⁷³ and in the activities of its predecessor, the Organisation of African Unity (OAU) in the Grand Bay Declaration in 1999.⁴⁷⁴

The good governance agenda necessarily overlaps with other areas of political conditionality through the articulation of the triad of ‘human rights, democracy and good governance’, at the beginning of the last decade as shown above.⁴⁷⁵ Similarly, although the term ‘good governance’ is not new, it belongs to the contemporary realm of political conditionality as defined by donors. However, at a more substantive level, the extent to which the elements of this ‘triad’ represent a single objective or distinct ones depends largely on our definitions of good governance. Whilst the elements of political conditionality may be interlinked,⁴⁷⁶ for many commentators, the link between good governance and democracy is clearer. For example, according to Santiso, “the essence of a functioning democracy is good governance.”⁴⁷⁷ This perspective (i.e. that democracy and good governance share the same meaning) is also shared by Hyden.⁴⁷⁸ Furthermore, Crawford claims that good governance overlaps with the democratic governance agenda of donors, however, whilst human rights and democracy overlap (in the case of civil and political rights), there is only an indirect relationship based on the connection to democracy, which is common to both human rights and good governance.⁴⁷⁹

⁴⁷¹ See EU-ACP Partnership Agreement, Article 9(3). See chapter four of this thesis.

⁴⁷² As mentioned in the previous chapter, the good government agenda has largely been attributed to the World Bank 1989 publication, ‘From Crisis to Sustainable Development’. See chapter one of this thesis. According to the World Bank, “what Africa needs is not just less government, but better government,” World Bank, (1989) p. 5.

⁴⁷³ For example, the African Union, ‘Solemn Declaration on the Conference on Security, Stability, Development and Cooperation of 2000,’ enshrines the principle of good governance. Source: <http://www.africa-union.org>. See also The New Partnership for Africa’s Development (NEPAD). NEPAD was adopted as the economic programme of the AU at the 37th session of the Assembly of Heads of State and Government in July 2001 in Lusaka, Zambia.

⁴⁷⁴ OAU, Grand Bay Declaration, 16th April 1999. Source: <http://ncb.intnet.mu/mfa/oau/decpl.htm>

⁴⁷⁵ For example, in the declarations of President Mitterand of France on 21st June 1990; World Bank President, Barber Conable, on 22nd September 1990. Quoted in ‘The Emergence of the ‘Good Governance’ Agenda: Some Milestones,’ 24 *IDS Bulletin* 1 (1993).

⁴⁷⁶ Moore, M., ‘Introduction,’ 24 *IDS Bulletin* 1 (1993a), p. 5.

⁴⁷⁷ Santiso, C., ‘Strengthening Democratic Governance and Preventing Crisis. The Challenges of ACP-EU Cooperation,’ Paper prepared for the 9th General Conference of EADI, Paris, France 22nd-25th September 1999, p. 12.

⁴⁷⁸ *Ibid.*, p. 23.

⁴⁷⁹ Crawford, *op. cit.*, (2001), p. 28.

As noted above, there has been some discussion of the ‘emerging right to democratic governance’,⁴⁸⁰ however, Van Boven argues that good governance should be viewed as a set of principles, rather than a specific right in itself.⁴⁸¹ According to the UN Human Rights Commission, the human rights and good governance agenda is interlinked through the emphasis on transparency, accountability and participation.⁴⁸²

4.3. The Promotion of Human Rights and the Role of Civil Society

Funding for the promotion of human rights is often allocated through civil society organisations. Civil society organisations (CSOs) are broadly considered to encompass a wide range of bodies including trade unions, professional associations, human rights organisations, development organisations, women’s groups, self-help groups, grassroots organisations. Civil society is a key tenet of western liberalism and, consequently, support to civil society and NGOs also constitutes an important aspect of donor democratisation programmes. According to Schmitter and Karl, democracy depends upon a strong civil society, which, “[a]t its best, ... provides an immediate layer of governance between the individual and the state that is capable of resolving conflicts and controlling the behavior of members without public coercion.”⁴⁸³ Furthermore, civil society has been described as “a flourishing network of voluntary associations in all areas of social life.”⁴⁸⁴ However, the assumption of a homogeneous civil society and indeed, a correlation between civil society and democracy is somewhat problematic as civil society is not necessarily democratic, nor are all voluntary and non-governmental organisations conducive to processes of democratisation.⁴⁸⁵ As a starting point, therefore, it is useful to distinguish between types of organisations rather than treat civil society groups as a

⁴⁸⁰ Arts, *op. cit.*, (2000), p. 40.

⁴⁸¹ Van Boven, T., ‘The Emerging Right to Good Governance,’ 13 *NQHR* 3 (1995), p. 311.

⁴⁸² UN Human Rights Commission Resolution 2000/64 on ‘The Role of Good Governance in Promoting Human Rights,’ 56th Sess., 26th April 2000. This Resolution was confirmed in UN HRC Resolution 2001/72, 57th Sess., 25th April 2001; UN HRC Resolution 2002/76, 58th Sess., 25th April 2002; UN Human Rights Commission Resolution 2003/65, 59th Sess., 24th April 2003.

⁴⁸³ Schmitter, P. and Karl, T., ‘What Democracy Is ... and Is Not,’ from Diamond, L. and Plattner, M.F., (eds.), *The Global Resurgence of Democracy*, (Baltimore, 1996), p. 54.

⁴⁸⁴ Beetham, D. and Boyle, K., *Introducing Democracy: Eighty Questions and Answers*, (Cambridge, 1995), p. 31.

⁴⁸⁵ Crawford, *op. cit.*, (2001), pp. 21-22.

uniform bloc. For example, the OECD DAC makes a distinction between economic self-interest groups and civic advocacy groups.⁴⁸⁶

5. Critical Insights into Donor Human Rights Conditionality and Measures to Promote Human Rights

As it has been shown above, the normative character and policy objectives of OECD donor development cooperation have changed considerably since the beginning of the last decade. Moving from policy statements to practical implementation, human rights and development have become linked in practical terms by donors through negative conditionality, positive conditionality, political dialogue and measures to promote human rights reform. In the following section, an analysis of the major criticisms of the implementation of OECD donor policy will be discussed, focusing on negative conditionality and measures to promote human rights. Two of the main themes that are often raised in the literature concern, firstly, the *ad hoc* nature of negative conditionality and secondly, the question of whether there is a bias towards certain hierarchies of rights and activities by donors. This analysis will also be useful for highlighting key issues that will be explored in the case study on EU-ACP cooperation in subsequent chapters of this thesis. This section implicitly examines the degree to which human rights are regarded as part of the process of development in donor policies – or in Sen’s terminology – the extent to which human rights are regarded as *instrumental* for the achievement of development. In other words, does the donor human rights agenda contribute to the process development either directly through human rights activities or indirectly through the mainstreaming of human rights in development strategies.

5.1. The *Ad hoc* and Fragmented Nature of Negative Conditionality

By virtue of the political nature of human rights conditionality, it is logical to expect that the decisions made by the OECD governments in this sphere are fraught with

⁴⁸⁶ Ibid., p. 22.

contradictions. This arises for a variety of reasons ranging from the complexities in raising sensitive human rights issues in third countries, the potential competing domestic objectives of donor governments such as established commercial and cultural links and perhaps also a lack of coordination among donors. The most well-known examples of inconsistencies in donor conditionality have been highlighted in the on-going literature in this field, most notably, Tomaševski's work which highlights the inconsistencies in donor reactions to human rights abuses through a variety of restrictive measures such as sanctions and financial incentives and reform activities through elections.⁴⁸⁷ Due to space constraints, this chapter will not deal with specific cases of donor conditionality. Instead, this chapter seeks to highlight the fragmented and *ad hoc* nature of conditionality in the application of donor policy. The discussion will also be useful for the key issues raised in the EU-ACP case study, particularly chapter four.

In the context of hard conditionality, some commentators have pointed to the lack of verifiable criteria in determining the circumstances in which the suspension of aid may be carried out in the event of alleged human rights abuses.⁴⁸⁸ Furthermore, although aid is often suspended for alleged human rights violations (in other words, as the 'ostensible justification'), the term human rights is often tagged on to donor decisions although these decisions may have been influenced by other criteria and circumstances, such as military coups, the absence of multi-party democracy and cases of serious corruption.⁴⁸⁹ This situation could be attributed to the so-called universal (legal and moral) force of human rights, which gives legitimacy to the suspension of aid, although it may also be concerned with other factors and not simply human rights ones. In light of the absence of verifiable and transparent indicators, Tomaševski notes the inconsistent and *ad hoc* basis upon which negative human rights conditionality takes place, thus highlighting the discretionary and arbitrary criteria of individual donors.⁴⁹⁰

⁴⁸⁷ Tomaševski, *op. cit.*, (1997). See also Baehr, P.R., *The Role of Human Rights in Foreign Policy*, (Basingstoke, 1996); Forsythe, D.P., *Human Rights and Comparative Foreign Policy*, (Tokyo, 2000).

⁴⁸⁸ Tomaševski, K., *Development Aid and Human Rights Revisited*, (London, 1993), p. 4.

⁴⁸⁹ Tomaševski, *op. cit.*, (2000), p. 380. According to this author, this was the case in examples of suspension in Africa such as Kenya, Malawi, Cameroon, Togo, Congo (Brazzaville), Gambia, Comores, Zambia and Niger.

⁴⁹⁰ *Ibid.*, pp. 382-383. (That donor decisions are also based on other concerns, including commercial interests, can be seen in the example of soft response of donors in the case of Nigeria, *ibid.*, p. 380); Tomaševski, *op. cit.*, (1997), p. xiv; Tomaševski, *op. cit.*, (1993), pp. 3-4; Smith, K.E., *European Union Foreign Policy in a Changing World*, (Cambridge, 2003), pp. 116-121.

The lack of the consistent correlation in practice between donor aid allocations and respect for human rights has also highlighted the fragmented and subjective nature of human rights conditionality. The question of whether the commitments made by donors at the end of the Cold War were followed through in the allocation of aid to countries on the basis of respect for human rights, democracy and the rule of law has become the subject of several empirical studies. If these commitments amount to more than empty rhetoric, aid allocations should correspond to a country's human rights performance.⁴⁹¹ However, in a 1992 UNDP report, it was stated that "twice as much aid per capita is being given to high military spenders and human rights violators."⁴⁹² Furthermore, published in 1997, Tomaševski's research has shown that from the period between 1990 and 1993, there was no correlation between respect for human rights and aid flows. In reality, the opposite is the case as countries such as Egypt, China and Indonesia were amongst the highest recipients.⁴⁹³ Tomaševski has argued that donor conditionality appears arbitrary because the practice of aid allocations does not reveal that aid is cut off to human rights violators despite official rhetoric.⁴⁹⁴ In contrast, she argues that conditionality has usually been applied in vulnerable countries that are heavily dependent on international aid and with a high debt burden.⁴⁹⁵

Recent empirical studies present varying responses to this question. For example, Neumayer questions whether respect for human rights is rewarded in bilateral and multilateral aid allocations.⁴⁹⁶ This study dealt with bilateral and multilateral aid in the period between 1984 and 1995. Human rights are defined as civil and political rights⁴⁹⁷ and personal integrity rights, which refer to freedom from political imprisonment, torture, disappearance, violence and political murder.⁴⁹⁸ Economic, social and cultural rights were excluded from this study as it was assumed that they are unmanageable and

⁴⁹¹ This was the subject of Tomaševski's 1997 publication. See Tomaševski, *op. cit.*, (1997).

⁴⁹² Ul Haq, M., 'Human Development in a Changing World,' Background Paper to UNDP, 'Human Development Report 1992. The Global Dimensions of Human Development,' (UNDP, 1992). Source: http://hdr.undp.org/docs/publications/ocational_papers/oc1.htm

⁴⁹³ Tomaševski, *op. cit.*, (1997), p. 64.

⁴⁹⁴ *Ibid.*, p. xiv.

⁴⁹⁵ *Ibid.*

⁴⁹⁶ Neumayer, E., 'Is Respect for Human Rights Rewarded? An Analysis of Total Bilateral and Multilateral Aid Flows,' 25 *HRQ* (2003a).

⁴⁹⁷ Freedom House Index <http://www.freedomhouse.org>

⁴⁹⁸ The information relating to personal integrity rights relies on data from the two Purdue Political Terror Scales (PTS). These include freedom from political imprisonment, torture and murder. See Neumayer, *op. cit.*, (2003a), p. 515; Neumayer, *op. cit.*, (2003b), p. 103.

unquantifiable.⁴⁹⁹ He concludes that despite official rhetoric since the end of the Cold War, “human rights play a limited role in the allocation of aggregate bilateral and multilateral aid.”⁵⁰⁰

In a similar study, Neumayer’s econometric analysis of twenty-one OECD bilateral donors⁵⁰¹ reveals a sharp contradiction between rhetoric and practice.⁵⁰² This inquiry deals with the link between respect for human rights and aid allocation between the period of 1985 to 1995.⁵⁰³ Human rights are defined as civil and political rights and personal integrity rights. One of the assumptions of this research is that the big donors are commonly regarded as pursuing their own interests,⁵⁰⁴ whereas it is assumed that the like-minded donors (LMD)⁵⁰⁵ would reward respect for human rights with little attention paid to their own interests. Finally, it is assumed that the smaller donors would be freer to promote human rights than big donors but that these objectives would not be pursued as strongly as among the like-minded donors. The findings of this research, however, lead Neumayer to dismiss the assumption that the end of Cold War brought about a radical re-allocation of aid towards countries which respect human rights.⁵⁰⁶ Neumayer concludes that respect for human rights (defined as civil and political rights) play a significant role at the eligibility stage/gate-keeper.⁵⁰⁷ However, at the level stage,⁵⁰⁸ the pattern amongst donors becomes more complex and varied, and is therefore “...much less consistent than other studies suggest.”⁵⁰⁹

The studies of Alesina and Dollar (2000) suggest that there is a more serious gap between rhetoric and practice by virtue of the pattern of aid allocation. For example, Alesina and

⁴⁹⁹ Neumayer, *op. cit.*, (2003a), p. 515.

⁵⁰⁰ *Ibid.*, p. 527.

⁵⁰¹ Neumayer, E., ‘Do Human Rights Matter in Bilateral Aid Allocation? A Quantitative Analysis of 21 Donor Countries’, 84 *Social Science Quarterly* 3 (2003c). The three groups of donors surveyed include: a) the big donors (France, Germany, Italy, Japan, UK, US); b) the like-minded donors (Canada, Denmark, the Netherlands, Norway, Sweden; c) the small donors (Australia, Austria, Belgium, Finland, Ireland, Luxembourg, New Zealand, Portugal, Spain and Switzerland). (Greece is the only DAC member that was not considered in this study.)

⁵⁰² *Ibid.*, pp. 663-665.

⁵⁰³ *Ibid.*, p. 649.

⁵⁰⁴ *Ibid.*, p. 658.

⁵⁰⁵ The like-minded donors (LMD) include Canada, Denmark, The Netherlands, Norway and Sweden.

⁵⁰⁶ Neumayer, *op. cit.*, (2003c), p. 662.

⁵⁰⁷ The first stage is known as ‘gate-keeping’ and refers to the decisions made by donors on which countries are eligible to receive aid. Neumayer, *op. cit.*, (2003c), p. 655.

⁵⁰⁸ The level stage is the second step and refers the amount of aid that will be allocated to a country after it has been selected as a recipient of aid in the first stage. *Ibid.*

⁵⁰⁹ Neumayer, *op. cit.*, (2003c), p. 663.

Dollar reveal the divergences in empirical research on aid allocation.⁵¹⁰ These findings relate to the period between 1970 and 1994 and record a “...modest positive association of aid with openness and with democracy.”⁵¹¹ Briefly, the conclusions point to clear differences in the rewards for reforms in the area of democracy among the major donors.⁵¹² For example, the Nordic countries (Denmark, Sweden, Finland, Norway), the US, the Netherlands and Canada put the most weight on democracy.⁵¹³ The findings indicate that the Nordic countries respond to “correct” incentives such as the existence of good institutions and openness in recipient countries.⁵¹⁴ In contrast, there is less weight attached to democracy in German aid policy, and even less so in the policies of France and Japan. The findings also confirm that political and strategic considerations (such as colonial past and political alliances) have an impact on aid flows.⁵¹⁵ For example, the bulk of France’s aid is awarded to former colonies, whilst the most significant amounts of US aid is allocated to the Middle East (approximately one third to Egypt and Israel).⁵¹⁶

5.2. The Practice of Donor Support for Human Rights Activities

Measures to support human rights cannot be viewed in isolation and should also be viewed within the wider context of political conditionality. As identified by Stokke, political conditionality may be carried out at the following levels – systemic, national, policy-oriented and programmatic.⁵¹⁷ At the systemic level, this may include support to the system of government and governing institutions; at the national level through reform in the area of human rights; at a policy level through sectoral reform; and additionally through programmatic and project level activities.⁵¹⁸ Aid for political reform is often targeted at political dialogue aimed at improving democratic infrastructure and institutions, along with activities to promote human rights activities through civil society

⁵¹⁰ Alesina and Dollar, *op. cit.*, (2000).

⁵¹¹ *Ibid.*, p. 37.

⁵¹² Respect for democracy is measured using the Freedom House Index. *Ibid.*, p. 36.

⁵¹³ *Ibid.*, p. 49.

⁵¹⁴ *Ibid.*, p. 33.

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.*

⁵¹⁷ Stokke, *op. cit.*, (1995), pp. 14-15.

⁵¹⁸ *Ibid.*, p. 14.

and NGOs.⁵¹⁹ Thus, most donors adopt a dual approach to the promotion of human rights and related elements of political reform, which relies upon the promotion of a ‘top-down’ approach (financing national efforts in the area of democratisation and human rights) and a grassroots approach (assisting civil society, NGOs and local community-based organisations in the area of human rights).

5.2.1. A Bias Towards Civil and Political Rights?

As this thesis is concerned with donor policy, it does not seek to analyse the implementation of human rights reform or to establish the extent to which human rights conditionality has achieved its objective. Instead, the following section seeks to discuss one of the debates which has been raised in the literature, namely the priority given to civil and political rights in donor human rights policy.⁵²⁰ For example, from the comparative study undertaken by Crawford, it can be seen that the UDHR and the 1966 Covenant on Civil and Political Rights provide the primary sources for the references to human rights within donor policies, along with the 1966 Covenant on Economic, Social and Cultural Rights, albeit to a lesser degree. In an analysis of donor definitions of human rights, Crawford has pointed to the consensus among donors on the prioritisation of human rights as civil and political rights, with economic, social and cultural rights simply promoted through development programmes as a whole.⁵²¹ This position has also been highlighted by Tomaševski.⁵²²

One explanation for the emphasis on civil and political rights could be attributed to the traditional dichotomy between civil and political rights, on the one hand, and economic, social and cultural rights, on the other. In this regard, the main criticisms against economic, social and cultural rights are well-known, centering upon firstly, the non-binding language of the 1966 Covenant and secondly, the relative weakness of its

⁵¹⁹ Mushi., *op. cit.*, p. 239.

⁵²⁰ For example, Crawford, *op. cit.*, (2001), p. 66; Stokke, *op. cit.*, (1995), p. 29.

⁵²¹ Crawford, *ibid*; Tomaševski, *op. cit.*, (1997), pp. 12-14.

⁵²² Tomaševski, *ibid.*, p. 12.

enforcement mechanisms.⁵²³ The denial of economic, social and cultural rights often rests upon the convenient designation of these rights as exclusively ‘positive’ rights and civil and political rights as exclusively ‘negative’ rights. This was one of the main objections raised during drafting negotiations for the Covenants, namely, that civil and political rights were negative rights and immediately justiciable, whereas economic and social rights demanded positive action on behalf of the State and could only be realised progressively, depending upon the socio-economic situation of the State parties.⁵²⁴ As mentioned above, the subject of socio-economic rights remains a highly contentious area in light of the failure to achieve consensus on the draft Optional Protocol to the ICESCR, as agreed by the Committee on Economic, Social and Cultural rights in 1996, which would grant the right of individuals or groups to submit communications (complaints) concerning non-compliance with the Covenant.⁵²⁵

Secondly, according to Tomaševski, the subordinate position of socio-economic rights in development can be attributed, on the one hand, to the dominance of the US model of human rights conditionality, which reflected the ideological conflict during the Cold War, thus, prioritising civil and political rights and negating the existence of economic, social and cultural rights. On the other hand, she argues that many donors did not refer to socio-economic rights as it was assumed that development, particularly, social development, automatically benefits the individuals within developing countries.⁵²⁶ However, as it has been shown in the many studies undertaken on the social impact of structural adjustment, human development indicators have deteriorated, rather than improved during the decades of development aid.⁵²⁷

Thirdly, the alleged bias towards civil and political rights may be linked to the priority given to support for democratisation activities and election support during the 1990s.

⁵²³ See section 4.1 above.

⁵²⁴ Jhabvala, *op. cit.*, (1987), p. 296.

⁵²⁵ Byrnes, A., ‘An Effective Complaints Procedure in the Context of Human Rights Law,’ p. 162, from Bayefsky, A., (ed.), *The United Nations Treaty System in the Twenty-First Century*, (The Hague, 2000). Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, 15th Sess., 18th November-6th December 1996. Source: <http://www.unhchr.ch/html/menu2/6/cesr.htm#protocol>

⁵²⁶ Tomaševski, *op. cit.*, (1997), pp. 12-14.

⁵²⁷ For a recent discussion of this issue, see UN Commission on Human Rights, ‘Effects of Structural Adjustment Policies and Foreign Debt on the Full Enjoyment of Human Rights, Particularly Economic, Social and Cultural Rights’, 61st Sess., E/CN.4/2005/42, 5th

This period has been described as the ‘era of electoralism’,⁵²⁸ and it was also accompanied by the policy of withholding aid in return for multi-party reform. The narrow conception of democracy and democratisation within development donor policies has been criticised by many commentators.⁵²⁹ This is derived from the debate within liberal democracy on procedural and substantive democracy.⁵³⁰ Procedural democracy is associated with Schumpeter’s definition, which states that “the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”⁵³¹ In contrast, alternative approaches are not only concerned with procedural requirements but also highlight the importance of participation and reducing inequalities, for example, in the area of economic, social and cultural rights.⁵³² However, as noted above, it was often assumed by donors that economic and social rights would be promoted automatically through development programmes, therefore, it did not appear necessary to develop separate policies or programmes to promote these rights as objectives in their own right.⁵³³

In this regard, most of the literature points to the over-emphasis of the majority of donors on providing technical assistance for the holding of elections and election monitoring,⁵³⁴ which is linked to the ‘minimal approach’ to democratisation in political science literature and is fulfilled by simply holding multi-party elections,⁵³⁵ or the minimum requirements of polyarchy.⁵³⁶ According to Gills, the emphasis on procedural requirements is described as ‘low intensity democracy,’ which provides formal and

January 2005. See chapter one for a more detailed discussion of the impact of the IFI-imposed structural adjustment on socio-economic rights in the 1980s and recent developments in the World Bank poverty reduction strategy papers (PRSPs).

⁵²⁸ According to Tomaševski, electoralism “balances a stick (suspending aid until multi-party elections are held) with a carrot (providing electoral support and monitoring). Tomaševski, *op. cit.*, (1997), p. xv.

⁵²⁹ Crawford, *op. cit.*, (2001), p. 19. See Andreassen, B.-A., and Swinehart, T, *Promoting Human Rights in Poor Countries: The New Political Conditionality of Aid Policies. Human Rights in Developing Countries Yearbook 1991*, (Oslo, 1992), p. viii; Sorensen, *op. cit.*, (1995), pp. 395-401; Stokke, *op. cit.*, (1995).

⁵³⁰ Crawford, *op. cit.*, (2001), p. 17.

⁵³¹ Quoted in Hyland, *op. cit.*, (1995), p. 44. The minimum requirements for democracy have been elaborated upon by Dahl to include: – “extensive competition for power through regular free, and fair elections: [h]ighly inclusive citizenship conferring rights of participation on virtually all adult; and implicitly, extensive civil and political liberties to allow for pluralism of information and organization.” Quoted in Held, *op. cit.*, (1996), p. 311. The requirements for polyarchy are also provided in Dahl, R.A., *Democracy and Its Critics*, (New Haven, 1989), p. 221 and Dahl, *op. cit.*, (1998), p. 92.

⁵³² This point is made by Crawford, *op. cit.*, (2001), p. 17. See for example, Pateman, C., *Participation and Democratic Theory*, (Oxford, 1970).

⁵³³ See Crawford, *ibid.*, (2001), p. 66. Tomaševski, *op. cit.*, (1997), pp. 12-14.

⁵³⁴ Van Canenburgh, *op. cit.*, (1999), p. 97.

⁵³⁵ *Ibid.*, p. 98.

⁵³⁶ Robinson, W.I., *Promoting Polyarchy: Globalization, US Intervention and Hegemony*, (Cambridge and New York, 1996), p. 49.

cosmetic changes, rather than leading to the democratisation of the institutional structures of a polity.⁵³⁷ Van Canenburgh argues that democratisation programmes in Africa which have focused on multi-party elections are ‘misdirected’ as they promote a western-style democracy without the existence of conditions which democracy can flourish – this includes the absence of respect for human rights, rule of law, strong state institutions and civil society.⁵³⁸ Similarly, the need to recognise democratisation as a long-term process, engendering respect for democratic principles and human rights norms is highlighted in the literature.⁵³⁹

A final justification for the priority given to civil and political rights in donor policy can be explained by the links between political conditionalities and economic conditionalities. According to Sarkar, civil and political rights are promoted as an integral part of rule of law activities, which he argues have become the new legal architecture of development. In his view, the new emphasis on rule of law activities aims to ensure the smooth transition to a market economy. This has occurred, firstly, to protect private investment and individual liberties and, secondly, to provide a regulatory framework for the smooth functioning of competitive markets and to provide the necessary legal protection for foreign direct investment.⁵⁴⁰ In this way, the promotion of the rule of law has centred upon the creation of a strong civil society, structural legal reform and the improvement of the administration of justice.⁵⁴¹ According to Sarkar,

The new ascendancy of the “Rule of Law” on a global scale is certainly worth considering. In the fracas of dying and defunct ideas, a core ideal of Western thought has endured, namely, Adam Smith’s elevation of the drive to acquire material wealth to a classical economic ideal. This, in combination with John Locke’s demand that the state protect private property and individual liberties, sets the stage for liberal political theory. In other words, the pursuit of one’s own personal happiness through the material acquisition of personal wealth as well as

⁵³⁷ Gills, B., *et al.* (eds.), *Low Intensity Democracy*, (London, 1992). See also Sorensen, *op. cit.*, (1993), p. 20.

⁵³⁸ Van Canenburgh, *op. cit.*, (1999), p. 103.

⁵³⁹ Andreassen and Swinehart, *op. cit.*, (1992), p. xii.

⁵⁴⁰ Sarkar, R., ‘The Developing World in the New Millennium: International Finance, Development, and Beyond,’ 34 *Vand. J. Transnat’l L.* (2001), p. 471. See also Sarkar, R., *Development Law and International Finance*, (Dordrecht, 1999), pp. 12-13.

⁵⁴¹ *Ibid.*, p. 473, fn. 4.

the state's protection of individual liberties has been elevated to a Western classical ideal. Indeed the terrifying force of this ideal may be its universality.⁵⁴²

In this way, Sarkar argues that civil and political rights are implemented as an element of rule of law reform, which seeks to create a favourable framework for a neoliberal economic policy agenda.

While there may have been a clear emphasis on civil and political rights from the onset of political conditionality in the 1990s, it could be argued that this argument no longer holds true as most donors have sought to integrate socio-economic rights within their policies, at least at a rhetorical level.⁵⁴³ Clear examples of the equal status of both sets of rights can be seen in the Swedish, EU and Danish development policies,⁵⁴⁴ along with other OECD donors which incorporate economic, social and cultural rights as an integral part of donor assistance policy.⁵⁴⁵ However, a notable exception to this approach is US development policy.⁵⁴⁶ In this respect, it should be noted that the integration of a holistic conception of human rights and development is not a straightforward task for all donors. Some donors cite policy restraints as an issue limiting their ability in this regard.⁵⁴⁷ Others are limited by political choices. For example, the US is only permitted to endorse a selected number of human rights treaties due to its non-ratification of the CRC and the ICESCR. For more pragmatic reasons, Australia has not yet adopted a specific human

⁵⁴² Ibid., p. 471.

⁵⁴³ This does not mean that this rhetorical commitment is implemented in practice as this claim would need to be verified through case study analysis, which is beyond the scope of this chapter. See chapters three to five of this thesis for a more thorough empirical analysis of EU development cooperation policy.

⁵⁴⁴ See Swedish International Development Authority (SIDA), 'Perspectives on Poverty (2002). A Policy Paper,' (Stockholm, 2002); SIDA, 'SIDA's Strategy for its Programmes of Democracy and Human Rights,' (Stockholm, 1993); European Commission, Communication from the Commission to the Council and the European Parliament on the European Union's role in promoting human rights and democratisation in third countries,' COM (2001) 252 fin., 8th May 2001; Europeaid, '(Draft) Handbook on Promoting Good Governance in EC Development Cooperation,' 2004, pp. 47-48. Source: http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/themes-gg-handbook_en.pdf; Denmark, 'DANIDA, 'Human Rights and Democracy in Danish Development Policy,' (Copenhagen, 1993) and DANIDA, 'Evaluation of Fulfillment of the Main Elements of Strategy for Danish Development Policy toward the Year 2000, A Developing World,' (Copenhagen, 1997).

⁵⁴⁵ Among the OECD donors, this includes: DFID, 'Realising Rights for Poor People,' (London, 2000), Piron, L.-H. and Watkins, F., 'DFID Human Rights Review,' (London, July 2004); Germany, Federal Ministry for Economic Cooperation and Development (BMZ), 'BMZ Concepts. Development Policy Action Plan on Human Rights, 2004-2007,' (Bonn, 2004); Canada, CIDA, 'Policy for CIDA on Human Rights, Democratization and Good Governance,' December 1996; The Netherlands, see Baehr, P.R., Castermans-Holleman, M.C. and Grünfeld, F., 'Human Rights in the Foreign Policy of the Netherlands,' 24 *HRQ* 4 (2002), p. 994; Norway, *Handbook in Human Rights Assessment. State Obligations, Awareness and Empowerment*, (Oslo, 2001); Swiss aid, Piron, L.-H. and Court, J., 'Report for the Swiss Agency Development and Cooperation,' (SDC, 2003).

⁵⁴⁶ On USAID, see Office of Democracy and Governance, 'User's Guide,' (Washington DC, 15th November 2004); Center for Democracy and Governance, 'A Conceptual Framework', November 1998,' (Washington DC, 1998).

⁵⁴⁷ The World Bank justifies its position on human rights on the basis of its non-political mandate. See chapter one, section 5.1.

rights policy for AusAid, however, in certain circumstances, it promotes human rights dialogue and supports human rights projects and national and regional institutions.⁵⁴⁸

5.3. Embedding Human Rights in Development Policy Frameworks: Mainstreaming and Human Rights-Based Approaches

Having discussed the orientation of support for human rights in donor policy, the following section further deals with the use of human rights as an instrumental aspect of development. This encompasses both human rights mainstreaming strategies and human rights-based methodologies, which will be briefly discussed to provide an insight into the current debates in this field. This enables a further understanding of the extent to which human rights are regarded as part of the process of development itself (i.e. as part of the means) or simply promoted as standalone objectives (i.e. as ends in themselves).

5.3.1. Mainstreaming Human Rights in Development

Beyond donor activities to promote respect for human rights, efforts are also made to mainstream human rights as cross-cutting or horizontal themes in development strategies. For the purposes of this debate, the activities of the OECD Task Force on Integrating Human Rights in Development is useful as it illustrates the present state of play regarding the role of human rights in the policies of OECD donors. This OECD task force was set up in 2004 in an attempt to formulate guidelines for donors on the integration of human rights in development.⁵⁴⁹ The momentum for this initiative has been generated by leading stakeholders including Switzerland, DFID, SIDA, CIDA, UNDP, UNIFEM, BMZ, OHCHR, the Asian Development Bank (ADB) and Austria.⁵⁵⁰ The World Bank subsequently joined this core team.⁵⁵¹ The objective of the task force is to create

⁵⁴⁸ Piron et al, *op. cit.*, (2005b), p. 7.

⁵⁴⁹ The OECD DAC Governance Network (GOVNET) has recently launched a task force on human rights. Telephone interview with Mr. Sebastian Bartsch, OECD, Human Rights and Development Task Force, 13th May 2005. It should be noted that previous efforts in this area failed due to the fact that some donors pushed too far ahead with rights-based agenda, which was unacceptable to others.

⁵⁵⁰ Interview with Sebastian Bartsch, 13th May 2005.

⁵⁵¹ Follow-up Interview with Mr. Sebastian Bartsch, 30th September 2005. The World Bank has 'observer' status during the negotiations of the OECD Task Force.

guidelines for the integration of human rights in development. This is in recognition of the various types of approaches adopted by donors at present ranging from political dialogue, mainstreaming, human rights impact assessments and human rights-based approaches. A key motivation of the core team of donors is to give legitimacy to their efforts to link human rights and development as they often face internal opposition within other government departments (this usually depends on the level of independence of individual bilateral aid agencies).⁵⁵² As the so-called “voice of the donor community,” the guidelines produced by the OECD DAC would send a strong signal to donors.

These negotiations resulted in a final report entitled ‘Synthesis of Donor Approaches and Experiences’, which was completed in September 2005.⁵⁵³ This study was commissioned by the Governance Network (GovNet) of the DAC, therefore, it does not represent the views of the DAC Members or the OECD GovNet Task Team on Human Rights and Development. The final report ultimately consists of a stock-taking exercise to assess the current role of human rights in OECD donor policies, rather than an attempt to push the debate forward. It is envisaged that this Task Force will ultimately produce a series of guidelines on the integration of human rights in development policy.⁵⁵⁴ These guidelines may lead to the updating of DAC statements and policies and the possibility for joint-initiatives among DAC Members in this area.⁵⁵⁵ Piron *et al* have provided a five-part typology for the current state of the art on the integration of human rights and development.⁵⁵⁶ This can be outlined as follows:⁵⁵⁷ i) human rights projects (direct projects aimed at the realisation of specific rights); ii) human rights dialogue; iii) human rights mainstreaming; iv) implicit human rights work; and v) human rights-based approaches. According to the results of this research, most of the direct human rights interventions have focused on civil and political rights through civil society organisations.⁵⁵⁸ Whilst most donors support the indivisibility of all human rights in

⁵⁵² Interview with Sebastian Bartsch, 30th September 2005.

⁵⁵³ Piron, L-H., with O’Neill, T., ‘Integrating Human Rights into Development. A Synthesis of Donor Approaches and Experiences,’ Prepared for the OECD DAC Network on Governance (GOVNET), (September 2005b), (unpublished, on file with author).

⁵⁵⁴ If it is not possible to agree on guidelines, the Task Force has stated that it may only produce a paper on ‘lessons learned’ on the integration of human rights in development cooperation policies. The mandate of the Task Force continues until the end of 2006.

⁵⁵⁵ Piron, *op. cit.*, (2005b), p. 10.

⁵⁵⁶ For an excellent overview of the literature in this area see: Annex IV: ‘Mapping Existing Studies on Human and Development and Identification of Good Practice’ from *ibid.*, Annex IV.

⁵⁵⁷ Reproduced from *ibid.*, p. vi.

⁵⁵⁸ *Ibid.*, p. vi and p. 24.

theory, Piron *et al* claim that this should be reflected in the policy documents and statements of the OECD GovNet to ensure that human rights are not only understood as civil and political rights or simply a subset of the governance agenda.⁵⁵⁹

Whilst the success of the efforts of the OECD Task Force remains to be seen, (it should be noted that previous efforts of the OECD development assistance committee to achieve consensus guidelines in the area of democracy and good governance failed),⁵⁶⁰ the issue of socio-economic rights will be on the agenda.⁵⁶¹ In light of the opposition to socio-economic rights in some jurisdictions, most notably the US which has not ratified the ICESCR,⁵⁶² it is unlikely that consensus will be reached – apart from the so-called ‘like-minded donors as mentioned above.’⁵⁶³ Even if the Task Force manages to achieve consensus on guidelines relating to the role of human rights (and supposing equal recognition is given to both sets of rights), the extent to which the rhetoric of even the like-minded donors is matched in practice, of course, remains open to question.⁵⁶⁴

5.3.2. Human Rights-Based Methodologies as a Framework for Donor Policy

Human rights-based approaches relate to the use of the principles and standards contained within international human rights law as a normative framework for development activities. In the first chapter, it was argued that the emergence of rights-based approaches was linked to the changing normative definition of development within UN circles (particularly in terms of human development), which purported to offer an added-value for the conceptualisation of development in terms of individual rights and emphasises the shared obligations on behalf of the international community for the

⁵⁵⁹ Ibid., p. 25.

⁵⁶⁰ Santiso, C., ‘International Cooperation for Democracy and Good Governance: Moving Towards a Second Generation?’, 13 *EJDR* 1 (June 2001), p. 170.

⁵⁶¹ The GOVNET Task Force is expected to produce an action-oriented policy in 2006. The mandate of this Task Force is for the period 2005-2006. Piron *et al*, *op. cit.*, (2005b), p. 50.

⁵⁶² Alston, *op. cit.*, (1990), pp. 365-92.

⁵⁶³ The term ‘like-minded’ donors refers to the Nordic countries, the Netherlands and Canada.

⁵⁶⁴ For example, Baehr notes that although economic, social and cultural rights enjoy an equal status in the Netherlands development policy, this equal status is not reflected in practice. Baehr, et al, *op. cit.*, (2002), p. 996.

promotion and protection of human rights law.⁵⁶⁵ Furthermore, in recognition of the lack of momentum in moving the debate on the ‘right to development’ forward, the human rights-based approach is grounded in human rights treaties which are legally binding. The widespread adoption of these policies by UN agencies is recognised in the 2003 Common Understanding on human rights-based approaches.⁵⁶⁶

The emergence of rights-based approaches also reflects the contribution of human rights lawyers to the development agenda.⁵⁶⁷ Along with earlier attempts to create obligations through the right to development, these international lawyers envisage a new paradigm for development, based on the normative framework of human rights law, which would move beyond needs-based and charity-based approaches by emphasising issues of accountability and obligations emanating from international treaty documents. As shown in the first chapter, this approach has been adopted by several UN agencies⁵⁶⁸ and non-governmental development organisations.⁵⁶⁹ The adoption of rights-based approaches has also been considered by several donors, most prominently, Swedish and UK development aid policies.⁵⁷⁰ The Swedish development agency has gone the furthest in the adoption of a human rights-based policy⁵⁷¹ and has moved on to the next generation of human rights-based approaches.⁵⁷² Several other bilateral development agencies have also followed suit

⁵⁶⁵ See section 4.5 of chapter one of this thesis.

⁵⁶⁶ For a more in-depth discussion of this theme, see chapter one of this thesis.

⁵⁶⁷ As mentioned in the first chapter of this thesis, there is a wide-ranging literature on this subject. See Alston, ‘What is in a Name? Does it matter if development refers to goals, ideals or human rights?’ from Helmich, J., (ed.), *Human Rights in Development Cooperation*, Special Edition, No. 22, SIM, (Utrecht, 1998); Alston, P., ‘Making Space for Human Rights: The Case of the Right to Development,’ 1 *Harvard Human Rights Yearbook* 1 (1998); Forsythe, D.P., *Human Rights and Development. International Views*, (Houndmills, 1989); Sano, H.-O., Development and Human Rights: The Necessary, but Partial Integration of Human Rights and Development,’ 22 *HRQ* 3 (August 2000); Senghupta, A., ‘Realizing the Right to Development,’ 31 *Development and Change* (2000); Donnelly, *op. cit.*, (1999). For a more recent discussion, see Uvin, P., *Human Rights and Development*, (Bloomfield, 2004); Center for Human Rights and Global Justice and Ethical Globalization Initiative, Conference on ‘Human Rights and Development: Towards Mutual Reinforcement,’ NYU, New York, 1st March 2004. See also IDS Bulletin devoted to rights-based approaches, Pettit, J., and Wheeler, J., (eds.), ‘Developing Rights,’ 36 *IDS Bulletin* 1 (January, 2005).

⁵⁶⁸ UNDP, *Integrating Human Rights with Sustainable Development*, UNDP Policy Document, New York, January 1998; OHCHR, ‘Development and Human Rights: The Undeniable Nexus’, Speech of Mary Robinson, UN High Commissioner for Human Rights (UNHCHR), Geneva, 26th June 2000. See also HURIST and UNDAF programmes; Jonsson, U., *Human Rights Approach to Development Programming*, (Nairobi, 2003), p. 4. [This book was written for and published by UNICEF]

⁵⁶⁹ CARE, ‘Adoption of Rights-Based Approach. Five Case Studies,’ (Nairobi, 2003); CARE, ‘Human Rights and Rights-Based Programming. Basic Training Manual,’ (Nairobi, 2003); O’Neill, W., ‘An Introduction to the Concept of Rights-Based Approach to Development: A Paper for InterAction,’ December 2003. Source: http://www.interactionorg/files.cgi/2495_RBA_1-5_04.pdf; See also Nelson, P.J. and Dorsey, E., ‘At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs,’ 31 *World Development* 12 (December 2003), pp. 2013-2026.

⁵⁷⁰ DFID, *op. cit.*, (2000); Swedish Ministry of Foreign Affairs, ‘Democracy and Human Rights in Sweden’s Development Cooperation,’ Government Communication SKR 1997/98, Stockholm, Swedish Ministry of Foreign Affairs, 1999.

⁵⁷¹ Piron, *op. cit.*, (2005a), p. 26.

⁵⁷² SIDA, ‘Country Strategy Development: Guide for Country Analysis from a Democratic Governance and Human Rights Perspective,’ (Stockholm, 2003). SIDA uses the concept of democratic governance as an umbrella term encompassing human rights, democracy, participation and good governance. This approach offers an added value because it goes beyond other approaches, such as

by adopting human rights-based approaches including Norway, New Zealand and Germany,⁵⁷³ whereas Canada and Switzerland are currently exploring the option of adopting a human rights-based approach to development aid.⁵⁷⁴

On the one hand, in view of the fact that bilateral donors increasingly adopt human rights-based approaches that explicitly endorse a holistic conception of rights, the question of whether economic, social and cultural rights continue to be relegated to a subordinate position is increasingly open to debate.⁵⁷⁵ On the other hand, it emerged from the OECD Task Force on Human Rights, as referred to above, that several donors are extremely reluctant to embrace the language of rights-based approaches and the approach is deemed unacceptable for certain donors, particularly the US and Australia.⁵⁷⁶ The US, for example, which has not ratified either the ICESCR or the CRC, would be unable to embrace a holistic conception of human rights as a framework for its bilateral development policy.⁵⁷⁷ Australia is also opposed to the adoption of this approach due to a lack of understanding of the term, the limitations that it may place on the delivery of aid, as well as the need to emphasise the duties of developing countries.⁵⁷⁸

Whilst several donors have introduced policies relating to human rights-based approaches, it is difficult to judge the extent to which this approach has been internalised by donors.⁵⁷⁹ Both the Swiss development agency and DFID have recognised some of the difficulties in internalising human rights within their policies and practice due to resistance within other sectors. Whilst there may not be outright resistance to the spirit of human rights-based approaches, some development officials may believe that there are already too many issues that have to be mainstreamed in development cooperation (for example, gender and the environment) and it may be difficult to prioritise every new

the human rights-based approach, by incorporating additional elements such as the division and balance of state power, democratic culture peoples' participation and good governance of the public administration.

⁵⁷³ NORAD, *op. cit.*, (1999); NZAID, *op. cit.*, (2002) and Germany BMZ, *op. cit.*, (2004).

⁵⁷⁴ Piron, *op. cit.*, (2005a), p. 26.

⁵⁷⁵ For example, see BMZ, *op. cit.*, (2004), p. 7.

⁵⁷⁶ Interview with Sebastian Bartsch, 30th September 2005; Piron, *op. cit.*, (2005b), p. 27; Piron, *op. cit.*, (2005a), p. 22, quoting AusAid, 'Putting Things to Rights: The Use of Foreign Aid to Advance Human Rights in Developing Nations,' Submission to the Human Rights Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade on its Inquiry into the Link Between Aid and Human Rights, 2001.

⁵⁷⁷ Piron, *op. cit.*, (2005a), p. 6.

⁵⁷⁸ *Ibid.*, p. 27.

⁵⁷⁹ *Ibid.* p. 26.

policy trend.⁵⁸⁰ For others, the human rights-based approach is considered to be redundant as it merely repackages existing development activities under another guise.⁵⁸¹ More importantly, however, it appears that there still continues to be significant opposition to the use of human rights as a normative framework for development activities.⁵⁸² In this way, debates on the conceptual and strategic use of human rights as a normative concept for development is still avoided by many practitioners who opt for traditional approaches such as poverty reduction.⁵⁸³ As with the issue of economic, social and cultural rights, it remains to be seen whether the OECD Task Force will develop guidelines in this area. However, it is expected that any guidelines developed will leave open the precise choice of modalities for the integration of human rights within development.⁵⁸⁴

5.3.3. Promoting Human Rights within Existing Donor Development Policy Frameworks

In light of the divergences of opinion over human rights-based approaches, what conclusions can be drawn on the instrumental role of human rights in OECD donor policies? Some of the major recommendations for the integration of human rights in development outlined in the Task Force Report by Piron *et al* may be useful in this regard as they appear to point to the need for donors to mainstream human rights within existing development strategies, rather than advocating the adoption of explicit human rights-based methodologies. According to these authors, the major challenges in this area relate to the need for DAC members to further institutionalise human rights into their systems and procedures. Staff incentives may offer a route for integrating human rights within policies and practice.⁵⁸⁵ It has also been noted that there are difficulties in engaging with national authorities on the integration of human rights concerns into development policies and programmes. This is often due to weak capacity for the implementation of human

⁵⁸⁰ Ibid., p. 27.

⁵⁸¹ Ibid., p. 28.

⁵⁸² Ibid.

⁵⁸³ Uvin, *op. cit.*, (2004), p. 47.

⁵⁸⁴ Interview with Sebastian Bartsch, 30th September 2005.

⁵⁸⁵ Piron et al, *op. cit.*, (2005b), p. viii.

rights, and in some cases, there may be structural or cultural barriers or indeed a lack of political will to engage in this domain.⁵⁸⁶ In order to move the debate on human rights and development forward, Piron *et al* argue that a key challenge for bilateral donors is to link human rights with existing aid policies and programme modalities.⁵⁸⁷ This could occur, for example, by linking human rights to the current debates on Millennium Development Goals (MDGs) which have become a cornerstone of the development agenda for the past half-decade.⁵⁸⁸ This would involve the use of human rights standards as indicators for the achievement of MDGs.⁵⁸⁹ Secondly, human rights could be taken into consideration on discussions relating to ‘alignment’, which refers to donor commitments to ensure that its policies and programmes are aligned and harmonised with the governmental policies in developing countries.⁵⁹⁰ In this context, documents such as the Paris Declaration on donor harmonisation, which refers to the need for coordination on cross-cutting issues.⁵⁹¹ Greater coordination among donors may lead to enhanced transparency in both human rights and dialogue.⁵⁹²

Thirdly, human rights could be integrated into the current emphasis of donors on ‘programme aid’ such as budget support and sector-wide approaches. This approach is linked to the recent debate on development compacts which emphasises the role of policy dialogue and also includes an element of selectivity and political conditionality, particularly in the area of good governance. As shown in the previous chapter, the late 1990s and first part of this decade witnessed a new policy trend in development known as development compacts.⁵⁹³ This has led to an increasing emphasis on ‘policy’ or ‘process’-oriented conditionality, particularly in the area of good governance

⁵⁸⁶ Ibid.

⁵⁸⁷ Ibid.

⁵⁸⁸ Ibid., p. 42. On the link between MDGs and human rights, see chapter one, section 4.5. See also Alston, P., ‘Ships Passing in the Night. The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals,’ 27 *HRQ* 3 (2005).

⁵⁸⁹ These authors provide the example of UNIFEM’s work which is supported by the German BMZ and technical assistance agency, the GTZ, on gender equality. See ‘In Pathway to Gender Equality’.

⁵⁹⁰ Piron, *op. cit.*, (2005b), p. 42. This relates primarily to harmonising public finance management and public procurement rules.

⁵⁹¹ Ibid. ‘Paris Declaration on Aid Effectiveness. Ownership, Harmonisation, Alignment, Results and Mutual Accountability,’ High Level Forum, Paris, 28th February-2nd March 2003.

⁵⁹² Ibid. DFID’s support for the Uganda Debt Network, which monitors the Poverty Action Fund, is cited by Piron *et al*, as an example of donor coordination that links rights and duties in a development perspective. Ibid., p. 43.

⁵⁹³ See chapter one of this thesis, section 5.2.1. Killick, T., ‘Politics, Evidence and the New Aid Agenda,’ 22 *Development Policy Review* 1 (2004), pp. 5-29.

conditionality.⁵⁹⁴ In addition, this new policy conditionality is also linked to social sector reform and the integration of the Millennium Development Goals into the development plans and budgetary process in developing countries. As mentioned in the previous chapter, the Bretton Woods institutions' poverty reduction strategies are also an example of development compacts, and moreover, this perspective is also reflected in the reports of the UN Independent Expert on the Right to Development.⁵⁹⁵ With regard to bilateral donors, a clear example of this change in policy can be seen in a recent policy paper by the UK's Department for International Development (DFID).⁵⁹⁶ In a similar way, USAID has adopted the Millennium Accountability Challenge, which has been described as a 'global compact' for development, which relies upon poverty reduction strategies and the integration of developing countries into the global economy.⁵⁹⁷ For Piron *et al*, the increasing shift towards programme aid and budget support means that the support for traditional human rights projects or support for civil society organisations that are active in this domain may be neglected. Consequently, some donors, such as the Netherlands, have ensured that human rights indicators should be used in assessing compliance with good governance requirements within its programme aid.⁵⁹⁸

Fourthly, human rights can be integrated into the result-based management systems of donors, which was also recommended in the Paris Declaration. This could also remedy the assumption that human rights are not measurable outcomes.⁵⁹⁹ Within the UN, there are several examples of the use of human rights in result-based management frameworks such as the efforts by UNIFEM to set out rights-based goals and indicators to determine the capacity of duty-bearers and right-holders and it also adopts a participatory approach to the planning and reporting of its activities.⁶⁰⁰ In addition, a fifth approach would involve the integration of human rights within mutual accountability frameworks. Mutual accountability is defined as "individual and joint accountability of donors and partner

⁵⁹⁴ UN Economic and Social Council, 'Economic, Social and Cultural Rights. The Right to Development: Study of Existing Bilateral and Multilateral Programmes and Policies for Development Partnership,' Sub-Commission on the Promotion and Protection of Human Rights, 56th Sess., 3rd August 2004, E/CN.4/Sub.2/2004/15.

⁵⁹⁵ See chapter one of this thesis.

⁵⁹⁶ DFID, 'Partnerships for Poverty Reduction: Rethinking Conditionality,' A Policy Paper, March 2005. Source: <http://www.dfid.gov.uk>

⁵⁹⁷ USAID, 'Millennium Challenge Accountability Update,' Fact Sheet, 3rd June 2002. Source: http://usaid.gov/press/releases/2002/fs_mca.html

⁵⁹⁸ Piron, *op. cit.*, (2005b), p. 44.

⁵⁹⁹ *Ibid.*, p. 42.

governments to their citizens and parliaments for their development policies, strategies and performance.”⁶⁰¹ There is a significant synergy between mutual accountability and human rights principles such as transparency, access to information and participation in decision-making.⁶⁰² DFID has recently signed a Memorandum of Understanding with Rwanda on the issue of mutual accountability which refers to human rights as a shared value of cooperation and lays down specific requirements for aid effectiveness and commitments relating to human rights.⁶⁰³ Whilst the MoU is used as a working example of the link between human rights and mutual accountability frameworks, it is acknowledged that the methodology for assessing compliance is relatively weak.⁶⁰⁴

6. Conclusions

As initially outlined in this chapter, human rights made their way onto the donor development agenda firstly through negative conditionality and subsequently through political conditionality, which intensified at the end of the Cold War. This chapter discussed the legal basis for human rights conditionality and measures to promote respect for human rights in donor policy. In this context, an overview of key concepts relating to human rights was provided, outlining in particular the need to move beyond the traditional dichotomy between the so-called first and second generation rights. It was also argued that the promotion of respect for human rights in donor policies could not be viewed in isolation and needs to be considered within the wider framework of political reform including democratisation and good governance.

This chapter sought to critically analyse the practical manifestation of human rights within donor policies. In this context, the issue of human rights conditionality was explored. From the perspective of negative conditionality, this chapter highlighted the often *ad hoc* nature of the suspension of aid and lack of verifiable indicators in this regard. In the context of measures to promote human rights, most of the literature in this

⁶⁰⁰ Ibid., p. 44. See Annex 7.4.4 of *ibid.*

⁶⁰¹ Ibid.

⁶⁰² Ibid.

⁶⁰³ Ibid.

area has pointed to the predominance of a narrow set of civil and political rights. Some explanations were offered for this trend, including the traditional concept of human rights as negative rights (freedom from, rather than freedom to), the idea of civil and political rights as an integral part of the neoliberal agenda of donors and the dominance of the US human rights conditionality model. Some doubts were expressed as to whether economic, social and cultural rights continue to occupy a subordinate position in some donor policies at least from a rhetorical perspective. For example, most OECD donors have adopted a holistic conception of human rights including both civil and political rights and economic, social and cultural rights. This can also be seen in the recent ‘synthesis report’ commissioned by the OECD GovNet Task Force on the integration of human rights in the policies of the DAC members, which reveals that apart from the US and perhaps Australia, the issue of economic, social and cultural rights is not a particularly contentious issue, thus indicating that the dichotomy between both generations of rights may have at last been overcome – at least a rhetorical level.

This chapter also considered the extent to which human rights have become embedded in donor policies, for example through the adoption of human rights-based methodologies. In this regard, it was shown that some donors (for example, Sweden, Norway and the UK) have openly supported the idea of human rights-based approaches. However, the report of the OECD Task Force is instructive as several donors – such as the US, Australia and Japan – have been reluctant to engage in the discussions relating to human rights-based approaches, however, the Task Force is in its early stages and it remains to be seen whether the guidelines that are ultimately developed will encourage coordination among donors in this area.

What conclusions can be drawn from the above critical assessment of the role of human rights in development policy? Whilst human rights have undoubtedly become part of the agenda of the OECD DAC members, there is a certain amount of (at least empirical) evidence to suggest that there are significant gaps between rhetoric and practice both in the area of human rights conditionality and donor efforts to promote human rights

⁶⁰⁴ Ibid., p. 45.

through technical and financial assistance. These claims will be verified at a more substantive level through a detailed case study of EU cooperation with the group of ACP states in order to ascertain how human rights intersect with development both in the context of changing development trends and also at a more micro level through the practical application of human rights in development.

CHAPTER THREE: THE EMERGENCE AND CONSOLIDATION OF HUMAN RIGHTS IN EU DEVELOPMENT COOPERATION POLICY AND COOPERATION WITH THE GROUP OF AFRICAN, CARIBBEAN AND PACIFIC (ACP) STATES

1. Introduction

The case study of European Union (EU) cooperation with the African, Caribbean and Pacific (ACP) countries is divided into two chapters. This chapter seeks to examine the general legal and institutional framework for EU development policy, as well as the extent to which human rights have infiltrated EU policy as a whole. In contrast, the following chapter analyses the convergence of human rights and EU development policy at a more micro level, including an examination of the EU's recourse to the consultation mechanisms and suspension measures, the conduct of political dialogue and technical and financial assistance in the area of human rights. A case study of European Union cooperation with the ACP countries will be carried out to determine whether the broad trends among OECD donors are reflected at a more substantive level. The justification for this case study lies in the strong legal basis for human rights in EU development policy,⁶⁰⁵ along with the EU's emphasis on a positive approach to the integration and mainstreaming of human rights in development, rather than an approach based on negative sanctions. Thus, in light of the EU's rhetorical commitment to a positive approach to the integration of human rights in development, this case study provides an appropriate avenue for examining consistency between rhetoric and practice.⁶⁰⁶

Firstly, the legal basis for EU development policy will be outlined including an analysis of the relevant EC Treaty provisions, Community competences in this domain and a

⁶⁰⁵ A note on terminology – EC development cooperation policy is contained within articles 177-181 of the EC Treaty, therefore, it falls under European Community (Pillar I) competence. This chapter will deal almost exclusively with the evolution of EC Community development policy, however, the term EU development policy is used as a more general term in this thesis as it is the most commonly used term and in the interests of simplification.

⁶⁰⁶ This case study seeks to build on previous works in this area, in particular, this case study seeks to develop on the recent article of Fierro, E., 'Legal Basis and Scope of the Human Rights in EC Bilateral Agreements: Any Room for a Positive Interpretation,' 7 *ELJ* 1 (2001).

discussion of where EU-ACP cooperation fits into the broader EU legal order. In this section, the institutional structure of EU development policy will be described encompassing the relevant institutions and actors involved. This encompasses an analysis of potential changes in the EU landscape that may affect the institutional structure and management of EU development aid. This includes the impact of the enlargement of the European Union and recent proposals to reorganise the instruments for external relations.

Secondly, this chapter outlines the background and evolution of the Community development cooperation framework. Although this thesis focuses primarily on European cooperation policy in relation to the African, Caribbean and Pacific (ACP) countries,⁶⁰⁷ it is also necessary to also outline the current trends that shape Community policy. The evolution of the EU's relations with the ACP group is discussed within this context, encompassing the origins of cooperation with the overseas territories of the founding EEC Member States through the provisions on association in the Treaty of Rome⁶⁰⁸ to the subsequent agreements with these territories following decolonisation. This section will include an analysis of the management and coordination of EU-ACP relations including the institutional structure and unique financing instruments for development aid.

Thirdly, an analysis of the early trends in EU-ACP cooperation is carried out. These early trends are contrasted with the emergence of the human rights as a central feature of cooperation in the fourth Lomé Convention. Equally, this section explores the extent to which human rights have shaped the history of relations between the EU and the ACP states through the various Lomé Conventions. The procedural and substantive aspects of the human rights clause are also discussed.

Fourthly, this chapter considers the consolidation of human rights in the Cotonou Agreement of 2000, which replaced the previous Lomé Conventions.⁶⁰⁹ In addition, this

⁶⁰⁷ Cooperation with the 78 ACP countries is formalised through the Cotonou Agreement, ACP-EC Partnership Agreement, *signed on 23rd June 2000 in Cotonou, Benin, [2000] OJ L 317/3. (ex Lomé Conventions I-IV). The Cotonou Agreement entered into force on 1st April 2003.*

⁶⁰⁸ Treaty establishing the European Economic Community, *signed in Rome on 25th March 1957, entered into force on 1st January 1958.*

⁶⁰⁹ See Annex 2 of this thesis for a list of the group of ACP states. [It should be noted that Cuba was admitted as a member of the ACP countries in December 2000, however it has not yet signed the new EU-ACP partnership agreement. East Timor joined the ACP group in 2003.] The Cotonou Agreement must be approved by all Member States in line with their own constitutional arrangements and

section also analyses the changing political dimensions of EU-ACP cooperation, in particular, the enhanced provisions on political dialogue and good governance. The controversial aspects of good governance are discussed, particularly, in light of the apparent absence of a legal basis for good governance conditionality in international law. This section also deals with other relevant innovations in the area of trade preferences, the role of non-state actors and performance-based evaluations, which have a significant impact on the framework of EU-ACP relations.

2. Legal Basis and Institutional Structure of EU Development Cooperation

2.1. Legal Basis for EU Development Policy

The legal basis for European Community development policy can be found in the first pillar of the European Union. Article 3(q) of the EC Treaty refers to development cooperation as a policy area of the European Community. Articles 177-181 of the EC Treaty⁶¹⁰ lay down the principles of the Community in this sphere and continues the practice developed by virtue of Article 310 and 308.⁶¹¹ The Treaty on European Union provided a legal foundation for development cooperation policy.⁶¹² Community policy in this area aims to foster sustainable economic and social development, to integrate the developing countries into the world economy and to alleviate poverty.⁶¹³ The Community and its Member States are required to comply with their commitments as members of the United Nations and other international organisations, to co-ordinate their policies and consult each other on their aid programmes and generally act together in international fora.⁶¹⁴ Article 181 provides a legal basis for cooperation between the Community and Member States with third countries and competent international organisations.

enters into force on the first day of the second month following the final notification of approval from the Member States. See Article 35(1) and (2) of the Internal Agreement attached to the Cotonou Agreement.

⁶¹⁰ Articles 177-181 (ex 130u-130y), Consolidated Version of the Treaty establishing the European Community in Foster, N., *Blackstone's EC Legislation 2005-2006*, (16th ed.), (Oxford, 2005). [hereinafter EC Treaty]

⁶¹¹ Lasok, K.P.E., *Law and Institutions of the European Union*, (7th ed.), (London, 2001), p. 847.

⁶¹² Treaty on European Union, signed in Maastricht on 7th February 1992, entered into force on 1st November 1993.

⁶¹³ Article 177(1) (ex Article 130u(1), EC Treaty).

Article 177(2) provides that “Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.” Furthermore, the Treaty of Nice provided for the insertion of Article 181(a) in the EC Treaty on economic, financial and technical cooperation measures with external countries which encourages Community action in this sphere to “contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.”⁶¹⁵ This indicates that respect for human rights principles is not directed exclusively towards developing countries, but for all cooperation agreements with third countries including trade and association agreements.⁶¹⁶

Apart from Articles 177-181, the following treaty provisions of the Treaty establishing the European Communities are relevant to European Union development cooperation policy. Firstly, Article 310 (ex Article 238) of the EC Treaty relates to the conclusion of association agreements, which may be either multilateral or bilateral in nature, involving reciprocal rights and obligations. The former includes treaties with a large number of partners and the latter includes agreements between the Community and a single country. Secondly, as mentioned above, Articles 177-181 (ex Articles 130u-y) provide a legal basis for the Community to conclude agreements with third countries relating to development cooperation. In addition, Article 133 (ex Article 113) governs the conclusion of treaties within the framework of the common commercial policy and also provides the legal basis for the General System of Preferences (GSP). Finally, Article 308 (ex Article 235) covers action which is necessary to attain the objectives of the Community. Article 308 provides a legal basis for cooperation with Asian and Latin American (ALA) countries and permits the Community to develop financial and technical aid for these countries and to organise thematic actions in areas such as food aid, humanitarian aid or the fight against AIDS.⁶¹⁷

⁶¹⁴ Articles 177(3), 180 and 181 (ex 130u(3) and 130x and 130y), EC Treaty.

⁶¹⁵ Title XXI, Article 181(a), EC Treaty. Treaty of Nice, signed on 26th February 2001, [2001] OJ C 80/1, 10th March 2001.

⁶¹⁶ Bulterman, M., ‘European Union,’ 19 *NQHR* 2 (2001), p. 201.

⁶¹⁷ Council Regulation (EEC) No. 443/92 of 25th February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries of Asia and Latin America, [1992] OJ L 52/1, 27th February 1992.

Development cooperation policy is not an area of exclusive Community competence. Development is a shared competence between the European Community and the Member States. Community policy in the sphere of development shall be complementary to the policies pursued by the Member States⁶¹⁸ and exists in parallel with the separate development policies of the EU Member States. According to Article 177(1), of the EC Treaty, “Community policy in the sphere of development cooperation, ... shall be complementary to the policies pursued by the Member States ...”. Furthermore, it was clear from the proposed Constitutional Treaty of the European Union that development cooperation would remain an area of shared competence.⁶¹⁹

2.2. Institutions and Actors in EU Development Cooperation Policy

2.2.1. EU External and Development Aid Instruments

The EU has concluded a wide range of cooperation agreements with non-candidate third countries. The 1970s also witnessed the creation of new accords with Mediterranean countries (MEDA) and Asian and Latin American countries (ALA). In 1972, the bilateral agreements of the Mediterranean Protocols encompassing the Maghreb (Algeria, Morocco, Tunisia) and Mashraq (Egypt, Jordan, Lebanon and Syria) were amended in order to integrate the Mediterranean countries into EEC system of preferential treatment. In 1976, the ALA programme of financial and technical cooperation with Asian and Latin American countries was established. The 1990s witnessed the initiation of cooperation with countries of Central and Eastern Europe (CEE), the New Independent States (NIS) and Mongolia. However, these countries do not fit into the category of ‘developing countries’ and have been assigned the term ‘countries whose economies are in transition.’ Community aid is distributed to these regions through programmes such as PHARE, which is essentially a pre-accession programme for Central Eastern European countries;

⁶¹⁸ In the case of *Portugal v. Council*, the ECJ referred to the ‘complementary’ competence of the EC in the field of development cooperation ‘...competence is not exclusive but is complementary to that of the Member States.’ Case C-268/94 *Portugal v. Council* [1996] ECR I-6177, para. 36.

⁶¹⁹ Article I-13 of the Treaty establishing a Constitution for Europe, [2004] OJ C 310, 14th December 2004. [hereinafter the Constitutional Treaty]. See section 2.4 below.

assistance for reconstruction, stability and institution building in the Balkans (CARDs) and technical assistance to the Newly Independent States (NIS) and Mongolia (TACIS), and finally, external assistance to Asia and Latin America through the ALA Regulation.⁶²⁰ It should be noted that these financial instruments shall be restructured in the new Financial Perspective of 2007-2013, however, this issue will be explored in more detail below.⁶²¹ As stated above, this thesis focuses exclusively on the bilateral agreement between the EU and group of ACP states within the context of the Cotonou Agreement of 2000.

2.2.2. EU Institutions and the Management of Development Aid

European Union development aid includes European Community development funds⁶²² and the European Development Fund (EDF) for the African, Caribbean and Pacific countries.⁶²³ EU development aid is managed by the European Commission. Responsibility for EU development policy is divided horizontally across a number of European Commission Directorate Generals (DGs), in particular DG External Relations and DG Development.⁶²⁴ The European Community Humanitarian Office (ECHO) continues to manage the distribution of humanitarian aid, food aid and emergency assistance for refugees and displaced persons.⁶²⁵ It is financed by Community funds and to a lesser extent by the EDF. The European Commission initiates legislation and implements programmes in line with EC Treaty provisions. The Commission also drafts horizontal strategies that are later presented for adoption by the respective Council Working Groups and Committees.

⁶²⁰ The human rights aspects of these agreements are outside the scope of this thesis. See Metcalf, K.N., 'Influence through Assistance – The EU Assistance Programmes,' 9 *European Public Law* 3 (2003).

⁶²¹ See section 2.3.2 below.

⁶²² See European Union, Annual Report 2005 on the European Community's Development Policy and External Assistance, (Luxembourg, 2005), p. 145, Table 7.8.1 on the Country Breakdown of EC Development Aid (ODA and OA).

⁶²³ The European Commission manages the Community budget, the European Development Fund (EDF) and assistance to the Overseas Countries and Territories under the Overseas Association Decision. This thesis deals exclusively with first pillar competences. The European Commission is also a member of the OECD Development Assistance Committee (DAC) which acts as a global forum for donor coordination. The role of the EU-ACP institutions will be described below, see section 3.3 of this thesis.

⁶²⁴ On the organisational structure of DG Development, see Annex 8(a) of this thesis. Other DGs also play a role in relations with the ACP states including DG Trade (trade and WTO), DG Fisheries (fisheries with ACP) and DG Agriculture (food aid and banana portfolios).

⁶²⁵ The legal basis for EC humanitarian aid can be found in Council Regulation (EC) No. 1257/96 of 20th June 1996. This Regulation is based on Article 179 of the EC Treaty.

DG Development is directly responsible for relations with the African, Caribbean and Pacific countries, as well as sectoral and global programming, including regional cooperation, macro-economic policy, institutional capacity building and the link between trade and development, as well as cross-cutting concerns such as human rights and the environment. DG External Relations is responsible for overall policy-making in the sphere of external relations, including responsibility for assistance to Asia and Latin America, as well as the Mediterranean countries through the new European Neighbourhood Policy.

The reorganisation of the Commission in 1999 retained the division of labour between the DG External Relations and DG Development. Some commentators have argued that this reform could have provided an opportunity to simplify this process by providing a clearer demarcation of responsibilities between DG External Relations and DG Development.⁶²⁶ Reform of EU external assistance in 2001 was sparked by the Commission White Paper and sharp criticism from many sources including the Court of Auditors.⁶²⁷ Criticism of EU development cooperation centred on the inefficient and lengthy procedures for the disbursement of aid.⁶²⁸ The institutional changes that followed led to the creation of a new organisational structure for the management of EU aid. It resulted in the establishment of the Europe-Aid Cooperation Office,⁶²⁹ which is a single unit charged with responsibility for the aid project cycle from the identification of programmes to their implementation and evaluation.⁶³⁰ These reforms aimed to centralise project management and to develop a single methodology and criteria for selection and evaluation to improve the coherence and efficiency of EU aid. EuropeAid replaced the Commission's Service for External Relations (SCR). EuropeAid is chaired by the

⁶²⁶ ODI/ECDPM, *European Development Cooperation to 2010*, ODI Working Paper 219/ECDPM Discussion Paper No. 48, (London, May 2003), p. 13.

⁶²⁷ European Commission, *White Paper on Reforming the Commission*, COM (2000) 200 fin., 1st May 2000; European Commission, *Communication to the Commission on the Reform of the Management of External Assistance*, 16th May 2000, Rev. 8; Court of Auditors, 'The Management of the Commission's External Aid Programmes,' Special Report No. 21/2000, [2001] OJ C 57, 22nd February 2001. See also European Commission, *Green Paper on Relations between the European Union and the ACP countries on the Eve of the 21st Century*, COM (96) 570 fin., 20th November 1996; OECD-DAC, *DAC Peer Review of the European Community*, OECD Development Cooperation Review Series, (2002); Santiso, C., 'The Reform of EU Development Policy: Improving Strategies for Conflict Prevention, Democracy Promotion and Governance Conditionality,' *CEPS Working Paper No. 182*, (2002).

⁶²⁸ Hoebink, P., 'European Development Aid in Transition', p. 128, from Faber, G. and Babarinde, O., (eds.), *The European Union and the Developing Countries. The Cotonou Agreement*, (Leiden, 2005).

⁶²⁹ See Annex 8(c) of this thesis.

⁶³⁰ Inter-Service Agreement between DG External Relations, DG Development and EuropeAid Co-operation Office, (Brussels, European Commission, 2001). Jointly established by DG RELEX, DG DEV and EuropeAid. It has been in operation since January 2001.

Commissioner of External Relations, who acts as Chair of the Board, and the Commissioner of Development, who is the Chief Executive of the Board.

According to the OECD report of 2002, the management of EU development assistance remains fragmented and confused between the various Directorate-Generals.⁶³¹ This is largely due to the horizontal split between the policy and programming of development activities between DG External Relations and DG Development. There is also a vertical split between programming and implementation, due to the creation of EuropeAid as a separate office in 2000, which is responsible for the entire project cycle of development activities.⁶³² On the one hand, it could also be argued that these criticisms are not justified as the establishment of EuropeAid has been largely hailed as a success in terms of improving the efficiency of programme management and the disbursement of funds. On the other hand, despite the impressive range of reforms undertaken by the EU to date, particularly, the creation of EuropeAid, the OECD's criticisms are valid to some extent. Firstly, there can be lack of coherence between the policy objectives of DG Development and EuropeAid. This is due to the fact that the design of programmes ultimately involves policy decisions, thereby rendering it difficult to view EuropeAid as merely a project cycle manager. Secondly, the creation of EuropeAid left DG Development with a narrower portfolio and as some have argued, in a weaker position to ensure that its policy decisions are followed through in the design of programmes and projects.⁶³³ For this reason the OECD report recommends that the relationship between the policy, programming and implementation should be strengthened.⁶³⁴ It could also be argued that the implementation of certain types of programmes and projects (particularly those relating to the 'essential elements' of the partnership) do not fit easily with the project cycle management techniques of EuropeAid, which may lead to a lack of coherence between the policy objectives of DG Relex and DG Development and the actual implementation on the ground by EuropeAid.⁶³⁵

⁶³¹ OECD, Development Assistance Committee, *Development Cooperation Review. European Community*, (Paris, 2002), p. 83.

⁶³² Ibid. See Annex 8(b) of this thesis on the organisational structure of EuropeAid.

⁶³³ ODI/ECDPM, *op. cit.*, p. 13.

⁶³⁴ OECD, *op. cit.*, (2002), p. 83.

⁶³⁵ A discussion of the methodologies used by EuropeAid is undertaken in chapter four of this thesis.

Another aspect of the reform of EU external assistance is the deconcentration of responsibility to the European Commission Delegations. This was influenced by criticism of the management of external assistance, which largely focused on the decision-making capabilities of the EU. In this regard, it was alleged that there was a lack of clarity in the division of responsibilities, a shortage of staff and expertise and overly complex administration procedures, especially over-burdensome *ex ante* measures.⁶³⁶ As a result of these criticisms, the European Commission recommended the deconcentration of decision-making and partial devolution of responsibility to the Delegations.⁶³⁷ It was envisaged that the Delegations would have a greater role in certain areas, including an active and effective contribution to programming; direct responsibility for the identification and appraisal of programmes; direct responsible for contracting and financial implementation; and technical implementation, including direct responsibility for technical expertise on the ground.⁶³⁸ Final authority for programming would necessarily remain in Brussels, as well as methodological support and quality control.⁶³⁹ By 2004, deconcentration had been completed in seventy-eight delegations.⁶⁴⁰ It should be noted that deconcentration also confers responsibility for micro-projects, such as food security and human rights budget lines.⁶⁴¹ In 2004, the Court of Auditors produced a special report on the devolution process.⁶⁴² This report was largely favourable towards the progress made in this area, however, it recommended the creation of indicators to assess the impact of devolution on the efficient delivery of aid and the further simplification and harmonisation of EU financial and contractual procedures.⁶⁴³ The deconcentration of responsibility for the design of projects and calls for proposals to the Delegations has reduced the workload of EuropeAid.

⁶³⁶ Bossuyt, J., *et al*, 'Assessing Trends in European Community Development Cooperation Policy. An Independent Review of the European Commission's External Aid Reform Process,' ECDPM, Discussion Paper No. 16, 2000.

⁶³⁷ European Commission, 'Development and Humanitarian Assistance of the European Union: An Evaluation of the Instruments and Programmes Managed by the European Commission,' Final Synthesis Report, 1999.

⁶³⁸ Frederiksen, J. and Baser, H., 'Better Aid Delivery, or Deconcentration of Bureaucracy?,' ECDPM InBrief No. 10, November 2004, p. 2.

⁶³⁹ *Ibid.*

⁶⁴⁰ European Union, 'Annual Report 2004 on the European Community's Development Policy and External Assistance,' (Luxembourg, 2004), p. 38. [*hereinafter* EU Annual Report 2004] There are over 120 European Commission Delegations.

⁶⁴¹ *Ibid.* Court of Auditors, 'Special Report No. 10/ 2004 concerning the devolution of external aid management to the Commission delegations, together with the Commission's replies,' [2005] OJ C 72/1, 22nd March 2005, p. 3.

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*, p. 3 and 21.

The drafting of legislation in the area of development cooperation under Article 179 of the EC Treaty is an area of co-decision between the Council and the European Parliament. Within the Council, the Development Ministers of the Member States currently meet in the General Affairs and External Relations Council (GAERC). At the EU Summit at Seville in 2002, the arrangements for EU enlargement were agreed, along with the reform of EU decision-making, which resulted in the cutting back of the number of Councils involved in strategic and operational activity from sixteen to nine.⁶⁴⁴ This resulted in the abolishment of the Development Council which used to meet bi-annually and at the same time, it led to the expansion of the competences of the General Affairs Council (GAC) to move towards more unified external relations policies. The General Affairs Council became the General Affairs and External Relations Council (GAERC) and was given a wide remit of responsibility, encompassing defence policy, external trade, development cooperation and humanitarian aid. Following the abolition of the Development Council, there was some concern that this would lead to a loss of political representation and influence on development issues, as well as less autonomy as there may be a risk that development concerns would become subservient within external relations and defence issues.⁶⁴⁵ On the other hand, the inclusion of development issues within the broader General Affairs and External Relations Council could ensure that development issues would become more visible on the external relations agenda and provide a more influential forum for discussing these issues, as well as improving coherence between CFSP and development objectives.⁶⁴⁶ Within the European Parliament, development issues are debated within the Development Committee, which debates matters relating to EU development policy, including the African, Caribbean and Pacific countries.

2.3. Financial Instruments

⁶⁴⁴ Presidency Conclusions Seville, 21st – 22nd June 2002, Annex 2.

⁶⁴⁵ Simon, A., 'The New Organisation of the Council of the European Union. Setback or Opportunity for EU Development Policy,' ECDPM Discussion Paper No. 46, ECDPM, Maastricht, January 2003, p. 17.

⁶⁴⁶ Ibid., pp. 6 and 13.

2.3.1. EU Budget and EDF

The EU aid for developing countries is derived from the EU budget and the European Development Fund. The latter relates exclusively to the development aid financing for the group of ACP states. The European Commission manages the EDF on behalf of the Member States meeting within the EDF Committee. This issue will be discussed in detail in section 3.3.2 below.

2.3.2. Future Financial Perspective 2007-2013

The new financial framework for the budgetary resources of the European Union for the period of 2007 to 2013 will also have an impact on the overall structure of the external aid instruments. These changes occur within the context of wider reforms proposed by the European Commission for the re-organisation of the Financial Perspective⁶⁴⁷ and the recent Commission proposals seek to simplify the existing range of budget lines for external assistance.⁶⁴⁸ This document builds on two previous initiatives in this area.⁶⁴⁹ The aim is to provide for six budget lines in total, three of which would have a geographical focus, whilst the remaining three would have a thematic focus. With regard to the former, the geographical budget lines would include the Pre-accession Instrument, the European Neighbourhood and Partnership Instrument and the Development Cooperation and Economic Cooperation Instrument. Firstly, the Pre-Accession Instrument (IPA) would relate to candidate countries and potential candidate countries and would cover issues such as institution-building, regional and cross-border cooperation and development.⁶⁵⁰ Secondly, the European Neighbourhood Policy would be financed by a new European Neighbourhood Policy Instrument (ENPI), which would

⁶⁴⁷ Reforms are also proposed in other areas including agriculture, budget, cohesion policy, customs, education policy, employment, enterprise and industry, environment, fisheries and maritime affairs, justice, freedom and security, regional policy, research and development and transport and energy.

⁶⁴⁸ European Commission, Communication from the Commission to the Council and the European Parliament on the Instruments for External Assistance under the Future Financial Perspective 2007-2013, COM (2004) 626 fin., 29th September 2004. The existing external assistance instruments include: PHARE, ISPA, SAPARD, CARDS, MEDA, TACIS, Russia, Humanitarian Aid and Macroeconomic Aid. This Communication also includes the thematic funds such as the human rights budget line (the European Initiative for Democracy and Human Rights).

⁶⁴⁹ European Commission, Communication on Building our Common Future, COM (2004) 101, 10th February 2004; European Commission, 'Communication on Financial Perspective 2007-2013,' COM (2004) 487, 14th July 2004.

replace the existing budget lines for the Mediterranean countries, the Western Newly Independent States (NIS) and cooperation with Russia.⁶⁵¹ This would promote stronger political cooperation between the EU and its “new neighbours”, as well as deepening cooperation on issues of mutual significance. The EU’s Neighbourhood policy emerged from the Commission Communication on Wider Europe.⁶⁵² It is envisaged that the Neighbourhood policy would follow a two-phase approach from 2004 to 2006, which would involve continuing existing programmes until the new Neighbourhood policy instrument is introduced from 2007 onwards.

For the purposes of this study, it is important to note that the European Commission originally proposed that EU-ACP cooperation would be included in the third budget line on Development and Economic Cooperation (DCECI).⁶⁵³ This would include funding to all countries (including the ACP countries) which are not eligible for funding under the Pre-accession or Neighbourhood Instrument.⁶⁵⁴ It would work towards the objectives of poverty reduction and integrating developing countries into the world economy, as stipulated in Articles 179 and 181 of the European Community Treaty. It would also include cross-cutting themes to improve coherence between EU policy areas. This proposal was complicated by the fact that the funding to the ACP countries (the European Development Fund) is currently outside the EU budget. However, as discussed below, this proposal was rejected by the EU Member States and the EDF will continue to remain outside the EU budget. The EU is currently in the process of negotiating the 10th EDF with the ACP states for the period 2008-2013.⁶⁵⁵

According to the proposed Financial Perspective, the geographical budget lines would be supplemented by three thematic instruments, namely, the Instrument for Stability, the Humanitarian Aid instrument and the macro-economic assistance instrument. The

⁶⁵⁰ This would replace existing instruments such as PHARE, ISPA, SAPARD, CARDS, among others. The candidate countries include Turkey and Croatia and potential candidates include the Western Balkans. *Ibid.*, p. 7.

⁶⁵¹ *Ibid.*, p. 8. This would replace the MEDA budget lines, as well as TACIS and the human rights budget line EIDHR.

⁶⁵² European Commission, ‘Communication to the Council and the European Parliament on Wider Europe,’ COM (2003) 104, 11th March 2003. See also European Commission, Communication to the Council and the European Parliament on Paving the Way for a New Neighbourhood Instrument, COM (2003) 393, 1st July 2003.

⁶⁵³ *Ibid.*, p. 9.

⁶⁵⁴ This proposal included the ACP countries, the ALA Regulation (Asia and Latin America) and would also be open to the possibility of cooperation with new countries, territories and regions. *Ibid.*, p. 8.

⁶⁵⁵ See section 3.2 below.

Stability Instrument would be used to respond to situations of instability or crisis in third countries and would be complementary to the geographical instruments.⁶⁵⁶ It would operate under the first pillar competence, however, there would be coherence between CFSP and Community actions in this sphere.⁶⁵⁷ The humanitarian aid instrument would remain unchanged, apart from the inclusion of humanitarian food aid within its remit, as opposed to a separate Regulation at present.⁶⁵⁸

2.4. The EU Constitutional Treaty

The above issue relating to the new financial framework will undoubtedly impact on the future structure of Community development cooperation policy. However, the potential impact of the EU Constitutional Treaty is not imminent due its rejection in the French and Dutch referenda.⁶⁵⁹ Nevertheless, the provisions relating to development cooperation with the proposed Constitutional Treaty will be discussed briefly – not because of their potential impact – but merely to illustrate that the substance of the Community development *acquis* would have remained largely similar to the present-day system. However, there is one exception, as the proposed Constitutional Treaty would have provided a legal basis for humanitarian aid, which is currently lacking from the EC Treaty.⁶⁶⁰

Within the Treaty establishing a Constitution for Europe which was signed in 2004, Articles 1-3 lay down the basic principles of the European Union which include sustainable development and the eradication of poverty.⁶⁶¹ The Constitutional Treaty also sets out the principles which have “inspired its own creation, development and enlargement,” which enshrine the values of EU external action for the first time.⁶⁶² These principles include human rights, democracy and the rule of law, as central objectives of

⁶⁵⁶ Ibid., p. 10.

⁶⁵⁷ Ibid.

⁶⁵⁸ Ibid.

⁶⁵⁹ Whitman, R., ‘No and After: Options for Europe,’ 81 *International Affairs* 4 (July 2005).

⁶⁶⁰ Article III-321 of the Constitutional Treaty.

⁶⁶¹ Article 1-3(4) *ibid.*

⁶⁶² Cremona, M., ‘The Union as a Global Actor: Roles, Models and Identity,’ 41 *CMLR*. (2004), p. 566.

the Union.⁶⁶³ Within Title V on the general provisions of the EU's External Action, Article III-292 states that the Union shall “foster sustainable social and environmental development of the developing countries, with the primary aim of eradicating poverty.”⁶⁶⁴ Among the remaining seven objectives, it is stated that EU external policy shall promote activities to “consolidate and support democracy, the rule of law, human rights and the principles of international law.”⁶⁶⁵ Coherence and consistency between the different spheres of external action and the Union's policies as a whole is provided for in Article III-292(3). Within the realm of external relations, the areas of activity are provided for in separate chapters, including common foreign and security policy, common commercial policy and cooperation with third countries and humanitarian aid.⁶⁶⁶ Development cooperation is provided for in Chapter IV, Articles III-316-318, whilst Articles III-319-320 provide more generally for cooperation with third countries.

The legal basis for concluding international agreements is provided for in Articles III-323-236 of the Treaty establishing a Constitution for Europe.⁶⁶⁷ Article III-324 provides a legal basis for association agreements between the European Union with one or more third countries. The procedures for concluding these agreements are also provided for, which state that after obtaining the consent of the European Parliament, the Council may adopt a European Decision on the conclusion of association agreements.⁶⁶⁸ These decisions on the conclusion of international agreements should be adopted by qualified majority voting, except for the case of areas that require unanimity, including association agreements.⁶⁶⁹

The issue of complementarity is also stressed in the Constitutional Treaty of the European Union. According to Article III-318 of Chapter IV on cooperation with third countries and humanitarian aid, the Treaty establishing the EU Constitution states that: “In order to promote complementarity and efficiency of their action, the Union and the

⁶⁶³ According to Article III-292(2) of the Constitutional Treaty.

⁶⁶⁴ Article III-292(2)(d), *ibid.*

⁶⁶⁵ Article III-292(2)(b), *ibid.*

⁶⁶⁶ Part III, Title V, Chapters II-VIII on external action, *ibid.*

⁶⁶⁷ Articles III-323-326, *ibid.*

⁶⁶⁸ Article III-325(6)(i), *ibid.* This excludes agreements on CFSP related issues.

⁶⁶⁹ Article III-325(8), *ibid.*

Member States shall coordinate their policies on development cooperation and shall consult each other on their aid programmes, including in international organisations and during international conferences. They may undertake joint actions.”⁶⁷⁰

If the Constitutional Treaty had been ratified, the Treaty establishing a Constitution of Europe may have had an impact on the institutional structure of EU development policy, in particular due to the proposed “double-hatted” role of EU Minister for Foreign Affairs.⁶⁷¹ On the one hand, the Minister would be an officer of the Council and the chairperson of the External Relations Council and on the other hand, he would also act as one of the Vice Presidents of the Commission, thereby also taking on some responsibility for coordinating the Commission’s external relations policy.⁶⁷² Therefore, along with assuming responsibility for conducting the EU’s common foreign and security policy, as Vice President of the Commission, “he or she shall be responsible within the Commission for responsibilities incumbent on it in external relations and for coordinating other aspects of the Union’s external relations.”⁶⁷³ In the development of the strategy and objectives of the Union and common country strategies, the European Council is “empowered to identify strategic interests and objectives of the Union” by means of binding European Decisions.⁶⁷⁴ The decisions are made unanimously on the direction of the Council of Ministers or following a joint proposal from Commission and Union Minister of Foreign Affairs.⁶⁷⁵

In the context of development cooperation, the dual mandate of the EU Foreign Minister raises the question of whether development issues would have become subservient to foreign policy or security concerns.⁶⁷⁶ This is linked to the current debate on the securitisation of development, in light of the recent adoption of increasing measures in

⁶⁷⁰ Article III-318, *ibid.*

⁶⁷¹ Article I-27, *ibid* provides for the role of ‘Union Minister for Foreign Affairs’.

⁶⁷² Article I-27(3) and (4), *ibid.*

⁶⁷³ Article I-27(4), *ibid.*

⁶⁷⁴ Article III-293 of the Constitutional Treaty. *Ibid.*, p. 569.

⁶⁷⁵ Article III-293(2), *ibid.*

⁶⁷⁶ Mackie, J. and Rossini, C., ‘A Changing EU. What are the Development Implications?’, ECDPM InBrief No. 8, April 2004, p. 2, fn. 6. The relationship between security and development is also highlighted in European Commission, Communication from the Commission to the European Parliament and the European Economic and Social Committee on Governance and Development, COM (2003) 615, 20th October 2003, section 2.4, pp. 7-8.

the area of European Security and Defence Policy (EDSP).⁶⁷⁷ According to the European Security Strategy: “development is impossible without security,” however, as Mackie and Rossini state, the strategy refrains from drawing the corollary conclusions, in other words, that security is impossible without development.⁶⁷⁸ On the other hand, as poverty reduction is enshrined as the central objective of development cooperation policy within the Constitution, these concerns may be unwarranted. In addition, the post of the Union Minister for Foreign Affairs may have helped to achieve greater consistency and unity between the Council and Commission.⁶⁷⁹ However, changes in the overall structure of the DGs External Relations and Development would have certainly had an impact upon development issues, in particular, the question of whether a Development Commissioner would remain in place, and in such circumstances, the evolution of the future relationship between the European Foreign Minister and the Development Commissioner.⁶⁸⁰

3. Evolution of Cooperation between the EU and the African, Caribbean and Pacific (ACP) States

This thesis focuses on a particular sphere of European Union cooperation with the developing countries, namely, cooperation with the African, Caribbean and Pacific (ACP) countries. The Cotonou Agreement (which replaced the former Lomé Conventions) is bilateral in nature - with the EC and the Member States as one party and the group of ACP states as the other party.

3.1. Background to EU-ACP Cooperation

In 1957, when the Treaty of Rome was signed between France, the Federal Republic of Germany, Belgium, Luxembourg, the Netherlands and Italy, links with developing

⁶⁷⁷ Youngs, R, ‘Normative Dynamics and Strategic Interest in the EU’s External Identity,’ 42 *JCMS* 2 (2004); Faust, J. and Messner, D., ‘Europe’s New Security Strategy and Challenges for Development Policy,’ Discussion Paper, German Development Institute, March 2004.

⁶⁷⁸ Mackie, and Rossini, *op. cit.*, (2004), p. 2, fn. 6.

⁶⁷⁹ Cremona, *op. cit.*, (2004), p. 568.

⁶⁸⁰ Mackie, J., *et al*, ‘Ensuring that Development Cooperation Matters in the New Europe,’ ECDPM, Maastricht, October 2003.

countries were well-established through the colonial endeavours of the founding Member States. Therefore, it was deemed necessary that the overseas territories of Italy, Belgium, the Netherlands and France should be taken into consideration during these negotiations. This was motivated in large part by the existence of established trade links and the reliance upon raw materials from these countries. France was instrumental in the establishment of a special relationship as its economy was particularly linked to that of its overseas territories.⁶⁸¹ The spirit of association was also influenced by the fact that France did not envisage that its colonies would attain independence and therefore, needed to ensure that the ‘special relationship’ would be maintained in any future free trade agreement. As a result, the Treaty establishing the European Communities contained provisions relating to the ‘association’ relationship within Part IV (Articles 131-136). Article 131 provided that “the Member States agree to associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands ... the purpose of this association shall be to promote the economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.” The tariff measures that were to apply to the six Member States were also extended to the overseas colonies.⁶⁸²

The relationship between the EEC and the OCTs was, therefore, contained within Part IV of the EEC Treaty. The Implementing Convention, entitled the “Implementing Convention on the association of the overseas countries and territories with the Community”, was signed on 25th March 1957 and entered into force on 1st January 1958.⁶⁸³ This provided for the first EDF and the procedures for the contributions of the Member States. The Implementing Convention was signed by the six EEC Member States, however, it was not signed by the OCTs as they did not possess legal personality.⁶⁸⁴

⁶⁸¹ Djamson, E.C., *The Dynamics of Euro-African Cooperation*, (The Hague, 1976), p. 4. On France’s role in establishing this ‘special relationship’, see Hewitt, A. and Whiteman, K., ‘The Commission and Development Policy,’ from Arts, K. and Dickson, A.K., (eds.), *EU Development Policy: From Model to Symbol*, (Manchester, 2004).

⁶⁸² Part IV of the EC Treaty.

⁶⁸³ The Implementing Convention expired on 31st December 1962. Its total funds were US\$ 581.25 million. Source Djamson, *op. cit.*, p. 5; Cohen, R., ‘Europe and the Developing Countries,’ p. 111 from Everts, Ph.P., (ed.), *The European Community in the World. The External Relations of the Enlarged European Community*, (Rotterdam, 1972).

⁶⁸⁴ Djamson, *op. cit.*, p. 4, fn. 3.

In the early part of the 1960s, the change in relations brought about through decolonisation and the attainment of independence by many Associated States necessitated the drafting of new agreements with the European Economic Community. Upon its expiration in 1962, the Implementing Convention on the Association of the OCTs was replaced by the Yaoundé Convention, which pursued a similar objective of promoting economic and social development to that of its predecessor.⁶⁸⁵ Yaoundé II maintained the provisions relating to the removal of customs duties, while recognising that many of the Associated States were not in a position to return the advantage to the EEC in accordance with the principle of non-reciprocity contained within Article 3(1).⁶⁸⁶

The 1970s constituted a period of change for the European Community's development cooperation policy as a whole. Djamson attributes this to the enlargement of the Community, which brought a new impetus for revising traditional approaches to development policy and the role of the EEC in international trade. The need to develop a coherent Community development policy clearly emerged in 1971, motivated by the desire to move beyond a purely commercial policy based exclusively on tariffs and quotas, to a relationship which would involve financial, technical and industrial cooperation, and contribute to the improvement of social conditions in developing countries.⁶⁸⁷ In this context, the EU went against the dominant "post-war liberal consensus"⁶⁸⁸ by virtue of its policies on preferential treatment and compensation for fluctuations in commodity prices. These policies responded to some of the demands of developing countries calling for a New International Economic Order.⁶⁸⁹

⁶⁸⁵ Yaoundé Convention, *signed* on 20th July 1963, [1964] OJ 93/1431, 11th June 1964. The first Yaoundé Convention had a duration of five years from 1st June 1964 to 31st May 1969 [This was concluded for a period of five years (from 1st June 1964 to 31st May 1969). The Development Fund amounted to \$620 million reimbursable grants and \$46 million loans from EIB]. This agreement was signed by the six EEC Member States and the 18 associated African States and Madagascar; Yaoundé II Convention was *signed* on 1st July 1969 and entered into force on 1st January 1971, *signed* on 29th July 1969, [1970] OJ 282/2, 28th December 1970.

⁶⁸⁶ Article 3(1) of the Convention of Association stated: "[p]roducts originating in the Community shall be imported into each Associated State free of customs duties and charges having equivalent effect."

⁶⁸⁷ European Commission, Memorandum on a Community Policy for Development Cooperation, SEC (71) 2700 fin., 17th July 1971, Bull. EC Supp. 5/71. In this Memorandum, it was stated that 'the basic purpose of any development cooperation policy is the systematic pursuit of a more harmonious distribution – and better adapted to modern times – of well-being throughout the world, in other words the pursuit of better conditions of life and the fulfillment of mankind.' Djamson, *op. cit.*, (1976), pp. 25-26.

⁶⁸⁸ Dickson, A., 'The Unimportance of Trade Preferences,' pp. 43-44 from Arts and Dickson, *op. cit.*, (2004).

⁶⁸⁹ *Ibid.* On the NIEO, see section 2.4 of chapter one of this thesis.

In the same year, the Generalised System of Preferences (GSP) was established to facilitate the access of products from developing countries to the Community markets.⁶⁹⁰ The motivation for its creation was influenced by the United Nations Conference on Trade and Development (UNCTAD) in 1968. The GSP system consisted of the granting of customs exemptions or reductions to developing countries with respect to manufactured or semi-manufactured goods, processed agricultural goods and textiles. However, it should be noted that this exemption was only provided to goods which were not in direct competition with products covered by the Common Agricultural Policy (CAP). It also contained a non-reciprocal trade agreement clause and the obligation, on behalf of the beneficiaries, not to discriminate among Community countries. The objective of this arrangement was to increase developing countries' export income and to promote the industrialisation and acceleration of economic growth in these countries. As mentioned above, the GSP system was proposed by UNCTAD to allow for preferential access to developing countries. As these tariff preferences went against the Most-Favoured Nation (MFN) principle of Article 1 of the GATT, they required a waiver to ensure compatibility with global trading rules. This was provided by the GATT Contracting Parties in 1971 through the 'Enabling Clause', which was adopted for a period of ten years and later renewed in 1979 for an indefinite period. The GSP constitutes a unilateral instrument and therefore, there is no element of contractuality unlike the preferences granted to the ACP group.⁶⁹¹

The accession of the UK to the EEC in 1973 led to the negotiation and conclusion of a new agreement with the Associated African States (AASM) group and Madagascar and the former British colonies in sub-Saharan Africa, the Caribbean and the Pacific.⁶⁹² In the early 1970s, consultations among the Organisation for African Unity (OAU) and the Caribbean and Pacific Associated States resulted in the creation of the African, Caribbean and Pacific (ACP) states, the body which would negotiate the future Convention with the EEC from 1973 onwards.⁶⁹³ These negotiations for a new Convention between the

⁶⁹⁰ For more on the legal basis for the adoption of a Generalised System of Preferences, see Case 45/86 *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1493.

⁶⁹¹ Panagariya, A., 'EU Preferential Trade Agreements,' 25 *The World Economy* 10 (2002), p. 7.

⁶⁹² Martenczuk, *op. cit.*, (2000), p. 463; Faber and Babarinde, *op. cit.*, (2005), p. 3.

⁶⁹³ Djamson, *op. cit.*, (1976), p. 25.

enlarged EEC and the group of ACP States differed from its predecessors with a new emphasis on equality and mutual respect between the contracting parties, in contrast to the previous ‘take it or leave it’ attitude.⁶⁹⁴ The first Lomé Convention continued the practice of non-reciprocal trade preferences for the ACP countries. As mentioned above, the preferences available through the GSP are distinct from those available to the ACP countries as the latter are based on a contractual relationship and are granted under a separate waiver under the GATT.⁶⁹⁵

Meanwhile, in response to a detailed proposal of action in 1972,⁶⁹⁶ Community development policy was gaining support, although its progress continued to be delayed due to internal disagreement regarding the proposed form of cooperation.⁶⁹⁷ Nevertheless, by 1974, with the approval of the Council, the development cooperation policy of the EEC had come into being.⁶⁹⁸ The first Lomé Convention was signed on 29th February 1975.⁶⁹⁹ Between 1975 and 2000, the Lomé Conventions I-V provided a firm legal basis for development cooperation between the ACP countries and the European Community and constituted a well-developed system of development cooperation. Upon the expiration of Lomé IV on 29th February 2000, the Cotonou Agreement was reached between the European Union and the group of ACP states.

3.2. Legal basis for EU-ACP cooperation within the EU Legal Order

It is also interesting to consider where the EU-ACP agreements fit into the overall EU legal order. The EU-ACP Agreements have been concluded as association agreements and are based on Article 310 (ex Article 238) of the EC Treaty.⁷⁰⁰ In the decision-making

⁶⁹⁴ Ibid., p. 27. In particular, this can be contrasted with the Convention of Association.

⁶⁹⁵ Panagariya, *op. cit.*, (2002), p. 7.

⁶⁹⁶ Memorandum from the Commission on a Community Policy on Development Cooperation: Programme for Initial Actions, SEC (72) 320 fin., 2nd February 1972, EC Bull. Supp. 2/72.

⁶⁹⁷ See McMahon, J.A., *The Development Cooperation Policy of the European Community*, (The Hague, 1998), p. 5. McMahon attributes this delay to the reluctance of Member States to give a Community mandate to an area usually designated to foreign policy, coupled with disagreement between those who favoured a regional as opposed to a worldwide policy.

⁶⁹⁸ Reproduced in (1974) 7 and 8 Bull. EC paras. 1213-1222.

⁶⁹⁹ ACP-EEC Convention, signed on 29th February 1975, [1976] OJ L 25/2, 30th January 1976. (entered into force on 1st April 1976.) [hereinafter Lomé I].

⁷⁰⁰ Association agreements also include the Europe association agreements, the Euro-Mediterranean agreements and agreements with Chile and South Africa. Bartels, L., *Human Rights Conditionality in the EU's International Agreements*, (Oxford, 2005), p. 177. These external agreements are beyond the scope of this thesis. For further reading, see Bartels, *ibid*.

process of the EU, Article 310 (ex Article 238) requires unanimity. Association agreements may be concluded with one or more third countries and with international organisations and involve reciprocal rights and obligations. In contrast, Article 181(ex Article 130y), which provides a legal basis for cooperation between the Community and Member States with third countries and with international organisations, requires a qualified majority.⁷⁰¹

As mentioned above, the EU-ACP agreements consist of association agreements, however, they have also been adopted as mixed agreements. Mixed agreements consist of agreements reached between the Community and one or more of the Member States.⁷⁰² According to Schermers, a mixed agreement is “any treaty to which an international organization, some or all of its Member States and one or more third States are parties and for the execution of which neither the organization nor its Member States have full competence.”⁷⁰³ The conclusion of mixed agreements illustrates that the EC does not have exclusive competence in a given area.⁷⁰⁴ The motivation for the conclusion of mixed agreements in the case of the Lomé Conventions was largely due to the unique nature of the financing instrument, the European Development Fund (EDF).⁷⁰⁵ The financing for the ACP countries is unique as the EDF contains an intergovernmental element as it is directly funded by voluntary contributions from the Member States. The EU-ACP agreements have been adopted as mixed agreements, which require the ratification of all contracting Parties and thereby, lead to significant delays in the ratification process.⁷⁰⁶ The conclusion of the EU-ACP agreements as mixed agreements is in line with the more general practice of concluding association agreements in a mixed form.⁷⁰⁷ In the case of

⁷⁰¹ Cooperation agreements have been concluded with third countries such as the Mercosur cooperation agreement, Mexico and the interim agreement with the Palestinian authority on the basis of Article 133 (trade) and Article 181 (development cooperation). Prior to the Maastricht Treaty, cooperation agreements were normally concluded under Article 133 and Article 308, as well as other provisions. This includes cooperation with Korea, Brazil, Cambodia, Laos, Sri-Lanka, Vietnam, Yemen and Pakistan. See *ibid.*, p. 177, fn. 25.

⁷⁰² See Riedel, E., and Will, M., ‘Human Rights Clauses in External Agreements of the EC,’ p. 737, from Alston, P., *The EU and Human Rights*, (Oxford, 1999). For further reading on mixed agreements see Rosas, A., ‘Mixed Union – Mixed Agreements,’ from Koskeniemi, M., (ed.), *International Law Aspects of the European Union*, (The Hague, 1998), pp. 125-48; Heliskoski, J., *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, (The Hague, 2001).

⁷⁰³ Schermers, H.G., ‘A Typology of Mixed Agreements,’ pp. 25-26 from O’ Keefe, D., and Schermers, H.G., *Mixed Agreements*, (Deventer, 1983).

⁷⁰⁴ Martenczuk, B., ‘From Lomé to Cotonou. The ACP-EC Partnership Agreement in a Legal Perspective,’ 5 *EFAR* (2000), p. 484.

⁷⁰⁵ The EDF is further elaborated in section 2.3 below.

⁷⁰⁶ The Cotonou Agreement of 2000 did not come into effect until 2003 due to delays in the ratification process.

⁷⁰⁷ Eeckhout, P., *External Relations of the European Union. Legal and Constitutional Foundations*, (Oxford, 2004), p. 106; Heliskoski, *op. cit.*, (2001), p. 3. She notes the agreements with Malta and Cyprus are exceptions to this trend.

EU-ACP Agreements, Internal Agreements between the representatives of the Member States meeting within the Council lays down the inter-institutional arrangements and modalities for the implementation of the Cotonou Agreement.⁷⁰⁸

3.3. Management and Coordination of EU-ACP Relations

3.3.1. Institutional Management and Actors

The joint institutional structure of EU-ACP relations is often heralded as a unique example of partnership and joint decision-making. The Summit of Heads of State of the ACP countries is the highest organ of the ACP group. It is responsible for policy-making and has convened regularly to lay down guidelines on policy orientation since 1997.⁷⁰⁹ ACP-EU cooperation is formally overseen by a joint institutional structure, comprised of the ACP-EU Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly. The ACP-EU Council of Ministers is composed of members from each government of the ACP countries or an individual designated by the government. It is the primary decision-making body and is responsible for implementing the guidelines and policy decisions of the ACP Summits. It meets on a bi-annual basis. The Committee of Ambassadors is composed of representatives from the ACP states and it is the second main decision-making body. It assists the Council in the implementation of the objectives of the ACP group and it acts on behalf of the Council between ministerial sessions. In addition, the joint EU-ACP Parliamentary Assembly provides a forum for discussion between EU and ACP Parliamentarians and acts as an advisory body for the ACP group. The ACP Secretariat and the EC Commission Directorate

⁷⁰⁸ Internal Agreement between the representatives of the governments of the Member States, meeting within the Council, on measures to be taken and procedures to be followed for the implementation of the ACP-EC Partnership Agreement, [2000] OJ L 317/376, 15th December 2000. On the financing and administration of the EDF, see Internal Agreement between Representatives of the Governments of the Member States, meeting within the Council, on the Financing and Administration of Community Aid under the Financial Protocol to the Partnership Agreement between the African, Caribbean and Pacific States and the European Community and its Member States signed in Cotonou (Benin) on 23rd June 2000 and the allocation of financial assistance for the Overseas Countries and Territories to which Part Four of the EC Treaty applies, [2000] OJ L 317/355, 15th December 2000.

⁷⁰⁹ Source: <http://www.acpsec.org> The ACP Summits include the Summits of Libreville, Gabon in 1997, Santo Domingo, Dominican Republic in 1999, Nadi, Fiji in 2001 and Maputo, Mozambique in 2004.

General for Development (DG-DEV) are located in Brussels. These institutions cooperate with European Commission Delegations and specialised agencies.

Despite the existence of joint EU-ACP institutions and the rhetoric of partnership between both parties, the management of cooperation is dominated by EU Brussels-based decision-making and management procedures. In practice, the principle of partnership is not reflected in the complex decision-making practices and the primacy of Brussels as the “center of gravity”⁷¹⁰ in EU development policy decision-making. The division of responsibilities between the EU institutions for developing policy was described above, however, attention should also be given to the role of these institutions in ACP relations. As mentioned above, the Council is the main decision-making body of the European Union. Several Council Working Groups deal with developing countries including the Development Cooperation Group, the ACP group and the ACP-Fin Group.⁷¹¹ The Council Working Groups operate on the basis of proposals from the Commission and report directly to the Member States’ permanent representatives in Brussels (COREPER).⁷¹²

The European Commission administers the EDF and implements Community aid on behalf of the Member States. The Member States have delegated significant authority to the Commission for the execution of Community aid, however, the administration of Community aid is overseen by the representatives of the Member States meeting within the EDF Committee.⁷¹³ The Committee also participates directly in decisions relating to the programming of Community aid and financing under the EDF and in addition, it monitors the implementation of aid,⁷¹⁴ however, it deals with more strategic issues rather than micromanagement of the Fund itself.⁷¹⁵ A representative from the Commission chairs the EDF Committee and the Commission also provides the secretariat.⁷¹⁶ The

⁷¹⁰ Hoebink, *op. cit.*, (2005), p. 136.

⁷¹¹ Within the CFSP framework, the Africa Group and the South Africa Group have relevance for the ACP countries.

⁷¹² Hoebink, *op. cit.*, (2005), p. 138.

⁷¹³ The decision-making powers of the EDF Committee are outlined in the Internal Agreement on the Financing and Administration of Community Aid, *op. cit.*

⁷¹⁴ Article 22, *ibid.*

⁷¹⁵ Hoebink, *op. cit.*, (2005), p. 138.

⁷¹⁶ Article 21(1) of Internal Agreement on the Financing and Administration of Community Aid, *op. cit.*

Council adopts rules of procedure for the Committee by unanimity⁷¹⁷ and the EDF Committee acts by qualified majority voting.⁷¹⁸

The European Parliament has limited involvement in the EU-ACP relations due to the intergovernmental nature of cooperation and the fact that the EDF is outside the EU budget. The Development Committee is responsible for drafting reports, which may be used for the adoption of resolutions at plenary sessions. Although its formal role is limited, the European Parliament exerts indirect influence through its links with ACP countries, activities on the ground and through its relations with the NGO community.⁷¹⁹ The Members of the European Parliament try to shape the direction of Commission policy and their influence can be seen in certain areas such as spending in social sectors⁷²⁰ and also in human rights.⁷²¹

3.3.2. Financial Instruments

As mentioned above, the EU is a major international donor.⁷²² In terms of aid, trade and direct investment, the European Union and its Member States account for 55% of official international development aid.⁷²³ EU development aid for ACP countries is channeled through two main routes. Firstly, the European Development Fund (EDF) which is funded by the contributions of the Member States, is dispersed on a geographical basis through the national or regional indicative programmes. Secondly, loans are administered through the European Investment Bank (EIB). The EIB is the development bank of the EU which aims to promote economic growth in developing countries through public and private loans, although it is increasingly focused on promoting investment and private enterprise.⁷²⁴ Although it provides services to over 120

⁷¹⁷ Article 21(2), *ibid.*

⁷¹⁸ It operates by qualified majority of 145 votes, cast by at least eight Member States. Article 21(4), *ibid.* The weighting of votes among EU Member States is provided for in Article 21(3).

⁷¹⁹ Hoebink, *op. cit.*, p. 142.

⁷²⁰ *Ibid.*

⁷²¹ See for example section 4 below.

⁷²² EC volume of ODA was US\$4.91bn in 2000. Source: OECD, 'The DAC Journal: Development Cooperation Report 2001: Efforts and Policies of the Members of the DAC,' vol. 3, no. 1, March 2002, p. 100.

⁷²³ EU Annual Report 2004, *op. cit.*, p. 5.

⁷²⁴ European Investment Bank, 'Financing in the ACP. Supporting Private Enterprise and Investment in Developing Countries,' January 2002, p. 2. Source: <http://www.eib.eu.int/publications/publication.asp?publ=91>

countries, its role in the ACP countries was strengthened following the signing of the Cotonou Agreement, particularly in the area of private sector investment. Furthermore, the Stabex and Sysmin instruments were established to provide compensation for the loss of export earnings by the ACP countries due to market instability or natural disasters.

Beyond the EDF and EIB loans, the ACP countries also benefit from EU budget lines created by resolutions and actions of Council and Parliament.⁷²⁵ The ACP countries first obtained budget aid funding under the Food Aid Convention (1967).⁷²⁶ They have also received funding from other budget lines such as humanitarian assistance, gender, poverty, environment, and population activities.⁷²⁷ The ACP states have also benefited from other financial instruments including Stabex and Sysmin that were created following economic crises after 1973.⁷²⁸ The Stabex programme finances the stabilisation of ACP countries' export income. It aims to compensate countries for loss of income due to fluctuations in the price of products that are particularly important for that country. Sysmin involves a special funding system for maintaining or restoring the production capacity of mines in ACP countries. It should be noted however, that the Cotonou Agreement provided that Stabex and Sysmin should be phased out due to the perceived lack of effectiveness of these instruments. These instruments will be replaced by grants to offset shortfalls in earning exports.⁷²⁹

3.3.2.1. European Development Fund

The primary financial instrument that has been used for the African, Caribbean and Pacific (ACP) countries since 1958 is the European Development Fund (EDF). The EDF was created by the then EEC Member States in 1957⁷³⁰ and continued under the Yaoundé Conventions and Lomé Conventions.⁷³¹ This instrument is unique as it has been outside

⁷²⁵ Hoebink, *op. cit.*, (2005), p. 130.

⁷²⁶ *Ibid.*

⁷²⁷ *Ibid.*, p. 130.

⁷²⁸ *Ibid.*, p. 128.

⁷²⁹ Babarinde, O., 'The Changing Environment of ACP-EU Relations,' from Babarinde and Faber, *op. cit.*, (2005), p. 33.

⁷³⁰ Part IV of the Treaty of Rome. Treaty establishing the European Economic Community, signed in Rome on 25th March 1957, entered into force on 1st January 1958. [*hereinafter* the Treaty of Rome]

⁷³¹ EDF 2 and 3 related to the Yaoundé Conventions of 1963 and 1969. EDF 4 was established with the signature of Lomé I. The Lomé Conventions were extended on three occasions, EDF 5 (Lomé II), EDF 6 (Lomé III) and EDF 7 and 8 for Lomé IV and IV-bis. Hoebink, *op. cit.*, (2005), p. 128.

the EU budget since its inception. The Fund is intergovernmental in nature as it is funded by the voluntary contributions of the EU Member States. The EDF is subject to complex decision-making and procedural rules. An Internal Agreement between the EU Member States lays down the roles and responsibilities of the EU institutions, whilst Annex IV of the Cotonou Agreement clarifies the responsibilities of the EU and the ACP states. These procedures have been largely harmonised in a separate Financial Regulation governing the EDF, which is negotiated every five years.⁷³² The European Commission is responsible for managing the EDF and the Court of Auditors is empowered to exercise strict controls by auditing the implementation of the Fund. As the EDF is outside the EU budget, the European Parliament is only involved in approving the discharge of the EDF.⁷³³ The Member States retain some oversight for the management of the fund through the EDF Committee. The EDF procedures also differ from those of the EU budget. The EDF resources are allocated under NIPs and RIPs and commitments can be made without any limits. In contrast, to the EU budget, the EDF is based on multiannual funds which are split up into yearly allocations.⁷³⁴ In addition, the unspent EDF appropriations are carried over and the EDFs only expire when all funds are disbursed, whereas unspent appropriations under EU budget are lost.⁷³⁵

Negotiations for the programming of the 10th EDF are currently underway.⁷³⁶ The provisional agreement on the future Financial Perspective 2007-2013 provides details of the new contribution key for the Member States' financing of the EDF.⁷³⁷ The general breakdown of the EDF is contained in the Financial Protocol of the revised Cotonou Agreement.⁷³⁸ The amount allocated for the 10th EDF is slightly less than the amount originally proposed by the European Commission.⁷³⁹

⁷³² €15,200 million is planned for Community assistance to ACP States for a period of five years, comprised of €13,500 million from the ninth EDF fund and loans of €1,700 million from the EIB. Source: Articles 1-4 Financial Protocol, Annex 1 of the Cotonou Agreement, *op. cit.*; European Commission, 'InfoFinance 2000,' (European Commission, February 2002), p. 8. Financial Regulation of 27th March 2003 applicable to the 9th European Development Fund, [2003] OJ L 83, 1st April 2003. The 9th EDF expires on 1st January 2008.

⁷³³ The European Parliament refused to discharge EDF funding in 1994.

⁷³⁴ Hoebink, *op. cit.*, (2005), p. 137.

⁷³⁵ *Ibid.*

⁷³⁶ See Frederickson, J., 'The 10th European Development Fund (EDF). Negotiations, Next Steps and Key Issues,' ECDPM, 24th January 2006. The provisional agreement on the Future Financial Perspective under the UK Presidency in the second half of 2005. Council of the European Union, Financial Perspective 2007-2013, Provisional Version, Brussels, 16th December 2005, p. 26, para. 70. The 10th EDF will provide €22,682 million from 2008-2013.

⁷³⁷ *Ibid.* Annex I 'Cooperation with the ACP countries contribution key'.

⁷³⁸ See Annex 1 of the Revised Cotonou Agreement. Council Decision 599/2005 of 21st June 2005 concerning the signing, on behalf of the European Community, of the Agreement amending the Partnership Agreement between the members of the African, Caribbean

There has been long-standing debate on the issue of budgetising the EDF. During the previous negotiations for the present ninth EDF fund, the Commission sought to raise the issue of bringing the EDF within the EU budget, however, these attempts were not successful.⁷⁴⁰ Nevertheless, the European Commission relaunched this debate through a proposal to Council and Parliament in 2003 on the budgetisation of the European Development Fund.⁷⁴¹ According to the Commission, budgetisation was a timely issue in light of the renegotiation and reorganisation of the EU external assistance budget lines⁷⁴² and the need to negotiate a replacement of the ninth EDF upon its expiration. The Commission recommended that a successor to the ninth EDF should not be found, but instead, that this funding should be brought within the EU budget for the following reasons.⁷⁴³ Firstly, it would improve the efficiency and effectiveness of the EDF by harmonising budget procedures and reducing transaction costs. Secondly, it would allow for the quicker disbursement of funding as the financial regulations could be adopted by the European Council and European Parliament without the delays under the current system, which requires the ratification by the EU Member States and two-thirds of the ACP countries. In addition, it would enhance the democratic legitimacy of the EU by involving the European Parliament and could potentially remedy perceived political marginalisation of the ACP countries by bringing them within the mainstream political discussions. On the other hand, however, the budgetisation of funding for the ACP states may weaken their hand at the negotiating table as there would no longer be a separate EU-ACP institutional framework and the amount allocated to the ACP states would be less secure if it was included within the mainstream external relations instruments.

Bringing the EDF within the EU budget would mean that it would be governed by the medium-term Financial Perspective which provides an overall framework for EU

and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23rd June 2000, [2005] OJ L 209, 11th August 2005, Annex 1.

⁷³⁹ The provisional amount agreed for the 10th EDF equals 0.028% of EU GNI and is lower than European Commission's original proposal of 0.031%. Source: Frederickson, *op. cit.*, (2006).

⁷⁴⁰ European Commission, Communication from the Commission to the Council and the European Parliament, Towards the Full Integration of Cooperation with the ACP countries in the EU Budget, COM (2003), 590 fin., 8th October 2003, p. 4.

⁷⁴¹ *Ibid.*

⁷⁴² This relates to the reform of EU external assistance and the proposed Financial Perspective on external assistance for 2007-2013. See section 2.3.2 above.

⁷⁴³ COM (2003), 590, *op. cit.*, p. 4.

expenditure.⁷⁴⁴ The EU budget is agreed within the general multi-annual framework of the Financial Perspective.⁷⁴⁵ It would also mean that the contributions of the Member States would be realigned according to the EU budget rather than the current weighting system under a separate financing mechanism.⁷⁴⁶ In contrast to the EDF, the EU budget is determined on an annual basis through the co-decision procedure.⁷⁴⁷ The European Parliament would also have a role in the discussions on funding allocations, which may enhance the democratic legitimacy of EU-ACP relations.⁷⁴⁸

The Commission advocated the inclusion of the EDF within the new Financial Perspective for 2007-2013 under the new subheading for development cooperation and economic cooperation. The European Commission had also laid out a time-table or 'road map' for the steps which need to be taken in order to complete the budgetisation of the EDF. This included plans for a proposed EP-Council Regulation or Regulations establishing a cooperation programme with the ACP and the OCTs in September 2005.⁷⁴⁹ Following this, it was envisaged that the European Parliament and Council would adopt the basic regulation(s) on ACP/OCT cooperation.⁷⁵⁰ During the same year, the ACP countries would be included in the draft budget for 2007 and that the EDF would be incorporated as part of the EU budget from then onwards.⁷⁵¹

The European Commission has long advocated that the EDF should be financed from the European Community budget and it has included the EDF within its pre-budget proposals since 1973.⁷⁵² In the Maastricht Treaty, it was agreed that the EDF would remain in place and continue to be financed through a separate regulation.⁷⁵³ Apart from the European

⁷⁴⁴ The Financial Perspective is adopted by the Council and approved by the Parliament and constitutes an agreement between the European institutions on the main budget headings for several years. The previous Financial Perspective was from 1993-1999 and following this from 2000-2006. Van Reisen, M., *EU 'Global Power'. The North-South Policy of the EU*, (Utrecht, 1999), p. 95.

⁷⁴⁵ European Commission, Communication from the Commission to the Council and the European Parliament on the Instruments for External Assistance under the Future Financial Perspective 2007-2013, COM (2004) 626 fin., 29th September 2004, p. 9.

⁷⁴⁶ COM (2003) 590, *op. cit.*, p. 4.

⁷⁴⁷ Through the co-decision procedure, the EU budget is adopted by the Council in co-decision with the European Parliament and the European Commission. Van Reisen, *op. cit.*, (1999), p. 95.

⁷⁴⁸ *Ibid.*, p. 10.

⁷⁴⁹ COM (2003) 590, Annex II 'Road map: Deadlines for essential legislative steps,' p. 22. This Regulation would render the Internal Agreement, EDF Regulation and implementation provisions in Cotonou would redundant. *Ibid.*

⁷⁵⁰ This may require ratification by the EU and ACP at the end of 2006. *Ibid.*

⁷⁵¹ This would necessitate a transition period from 2008-2011 for the disbursement of existing EDFs.

⁷⁵² Commission des Communautés Européennes, Rapport sur les Possibilités et les Modalités de Budgétisation du Fonds Européen de Développement, SEC (1994) 640, 6th June 1994; Van Reisen, *op. cit.*, (1999), p. 105.

⁷⁵³ Declaration No. 12 on the European Development Fund, Annexed to the *Treaty on European Union*.

Commission, other stakeholders such as the representatives of the ACP governments, the European Parliament, the EU Member States, the European Court of Auditors and NGOs have expressed some concern regarding the proposed budgetisation of the EDF. These concerns include the potential lack of security of funding for the ACP countries and the risk that the new flexible procedures may allow EDF funding to be used to fund other external assistance activities such as the EU's Common Foreign and Security Policy.⁷⁵⁴ However, these stakeholders also agree with the need to enhance the democratic legitimacy of EU-ACP relations, improve the effective and efficient delivery of aid and promote coherence in EU external actions. The EU Member States are divided on this issue,⁷⁵⁵ as it would alter the rates of contributions to these countries.⁷⁵⁶ This could also prove difficult in the absence of a close relationship between the new Member States and the ACP countries. However, it appears that there is some support for budgetisation.⁷⁵⁷ The ACP governments have mixed views, for example, some feel that there is a risk of losing the special relationship which currently exists, whilst others believe that they would obtain a better position in the more mainstream political forums which may prove advantageous.⁷⁵⁸ The European Parliament has traditionally been in favour of budgetisation,⁷⁵⁹ however, it also seeks to protect the funding to the ACP countries. The Parliament first requested the budgetisation of the EDF in 1973, however, this was rejected by the Council.⁷⁶⁰ In the past, the Court of Auditors has favoured a separate EDF,⁷⁶¹ however, in light of the delays in ratifying the EDF, it has suggested that a separate Financial Regulation should be drawn up in order to simplify management procedures without bringing it directly within the EU budget.⁷⁶² Many of the Brussels-based development NGOs are largely in favour of the budgetisation of the EDF, however,

⁷⁵⁴ Mackie, J., *et al*, 'Improving ACP-EU Cooperation: Is budgetising the EDF the Answer?', Discussion Paper, No. 51, January 2004a.

⁷⁵⁵ Agence EUROPE, 21st October 2003, p. 15, quoted in Mackie *et al*, *op. cit.*, (2004a), p. 17, fn. 23. This refers to an informal meeting between development ministers at the General Affairs and External Relations Council (GAERC), at which it was reported that during discussions on this issue, France, Belgium, Luxembourg, the Netherlands, Sweden, Finland, Denmark, Poland and Hungary came out in favour of budgetisation, whilst Spain, the UK and Ireland came out against budgetising the EDF.

⁷⁵⁶ See Annex on Financial Information on the EDF, 'Financial Regulation of 27th March 2003 applicable to the 9th EDF, [2003] OJ L 73/30, 1st April 2003.

⁷⁵⁷ Mackie, *op. cit.*, (2004a), p. 17.

⁷⁵⁸ *Ibid.*

⁷⁵⁹ See European Parliament Resolution of 14th February 1973 on the budgetisation of the EDF, OJ C 14, 27th March 1973.

⁷⁶⁰ European Parliament Resolution, OJ C 14, 27th March 1973, pp. 25-26; Van Reisen, *op. cit.*, (1999), p. 105.

⁷⁶¹ Court of Auditors, 'Annual Report 2001. Report on the Activities of the 6th, 7th and 8th European Development Funds (EDFs)', [2002] OJ C 295/289, 28th November 2002, p. 289, para. 14-17.

⁷⁶² Court of Auditors, Opinion No. 12/2002 on the proposal for a Council Financial Regulation applicable to the 9th EDF under the ACP-EU partnership agreement signed in Cotonou, 23rd June 2000.

the security and predictability of funding for the ACP countries remains a priority for these organisations.⁷⁶³

As mentioned above, the European Commission had previously proposed including the EDF in a general budget heading for development cooperation and economic cooperation in the Financial Perspective (2007-2013). Other possible scenarios were also foreseen for the future of the EDF.⁷⁶⁴ For example, it was possible to maintain the current special relationship between the EU and the ACP countries by keeping the EDF separate. After much debate, the Member States chose this option. Another option that had been open to the EU would have been to follow the Commission's proposal for budgetisation, but to keep a separate sub-heading in the Financial Perspective for the EDF.⁷⁶⁵ However this option was also rejected. Although the subject of budgetisation may appear to merely deal with technical matters relating to the EU budget, this issue is of immense significance for the stakeholders as it impacts directly on the future landscape of EU-ACP relations.

3.4. Enlargement of the European Union and the ACP Countries

The enlargement of the European Union in 2004 raises questions for the future orientation of European development policy. By virtue of the *acquis communautaire*, the ten new Member States will inevitably become donors through their contributions to the EU budget, or some may indeed re-emerge as donors.⁷⁶⁶ The new Member States are automatically Parties to the Cotonou Agreement.⁷⁶⁷ In 2003, a programme of work was launched to assess the impact of enlargement on development policy.⁷⁶⁸ It was found that enlargement would have implications, firstly, for the decision-making and priorities of the EU, as well as the channels of implementation used and level of financial

⁷⁶³ Eurostep, 'Integration of Cooperation with ACP countries in the EU Budget: the Budgetisation of the EDF,' Eurostep Discussion Paper, October 2003, pp. 16-19 Eurostep is a Brussels-based association of development organisations.

⁷⁶⁴ Ibid., p. 7.

⁷⁶⁵ Ibid., p. 30.

⁷⁶⁶ For example, Slovenia has already engaged in development assistance activities in Bosnia and Herzegovina.

⁷⁶⁷ According to Article 94(3) of the Cotonou Agreement, any new EU Member State "shall become a contracting party to this Agreement from the date of its accession by means of a clause to this effect in the act of concession."

⁷⁶⁸ European Commission, 'The European Union's Development Policy. The EU's Current Agenda for Development Policy and Enlargement,' p. 6.

commitments. Secondly, their capacity to undertake responsibility for the development *acquis* was also questioned in light of the fact that some of the new members such as Cyprus, Malta, Latvia and Lithuania do not have a policy framework or a legal basis for development cooperation.⁷⁶⁹ The issue of enlargement may also have implications for the ACP group. For example, it remains to be seen whether they will choose to give voluntary donations to the European Development Fund as they do not have long-standing relations with the ACP countries. If the EDF had been brought within the EU budget, as recommended by the European Commission, this would have automatically ensured that contributions would be made to development policy as a whole through their contribution to the EU budget.⁷⁷⁰ However, the new Member States of the European Union were reluctant to change the status quo, preferring that the EDF remains outside the EU budget.⁷⁷¹

3.5. Community Competences in the Sphere of Development Aid

As mentioned above, development cooperation constitutes an area of shared competence, therefore, the EC does not exercise exclusive competence in this domain. The issue of ‘complementarity’ is emphasised in this regard, which means that EC development policy is complementary by the separate bilateral and multilateral development cooperation policies of the Member States. Although, the Commission may take any useful measure to promote coordination of the national efforts in this field,⁷⁷² development policy must be complementary to the policies of the Member States.⁷⁷³ Similarly, the capacity of Member States to negotiate with international bodies and conclude international agreements is protected.⁷⁷⁴ This is consistent with the principle of subsidiarity, in that “the Commission can only take the initiative to act if Member States measures are

⁷⁶⁹ Ibid., pp. 7-26.

⁷⁷⁰ On the budgetisation of the EDF, see section 3.2.2.1 above.

⁷⁷¹ Interview with EU Official, DG Development.

⁷⁷² Article 180 (ex Article 130x), EC Treaty.

⁷⁷³ Article 177(1) (ex Article 130u), EC Treaty.

⁷⁷⁴ Article 181 (ex Article 130y), EC Treaty.

insufficient to achieve the objectives identified in ex. Article 130u, or if a goal could be better achieved by EU.”⁷⁷⁵

The nature of Community and Member State competences was clarified in the following cases which contribute to our understanding of the legal principles governing the administration of development aid.⁷⁷⁶ In the *Bangladesh*⁷⁷⁷ and *EDF*⁷⁷⁸ cases, it was questioned whether there are circumstances in which the EC Treaty prevents the Member States from taking independent and collective action concerning aid, or whether the Member States should have recourse to Community institutional mechanisms. In the former case, a decision to grant ECU 60 million in special emergency aid to Bangladesh following severe cyclone damage was made at a meeting of the Ministers of Foreign Affairs of the Member States and by a Member of the Commission in 1991. Subsequently, at the 1487th session of the Council, it was stated that:

The Member States meeting in the Council have decided, on the basis of a Commission proposal, to grant special aid of ECU 60 million to Bangladesh under a Community action. The distribution among the Member States will be based on GNP. The aid will be integrated into the Community’s general action for Bangladesh. It will be provided either directly by the Member States or by means administered by the Commission. The Commission will co-ordinate the whole of the special aid of ECU 60 million.⁷⁷⁹

The Parliament argued that the act in question could only be adopted by the Council and objected to the use made of intergovernmental consultation, rather than the procedures provided under the EC Treaty. It was therefore necessary for the Court to consider whether the decision in question constituted an act of the Council or a collective action undertaken by the Member States, as the acts of the latter acting outside of their capacity as members of the Council are not subject to judicial review by the ECJ, in contrast to the

⁷⁷⁵ Holtz, U., ‘Towards a Europeanisation of Aid?’, *The Courier ACP-EU*, No. 170, (1998), pp. 93.

⁷⁷⁶ Ward, A., ‘Community Development Aid and the Evolution of the Inter-institutional Law of the European Union,’ from Dashwood, A. and Hillion, C., *The General Law of European Community of External Relations*, (London, 2000).

⁷⁷⁷ Case C-181/91 and C-248/91 *Parliament v. Council and Commission* [1993] ECR I-3685 (‘Bangladesh case’).

⁷⁷⁸ Case C-316/91 *Parliament v. Council* [1994] ECR I-625.

⁷⁷⁹ *Ibid.*, para. 2.

Council which is under the jurisdiction of the Court.⁷⁸⁰ Upon examination, the disputed decision was not found to be an act of the Council and furthermore, it was stated that the Community's competence in the field of humanitarian aid is not exclusive, and consequently, the Member States are not prevented from exercising their competences in this respect collectively, within or outside the Council.⁷⁸¹

This judgment was reaffirmed in the *EDF* case.⁷⁸² This case involved the scrutiny of the framework of the EC-ACP relationship and its financial instrument, the European Development Fund. As mentioned above, the EDF is an intergovernmental arrangement, however, the Member States have delegated significant authority to the Community institutions for the administration of this fund.⁷⁸³ In the *EDF* case, the European Parliament contested the legality of a financial regulation, adopted by the Council on the basis of an Internal Agreement of the Member States.⁷⁸⁴ However, the Court held that although the regulation constituted a Community act and had been adopted by an extra-Community agreement, the financial regulation had been based on an appropriate legal basis and the proposed action of the Parliament to annul the decision was rejected.⁷⁸⁵

The outcome of these cases confirms that the Member States have a broad discretion and autonomy in the sphere of development cooperation and are permitted to choose the appropriate channel for the distribution of aid, and the fact that the granting of aid was made under an intergovernmental agreement does not preclude the Member States from using the Community institutions to carry out the distribution of aid.⁷⁸⁶

4. The Emergence of Human Rights in EU-ACP Cooperation

⁷⁸⁰ See Joined Cases C-181/91 and C-248/91, para. 12. According to para. 12: 'acts adopted by representatives of the Member States acting, not in their capacity as members of the Council but as representatives of their governments and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court.'

⁷⁸¹ C-181/91 and C-248/91, para. 16.

⁷⁸² C-316/91 *op. cit.*

⁷⁸³ *Ibid.*, para. 41.

⁷⁸⁴ *Ibid.*, para. 14.

⁷⁸⁵ C-316/91 *op. cit.*, para. 42.

⁷⁸⁶ Ward, *op. cit.*, para. 3.06.

4.1. Introduction

Within the literature on EU-ACP cooperation, the introduction of the human rights clause in Lomé Convention IV (and political conditionality) has often been described as heralding a new political dimension of this relationship. Whilst the Lomé Conventions were characterised as non-political, technical, based on development needs⁷⁸⁷ and furthermore, purported to be infused with the spirit of “ideological neutrality,”⁷⁸⁸ it will be shown that human rights have undoubtedly influenced the changing nature of EU development policy. This section will consider the emergence of human rights in EU development cooperation in general, with particular emphasis on the role of human rights in the agreements with the group of ACP states.

4.2. Early Trends in EU-ACP Cooperation: Towards Political Conditionality

The Lomé system, which developed from the relationship between the European colonial powers and their overseas territories, institutionalised the relationship between the Community and the ACP countries. It dealt comprehensively with cooperation on aid, trade, technical assistance and the stabilisation of export earnings. The first European Commission document on development policy in 1971 emphasised the non-political and neutral character of development aid.⁷⁸⁹ Broadly speaking, the development agenda of Lomé I and II centred on the promotion of industrial development and wealth creation.⁷⁹⁰ In the 1980s, donors emphasised a macro-economic approach to development and concentrated on structural adjustment programmes, although there was considerable objection to the social drawbacks of these programmes by some Member States.⁷⁹¹ Issues such as self-reliant development, self-sufficiency, food security and the fulfillment of basic needs were also brought to the fore during this decade.⁷⁹² During the first three

⁷⁸⁷ Brown, W., ‘From Uniqueness to Uniformity? An Assessment of EU Development Aid Policies,’ from Arts and Dickson, *op. cit.*, (2004); Brown, W., *The European Union and Africa: The Restructuring of North-South Relations*, (London/New York, 2002), p. 4.

⁷⁸⁸ *Ibid.*

⁷⁸⁹ Quoted in Hoebink, p. 128.

⁷⁹⁰ Second ACP-EEC Convention, signed on 31st October 1979, [1980] OJ L 347/1, 22nd December 1980. [*hereinafter* Lomé II].

⁷⁹¹ Simma, B., *et al.*, ‘Human Rights Considerations in the Development Cooperation Activities of the EC’, from Alston, P., *op. cit.*, (1999), p. 575. See chapter one of this thesis for an overview of international development trends.

⁷⁹² *Ibid.*

decades of Lomé, the technical and non-political character of EU aid was strongly emphasised. The absence of any reference to human rights was also evident from the early decades of cooperation and this issue will be described in greater detail below.

4.3. The Introduction of the Human Rights Clause in EU External Relations

Prior to the introduction of Lomé IV, there was no legal basis for the inclusion of human rights as an essential element of cooperation between the EU and ACP countries, despite longstanding efforts on behalf of the EU.⁷⁹³ This was illustrated in the absence of any reference to human rights in the first two Lomé Conventions. Although, Lomé III (1986-1990) established a link between human rights and development aid and trade within its Preamble and Article 4,⁷⁹⁴ these provisions were devoid of a clear legal value. According to Marantis, this policy was influenced by a number of factors.⁷⁹⁵ Firstly, human rights were considered peripheral to the EC's agenda which focused on the integration of the markets of the Member States. The EEC Treaty itself did not make any reference to human rights, and was largely conceived as an economic association.⁷⁹⁶ Secondly, Member States were cautious in this area due to sensitivities towards recent decolonisation, and were also aware that human rights conditions may be considered by the ACP countries as a neo-colonialist enterprise. Thirdly, the economic conditions of the early 1970s rendered the ACP countries in a good bargaining position due to the uncertainty caused by the oil crises and the destabilisation of the Western economies which followed.⁷⁹⁷

A number of issues contributed to the insertion of a human rights clause within the Lomé Conventions. Firstly, although there were no legal provisions that allowed for the suspension of aid on grounds of political conditionality, the *de facto* suspension of EEC

⁷⁹³ See for example, the 1977 Lusaka Meeting of the ACP Council of Ministers, *The Courier* No. 47 (January-February 1978).

⁷⁹⁴ Third ACP-EEC Convention, signed on 8th December 1984, [1986] OJ L 86/3, 31st March 1986. [hereinafter Lomé III].

⁷⁹⁵ Marantis, D.J., 'Human Rights, Democracy and Development: The European Community Model,' 7 *Harvard Human Rights Journal*, 1 (1994), p. 5.

⁷⁹⁶ On the human rights policies of the EU, see Alston, *op. cit.*, (1999).

⁷⁹⁷ As a consequence of OPEC's oil shocks, it was commented that Lomé I "was probably the closest to mutual dependency that any North-South any agreement ever was ... Lomé was then almost a partnership of equals." Glaser, T., 'EEC-ACP Cooperation: The Historical Perspective,' 120 *The Courier* (1990), pp. 24-26.

aid in light of human rights violations in Uganda under the Idi Amin regime in 1976, highlighted the inability of the Community to react to specific human rights crises in partner countries.⁷⁹⁸ The Vienna Convention of the Law of Treaties (VCLT) 1969 does not provide for the termination of a treaty exclusively on the basis of human rights violations.⁷⁹⁹ According to Riedel and Will, human rights must be included as an essential element of the treaty in order to provide a legal basis for suspension in the event of a violation of these provisions.⁸⁰⁰ Therefore, in the absence of a direct reference to human rights in the treaty, it was not possible to legally suspend Sysmin payments to Uganda and Equatorial Guinea in the 1970s despite on-going human rights violations.⁸⁰¹ For cases of civil war and unrest, the EU has relied on ‘impossibility of performance’ treaty obligations or more generally on the concept of *rebus sic stantibus* (a fundamental change in circumstances),⁸⁰² however, the absence of a specific human rights clause was regarded as a severe limitation on action in this sphere. In response to this crisis, the European Parliament called for the legal aspect of human rights to be strengthened within EC policy.⁸⁰³ This was followed by the issuing of a Memorandum by the Commission for the inclusion of human rights within Lomé II, despite objections from certain ACP states.⁸⁰⁴

In addition, by the 1980s, the European Union had significantly developed its internal position on human rights within the jurisprudence of the ECJ based on the inherent fundamental rights within the constitutional tradition of the Member States,⁸⁰⁵ which in turn influenced its external policies. The need to address the root causes of

⁷⁹⁸ This resulted in the *de facto* suspension of aid and the issuing of the ‘Uganda Guidelines’. See Declaration by the Council on Uganda (‘Uganda Guidelines’), 21st June 1977. See Arts, K., ‘European Community development cooperation policy, human rights, democracy and good governance: at odds or at ease with each other?’, pp. 267-268, from Ginther, K., *et al.*, (eds.), *Sustainable Development and Good Governance*, (Dordrecht, 1995).

⁷⁹⁹ The VCLT of 23rd May 1969, 1155 UNTS 331. The VCLT is not directly binding on EC as it is only open to ratification by states, however, some provisions have become part of customary international law, therefore, is also binding on EC. The EC is not a signatory to the VCLT between States and International Organisations. Riedel and Will, *op. cit.*, (1999), p. 723.

⁸⁰⁰ *Ibid.*, p. 724. According to Articles 60(1) and (2) VCLT, a treaty may be suspended in light of a material breach. According to Riedel and Will, *ibid.*, “such material breaches may consist, for example, in the violation of a provision essential to the accomplishment of the object or purpose of the treaty,” in line with Article 60(3)(b) VCLT.

⁸⁰¹ *Ibid.*, p. 725.

⁸⁰² *Ibid.*, pp. 724-725.

⁸⁰³ Resolution of the European Parliament on human rights in the world for the year 1984 and Community policy on human rights of 22nd October 1985, [1985] OJ C 343, 31st December 1985, para. 5.

⁸⁰⁴ European Commission, Memorandum on the Linking of Economic Aid and Human Rights, COM (1978) 47 fin., (1978). On the failure to include human rights in Lomé II, see Young-Anawaty, A., ‘Human Rights and the ACP-EEC Lomé II Convention: Business as Usual at the EEC,’ 13 *N.Y.U. Journal of Int’l Law & Politics* (1980), pp. 97-98.

⁸⁰⁵ See Case 29/69 *Stauder v. City of Ulm* [1969] ECR 419, Case 44/79 *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727. See also Joint Declaration of Parliament, the Council and the Commission on Human Rights, [1977] OJ C 103, p. 1.

underdevelopment such as the rise in poverty, population growth, decline in food production and the misappropriation of development funds became a concern of Community policy.⁸⁰⁶ Finally, these developments did not occur in isolation as human rights and democratisation initiatives were simultaneously gaining force in the developing world.⁸⁰⁷

In 1989, Article 5 of the Fourth Lomé Convention (Lomé IV) provided a legal basis for promoting human rights in development, however, it did not provide for a suspension clause. Lomé IV emphasised the EU's positive approach to the integration of human rights and development, for example, through political dialogue. In the 1990s, the European Parliament renewed their calls for the inclusion of a human rights clause in all cooperation agreements with third countries. The model established in Article 5 of Lomé IV was deemed inadequate due to the reference to social rights and apartheid, as well as the absence of a non-compliance clause.⁸⁰⁸ These developments thus led to the 'basis clause' as established in the cooperation agreement with Argentina in 1990. According to Article 1(1) of the agreement: "[c]ooperation ties between the Community and Argentina and this agreement in its entirety are based on respect for democratic principles and human rights, which inspire the domestic and external policies of the Community and Argentina." The basis clause was also inserted in other agreements with South America including agreements with Chile, Uruguay and Paraguay.

In line with the growing consensus at the international level on linking human rights and development cooperation from the early 1990s onwards, the declarations of the Council of Ministers indicated a move towards the new trends in development thinking.⁸⁰⁹ In this way, the European Community turned its attention towards the creation of an enabling political environment in which sustainable development could take place. These declarations were followed up in 1991 with the adoption of a resolution on human rights,

⁸⁰⁶ See for example, Pisani, E., 'Comments on the Memorandum on Community Development Policy,' *The Courier*, No. 76 (1982), pp. 49, 50-55.

⁸⁰⁷ For example, African Charter on Human and Peoples' Rights, *opened for signature* on 27th June 1981, O.A.U. Doc. CAB/LEG/67/3/Rev.5 (1981).

⁸⁰⁸ Article 5(2), (3) and (4) of Lomé IV.

⁸⁰⁹ Most notably the Luxembourg Declaration on Human Rights adopted 28th-29th June 1991. See also Dublin Summit in June 1990 on human rights and good governance in Africa and Rome Summit in December 1990 on the promotion of democracy and human rights in external relations.

democracy and development, establishing specific guidelines, procedures and priorities for improving development programmes in order to ensure a common and consistent approach in the promotion of human rights by both the Community and Member States.⁸¹⁰ According to the then Commissioner of Development, respect for human rights and democratic principles are integral aspects of sustainable development, which necessitates “a simultaneous process of democratization and transparent, just and effective government.”⁸¹¹

The November 1991 Resolution of the European Council on human rights, democracy and development emphasised the indivisibility of civil, political and economic, social and cultural rights. It also highlighted the EU’s positive approach to human rights by stating that “the Commission and its Member States will give high priority to a positive approach that stimulates respect for human rights and encourages democracy.”⁸¹² The November Resolution also referred to negative sanctions, thus indicating that the EU would adopt a dual approach to the question of human rights in development.⁸¹³ A dual approach signifies that priority will be given not only to negative conditionality but also to the promotion of human rights in development cooperation policy. It should be noted that the spirit of the November Resolution was in line with the more general post-Cold War trends in OECD thinking as explored in the second chapter of this thesis.

In the following year, the Council Declaration of 11th May 1992 stated that respect for human rights, as contained within the Helsinki Final Act and the Charter of Paris for a New Europe, would form an integral part of cooperation with the agreements between the EC and the Conference for Security and Cooperation in Europe (CSCE). Consequently, a reference to human rights as an ‘essential element’ was included in the new agreements with the Baltic States and Albania. Paving the way for the standard human rights clause, the so-called ‘Baltic clause’ allowed for suspension of the aid agreement in the event of

⁸¹⁰ Resolution of the Council of the Member States of the Member States meeting in the Council of Human Rights, Democracy and Development, 28th November 1991, Bull. EC 11-1991. See also Commission Memorandum to the Council and the Parliament on Human Rights, Democracy and Development Cooperation Policy of March 1991 and European Council Resolution of June 1991, which mentioned relationship between human rights and development, 28th-29th June 1991, Bull. EC 6-1991, Annex V, *Declaration on Human Rights*, at 17-18: ‘all development should be centered on man as the bearer of human rights.’

⁸¹¹ Marin, M., Vice President of the Commission and Commissioner for Development of the European Community, 1991, OJ (Annex 411), 316, 317, 21st November 1991 (Debates of the European Parliament).

⁸¹² Council Resolution 28th November 1991, *op. cit.*

non-compliance with the essential elements of cooperation,⁸¹⁴ thereby fulfilling Article 60(3)(b) VCLT. It was not only included in agreements with the Baltic countries and Albania, but also with Brazil and in the Andean Pact.⁸¹⁵ This clause provided that “the parties reserve the right to suspend this Agreement in whole or in part with immediate effect if a serious breach of its essential provisions occurs.”⁸¹⁶

In subsequent agreements, a modified version of the ‘basis clause’ was included in the agreements between the EC and Romania⁸¹⁷ and Bulgaria.⁸¹⁸ This was known as the ‘Bulgarian clause,’ and it was milder than the Baltic clause,⁸¹⁹ offering wider scope of application and more potential for a positive response to alleged infringement due to its emphasis on consultations.⁸²⁰ Accordingly, it stated that:

If either party considers that the other party has failed to fulfil an obligation under this agreement, it may take appropriate measures. Before so doing, except in cases of special urgency, it shall supply the Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the parties. (...) In the selection of measures, priority must be given to those which least disturb the functioning of this Agreement...⁸²¹

Unlike the Baltic clause, the Bulgarian clause allows for a positive response and is designed to ensure that dialogue continues, even in the event of human rights violations.⁸²² However, it was feared that these provisions could also be used as an excuse for inaction, therefore, it was supplemented in agreements with Russia and

⁸¹³ Simma, *op. cit.*, (1999), p. 582.

⁸¹⁴ Lenaerts, K., and De Smijter, E., ‘The European Community’s Treaty-Making Competence,’ 16 *YBEL* (1996), p. 46.

⁸¹⁵ European Commission, ‘Communication from the Commission to the Council and the European Parliament ‘The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries,’ COM (1995) 216 fin., 23rd May 1995.

⁸¹⁶ Article 21(3) [1992] OJ L 403/2 (Estonia), [1992] OJ L 403/11 (Latvia) and [1992] OJ L 403/20 (Lithuania) respectively. Cited in Riedel and Will, *op. cit.*, p. 728.

⁸¹⁷ Article 119(2), [1994] OJ L 357/2.

⁸¹⁸ Article 118(2), [1994] OJ L 358/3.

⁸¹⁹ Tomaševski, K., *Between Sanctions and Elections*, (London, 1997), p. 48.

⁸²⁰ Riedel and Will, *op. cit.*, (1999), p. 729.

⁸²¹ COM (1995) 216, B.

⁸²² *Ibid.*

Commonwealth of Independent States (CIS) with measures for cases of ‘special urgency’ to allow for immediate suspension in specific cases of non-compliance.⁸²³

Lomé IV (1991-1995) represented a revolutionary step through the inclusion of reference to international human rights treaties and declarations in the Preamble,⁸²⁴ thus, breaking with the previous Convention model, and set in place a new framework in which human rights and the promotion of democratic principles were central elements.⁸²⁵ According to Article 5 of the fourth Lomé Convention:

Cooperation shall be directed towards development centered on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human rights. Cooperation operations shall thus be conceived in accordance with the positive approach where respect for human rights is recognized as a basic factor of real development and where cooperation is conceived as a contribution to the promotion of these rights.

Hence, the Parties reiterate their deep attachment to human dignity and human rights ... The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; and economic, social and cultural rights.⁸²⁶

Whilst the ethos of Lomé I – III reflected the idea that development was considered as a precondition for the fulfillment of human rights,⁸²⁷ the fourth Lomé Convention stated

⁸²³ Riedel and Will, *op. cit.*, (1999), p. 730. This approach was also followed in agreements with Vietnam, South Korea and Tunisia and Morocco in 1995.

⁸²⁴ Fourth ACP-EEC Convention, signed on 15th December 1989, [1989] OJ L 229/3, 17th August 1989. [hereinafter Lomé IV]. The Preamble refers to the Universal Declaration of Human Rights (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). References to human rights, democracy and good governance included: environmental protection (Art. 6, 14), enterprise and service sector development (Titles VIII-IX), cultural development (Arts. 139-140), education and training (Art. 151), scientific and technical Cooperation (Art. 152), strengthening the position of women (Art. 153), and access to health care (Art. 154). See also Joint Declaration on Apartheid (Annex IV to the final act) and on ACP migrant workers and students in the EEC (Annex V to the Final Act).

⁸²⁵ Marantis, *op. cit.*, (1994), p. 2; Hilpold, P., ‘European Development Co-operation at a Cross-roads: The Cotonou Agreement of 23 June 2000 and the Promotion of Good Governance,’ 7 *EFAR* 1 (2002b), p. 60.

⁸²⁶ Article 5 of Lomé IV.

⁸²⁷ Bartels, *op. cit.*, (2005), p. 7.

that human rights were a ‘basic and real factor’ of development.⁸²⁸ According to Hilpold, Article 5 reflects the “anticipatory effects”⁸²⁹ of the move towards Western-style democracy in the post-Cold War international climate still underway. In this respect, “[t]he achievement of high human rights standards was no more the necessary byproduct of the development process but an autonomous goal and constituent element of development itself.”⁸³⁰

In the revision of Lomé IV in 1994, human rights were included as an essential element of cooperation.⁸³¹ This included a non-compliance clause which was similar to the Bulgarian clause as it provided for consultations. In the event of an alleged breach of the ‘essential elements’, consultations must be established by the contracting parties and following the failure of these negotiations, suspension of aid may result.⁸³² Article 366a provided that: “[i]f one party considers the other Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it [...] The consultations shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days”. Lomé IV-bis, thus, allowed for the suspension of cooperation with any ACP country in the event of human rights violations.

The Council Decision of May 1995 recognised the need for uniformity and consistency in the application of human rights clauses within external agreements with third countries,⁸³³ and approved the Commission guidelines that expanded upon the use and application of the human rights clauses with third countries. The human rights clause, which is included in all economic and cooperation agreements, represents a non-negotiable aspect of Community relations with third countries.⁸³⁴ This clause now serves as the standard clause for the Community and its format was codified in the 1995

⁸²⁸ Article 5(1) of Lomé IV.

⁸²⁹ Hilpold, *op. cit.*, (2002b), p. 60.

⁸³⁰ *Ibid.*

⁸³¹ Article 5 of Lomé IV-bis.

⁸³² Article 366a of Lomé IV-bis 1995. Council Decision EC 344/98 of 27th April 1998 concerning the conclusion of the Agreement amending the fourth ACP-EC Convention of Lomé signed in Mauritius on 4th November 1995, [1998] OJ L 156/2, 29th May 1998.

⁸³³ Doc. 7255/96, General Affairs Council. COM (1995) 216 fin.

Communication on the inclusion of respect for human rights and democratic principles in external agreements.⁸³⁵ The standard clause reads as follows: “[r]espect for the democratic principles and human rights inspires the domestic and external policies of the Community and of [third countries] and constitutes an essential element of this agreement.” This clause includes both a substantive element (the ‘essential elements’ clause) and a procedural element (non-compliance provisions). The 1995 Communication provides guidelines for suspension in an effort to improve “consistency, transparency and visibility.”⁸³⁶ It also states that any negative measures should be taken in the “spirit of a positive approach” which should be “based on objective and fair criteria” and aim to “keep dialogue going”.

For over a decade, the EC has included a ‘human rights clause’ in its bilateral trade and cooperation agreements with third countries, a practice which followed international donor trends at the end of the Cold War.⁸³⁷ This includes the technical and financial measures granted through the ALA,⁸³⁸ MEDA,⁸³⁹ TACIS,⁸⁴⁰ CARDS,⁸⁴¹ the OCTs⁸⁴² and trade agreements. The EU’s insistence on the inclusion of a human rights clause as a non-negotiable aspect of cooperation prevented the conclusion of an agreement with

⁸³⁴ Bulterman, M., *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?*, (Gronigen, 2001), p. 3.

⁸³⁵ COM (1995) 216.

⁸³⁶ *Ibid.*, D.

⁸³⁷ According to the EU, there are over 150 agreements containing a human rights clause, although it should be noted 78 of these countries are located within the ACP group. Bartels, L., *Human Rights Conditionality in the EU's International Agreements*, (Oxford, 2005), p. 32.

⁸³⁸ Council Regulation 443/1992 (ALA) *op. cit.* Article 2 states that “[I]n the case of fundamental and persistent violation of human rights and democratic principles, the Community could amend or even suspend the implementation of cooperation with the States concerned by confining cooperation to activities of direct benefit to those sections of the population in need.”

⁸³⁹ Council Regulation 1488/1996 of 23rd July 1996 on financial and technical measures to accompany (MEDA) the reform of economic and social structures in the framework of the Euro-Mediterranean Partnership [1996] OJ L189/1, 30th July 1996. Article 3 states that “[t]his Regulation is based on respect for democratic principles and the rule of law and also for human rights and fundamental freedoms, which constitute an essential element thereof, the violation of which element will justify the adoption of appropriate measures.” Article 16 (introduced in Council Regulation 780/1998 [1998] OJ 113/3) states that “[w]hen an essential element for the continuation of support measures to a Mediterranean partner is missing, the Council may, acting by qualified majority on a proposal from the Commission, decide upon appropriate measures.”

⁸⁴⁰ Council Regulation 99/2000 (TACIS) concerning the provision of assistance to the partner States in Eastern Europe and Central Asia [2000] OJ L12/1. Article 16: “[w]hen an essential element for the continuation of cooperation through assistance is missing, in particular cases of violations of democratic principles and human rights, the Council may, on a proposal from the Commission, acting by qualified majority, decide upon appropriate measures concerning assistance to a partner State. The same procedure may apply as a last resort in cases of a serious violation of the obligations of the partner States as set out in the Partnership and Cooperation Agreements.”

⁸⁴¹ Council Regulation 2666/2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia (CARDS) [2000] OJ L 306/1. Article 5 states that “[r]espect for the principles of democracy and the rule of law and for human and minority rights and fundamental freedoms is an essential element for the application of this Regulation and a precondition of eligibility for Community assistance.”

⁸⁴² Council Decision 822/2001 on the association of overseas countries and territories with the European Community [2001] OJ L314/1. Article 2 states that “[t]he OCT-EC association shall be based on the principles of liberty, democracy and respect for human

Australia, and also prevented a follow-up agreement with China.⁸⁴³ Mexico and South Korea are the only OECD countries that have signed cooperation containing a human rights clause with the EU.⁸⁴⁴

The scope of the EU's powers in the area of development cooperation policy following the Maastricht Treaty was challenged in the case of *Portugal v. Council*.⁸⁴⁵ Portugal applied for an annulment of a Council Decision concerning the conclusion of a partnership and development agreement between the EC and India containing a human rights clause.⁸⁴⁶ The Portuguese government based its claim on several grounds. Portugal argued that Articles 113 and Article 181 (ex Article 130y) did not provide a sufficient legal basis for an agreement containing a human rights clause. In this respect, it argued that an agreement, which contained human rights as an essential element should have been based on Article 308 (ex Article 235) which requires unanimity.⁸⁴⁷ The Portuguese government also argued that the provisions relating to the fundamental rights in the Maastricht Treaty were 'programmatic' and referred to a general objective, but did not confer any specific powers of action on the Community.⁸⁴⁸ In this respect, Portugal claimed that the essential elements clause contained within the agreement with India went beyond the provisions in Article 181 (ex Article 130y), which merely refers to human rights as a general objective.⁸⁴⁹

In its judgment, the ECJ stated that recourse to Article 308 (ex Article 235) is not justified as a legal basis for a measure if another provision of the Treaty gives the Community institutions the necessary power to adopt the measure in question.⁸⁵⁰ In seeking to determine the validity of the Decision, the Court held that Article 177(2) (ex

rights and fundamental freedoms and the rule of law. These principles, on which the Union is founded in accordance with Article 6 of the Treaty on European Union, shall be common to the Member States and OCTs linked to them."

⁸⁴³ On this issue see Fierro, *op. cit.*, (2003), pp. 287-308; See Bartels, *op. cit.*, (2005), pp. 32-35.

⁸⁴⁴ *Ibid.*, (2005), p. 34. Bartels notes that Mexico and South Korea both have developing country status at the WTO.

⁸⁴⁵ Case C-268/94 *Portugal v. Council* [1996] ECR I-6177. See also Peers, S., 'Case C-268/94, *Portugal v Council*,' 35 *CMLR* (1998); Kokott, J. and Hoffmeister, F., 'Portuguese Republic v. Council,' 92 *AJIL* (1998), p. 292.

⁸⁴⁶ EC-India Cooperation Agreement on Partnership and Development, [1994] OJ L 223/24, 27th August 1994. Article 1(1) of the Agreement states that 'respect for human rights and democratic principles constitutes an essential element of the Agreement.' This Decision was based on Articles 113 and 181 (ex 130y of the EC Treaty) and was adopted by the Council acting by QMV after consultation with the Parliament.

⁸⁴⁷ *Portugal v. Council*, paras. 14-15.

⁸⁴⁸ *Ibid.*, para. 16.

⁸⁴⁹ *Ibid.*, para. 17.

⁸⁵⁰ *Ibid.*, para. 21.

Article 130u(2)) “... *requires* the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation” [*emphasis added*].⁸⁵¹ The Court argued that the wording of Article 177(2) (ex Article 130u(2)) demonstrates the importance attached to respect for human rights and fundamental principles and that development cooperation policy must be adapted to the requirement of respect for those rights and principles.”⁸⁵² The ECJ confirmed the validity of the decision and found that the human rights clause was within the objectives of Article 177(2) (ex Article 130u(2)).⁸⁵³

This case confirmed the extent of Community powers under Article 181 (ex Article 130y) for the first time and affirmed the Community’s competence to adopt measures relating to human rights protection, food aid or emergency aid in agreements concluded between the EC and third countries and also its power to enter into international agreements on development matters within its ‘sphere of competence’.

Portugal also questioned the inclusion of activities such as cooperation in the area of intellectual property and the fight against drug abuse, arguing that these were outside the framework of Community development policy and would necessitate the conclusion of a mixed agreement. However, the Court found that an agreement can be considered to be ‘development policy’ as long as its objectives are consistent with those laid out in Article 177 (ex Article 130u).⁸⁵⁴

4.4. Human Rights and the Increasingly Political Dimensions of EU Aid

From the above depiction of the changing trends in EU development cooperation policy, it is evident that the previous emphasis on non-political, technical assistance to developing countries underwent a profound shift in the context of EU relations with the

⁸⁵¹ Ibid., para. 23. According to the Court, “by declaring that ‘Community policy (...) shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms,’ Article 130u(2) *requires* the Community to take account of the objective of respect for human rights when it adopts measures in the field of development cooperation.”

⁸⁵² Ibid., para. 24.

⁸⁵³ Ibid., para. 29.

⁸⁵⁴ Ibid., paras. 60-68.

ACP states. The adoption of the human rights clause in Lomé IV illustrated that development aid would be directed towards the promotion of human rights and democratic principles as an essential element of the partnership, whilst Lomé IV-bis provided a legal basis for the suspension of cooperation with ACP members in the event of alleged violations of human rights. The nature of engagement between the EU and its ACP partners had become overtly political through conditionality procedures and the commitment to provide aid for political reform. According to Alston and Weiler, the EU had previously been reluctant to embrace human rights and democracy as an “authentic dimension of the union.”⁸⁵⁵ As stated above, since the 1990s, the EU has focused its efforts on ensuring the inclusion of human rights within association agreements with developing countries, and also within its cooperation with the countries of Central and Eastern Europe (PHARE) and with the New Independent States and Mongolia (TACIS). In recent years, it was recommended to the Commission that the titles PHARE and TACIS should be dropped in favour of renaming them the ‘EU Democracy Programme’.⁸⁵⁶ For various reasons,⁸⁵⁷ however, this approach was rejected. According to Alston and Weiler, this act was indicative of EU’s initial reluctance to accept that an explicit democracy programme should be undertaken by the Union.⁸⁵⁸

In recent years, it has become clear that the EU has abandoned its initial reluctance to explicitly recognise its role in the protection of human rights through the adoption of an overtly political approach. The most compelling example of this shift in approach can be found in the mandate of the European Initiative for Democracy and the Protection of Human Rights.⁸⁵⁹ Founded in 1994, this single budget line (known as the EIDHR) was created to support human rights, democratisation and conflict prevention in the context of official development assistance to the ACP countries and in other third countries. Activities under the EIDHR are primarily carried out by non-governmental organisations

⁸⁵⁵ Alston and Weiler, *op. cit.*, (1999), p. 693.

⁸⁵⁶ See ‘Evaluation of the Phare and Tacis Democracy Programme 1992 – 1997,’ s. 6(1). Source: <http://europa.eu.int/comm/dg1a/evaluation/pdtp>

⁸⁵⁷ These objections included different legal bases of the separate programmes and the specific historical origins. Alston and Weiler, *op. cit.*, (1999), p. 693.

⁸⁵⁸ *Ibid.*

⁸⁵⁹ EIDHR funding was initially placed under Chapter B7-70 of the Community budget. It began in 1994 with a budget of €59.1 million. By 1998, the amount allocated had risen to €97.4 million, (Alston and Weiler, *op. cit.*, (1999), p. 690). It remained relatively unchanged in 2000 at €97.3 million. For a detailed report of 2000 budget see: http://europa.eu.int/comm/external_relations/human_rights/doc/

and international organisations and the budget line was created in response to an initiative of the European Parliament, which amalgamated a series of budget headings under Chapter B7-70.⁸⁶⁰ According to official sources, in contrast with other EC instruments, the EIDHR is advantageous as it is complementary to existing programmes in the area and provides a legal basis for human rights programmes without the consent of the host government.⁸⁶¹ It also provides an opportunity for the EU to promote activities that may be politically controversial for some Member States, as the EIDHR is perceived to be motivated by more impartial concerns.⁸⁶² However, it could also be contended that these ‘advantages’ are contrary to the spirit of ‘partnership’ between the EU and the ACP countries, and furthermore, reinforce the idea of support for human rights activities as a response to human rights violations rather than positive measures to support human rights initiatives. The following section discusses the provisions relating to human rights in the successor to the Lomé Conventions and the changing nature of the political dimensions of EU-ACP relations.

5. The Cotonou Agreement and Changing Trends in EU Development Cooperation Policy

The Cotonou Agreement, which was signed on 23rd June 2000, continues the long-standing practice of EU-ACP relations. The agreement aims ‘to expedite the economic, cultural and social development of the ACP States, with a view to contributing to peace and security and to promoting a stable and democratic political environment’. The objectives of the Cotonou Agreement focus on poverty reduction in line with the principles of sustainable development and the gradual integration of the ACP countries into the world economy.⁸⁶³ The political dimensions of cooperation can be seen from the

⁸⁶⁰ B7-700 (CEE, republics of the former Yugoslavia), B7-701 (NIS and Mongolia), B7-702 and B7-7021 (ACP Countries), B7-703 Latin America, B7-704 (human rights organisations), B7-705 (MEDA Countries), B7-706 (International Criminal Tribunals), B7-707 (Asia), B7-709 (democratic transition and electoral processes), B7-02, 7021, 703, 704, 705, 707 (abolition of death penalty). The background to the legal basis for this budget line is described in chapter four of this thesis. See section 4.4 above on Council Regulations 975/1999 and 976/1999. EIDHR is now included in Chapter 19.04 of the EU Budget. See chapter four of this thesis, section 3.3.2 for the updated budget lines.

⁸⁶¹ European Commission, ‘Annual Report on the Implementation of the European Commission’s External Assistance,’ (2000), p. 20. Source: http://europa.eu.int/comm/europeaid/reports/aidco_2000_annual_report_horizon_en.pdf

⁸⁶² Ibid.

⁸⁶³ Article 1, Cotonou Agreement 2000.

five principle pillars of this accord, which include: an enhanced political dimension including political dialogue; a more integrated approach to poverty reduction; the increased involvement of civil society through decentralised cooperation; a new trade framework; and reform of financial cooperation based on needs and performance of individual ACP States.

Before moving to a discussion of the human rights aspects of the Cotonou Agreement, several innovative features should be mentioned. This relates to the reform of financial cooperation mechanism, which is now allocated on the basis of needs and performance. The Mid-Term Reviews (MTRs), which are scheduled to take place every five years, allow for the reallocation of funding on the basis of performance and may include an analysis of the institutional reforms undertaken by the ACP states.⁸⁶⁴ The Cotonou Agreement provides for increased involvement of civil society through decentralised cooperation. Non-state actors are also eligible to apply for EDF funding, however, this situation does not detract from the highly intergovernmental nature of EU-ACP cooperation. In principle, non-state actors such as NGOs, the private sector and civil society are eligible to obtain up to 15% of EDF funding,⁸⁶⁵ however, this is unlikely to happen in practice due to the overriding authority of ACP governments for the approval of all financial operations.⁸⁶⁶

The following section discusses the position of human rights within the Cotonou Agreement to assess any divergences from the previous Lomé system. The final section addresses some of the innovations with respect to political conditionality, focusing in particular on good governance, which has emerged as a key priority in EU development policy.

⁸⁶⁴ See Annex IV, *ibid.*

⁸⁶⁵ European Commission, *The European Development Fund in a Few Words*, (February 2002), p. 19. Source: http://europa.eu.int/comm/development/doc/fed_en.pdf#zoom=100 For further reading see Carbone, M., 'The Role of Civil Society in the Cotonou Agreement,' from Babarinde and Faber, *op. cit.*, (2005).

⁸⁶⁶ Article 35 of Annex IV of the Cotonou Agreement provides that financial operations require the approval of the NAO. This should be carried out in close cooperation with the Head of the EU Delegation (Article 35(1)(a)). The NAO is appointed by the ACP government in question and is normally the Minister of Finance. Hoebink, *op. cit.*, (2005), p. 150.

5.1. Human Rights and the Cotonou Agreement

The political dimensions of EU-ACP relations have been consolidated and strengthened over the past decade, in particular, through enhanced procedures on political dialogue and good governance.⁸⁶⁷ Human rights were maintained as an essential element of cooperation in the new ACP-EU Cotonou Agreement of 2000. The human rights clause in the Cotonou Agreement contains both a substantive and a procedural element. The substantive element is contained within Article 9, which states that ‘respect for human rights, democratic principles and the rule of law are considered essential elements of the partnership.’ On the procedural side, Article 96 allows for the suspension of cooperation in the event of serious violations of the essential elements by the State Parties. Article 96 reiterates the EU’s emphasis on positive measures by including provisions on political dialogue and consultations, and by stating that suspension is a measure of last resort. In this regard, in the course of regular political dialogue, a Party to the Agreement may initiate consultations if it is believed that the essential elements are not being respected.⁸⁶⁸ There is an exception to this in cases of “special urgency”, which allow for immediate action in the event of serious and flagrant abuses of one of the elements contained within Article 96(2).⁸⁶⁹ If agreement is not reached during the consultation period or in “cases of special urgency”, “appropriate measures” may be taken to allow for the suspension of the Agreement, in whole or in part.⁸⁷⁰

The political component of development cooperation has been intensified with the entry into force of the Cotonou Agreement 2000 through the introduction of good governance as a ‘fundamental element’ of cooperation (Article 97). Good governance is described as a fundamental element in Article 9 and measures may also be taken such as consultation and eventual suspension in the event of serious corruption, which constitutes a violation of the agreement.⁸⁷¹

⁸⁶⁷ Arts, K., ‘Political Dialogue in a ‘New’ Framework,’ p. 163, from Babarinde and Faber, *op. cit.*, (2005).

⁸⁶⁸ Article 96(2), Cotonou Agreement. Consultations must begin within 15 days and may last for no longer than 60 days.

⁸⁶⁹ *Ibid.* In this case, the Party initiating the procedure must inform the other Party and inform the Council of Ministers. Consultations may follow at the request of the Party in order to resolve the situation. Procedures are also provided for carrying out these consultations in Article 96(2)(a).

⁸⁷⁰ Article 96(2). “Appropriate measures” are described as those in accordance with international law and should be taken in proportion to the violation in question.

⁸⁷¹ The opening of consultation is provided for in Article 97 of the Cotonou Agreement.

The Internal Agreement lays down modalities for consultations and suspension under Articles 96 and 97. These provisions are largely identical to the previous ones under Lomé IV.⁸⁷² According to the Internal Agreement, the Council is authorised to adopt common positions within the Council of Ministers or Committee of Ambassadors, acting on unanimity (following a draft from a Member State or the Commission).⁸⁷³ In the event of recourse to the non-execution procedures, the Member States are required to use qualified majority voting for acts (including the invitation to hold consultations and partial suspensions)⁸⁷⁴ and unanimity for full suspension.⁸⁷⁵

Article 9(1)(2) of the Cotonou Agreement reaffirms the view that human rights constitute an integral part of sustainable development⁸⁷⁶ and the Partners agree to actively promote respect for the essential and fundamental elements of cooperation.⁸⁷⁷ Whilst this agreement consolidates the position of human rights in EU-ACP relations, Cotonou also introduced more expansive provisions on the broader political dimensions of the partnership. In chapter two of this thesis, it was argued that the human rights activities of donors should not be viewed in isolation from the broader political reform agenda, therefore, the following section examines the new provisions and assesses their potential impact on the position of human rights in EU-ACP relations.

5.2. The Changing Nature of Political Conditionality: Good Governance and EU-ACP Relations

The Cotonou Agreement introduced good governance as a fundamental element of cooperation. This move is in line with the recent consensus among donors on ‘development compacts’ as described in chapter one, which seek to couple good

⁸⁷² Heliskoski, *op. cit.*, (2001), p. 236.

⁸⁷³ Article 1 of the Internal Agreement on measures to be taken and procedures to be followed for the implementation of the Cotonou Agreement, [2000] OJ L 317/376.

⁸⁷⁴ Article 3(1) and Article 2 of Annex to the Internal Agreement. Internal Agreement on the financing and administration of Community Aid under the Cotonou Agreement, [2000] OJ L 317/355.

⁸⁷⁵ *Ibid.*

⁸⁷⁶ Article 9(1)(2) of the Cotonou Agreement.

⁸⁷⁷ Article 9(4), *ibid.*

governance conditionality and poverty reduction targets. Furthermore, respect for good governance in the interests of ensuring macro-economic stability is becoming increasingly more relevant for the EU in light of its preference for direct financing instruments to deliver aid to developing countries, such as budget support.⁸⁷⁸ Whilst the aims of good governance conditionality are in line with the general objectives of political conditionality, it should be noted that there continues to be considerable controversy on the issue of good governance conditionality in the literature.

Although the primary aim of EU aid is cited as poverty alleviation,⁸⁷⁹ empirical evidence points to the gradual diminution in the volume of aid to the least developed countries (LDCs). The reduction of aid to the least developed countries is linked to the concept of 'aid fatigue', which signifies an unwillingness on behalf of the taxpayers of donor countries to fund regimes which are considered to have weak and corrupt governance systems when the wider society suffers.⁸⁸⁰ This is witnessed in the reduction of aid from one third of OECD donor's GNP to 0.23% in the last decade.⁸⁸¹ Although there continues to be a strong contribution to social infrastructure and the provision of social services, such as health, education and water in developing countries,⁸⁸² Bonaglia confirms that recent trends indicate a decrease in aid from the 'poorest of the poor'.⁸⁸³

In response to the phenomenon of aid fatigue, the issue of good governance has become a primary concern in development policy. In addition, the introduction of good governance conditionality within the Cotonou Agreement 2000 represented a major innovation in cooperation with ACP countries. As a result of a compromise between the contracting parties, it was not included as an essential element of partnership, but instead as a 'fundamental element'. Through its inclusion, the EU aims on the one hand, to demonstrate a commitment to good governance and active dialogue on the basis of the

⁸⁷⁸ It should be noted that within the country strategy papers, roughly half of the A envelope is earmarked for support to the macro-economic framework of ACP countries, whilst support for human rights, democracy and the rule of law rarely amount to more than 6% of funding and often this amount is far inferior. Interview with Vanessa Nagel-Dick, EU Delegation Kenya, Nairobi, 5th October 2004.

⁸⁷⁹ Declaration of the Council and the Commission of 20th November 2000 on the EC's Development Policy based on the Communication from the Commission to the Council and the European Parliament of 26th April 2000 on the same subject.

⁸⁸⁰ European Commission, 'Development with the least developed countries: Fighting Poverty,' (Luxembourg, 2001), p. 15.

⁸⁸¹ Ibid.

⁸⁸² Cox, A. and Chapman, J., *The European Community External Cooperation Programmes: Policies, Management and Distribution*, (London, 1999), pp. 53-54.

partnership agreement, while on the other hand, it establishes a specific consultation procedure in cases of serious corruption which may constitute a violation of the agreement and thus lead to suspension.⁸⁸⁴ According to the EU, good governance conditionality constitutes:

...a real innovation, both in the EU-ACP context and in international relations. This procedure will be applied not only in cases of corruption involving [European Development Fund] money but also more widely, in any country where the EC is financially involved ... By adopting such a provision in their partnership agreement, the EU and the ACP states are together sending a clear and positive signal that will doubtlessly be appreciated by European taxpayers and investors, and by the legitimate beneficiaries of aid.⁸⁸⁵

However, the ACP States were more hostile to the introduction of good governance requirements as: “[they] found them to be unbalanced as a result of the overemphasis given to EU objectives, particularly political objectives, while those of the ACP – such as development – were often ignored. Some attempt was made to remedy this criticism but the text is still unbalanced with EU objectives not only repeated *ad nauseam* but often elaborated whilst those of the ACP, such as the arms trade and the EU’s role in this, do not merit attention.”⁸⁸⁶

Good governance and human rights are interrelated concerns and the EU has often defined the former term as encompassing respect for the latter.⁸⁸⁷ According to Hilpold, the inclusion of good governance may represent an attempt to overcome the difficulties in making the governments of developing countries directly accountable for breaches of human rights and democratic principles.⁸⁸⁸ However, although the notion of ‘good governance’ is widely used, there is little consensus on its definition from a legal

⁸⁸³ Bonaglia, F., Goldstein, A. and Petito, F., ‘Values in EU Global Action: The Case of the Development Cooperation Policy,’ Paper presented at the Forum on the Problems of Peace and War, European University Institute, Florence, 25th-26th October 2002, p. 40.

⁸⁸⁴ The opening of consultations in serious cases of corruption is provided for in Article 97 of the Cotonou Agreement 2000, *op. cit.*

⁸⁸⁵ European Commission, ‘The New ACP-EU Agreement,’ pp. 3-4. Source: http://europa.eu.int/comm/development/document/acp_eu_agreement_en.htm Quoted in Arts and Dickson, *op. cit.*, (2004), pp. 10-11.

⁸⁸⁶ ACP Secretariat, ‘Press release on the occasion of the successor agreement to the Lomé Convention,’ (2000), p. 2. Source: http://www.acpsec.org/gb/press/037900_e.htm

⁸⁸⁷ EU Commission, Communication to the Council and the European Parliament, COM (1998) 146 fin., 12th March 1998.

perspective. Furthermore, as the term is most often used in soft law and non-binding instruments, it remains impossible to delineate clear obligations and ensure accountability with regard to respect for good governance.⁸⁸⁹ In this way, “good governance is far more the expression of a political programme directed at making development dependent on the respect of certain basic values, rather than expression of such values itself.”⁸⁹⁰

At the same time, it should be noted that democracy, human rights and the rule of law are enshrined as ‘essential elements’ and good governance is included as a ‘fundamental element of cooperation’, thus indicating that good governance is perceived as a ‘distinct’ yet interrelated facet of political conditionality in EU-ACP relations. According to Article 9(3), good governance is defined as:

the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.⁸⁹¹

In addition, it appears that the EU correlates a lack of respect for good governance with ‘serious cases of corruption’, thus, adopting a narrow definition of the failure to meet good governance requirements.⁸⁹² In this regard, Article 9(3) further states that: “...the Parties agree that only serious cases of corruption, including acts of bribery leading to such corruption, as defined in Article 97 constitute a violation of that element.” This includes any case of serious corruption in a particular country and not simply those involving European Union funds.⁸⁹³

⁸⁸⁸ Hilpold, *op. cit.*, (2002b), p. 67.

⁸⁸⁹ *Ibid.*, pp. 69 and 70.

⁸⁹⁰ *Ibid.*, p. 71.

⁸⁹¹ Article 9(3) of the Cotonou Agreement 2000.

⁸⁹² See chapter two of this thesis on mainstream definitions of good governance, as well as human rights, democracy and the rule of law.

⁸⁹³ COM (2003) 615, para. 34, p. 11.

According to Arts and Dickson, caution should be exercised in this regard as good governance lacks a legal basis in international law and doubts have been raised as to whether it constitutes an international legal principle.⁸⁹⁴ In order to comply with the Vienna Convention on the Laws of Treaties, it was shown above that the human rights clause was introduced to incorporate human rights as an ‘essential element’ of EU external relations and thereby provide a legal basis for suspension.⁸⁹⁵ Due to the failure to reach agreement on the inclusion of good governance as an essential element, the EU sought to reconcile this issue by including good governance as a ‘fundamental element’. However, it is clear that non-compliance with the good governance requirements may ultimately give rise to the suspension of EU-ACP cooperation,⁸⁹⁶ thereby raising the question of the EU’s compliance with international law.

In light of the controversy surrounding good governance conditionality, it is argued that this subject merits greater attention. In the following section, the rationale behind the trends towards good governance conditionality will be elaborated upon, including the recent debate on development compacts, the EU’s increasing emphasis on direct budget support and convergence between the EU and the World Bank on the poverty reduction strategy papers.

As mentioned in the second chapter of this thesis, the issue of good governance has become increasingly prioritised in donor development policies as a whole due to the recent emphasis upon development compacts. Within the development compact approach, donors link the provision of aid to specific good governance requirements and poverty reduction objectives, as laid down in the Millennium Development Goals (MDGs). This consensus can be traced to the agreement among Heads of State on the role of good governance for development at the Monterrey Summit in 2002, along with the

⁸⁹⁴ Arts and Dickson, *op. cit.*, (2004) p. 10; Arts, *op. cit.* (2000), pp. 40-41 and 50; Hilpold, *op. cit.*, (2002b), p. 69.

⁸⁹⁵ Riedel and Will, *op. cit.*, (1999), p. 724. See section 4.2 above.

⁸⁹⁶ According to Article 97(1), a violation of good governance provisions, defined as a ‘serious cases of corruption’. This may give rise to consultations and the adoption of “appropriate measures” Article 97(2). In light of a failure of these consultations, suspension may take place as a last resort. Article 97(3), Cotonou.

central role of the MDGs.⁸⁹⁷ In this regard, the EU has followed broad donor government trends as it has recently highlighted the role of good governance in a recent communication, which was adopted by General Affairs and External Relations Council (GAERC) on 17th and 18th November 2003.⁸⁹⁸ It has also developed a core set of indicators to measure compliance with the Millennium Development Goals.⁸⁹⁹

In its definition of governance, the EU notes both the distinction and overlap between good governance and human rights, whilst at the same time, it recognises that there is no internationally agreed definition of the term. In this regard, it is stated that “governance concerns the state’s ability to serve its citizens. Such a broad approach allows conceptually to disaggregate governance and other topics such as human rights, democracy or corruption...”⁹⁰⁰ The terminology of ‘policy dialogue’ (as opposed to political dialogue) also features in the EU’s promotion of good governance.⁹⁰¹ This approach seeks to move beyond the notion of dialogue as simply a means of resolving problems between donors and developing countries, but instead as an on-going process of reform and creating an enabling environment for growth.

5.2.1. EU Financial Instruments in Third Countries: Sector-wide Approaches, Budget Support and the Primacy of Good Governance

The issue of good governance conditionality is also a particularly pertinent issue in the context of EU development policy due to the financial instruments that the EU increasingly seeks to use in its delivery of aid. Firstly, the EU seeks to promote sector-wide approaches (SWAs) in the delivery of development aid to move away from support to *ad hoc* projects that characterised development strategies in previous decades. As its name suggests, this approach involves the funding of a specific sector through a coordinated donor response to reduce transaction costs, ensure direct cooperation with the

⁸⁹⁷ Ibid., p. 24. The Monterrey Consensus was adopted on 22nd March 2002 at the Monterrey Summit on International Conference on Financing for Development’, Mexico; United Nations, ‘Final Outcome of the International Conference on Financing for Development’, A/CONF/198..., item 11. 1st March 2002.

⁸⁹⁸ Ibid., p. 25.

⁸⁹⁹ Ibid., p. 18. This includes ten indicators which are derived from over 48 MDG indicators. See also COM (2003) 615, *op. cit.*

⁹⁰⁰ COM (2003) 615, *op. cit.*, p. 3.

government and to avoid overlapping programmes. Funding instruments such as direct budget support to governments and basket funding are often used to implement sector-wide approaches.⁹⁰² The use of sector-wide approaches is also amenable to the promotion of good governance as it may be mainstreamed through programmes such as health and transport and it can also involve specific institution building programmes (such as public sector reform and judicial reform).⁹⁰³

In the area of budget support, the question of good governance conditionality is particularly relevant. In recent years, the EU has embarked on the provision of direct budget support to the ACP countries as a means of supporting poverty reduction.⁹⁰⁴ The European Commission first expressed its desire to move from programme aid to budget support in the Green Paper on the future of Lomé.⁹⁰⁵ According to the EU, direct budget support has the advantage of reducing transaction costs for ACP countries and achieving coherence with other donors. It also provides for greater ownership of development aid and contributes to creating macro-economic stability as developing countries are able to anticipate the amount of external resources that will be added to their budget, thus allowing the earmarking of donor funds for specific policies from a budget rather than *ad hoc* programmes.⁹⁰⁶

By 2004, almost one-third of the European Development Fund for the ACP countries was channeled through sectoral and budget support, and good governance conditionality as a precondition for the disbursement of this type of assistance.⁹⁰⁷ In addition, there is an increase in funds specifically earmarked to meet the good governance requirements.⁹⁰⁸ In order to move from a project approach to direct budget support, compliance with World Bank/IMF economic governance conditionalities is also a prerequisite for EU

⁹⁰¹ Ibid., section 2.3, p. 7.

⁹⁰² Ibid., section 2.8, pp. 12-13. Basket funding consists of a funding instrument in which donors voluntarily contribute to a particular fund in order to take collective action on a particular issue and/or to reduce transaction costs. This fund is usually managed by a third party financial management agent in order to ensure transparency and accountability.

⁹⁰³ Ibid., p. 12.

⁹⁰⁴ It should be noted that the Stabex and Sysmin instruments constituted direct payments, however, direct budget support refers to direct financial contributions to a particular government. Van Reisen, *op. cit.*, (1999), pp. 117.

⁹⁰⁵ COM (1996) 570.

⁹⁰⁶ European Union, Annual Report 2003 from the Commission to the Council and the European Parliament on the EC Development Policy and the Implementation of External Assistance in 2002, COM (2003) 527 fin., 3rd September 2003, p. 47.

⁹⁰⁷ EU Commission, Annual Report 2004, *op. cit.*, p. 91.

⁹⁰⁸ Ibid., p. 93.

development policy. In this regard, before an ACP country is permitted to receive budget support from the EU, a poverty reduction strategy paper (PRSP) must be in place, thus, ensuring compliance with the macro-economic requirements of the international financial institutions.⁹⁰⁹ Following compliance in the area of macro-economic conditionality, the ACP government is also expected to meet objectives relating to poverty reduction.⁹¹⁰

5.2.2. The Nexus between the EU and the International Financial Institutions: Poverty Reduction Strategy Papers (PRSPs)

As mentioned in the first chapter of this thesis, good governance conditionality has become a staple feature of the policies of the international financial institutions. This relates, in particular, to the economic aspects of good governance conditionality due to the strict mandate of the Bretton Woods institutions, which restricts interference in the political affairs of developing countries. The increasing convergence between the EU and the World Bank/IMF has also been noted in recent times. According to the EU, the move towards direct budget support necessitates compliance with strict macro-economic conditionality and therefore, it has begun “scaling up collaboration with the international financial institutions”.⁹¹¹ In 2003, a joint communication was issued to the staff of the EU and the World Bank on the need to align budget support to national PRSPs.⁹¹² The EU has also drafted its country strategy papers in line with the poverty reduction strategies or interim strategies where they exist.⁹¹³ This was initiated by the former Development Commissioner in 2000, when he stated that “support for endorsed PRSPs should over time become the central focus of Commission country strategies”.⁹¹⁴

Cooperation between the EU and the international financial institutions is not a novel aspect of EU development policy, as the EU has previously offered support for the

⁹⁰⁹ Ibid., p. 94.

⁹¹⁰ EU Annual Report 2004, *op. cit.*, p. 21.

⁹¹¹ Ibid., p. 49.

⁹¹² Ibid., p. 49; EU Annual Report 2003, *op. cit.*, p. 175.

⁹¹³ Ibid., p. 50.

⁹¹⁴ Nielsen, P., ‘Letter to Michel Camdessus, Managing Director IMF’, B2(00)D/2999. Source: http://europa.eu.int/comm/development/sector/poverty_reduction/index.htm

structural adjustment policies of the World Bank.⁹¹⁵ This occurred firstly in the third Lomé Convention as support for balance of payments was initiated due to the hardships endured by the population as a result of social sector cutbacks arising from macro-economic conditionality measures.⁹¹⁶ Support for structural adjustment was also included in Lomé IV and furthermore, in Article 67 of the Cotonou Agreement. The EU has been willing to point out the negative social impact of structural adjustment. For example, in 1988, the EC adopted a resolution on structural adjustment, noting that these policies should be tailored to individual countries and should also take note of the social impact of these reforms.⁹¹⁷ This was followed by another resolution in 1995, which sought to further highlight the social impact of structural adjustment and requested that the European Commission should give more priority to the social dimensions of cooperation in the implementation of the Lomé Convention.⁹¹⁸ In a similar way, Article 67(3) of the Cotonou Agreement refers to the economic, social and political hardships that may result from structural adjustment.

As mentioned in the first chapter of this thesis, the poverty reduction strategy (PRSP) process has replaced the structural adjustment programmes with a new approach based on country ownership, governance and institution building and poverty reduction. However, as shown in the recent work of Stewart and Wang, the extent to which the new PRSP approach marks a break with the past is open to question.⁹¹⁹ Furthermore, these authors also noted the lack of participation, which undermines the alleged ownership of these strategies. The European Commission has also noted the discrepancies between rhetoric and practice in the area of participation.⁹²⁰ In light of the increasing convergence between EU and WB/IMF policies, Brown begs the question of whether EU development policy is

⁹¹⁵ Article 67, Cotonou Agreement 2000. See also Brown, *op. cit.*, (2004), pp. 35-38.

⁹¹⁶ Support for structural adjustment had not been introduced prior to Lomé III due to disagreement among the Member States. Van Reisen, *op. cit.*, (1999), p. 117.

⁹¹⁷ Council Doc. 6453/89. Quoted *ibid.* See also Council Doc. 6038/92, May 1991.

⁹¹⁸ European Council, 'Resolution on Structural Adjustment,' 1995, Doc. 7711/95. Quoted *ibid.*

⁹¹⁹ Stewart, F. and Wang, M., 'PRSPs within the Human Rights Perspective,' from Alston, P. and Robinson, M., *Human Rights and Development: Towards Mutual Reinforcement*, (Oxford, 2005); Stewart, F. and Wang, M. 'Do PRSPs Empower Poor Countries and Disempower the World Bank, or is it the Other Way Round,' *QEH Working Paper Series*, WP No. 18, University of Oxford, (May 2003).

⁹²⁰ Brown, *op. cit.*, (2004), p. 37; European Commission, 'Note to heads of delegation, heads of unit and desk officers: poverty reduction strategy papers: guidance notes', B2(00)D/4371, 2000. Source: http://europa.eu.int/comm/development/sector/poverty_reduction/index.htm

moving from ‘uniqueness’ to ‘uniformity’.⁹²¹ In addition, whilst the EU may have sought to mitigate the hardships imposed by structural adjustment in the past, at least at a rhetorical level, the current nexus between the EU and the WB/IMF strategies may illustrate that this is no longer a priority, or even a possibility.⁹²²

5.2.3. The Cotonou Agreement and the Future of EU Development Policy: ‘From Uniqueness to Uniformity’?⁹²³

As a final note, this chapter considers the future of EU development cooperation, including the prospects for maintaining the special relationship with the African, Caribbean and Pacific (ACP) countries. As noted throughout this chapter, the strong legal basis for human rights and political conditionality has led many commentators to remark on the uniqueness of EU development policy.⁹²⁴ However, in the recent publication by Arts and Dickson, the uniqueness of EU development policy has been called into question.⁹²⁵ Firstly, as noted above, there is increasing convergence between the EU and the international financial institutions. Secondly, during the negotiations of the successor to Lomé IV, the EU illustrated that it was willing to bring EU-ACP trade arrangements in line with the requirements of the World Trade Organisation (WTO). In this regard, it broke with the previous relationship between the EU and ACP countries as the issue of reciprocity became a central element of the new partnership agreement and it was agreed that the trade preferences that had been granted through the Lomé system would be gradually phased out.⁹²⁶ This was partly due to the unsatisfactory outcomes from the system of non-reciprocal trade preferences⁹²⁷ and at the same time, it emerged as a result of the new obligations arising from the creation of the WTO.⁹²⁸

⁹²¹ Ibid., p. 17 *et seq.*

⁹²² Ibid., p. 37.

⁹²³ Ibid., p. 17.

⁹²⁴ Arts, *op. cit.*, (2000).

⁹²⁵ Arts, and Dickson, *op. cit.*, (2004).

⁹²⁶ Lomé I-IV allowed for the duty-free entry of primary commodities. Separate Protocols to cover sugar, beef, veal and bananas were attached to the Conventions.

⁹²⁷ Dickson, A.K., ‘The Unimportance of Trade Preferences,’ from Arts and Dickson, *op. cit.*, (2004).

⁹²⁸ The EU’s preferential access to bananas from ACP countries was found to be in violation of WTO law. See Huber, J., ‘The Past, Present and Future ACP-EC Trade Regime and the WTO,’ 11 *EJIL* (2000), p. 430; Abass, A., ‘The Cotonou Trade Regime and WTO Law,’ 10 *ELJ* 4 (2004), p. 443.

Consequently, the Cotonou Agreement does not allow for the continuation of non-reciprocal trade between the EU and the ACP countries. Although Stabex and Sysmin will continue until 31st December 2007, the EU-ACP trade relations will be replaced by the Economic Partnership Agreements (EPAs), which are compatible with WTO rules.⁹²⁹ Within this context, the European Commission has emphasised the importance of building regional markets and south-south cooperation, rather than bilateral trade agreements as promoted by the US. For this reason, Sustainability Impact Assessments (SIA) are being carried out to monitor the potential economic, social and environmental impact of the EPAs. The first phase of these assessments in the ACP countries was completed by December 2003.⁹³⁰ There is also an alternative option for least developed countries (LDCs) through the Everything But Arms (EBA) initiative.⁹³¹ Therefore, in light of the removal of the Lomé trade preferences, the previously unique policy devised in the 1970s has gradually succumbed to the exigencies of compliance with international obligations.

Finally, the special relationship between the EU and the ACP group itself may be uncertain due to the creation of new regional trading blocs that are due to come into effect in 2008.⁹³² The division of the ACP group into regional trading blocs may have an impact on the strong collective voice of the ACP group. Regional trading blocs may have less incentive to negotiate as a collective if their economic agendas should differ. In this way, the long-term prospects for the African, Caribbean and Pacific countries as a specific group remains unclear.⁹³³ On the one hand, this development may provide new opportunities for the ACP group to move into the centre of political discussions within EU external relations generally and to bring attention to the perhaps marginalised position of the ACP countries within the EU system. It may also allow the EU to modernise its development policy by moving away from a system which emerged from

⁹²⁹ On the impact of EPAs, see ECDPM, 'Implementing the New Partnership Agreement,' Lomé Negotiating Brief No. 8, (Maastricht, 2000).

⁹³⁰ EU Annual Report 2004, *op. cit.*, p. 19.

⁹³¹ LDC ACP states can opt for the continuation of the EBA which amounts to non-reciprocal trade preferences for almost all products except arms and temporarily some temperate zone agricultural products such as sugar. Babarinde and Faber, *op. cit.*, (2005), p. 8.

⁹³² For further reading see Faber, G., 'Economic Partnership Agreements and Regional Integration among ACP Countries,' pp. 85-110 from Babarinde and Faber, *ibid.* In addition, on the loss of privilege of the ACP group, see McMahon, J., 'The Negotiation of the Cotonou Agreement: Negotiating Continuity or Change?', pp. 62-3, from Babarinde and Faber, *ibid.*

⁹³³ At the same time, it should be remembered that the ACP group exists independently as an international organisation by virtue of the Georgetown Agreement on the Organisation of the African, Caribbean and Pacific Group of States, signed on 6th June 1975.

former colonial ties to a more global agenda and to undertake enhanced cooperation in other developing countries, for example, in Asia. On the other hand, however, there has been some concern voiced that sub-Saharan Africa may be sidelined in external relations at the expense of common foreign and security policy concerns and those of the new Neighbourhood Policy.⁹³⁴ Furthermore, as the EU seeks to emphasise issues such as performance and reciprocal obligations, the security for funding for the ACP countries will be more difficult to achieve, in contrast to the previous system under the Lomé Conventions.

5.3. A Response to Claims of Uniformity and the Consolidation of Human Rights in EU Development Cooperation Policy and Relations with the ACP States

A brief response will be given to the claims that EU-ACP cooperation has moved from ‘uniqueness to uniformity’. As described above, the shift towards compliance with the exigencies of WTO membership is evident through the removal of the system of preferential treatment for the ACP group, which had been a distinctive feature of relations between the Parties from the onset. Furthermore, enhanced coordination with the international financial institutions also adds to the trend towards conformity. In response to the claims that the EU is moving from uniqueness to uniformity, it is clear that the novelty of the Lomé relationship has been replaced with a search for conformity. According to the EU, this situation was inevitable due the need to ensure compatibility with WTO rules and reform has been on the cards for some time.⁹³⁵

Whilst there has been significant speculation about the impact of these innovations, has the shift from Lomé to Cotonou significantly altered the relationship between the EU and ACP states? Babarinde has surmised that even the change of name from Lomé to Cotonou was heralded as “...an embodiment of a break from the past as if to signal that

⁹³⁴ The proportion of aid allocated to the ACP countries has fallen over the past few decades. The seven top recipients of EU external assistance are now located in Mediterranean and the Middle East. Hoebink, *op. cit.*, (2005), p. 130.

⁹³⁵ See COM (1996) 570 fin., *op. cit.*, p. 35.

the new relationship would not be business as usual but the dawn of a new era.”⁹³⁶ However, despite the clear innovations within Cotonou, this Agreement preserves much of the Lomé *acquis*. For this reason, it has been argued that “...the story of Lomé is one of incremental change,”⁹³⁷ rather than a revolutionary break with the past. This is certainly the case with human rights as the Cotonou Agreement serves to maintain and consolidate the position of human rights as an essential element of EU-ACP development cooperation policy. This also reflects the general trend in EU development policy as a whole as human rights continue to infiltrate general policy strategies including the Development Policy Statement of 2000 and the most recent Development Policy Statement on the ‘European Consensus’ of 2005.⁹³⁸

6. Conclusions

This chapter examined the emergence and consolidation of human rights in EU development cooperation, in general, and EU-ACP relations, in particular. As a starting point, the legal and institutional structure of EU development policy and EU-ACP cooperation was discussed. The provisions relating to the EU’s development cooperation policy were outlined, in addition to the nature of competences of the Community and EU Member States in this sphere. As development actor, the uniqueness of the EU has been noted due to the fact that it is the only donor that has a statement on development policy in its ‘constitution’.⁹³⁹

In highlighting the changing policy trends in EU development policy in general and relations with the ACP states in particular, it was shown that the origins of cooperation in the Treaty of Rome were motivated primarily by pressure from the French government to guarantee a relationship of association with her overseas territories and to ensure that the free trade area would be extended to these regions. The independence of the first

⁹³⁶ Babarinde, O. and Faber, G., ‘From Lomé to Cotonou: ACP-EU Partnership in Transition,’ p. 2, from Babarinde and Faber, *op. cit.*, (2005).

⁹³⁷ Forwood, G., ‘The Road to Cotonou: Negotiating a Successor to Lomé,’ 39 *JCMS* 3 (September 2001), p. 439.

⁹³⁸ Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Council, ‘The European Consensus on Development’, approved at the GAERC 2691st Meeting, Brussels, 21st and 22nd November 2005, p. 7.

associated states in Africa and the Caribbean necessitated the signature of the Yaoundé Conventions in 1963 and 1969, which maintained the status quo through the provision of aid and the granting of non-reciprocal tariff preferences. The accession of the UK in 1973 resulted in the negotiations for the first Lomé Convention of 1975, which in contrast to the previous arrangements, was predicated on the basis of partnership. This was manifested in the creation of joint institutional structures between the EU and ACP states, however, it was illustrated in this chapter that the notion of partnership has been rendered illusory due the complexity of decision-making procedures and dominance of the EU institutions in negotiations and overall agenda setting.

In tracing the trajectory of human rights in EU-ACP relations, it was shown that by the late 1970s, the issue of human rights had already risen to the fore of EU-ACP relations. The *de facto* suspension of aid to Uganda occurred through the issuing of the ‘Uganda Guidelines’ due to the absence of a legal basis to suspend cooperation under the terms of international law. This was an unsatisfactory situation under international law and it became clear that the issue of human rights would have to be addressed.⁹⁴⁰ However, the ACP countries were in a relatively strong position on the international arena and rejected any attempts to introduce provisions relating to human rights conditionality. The Preamble of the third Lomé Convention referred to human rights as a general objective of development, however, these references were not backed up by substantive provisions within the text on the treaty to remedy the absence of a legal basis to address human rights-related issues.

Nevertheless, negotiations for the fourth Lomé Convention led to the inclusion of human rights as an essential element of cooperation. These events coincided with the Council Resolution of 1991 on human rights, democracy and development indicating that the EU was intent on following the general shift in the language of legitimacy and policy orientation of OECD donors at the time. In the following year, the Maastricht Treaty provided a solid legal basis for human rights within European development cooperation policy. In the renewal of Lomé IV and the subsequent Cotonou Agreement of 2000, the

⁹³⁹ Hoebink, *op. cit.*, (2005), p. 127.

primarily technical and economic character of EU-ACP cooperation was replaced by an inherently political agenda. The promotion of liberal values in the form of human rights, democratic principles and the rule of law became an objective of the partnership and alleged violations of these principles could result in restrictive measures and suspension as a last resort.

Whilst EU development policy has been regarded as a unique model in the past, some commentators have noted the trends towards uniformity. This is due, for example, to the increasing convergence between the EU and the World Bank/IMF in the area of strategy and implementation. Furthermore, there has also been some doubt cast on the future of the special relationship between the EU and the ACP countries in light of the phasing out of trade preferences for this group.⁹⁴¹ Furthermore, the changing nature of the political dimensions of partnership is also evident through the introduction of good governance as a fundamental element of cooperation. In this respect, it is clear that the EU has also followed recent trends in the area of development compacts, which emphasise good governance conditionality and poverty reduction, along with the notion of policy dialogue as opposed to strict conditionality measures.

This chapter examined the rationale behind the increasing attention given to good governance conditionality by the EU, particularly, the economic aspects of good governance. This centres on the EU's recourse to direct financing channels such as sector-wide approaches and budget support. In order to ensure macro-economic stability, the EU has imposed strict conditionalities on the receipt of budget support, which includes compliance with the IMF/WB poverty reduction strategy papers (PRSPs). It also entails strict compliance with good governance requirements including the transparent and accountable management of public finances. However, as noted in the first chapter of this thesis, the extent to which human rights have infiltrated the PRSPs remains questionable.

⁹⁴⁰ Arts, *op. cit.*, (1995), pp. 267-268.

⁹⁴¹ The role of the ACP group in the practical application of the EU's human rights policy will be considered in greater detail in the following chapter of this thesis.

Although the good governance agenda overlaps to some degree with the objective of promoting human rights in development (for example, reform of the judiciary and legal reform), it is clear that the EU has included good governance as a related but distinct objective through its inclusion as a fundamental element, rather than an essential element.⁹⁴² As a fundamental element, failure to respect good governance correlates with ‘serious cases of corruption’, thus illustrating the EU’s priorities in this domain. It should not be overlooked that there is considerable controversy surrounding the issue of good governance conditionality. As Arts has noted, although good governance may overlap with a number of legal principles, there is no legal basis for this principle in international law. Moreover, good governance conditionality, such as reform of public procurement laws, has met with some resistance in the developing world, not merely due to a reluctance to undertake externally-imposed reform, but due to the anticipated negative impact of these reforms on domestic enterprises.

In conclusion, this chapter illustrated that the position of human rights has been consolidated as a constituent element of EU development cooperation policy and EU-ACP relations. The following chapter aims to analyse the position of human rights in EU-ACP relations at a more micro level, focusing in particular, on the extent to which the EU lives up to the Maastricht Treaty commitments of promoting human rights as a general objective of cooperation.

⁹⁴² The relationship between these elements will be further discussed in chapter four of this thesis.

CHAPTER FOUR: THE PRACTICAL APPLICATION OF HUMAN RIGHTS IN EU-ACP RELATIONS: HUMAN RIGHTS AS INSTRUMENTAL FOR DEVELOPMENT?

1. Introduction

The previous chapter explored the trajectory of human rights in the history of EU-ACP cooperation. This analysis concerned the way in which human rights have shaped EU-ACP cooperation at a macro level through the inclusion of human rights in bilateral cooperation agreements and overall development policy strategies. It was illustrated that human rights have emerged as constituent aspects of the EU-ACP definition of development, a trend that began with Lomé IV and has been consolidated in the Cotonou Agreement of 2000.

The scope of inquiry of this chapter focuses on the more micro aspects of the EU's commitment to a 'positive approach' to the integration of human rights in development.⁹⁴³ On the one hand, an analysis of the EU's positive approach is instructive as it enables an understanding of the extent to which the EU lives up to the Maastricht Treaty commitment to promote human rights as a 'general objective' of its development cooperation policy. On the other hand, and more specifically for the purposes of this thesis, this analysis provides an insight into the extent to which human rights are integrated or embedded in the *process* of development itself, for example, through mainstreaming or human rights-based approaches.⁹⁴⁴

This chapter is divided into two parts. The first part examines the legal basis and normative framework for the promotion of a 'positive approach', as opposed to an

⁹⁴³ The EU's commitment to a 'positive approach' was articulated in the 1991 Council Resolution. See Resolution of the Council and of the Member States meeting in the Council of Human Rights, Democracy and Development, 28th November 1991, Bull. EC 11-1991, pp. 122-3.

⁹⁴⁴ See chapter two (section 4.3) on the types of initiatives undertaken by OECD donors for the integration of human rights in development strategies.

approach based on negative sanctions. The first subsection deals with the scope for interpreting a 'positive approach' within the human rights clause in relation to negative conditionality. This includes the provisions for political dialogue and consultations and the idea of 'keeping dialogue' going. In the second sub-section, the legal basis for the promotion of human rights (the so-called 'positive measures') within the essential elements clause is discussed. Equally, this section analyses the normative aspects of the human rights clause, including the relationship between the various political dimensions of the Cotonou Agreement, namely, human rights, democratic principles, the rule of law and good governance. The third sub-section briefly outlines the relevance of positive conditionality for the ACP countries. This is followed by an examination of the role of political dialogue between the EU and ACP states as a means of promoting a 'positive approach'. Beyond the scope of the Cotonou Agreement, the fifth sub-section analyses the legal basis and normative scope of support for human rights in other external instruments such as thematic Regulations. Finally, conclusions are drawn on the normative provisions for the promotion of human rights in the ACP countries.

The second part of this chapter examines the operational framework and practical implementation of the EU's 'positive approach', looking specifically at the integration of human rights in EU-ACP relations. This analysis encompasses the various avenues available to the EU for the promotion of human rights including human rights conditionality, political dialogue and technical and financial measures. In the context of negative conditionality, this analysis will endeavour to ascertain whether the EU's positive approach can be seen in practice – for example, whether adequate use is made at the implementation level of the provisions for political dialogue and consultation in order to avoid restrictive measures. This section will also examine whether the EU's emphasis on a 'positive approach' leads to other tensions, for example, in striking an appropriate balance between the need for flexibility in recourse to suspension measures with the requirements of transparency and accountability. The controversial issue of good governance conditionality will also be considered in this section due to the absence of a legal basis in international law. The second sub-section of this part analyses the application of political dialogue under Article 8 of the Cotonou Agreement. This analysis

will inquire into the modalities for political dialogue in ACP countries and consider possibilities for enhanced recourse to Article 8 as a means of promoting a positive approach to the application of human rights in EU-ACP relations.

In the context of measures to promote human rights, the third sub-section examines the EU's support for human rights in the ACP countries. This analysis necessitates an outline of the operational and financial mechanisms used for the implementation of these activities, which are funded through the European Development Fund (EDF). This includes an analysis of the direct financing measures to support human rights and related elements. It examines priorities in EU funding within the ACP countries and seeks to ascertain whether some of the key biases in donor policy, as discussed in chapter two, are reflected in EU-ACP relations – for example, whether there is a hierarchy of rights or whether human rights are promoted as a subset of democratisation or good governance reform. This section also examines indirect measures such as the integration of human rights as cross-cutting issues in country strategies and mainstreaming policies that aim to integrate human rights into the general framework for EU-ACP relations. In addition, the *ad hoc* operations of the EU human rights budget line, known as the European Initiative for Democratisation and Human Rights (EIDHR), in ACP countries are also analysed. In this regard, the types of activities funded by the EIDHR are analysed, its geographical scope and also whether there is a bias towards certain types of human rights as mentioned in the literature.⁹⁴⁵ This section also considers how the *ad hoc* projects funded by EIDHR contribute to the EU's general objective of promoting human rights in developing countries. The final part of this section examines the outcome of various evaluations on the practical application of human rights in the ACP countries.

In light of the conclusions drawn within the second part of this chapter relating to human rights conditionality, political dialogue and measures to promote human rights, the final section takes stock of the practical implementation of the EU's 'positive approach' to human rights in the ACP countries. Firstly, this section examines the level of internal

⁹⁴⁵ Alston, P. and Weiler, J.H.H., 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights,' from Alston, P., (ed.), *The European Union and Human Rights*, (Oxford, 1999); Van Reisen, M., *EU Global Power. The North-South Policy of the EU*, (Utrecht, 1999).

coherence between the EU's strong legal and operational framework for a 'positive approach' to human rights in development. This analysis does not aim simply to expose a gap between rhetoric and practice for its own sake, as this chapter also examines the potential contribution of institutional reforms such as the creation of a Fundamental Rights Agency. In addition, the final part of this chapter also seeks to determine the extent to which human rights are regarded as instrumental for achieving development objectives. In this respect, it ascertains the extent to which the normative aspects of human rights instruments are utilised and integrated in the conceptualisation, implementation and evaluation of EU development policy. This includes an analysis of the degree of synergy between the various financial instruments such as the EDF and the EIDHR budget lines – thus providing an insight into the question of whether the EU adopts a 'mainstreaming' versus a 'standalone' approach to human rights .

2. Legal Basis and Normative Framework for a 'Positive Approach' to Human Rights in Development Cooperation and Relations with the ACP Countries

2.1. Legal Basis for a 'Positive Approach' to Human Rights in EU Development Cooperation Policy

Although the adequacy of the EU's human rights policy in external relations is a contentious issue,⁹⁴⁶ there is little ambiguity in relation to developing countries. In line with international standards of political legitimacy, human rights have become an integral part of the EU's development co-operation policy.⁹⁴⁷ This is evident from European Community legislation, in which Article 177(2) of the EC Treaty provides that 'Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.'⁹⁴⁸ Furthermore, the Treaty of Nice provided for the insertion of Article 181(a) in the ECT on economic, financial and technical co-operation measures

⁹⁴⁶ See Alston and Weiler, *ibid.*

⁹⁴⁷ Donnelly, J., *Universal Human Rights in Theory and Practice*, (2nd ed.), (London, 2003), p. 185.

with external countries, which encourages Community action in this sphere to ‘contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.’⁹⁴⁹

The scope of the EU’s human rights policy in developing countries has been largely fleshed out by a series of instruments including Council Resolutions and various soft law documents, including communications of the European Commission. The positive approach to the EU’s human rights and democratisation activities was first articulated in the 1991 November Resolution of the Council on human rights, democracy and development.⁹⁵⁰ This Resolution affirmed the positive dimension of human rights in the Community’s external relations and indicated possible initiatives, including support for:

...countries which are attempting to institute democracy and improve their human rights performance; the holding of elections, the setting up of democratic institutions and the strengthening the rule of law; the strengthening of the judiciary, the administration of justice, crime prevention and the treatment of offenders; promoting NGOs and other institutions which are necessary for pluralist society; the adoption of a decentralised approach to cooperation; ensuring equal opportunities for all.⁹⁵¹

Priorities in this domain were also outlined in the Commission Communications of 1995.⁹⁵² In the latter Communication of November 1995, the term ‘positive measures’ was introduced and some general priorities were highlighted with specific attention given to the promotion of education on human rights issues, freedom of opinion and expression and combating racism and xenophobia.⁹⁵³ Similarly, the 1998 Commission Communication on human rights, democracy and the rule of law in EU-ACP cooperation

⁹⁴⁸ Articles 177-181 (ex 130u-130y), Consolidated Version of the Treaty Establishing the European Community in Foster, N., *Blackstone’s EC Legislation 2005-2006*, (16th ed.), (Oxford, 2005).

⁹⁴⁹ Title XXI, Article 181(a), Treaty of Nice, signed on 26th February 2001, [2001] OJ C 80/1, 10th March 2001. (entered into force on 1st February 2003.)

⁹⁵⁰ Resolution on Human Rights, Democracy and Development of 28th November 1991, *op. cit.*

⁹⁵¹ *Ibid*, para. 4.

⁹⁵² European Commission, Communication from the Commission to the Council and the European Parliament on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries, COM (1995a) 216 fin., 23rd May 1995; European Commission, Communication on The External Dimension of the EU’s Human Rights Policy: From Rome to Maastricht and Beyond, COM (1995b) 567, 22nd November 1995.

highlighted four key themes including: support for institutional and administrative reform; the promotion of human rights education; strengthening civil society and women's participation in democratisation and development process; and the rights of minorities.⁹⁵⁴ These priorities were subsequently endorsed by both the Council and the Parliament.⁹⁵⁵

In 2001, the European Commission stated that the promotion of human rights were among its 'essential objectives'.⁹⁵⁶ This Communication outlined the move towards the 'mainstreaming' of human rights in all aspects of EC external assistance, including relations with developing countries. The mainstreaming of human rights embodies the positive approach outlined above and is implemented by promoting coherent policies in support of human rights, making further recourse to political dialogue and adopting a more strategic approach to the use of human rights budget lines.⁹⁵⁷ The positive approach also emphasises that even in cases of suspension, support to non-governmental organisations and civil society organisations on the ground can continue, as well as humanitarian assistance activities, which are not governed by human rights conditionality. This type of assistance is described by the EU as 'decentralised cooperation'.⁹⁵⁸ Against this backdrop, the following section examines the legal basis for a positive approach to the promotion of human rights in the context of EU-ACP relations.

2.2. Legal Basis for Human Rights in EU-ACP Relations

The Preamble of the Cotonou Agreement refers to the values that inform the aims and objectives of the cooperation agreement. With regard to human rights, the Parties 'refer' to a wide variety of international instruments and Conventions including Universal

⁹⁵³ COM (1995b), 567, p. 7.

⁹⁵⁴ European Commission, Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM (1998) 146 fin., 12th March 1998, pp. 6 and 10.

⁹⁵⁵ See Common Position on Human Rights, Democratic Principles, the Rule of Law and Good Governance in Africa, 98/350/CFSP, [1998] OJ L 158, 25th May 1998; European Parliament Resolution A4-0411/98, [1999] OJ C 104/185, 14th April 1999.

⁹⁵⁶ European Commission, Communication from the Commission to the Council and the European Parliament, The European Union's role in promoting human rights and democratisation in third countries, COM (2001) 252 fin., 8th May 2001, p. 3.

⁹⁵⁷ COM (2001) 252.

⁹⁵⁸ Simma, B., *et al*, 'Human Rights Considerations in the Development Co-operation Activities of the EC,' p. 608 from Alston, *op. cit.*, (1999).

Declaration on Human Rights and the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. In addition, reference is made to the conclusions of the Vienna Declaration in 1993 and other major international Conventions.⁹⁵⁹ The Parties ‘consider’ the positive contribution of regional human rights treaties including the European Convention on Human Rights and Fundamental Freedoms and the African Charter on Human and Peoples’ Rights to the respect of human rights in the EU and ACP States.⁹⁶⁰ Furthermore, the Parties declare that they are ‘anxious to respect basic labour rights, taking account of the key Conventions of the ILO’. Although the provisions are not binding, they carry some ‘normative weight’ in the interpretation of the human rights clause.⁹⁶¹

In Article 9, the Parties reiterate their attachment to individual human dignity and respect for human rights, which are deemed to be universal, indivisible and inter-related. The definition of human rights comprises of civil, political, economic, social and cultural rights contained within international conventions.⁹⁶² The provisions relating to social and human development refer to ‘basic social rights’⁹⁶³ and a reference to respect for sexual health rights was inserted following the revision of Cotonou in 2005.⁹⁶⁴ Article 50 refers specifically to the international core labour standards. This includes the freedom of association, the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and non-discrimination with respect to employment. The following section elaborates on the legal basis for a positive approach within the human rights clause.

2.2.1. Legal Basis for a Positive Approach within EU-ACP Human Rights Clause

⁹⁵⁹ This includes the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions, the 1954 Convention relating to the Status of Stateless Persons, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees.

⁹⁶⁰ Reference is also made to the American Convention on Human Rights.

⁹⁶¹ Bartels, L., *Human Rights Conditionality in the EU's International Agreements*, (Oxford, 2005), p. 84, fn. 10.

⁹⁶² Article 9 (2) of the Cotonou Agreement.

⁹⁶³ Article 25(1)(g), *ibid.*

⁹⁶⁴ in Article 25(1)(d), *ibid.*

2.2.1.1. Negative Conditionality

As mentioned in the previous chapter, the human rights clause contains a substantive element (Article 9) and a procedural element (Article 96). Article 96 provides a legal basis for the holding of consultations and suspension of EU-ACP cooperation in the event of alleged violations of the essential elements of the partnership. Before embarking on an analysis on the positive ethos of these provisions, it is necessary to reiterate that a restrictive interpretation of human rights clause is necessary in relation to negative conditionality. This is essential to ensure transparency in the identification of the circumstances in which a breach of the essential elements may have occurred by a State Party to the Cotonou Agreement.⁹⁶⁵

Some authors have sought to interpret the scope of the human rights clause in order to determine the circumstances that would trigger the consultation mechanism and ultimately lead to suspension measures. This is illustrated by Brandtner and Rosas, who reiterate that EU policy in this domain is premised upon the principles contained within the Universal Declaration of Human Rights, which form part of a generally accepted standard of either “customary international law or as general principles of law recognised by civilized nations”.⁹⁶⁶ These principles should be given a restrictive definition in line with the fundamental general principles of international law.⁹⁶⁷ These authors further state that, “[s]uch a clause does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all states as well as the EC in its capacity as a subject of international law.”⁹⁶⁸ This position also indicates acceptance of the view within the EU that the UDHR (at least at the level of general principles) has become reflective of general international law in the area of human rights.⁹⁶⁹

⁹⁶⁵ Bulterman, M., *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?*, (Gronigen, 2001), p. 179.

⁹⁶⁶ Brandtner, B. and Rosas, A., ‘Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice,’ 9 *EJIL* (1998), p. 475; Brandtner, B. and Rosas, A., ‘Trade Preferences and Human Rights,’ p. 707, from Alston, *op. cit.*, (1999).

⁹⁶⁷ As stated by these authors: “Now, by necessity, such general principles are fundamental in nature. They thus seem not to cover details concerning, say, the functioning of the judicial system or the protection of family life, which would be regulated in particular by human rights conventions or stem from individual case law,” *ibid.*, (1999), p. 707.

⁹⁶⁸ Brandtner and Rosas, *op. cit.*, (1998), p. 475.

⁹⁶⁹ Brandtner and Rosas, *op. cit.*, (1999), p. 707. This position has been confirmed by the EU. See EU, Annual Report on Human Rights, (1999), section 4.2.5.

Similarly, in attempting to clarify the content of the human rights clause, Bulterman proposes that the interpretation should be based on the internationally binding norms emanating from the UDHR – either as customary international law or as general principles of international law.⁹⁷⁰ In her analysis, she draws from case law of the International Court of Justice (ICJ) which has indicated that international humanitarian law, contained within the Geneva Conventions and the Protocol of 1977, forms part of customary international law.⁹⁷¹ From a comparison of the rights enshrined within the common Article 3 of the Geneva Conventions, Bulterman deduces that a number of rights contained within the UDHR are considered binding under international law. These include the right to non-discrimination (Articles 1, 2, 7); the right to life (Article 3); the prohibition of slavery (Article 4); the prohibition of torture and inhuman or degrading treatment (Article 5) and the prohibition of arbitrary sentences and executions (Article 10).⁹⁷² From this list, she also derives that the right to recognition before the law (Article 6); the right to an effective remedy before domestic courts for violation of human rights (Article 8); prohibition of arbitrary detention; right to a fair trial (Article 10, 11); freedom of religion (Article 18) and freedom of thought (Article 19) form part of customary international law.⁹⁷³

A restrictive interpretation of the human rights clause is essential to determine the circumstances in which cooperation can be suspended, however, it should also be noted that the non-execution clause strongly prioritises the need for a ‘positive approach’. In the course of regular political dialogue, a Party to the Agreement may initiate consultations if it is believed that the essential elements are not being respected.⁹⁷⁴ This is based on the fact that ‘appropriate measures’ should only be taken as a measure of last resort and can only be taken following political dialogue and consultations between the EU and ACP parties in question.⁹⁷⁵ The requirement of political dialogue and the holding of

⁹⁷⁰ Bulterman, *op. cit.*, (2001), p. 177 *et seq.*

⁹⁷¹ *Military and Paramilitary Activities in and against Nicaragua*, (Nicaragua/Spain) Merits, [1986] ICJ Rep. 14, para. 218.

⁹⁷² Bulterman, *op. cit.*, (2001), pp. 177-179.

⁹⁷³ *Ibid.*, p. 179.

⁹⁷⁴ Article 96(2) of the Cotonou Agreement.

⁹⁷⁵ Article 96(2)(c), *ibid.*

consultations can be bypassed in cases of special urgency.⁹⁷⁶ If agreement is not reached during the consultation period or in “cases of special urgency”, “appropriate measures” may be taken to allow for the suspension of the Agreement, in whole or in part.⁹⁷⁷ The opening of consultations is provided for in Article 97, which deals with the ‘consultation procedure and appropriate measures as regards corruption.’ According to Article 97(2), either Party may initiate consultations and in line with Article 97(3), and “appropriate measures” may be taken if the consultations do not lead to a solution that is acceptable to both Parties. Furthermore, the measures taken must be proportional to the seriousness of the situation and it is affirmed that suspension should only be taken as a last resort.

In the revision of Cotonou in 2005, it appears that efforts were made to strengthen the ‘positive’ ethos of the non-execution mechanism. Firstly, the consultation procedure under Article 96 was extended with consultations beginning no later than 30 days after they have been initiated by a Party and that dialogue during the consultation procedure should last for no longer than 120 days.⁹⁷⁸ The period for dialogue under the consultation procedure was thus extended from 60 to 120 days.⁹⁷⁹ The consultation procedure under Article 97 must begin no later than 30 days following initiation (this was extended from 21 days).⁹⁸⁰ Secondly, it was stated that the Parties must exhaust all possibilities for dialogue through the introduction of new provisions relating to more formal and systematic dialogue procedures.⁹⁸¹ The new provisions are helpful as they clarify the relationship between Article 8 and Article 96, by stating that dialogue must be held before the consultation procedure can be launched.⁹⁸² However, political dialogue would continue to be bypassed in cases of ‘special urgency’ or if there is a persistent lack of

⁹⁷⁶ Article 96(2)(b), *ibid.*

⁹⁷⁷ Article 96(2). “Appropriate measures” are described as those in accordance with international law and should be taken in proportion to the violation in question.

⁹⁷⁸ The previous time limits were 15 days and 60 days respectively [Article 96(2) Cotonou]. See Revised Cotonou Agreement 2005. Council Decision 599/2005 of 21st June 2005 concerning the signing, on behalf of the European Community, of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23rd June 2000, [2005] OJ L 209, 11th August 2005.

⁹⁷⁹ *Ibid.*

⁹⁸⁰ Article 97(2), *ibid.*

⁹⁸¹ This was achieved through the inclusion of Annex VII of the Revised Cotonou Agreement.

⁹⁸² Article 1(1) of Annex VII, *ibid.*

compliance with previous commitments made or a failure to engage in dialogue in good faith.⁹⁸³

The Revised Cotonou Agreement therefore clearly elaborates on the positive ethos of EU-ACP cooperation by ensuring that political dialogue is kept going and by extending the time frame for consultations under Articles 96 and 97. The EU's reluctance to impose sanctions and negative measures is linked to its commitment to promoting a positive approach to the integration of human rights in development. According to Simma, the EU adopts a positive approach in order to avoid the over-infringement of state sovereignty and conflict with foreign policy interests.⁹⁸⁴ Furthermore, sanctions are deemed to be ineffective if the particular government or regime is incapable of responding to the human rights breaches and only address the symptoms of human rights violations rather than the causes.⁹⁸⁵

2.2.1.2. Support for Human Rights

The promotion for respect for human rights is an explicit objective of the Cotonou Agreement. According to Article 9(4), the Partnership shall actively support the promotion of human rights in tandem with processes of democratisation, the consolidation of the rule of law and good governance. Although the promotion of human rights is not referred to in the Preamble as an objective of cooperation or in Article 1, which outlines the objectives of the Cotonou Convention, Bartels has argued that "it is more sensible to assimilate it to the stated objectives of the Cotonou Agreement."⁹⁸⁶

The European Commission has produced several communications that elaborate on a more comprehensive definition of the positive application of the human rights clause to remove any ambiguity in interpreting the scope of the human rights clause. In the 1998 Commission Communication, it was stated that human rights are defined as those

⁹⁸³ Article 2(4), *ibid.*

⁹⁸⁴ See Simma, *op. cit.*, (1999), pp. 578-582; Tomaševski, K., *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*, (London, 1997); Alston, P., 'International Trade as an Instrument of Positive Human Rights Policy,' 4 *HRQ* (1982).

⁹⁸⁵ Simma, *ibid.*

⁹⁸⁶ Bartels, *op. cit.*, (2005), p. 86.

contained within the major international conventions.⁹⁸⁷ However, apart from outlining the international documents that inspire the human rights, is there still some ambiguity on the precise scope of the human rights clause? In the sphere of human rights, a plethora of international legal instruments and treaties exist which define the normative elements of rights, create legal obligations for state parties, establish core entitlements, set minimum standards and monitor compliance.⁹⁸⁸ However, despite being included in a wide-ranging number of external agreements, the meaning attached to the term ‘human rights’ varies considerably within these instruments.⁹⁸⁹ Furthermore, as emphasised in previous chapters, the definition of human rights in donor policies varies considerably. This is often due to tendency in the early 1990s to define human rights in terms of civil and political rights. According to Crawford, human rights should be defined as civil and political rights as contained within the International Covenant on Civil and Political Rights.⁹⁹⁰ Furthermore, he argues that the clause relating to democratic principles should refer to “procedural elements, referring specifically to regular, free and fair elections, as well as the principle of civil and political rights”. The priority given to civil and political rights represents a trade-off between certain categories of rights in light of the limited availability of resources.⁹⁹¹ This compromise is justified as the implementation of civil and political rights projects are perceived as more manageable and easier to evaluate, for example, as in the case of support for the holding of free and fair elections or support for judicial reform, when compared with economic, social and cultural rights.⁹⁹²

Within the EU, there is an expansive interpretation of human rights, which can be discerned from Article 9(2) that refers to the promotion of both civil and political rights and economic, social and cultural rights. However, despite the reference to a broad

⁹⁸⁷ COM (1998) 146 fin., p. 4. This includes the Universal Declaration on Human Rights (1948), the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the African Charter on Human and Peoples’ Rights (1981) and the American Convention on Human Rights (1969).

⁹⁸⁸ Among these include: the Universal Declaration of Human Rights (1948); the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (1966). These commitment were reaffirmed at Rio Conference on environment and development (1992); Vienna Declaration on Human Rights (1993); Cairo on population development (1994); Copenhagen Conference on social development (1995); Beijing on Women and Development (1995); Rome on food (1996); Istanbul on Habitat II (1997) and Geneva on social development (2000).

⁹⁸⁹ Tomaševski, *op. cit.*, (1997), 42.

⁹⁹⁰ Crawford, G., ‘Human Rights and Democracy in EU Development Cooperation: Towards Fair and Equal Treatment,’ p. 157, from Lister, M.R., (ed.), *European Union Development Policy*, (Basingstoke, 1998).

⁹⁹¹ Sørbo and Tostensen, ‘Aid for Human Rights and Democracy: Challenges of Design, Management and Evaluation,’ p. 226, from Stokke, H. and Tostensen, A., *Human Rights in Developing Countries Yearbook 1999-2000*, (The Hague, 2001).

⁹⁹² *Ibid.*

conception of human rights, some commentators have argued that the provisions relating to social rights are relatively vague within the EU's development cooperation policy.⁹⁹³ The subordinate position of economic, social and cultural rights has also been noted in the Euro-Mediterranean Partnership Agreement.⁹⁹⁴ Furthermore, the lack of attention given to economic, social and cultural rights has been described as the 'missing link' in donor human rights policies.⁹⁹⁵

Despite these criticisms, from a normative perspective, the Cotonou human rights clause is sufficiently broad to provide a legal basis for economic, social and cultural rights. In addition, coupled with the reference to basic social rights in Article 25, it is clear that Cotonou contains an adequate normative basis for a holistic interpretation of human rights. As mentioned above, explicit recognition is given to the protection of core fundamental rights contained within the Conventions of the ILO.⁹⁹⁶ Furthermore, Article 25, which deals with the general and sectoral policies of ACP-EU co-operation which aim to improve access to basic infrastructure and services and, in particular, to reduce the inequalities of access to these resources, also refers to a commitment to basic social rights.⁹⁹⁷ Article 25 does not elaborate upon the scope of these rights, apart from the provision on "promoting the fight against: HIV/AIDS, ensuring the protection of sexual health and reproductive rights of women."⁹⁹⁸ The extent to which this broad-based rhetorical support for social rights is matched in practice will be discussed in the second part of this chapter.⁹⁹⁹

In order to provide increased protection for social rights, the European Parliament has previously advocated the introduction of a separate social clause into EC agreements with

⁹⁹³ Alston, P., and Weiler, J.H.H., 'An 'Ever Closer Union' in Need of a Human Rights Policy,' 9 *EJIL* (1998), pp. 688-689.

⁹⁹⁴ Schmid, D., 'The Use of Conditionality in Support of Political, Economic and Social Rights: Unveiling the Euro-Mediterranean Partnership's True Hierarchy of Objectives?', 9 *Mediterranean Politics* 3 (Autumn 2004), p. 402.

⁹⁹⁵ *Ibid.*

⁹⁹⁶ Article 50(1), Cotonou Agreement.

⁹⁹⁷ Article 25(1), Cotonou Agreement. Article 25(1) stipulates that "co-operation shall aim at: improving education and training, and building technical capacity and skills; improving health systems and nutrition, eliminating hunger and malnutrition, ensuring adequate food supply and security; integrating population issues into development strategies in order to improve reproductive health care, primary health care, family planning; and prevention of female genital mutilation; promoting the fight against HIV/AIDS; increasing the security of household water and improving access to safe and adequate sanitation; improving the availability of affordable and adequate shelter ...; and encouraging the promotion of participatory methods of social dialogue as well as respect for basic social rights". Article 25(g), *ibid.*

⁹⁹⁸ Article 25(d) of the Revised Cotonou Agreement.

⁹⁹⁹ See section 3 below.

third countries,¹⁰⁰⁰ which would make development assistance conditional upon the observance of specific social rights.¹⁰⁰¹ Many commentators have voiced their opposition to the introduction of a social rights clause, as it could, firstly, threaten the indivisibility of human rights and, secondly, that it might be perceived by developing countries as a protectionist initiative.¹⁰⁰² This debate recalls the opposition of the WTO Singapore Ministerial Declaration to the introduction of labour standards in trade agreements, in which it was stated that the ILO was the competent authority to deal with labour rights and that the comparative advantage of developing countries should not be jeopardised by the introduction of labour rights by the WTO for protectionist purposes.¹⁰⁰³

The discussion on the social clause may illustrate that the precise scope of the ‘human rights clause’ is still regarded as ambiguous.¹⁰⁰⁴ It is argued in this thesis that the human rights clause provides a strong legal basis for a holistic conception of human rights, including social rights through the reference to the Universal Declaration of Human Rights.¹⁰⁰⁵ For this reason, Alston and Weiler contend that recourse should be made to the human rights clause in order to promote economic and social rights, rather than creating a separate social clause.¹⁰⁰⁶ Furthermore, it is argued that the inclusion of a separate provision in Article 25 on basic social rights should not be interpreted as an indication that social rights are not reflected in the human rights clause. The inclusion of Article 25(1)(g) does not necessarily reflect a division between the generations of rights but may have been introduced to provide an impetus for the effective protection of these rights that does not seem to have been achieved through the human rights clause.¹⁰⁰⁷

2.2.1.3. Human Rights, Democracy and Good Governance: Three Agendas or One?

¹⁰⁰⁰ European Parliament, Resolution in the European Union’s Foreign Policy, [1994] OJ C 128/370, 9th May 1994; Resolution on the Introduction of a Social Clause in the Unilateral and Multilateral Trading System, [1994] OJ C 61/89, 28th February 1994.

¹⁰⁰¹ Riedel E. and Will, M., ‘Human Rights Clauses in External Agreements of the EC,’ from Alston, P. and Weiler, *op. cit.*, (1999).

¹⁰⁰² *Ibid.*, pp. 744-745; Brandtner and Rosas, *op. cit.*, (1998), p. 486.

¹⁰⁰³ World Trade Organisation, Singapore Ministerial Declaration, para. 4, WT/MIN(96)/DEC/W, 13th December 1996.

¹⁰⁰⁴ This point is made by Fierro in relation to the positive interpretation of the human rights clause in bilateral agreements in general. Fierro, E., *The EU’s Approach to Human Rights Conditionality in Practice*, (The Hague, 2003), p. 366.

¹⁰⁰⁵ Riedel and Will, *op. cit.*, (1999), p. 744.

¹⁰⁰⁶ Alston and Weiler, *op. cit.*, (1999), p. 34; Brandtner and Rosas, *op. cit.*, (1998), pp. 485-486.

¹⁰⁰⁷ The inclusion of a social clause in agreements with third countries relating to a limited group of core rights (such as the prohibition of forced or child labour) was suggested by Riedel and Will, *op. cit.*, (1999), p. 746.

As mentioned in the second chapter of this thesis, the normative provisions of donor human rights policies are instructive as they provide an insight into the conception of human rights in donor policies and in some respects, these policies provide a normative framework that influences the direction of future operational activities. Therefore, in addition to examining the provisions relating to human rights, it is equally important to outline the interlinkages (if any) between human rights and issues such as democratisation and good governance in EU-ACP relations. Before embarking on this analysis, however, it is useful to examine whether ‘human rights, democracy and good governance’ are a ‘seamless agenda’, or are there three separate concerns at stake.¹⁰⁰⁸ In this thesis, it is contended that human rights, democracy and good governance are fluid and mutually reinforcing concepts, which should be viewed as interdependent in order to provide for a multi-faceted approach which is necessary to create conditions for sustainable development.¹⁰⁰⁹ Nevertheless, recognition of the interrelated nature of ‘human rights, democracy, good governance and the rule of law’ does not mean that these terms should be used interchangeably. Although, each of these activities forms an integral part of development cooperation, the term human rights should not be used synonymously with democracy and governance assistance. In the following section it will be considered whether human rights are conceived as a subset of broader definitions of democracy or good governance within the EU-ACP legal framework.

The difficulty in using these terms interchangeably is illustrated by a brief examination of the definitions in key EU-ACP documents. For example, following the inclusion of Article 5 in the Lomé IV Convention, subsequent policy documents sought to elaborate on the interrelationship between human rights and other political dimensions of the EU’s external activities.¹⁰¹⁰ For example, a 1998 Communication contributed to the definition of the broader political concepts within the essential elements clause.¹⁰¹¹ The ‘rule of law’ is defined as an essential component of the democratic system, which seeks to ensure the division of executive, judicial and legislative powers and an independent judiciary. The rule of law relies upon the individual’s right to legal recourse and equality

¹⁰⁰⁸ Burnell, P., (ed.), *Democracy Assistance: International Cooperation for Democratisation*, (London, 2000), p. 1.

¹⁰⁰⁹ *Ibid.*, pp. 18-19.

¹⁰¹⁰ COM (1995b) 567.

before the law.¹⁰¹² In the context of EU-ACP relations, the term ‘democratic principles’ was selected over the term ‘democracy’ in order to highlight the notion of universally agreed democratic norms, whilst respecting the different models and systems of democracy of the ACP states.¹⁰¹³ It was also stated that the term good governance “implies managing public affairs in a transparent, accountable, participative and equitable manner showing due regard for human rights and the rule of law”.¹⁰¹⁴

In the document mentioned above, good governance is interpreted as a broad term which encompasses human rights. Similarly, in its evaluation of aid to ACP countries in 1998, the European Commission referred solely to good governance, thus employing it as a broad term to cover democracy, the rule of law and respect for human rights.¹⁰¹⁵ This observation is useful as it may provide a greater insight into the policy direction of EU funding activities, for example, by include human rights within the wider agenda of good governance reform.

Article 9 of the Cotonou Agreement reaffirms the EU’s commitment to the triad of human rights, democratic principles and the rule of law. However, the political dimensions were expanded upon through the reference to respect for good governance in the same provision. As noted in the previous chapter, good governance was included as a fundamental element, rather than an essential element due to disagreement on the issue with the ACP group. Within the Cotonou Agreement, democratic principles refer to ‘universally recognised principles underpinning the organisation of the State to ensure the legitimacy of its authority. The legality of its actions reflected in its constitutional, legislative and regulatory systems’.¹⁰¹⁶ The principle of universality is accepted in this provision, which acknowledges that countries develop their own democratic culture in line with universally recognised principles. The Cotonou Agreement reaffirms that the

¹⁰¹¹ COM (1998) 146.

¹⁰¹² Ibid.

¹⁰¹³ Ibid., p. 5.

¹⁰¹⁴ Ibid., p. 7.

¹⁰¹⁵ Crawford, *op. cit.*, (2001), p. 116. European Commission, ‘Evaluation of European Aid managed by the Commission to African, Caribbean and Pacific Countries,’ (Brussels, November 1998).

¹⁰¹⁶ Article 9(2) of the Cotonou Agreement.

structure of governments should be founded on the rule of law and reaffirms the centrality of the right to redress, an independent judiciary and equality before the law.¹⁰¹⁷

In contrast to the previous policy documents outlined above in which human rights were included as a subset of good governance, Article 9 of the Cotonou Agreement situates good governance within the context of ‘a political and institutional environment that upholds democratic principles, human rights and the rule of law.’¹⁰¹⁸ Within this environment, good governance is defined as ‘the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development.’¹⁰¹⁹ Respect for the principles of good governance require the existence of transparent and accountable institutions, clear decision-making within public authorities and measures aimed at preventing and combating corruption. Therefore, it appears that the Cotonou Agreement conceives good governance as dependent on a wider political context, of which human rights is an integral part. Furthermore, the failure to meet good governance standards contained within Article 9 does not provide a legal basis for consultations or restrictive measures, as this may only occur in the event of serious cases of corruption.¹⁰²⁰

The position of human rights within the EU-ACP legal framework should also be viewed within the context of the broader political dimensions contained within the human rights clause. Nevertheless, due to the variations in the definition of human rights, democracy and good governance, it is argued that these terms should not be used interchangeably. This position does not ignore the strong interlinkages and mutually reinforcing nature of these elements, however, it merely seeks to ensure greater clarity in the normative framework of the political dimensions of development.

2.3. Positive Conditionality

¹⁰¹⁷ Ibid.

¹⁰¹⁸ Article 9(3), *ibid.*

¹⁰¹⁹ Ibid.

¹⁰²⁰ Article 97(3).

In contrast to negative human rights conditionality, which refers to the suspension of aid following the failure to meet specific requirements, positive conditionality is an incentive-based system of conditionality that provides for the possibility of granting or increasing aid if specific conditions are fulfilled. This may lead to granting a variety of measures including aid, grants and technical and financial assistance.¹⁰²¹ Positive conditionality may also refer to the compliance with specific requirements to gain membership of a group or organisation. For example, the so-called ‘Copenhagen criteria’ lay down *ex ante* conditions that must be fulfilled to gain approval for membership of the European Union.¹⁰²² A more explicit example of a system of positive conditionality is the GSP, which provides tariff preferences to developing countries that are linked to compliance with core human rights conventions.¹⁰²³

In contrast to the Copenhagen criteria, there are no *ex ante* conditions that must be fulfilled to gain membership of the ACP group or for accession to the Cotonou Agreement.¹⁰²⁴ According to Fierro, positive conditionality is implicit in human rights clause.¹⁰²⁵ However, as there is little evidence of explicit positive conditionality, this aspect will not be addressed in this chapter. Nevertheless, it should be noted that the introduction of performance-based or incentive-based conditionality in the Cotonou Agreement of 2000 may indicate a move towards an explicit form of positive conditionality. According to Article 2, cooperation arrangements and priorities shall vary according to the State Party’s level of development, needs, performance and long-term development strategy. The definition of needs and performance is outlined in Article 3 of Annex IV to the Cotonou Agreement.¹⁰²⁶ The performance-based criteria should be agreed with the individual ACP country¹⁰²⁷ and the allocation of resources will be revised periodically on the basis of performance and needs during Mid-Term Reviews and End of

¹⁰²¹ Fierro, *op. cit.*, (2003), p. 100. See section 2.5.5.3 below for a more detailed discussion of the provisions contained within the GSP Regulations.

¹⁰²² Fierro, *ibid.*, pp. 138-153.

¹⁰²³ *Ibid.*, p. 100.

¹⁰²⁴ Membership is based upon Article 94 of the Cotonou Agreement, which provides that membership will be considered for any “independent State whose structural characteristics and economic and social situation are comparable to those of the ACP States.”

¹⁰²⁵ Fierro, *op. cit.*, (2003), p. 100.

¹⁰²⁶ According to Article 3(1) of Annex IV of the Cotonou Agreement: ‘Resource allocation shall be based on needs and performance, as defined in this Agreement. Needs are defined on the basis of social and income-related indicators, export earning losses. Special attention is given to least-developed countries (LDCs), landlocked countries and countries emerging from violent conflict. Article 3(1)(b) ‘progress in implementing institutional reforms, country performance in the use of resources, effective implementation of current operations, poverty alleviation or reduction, sustainable development and macro-economic and sectoral policy performance.’

Term Reviews.¹⁰²⁸ The provisions relating to institutional reform may overlap with the good governance agenda of the Agreement, therefore, it will be interesting to see if increased use will be made of positive conditionality in the future development of EU-ACP cooperation.¹⁰²⁹

2.4. Political Dialogue between the EU and ACP countries

The provisions relating to political dialogue within the Cotonou Agreement also constitute a central part of the EU's positive approach to human rights. More generally, political dialogue constitutes a central feature of the EU's external relations. This can take the form of dialogue or discussions of a general nature within the framework of bilateral relations in the context of association and cooperation agreements; dialogues focusing exclusively on human rights;¹⁰³⁰ dialogue with third countries, which have special relations with the EU, including the US and Canada;¹⁰³¹ and *ad hoc* dialogues within the framework of the CFSP-related topics including human rights.¹⁰³² In addition, a specific 'human rights dialogue' may also be initiated by the EU with a third country, including ACP states, or upon request of the country itself.¹⁰³³ Along with the consideration of alleged violations of human rights, regular dialogue on human rights and democratic principles also takes place to promote the accession, ratification and domestic implementation and monitoring of international legal instruments.¹⁰³⁴ Human rights dialogue may also encompass thematic issues such as the abolition of the death penalty, combating torture, women's rights and the elimination of all forms of discrimination.¹⁰³⁵

¹⁰²⁷ Article 4 of Annex IV of the Cotonou Agreement.

¹⁰²⁸ Article 5(7) and Article 11, *ibid.* At the beginning of each period covered by the Financial Protocol, the ACP countries receives an indication of resources that it may receive during five-year period (Article 9).

¹⁰²⁹ The concluding chapter elaborates on the possible impact of positive conditionality in the area of good governance. See chapter six, section 5.6.

¹⁰³⁰ The EU conducts specific human rights dialogues with China and Iran. See section 3.3 of Annual Report Council of the European Union, 'EU Annual Report on Human Rights 2005,' (Luxembourg, 2005).

¹⁰³¹ EU dialogue with the US and Canada is carried out on a six-monthly basis.

¹⁰³² This includes dialogue with Cuba and Sudan at the level of heads of mission. Council of the EU, EU Guidelines on Human Rights, 13th December 2001, reproduced in Annex 15 of EU, 'Annual Report on Human Rights 2002,' (Luxembourg, 2002), para. 2.3.

¹⁰³³ See Annex 15, *ibid.*, 'European Union Guidelines on Human Rights Dialogues,' para. 3.2, pp. 258.

¹⁰³⁴ *Ibid.*, para. 5.

¹⁰³⁵ *Ibid.*

Within the legal and normative framework for human rights in EU-ACP cooperation, political dialogue takes place on human rights-related issues by virtue of Article 8 of the Cotonou Agreement. On the one hand, political dialogue is inextricably linked to the human rights conditionality procedures within Article 96 and on the other hand, political dialogue seeks to promote the active implementation of the ‘essential elements’ of partnership. In this way, political dialogue cuts across two of the areas described in this chapter, namely, human rights conditionality and measures to promote human rights.

The Cotonou Agreement provided enhanced provisions for political dialogue in EU-ACP relations.¹⁰³⁶ The notion of enhanced political dialogue was strongly endorsed in the Green Paper on relations between the European Union and the ACP countries.¹⁰³⁷ Article 8 of the Cotonou Agreement stipulates that both parties shall engage in regular dialogue leading to commitments on both sides. The objective of political dialogue shall be to ‘exchange information, to foster mutual understanding, and to facilitate the establishment of agreed priorities and shared agendas.’¹⁰³⁸ According to Article 8(3), the subject of political dialogue covers issues relating to the aims and objectives of the Cotonou Agreement. Article 8(4) further clarifies the scope of political dialogue relating to ‘political issues of mutual concern’ including “the arms trade, excessive military expenditure, drugs and organised crime, or ethnic, religious and racial discrimination.’ According to this article, ‘the dialogue shall also encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.’ As mentioned above, political dialogue is inextricably linked to the consultation procedure in Articles 96 and 97 of the Cotonou Agreement in the event of serious breaches of human rights and democratic principles in ACP states, political dialogue is the first step towards avoiding negative sanctions.

Article 8 provides some broad parameters for the conduct of political dialogue. According to Article 8(6) this dialogue shall be conducted in a flexible manner. Dialogue shall be formal or informal according to the need, and conducted within and outside the

¹⁰³⁶ Arts, K., ‘ACP-EU Relations in a New Era: The Cotonou Agreement,’ 40 *CMLR* (2003), p. 112.

¹⁰³⁷ European Commission, Green Paper on Relations between the European Union and the ACP countries on the Eve of the 21st Century, COM (1996) 570 fin., November 1996, 13.

institutional framework, in the appropriate format and at the appropriate level including regional, sub-regional or national level.’ Article 8(7) states that regional and sub-regional organisations and civil society actors are also permitted to engage in the dialogue process.

Article 8 has a dual role. Firstly, it provides a means of promoting dialogue on the essential elements (including human rights) and other issues of mutual concern between the Parties. The dialogue process is difficult to codify as it may take place in a variety of formal and informal settings. For example, dialogue can take place between the EU and an ACP country at the initiative of either party on a human rights-related issue; between a member of an ACP government and a representative from the European Commission Delegations which provide a focal point for political dialogue¹⁰³⁹ and at EU-ACP fora. Secondly, Article 8 is inextricably linked to the consultation process under Article 96 and 97, and the distinction between Article 8 dialogue and the consultation procedure is not always clear.¹⁰⁴⁰ Article 96 stipulates that dialogue should be held between the parties before proceeding to consultations in the event of alleged breaches of the ‘essential elements’. In this context, the modalities for political dialogue are also quite vague and it is merely stated that all possibilities for political dialogue should be exhausted before initiating consultations, except in cases of ‘special urgency.’

Article 8 is a clear manifestation of the EU’s rhetoric on a positive approach to human rights conditionality, which sets it apart from other donors. As mentioned above, the Revision of Cotonou in 2005 provided for enhanced procedures on the political dialogue. These amendments affirmed that political dialogue must be held prior to the initiation of consultations and detailed provisions were laid out for the conduct of political dialogue itself. However, whilst the revision of Cotonou provides for a more systematic and formalised dialogue in a new annex, the modalities for holding dialogue continue to be extremely vague. It could be argued that the precise modalities for political dialogue are kept deliberately vague in order to ensure that all channels for dialogue remain open and to facilitate a negotiated solution through formal or informal dialogue, rather than

¹⁰³⁸ Article 8(2) of the Cotonou Agreement.

¹⁰³⁹ Santiso, *op. cit.*, (2002), p. 26.

¹⁰⁴⁰ This issue is discussed in further detail below.

resorting to conditionality procedures. Therefore, whilst provisions are made for a more structured dialogue on paper, it is unlikely that the notion of political dialogue will become overly rigid to ensure that all possibilities and channels for communication are kept open between the EU institutions and ACP countries.

2.5. Human Rights and Unilateral Regulations

An analysis of the legal and normative framework for human rights in EU development cooperation policy would be incomplete without addressing the complementary unilateral thematic Regulations that deal with the issue of human rights. Whilst many of the EU's thematic Regulations are used to promote human rights in external relations in general, the following section is limited to the discussion of Regulations relating to developing countries.

2.5.1. Council Regulation (EC) No. 975/1999

The legal basis and normative provisions of secondary legislation provides a further insight into the EU's human rights policy in developing countries. Apart from the Cotonou Agreement, *ad hoc* human rights activities are also funded in ACP countries through the European Initiative for Democratisation and Human Rights (EIDHR). This budget line was created in 1994 by the European Union to support human rights, democratisation and conflict prevention in the third countries. Its establishment came in response to sustained requests from the European Parliament to rationalise the diverse human rights budgets under a single heading in order to improve accountability and to ensure transparency.¹⁰⁴¹ The legal basis for the activities carried out by the EIDHR can be found in Council Regulations 975 and 976 of 1999.¹⁰⁴² The former Regulation applies to

¹⁰⁴¹ European Parliament, 'Opinion of the Committee on Budgets for the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy on human rights in the world in 2000 and the European Union human rights policy,' AD\438117EN.doc, 25th April 2001, p. 4.

¹⁰⁴² Council Regulation (EC) No. 975/1999 of 29th April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, [1999] OJ L 120, 8th May 1999; Council Regulation (EC) No. 976/1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating

operations in developing countries, including the ACP states, while the latter applies to non-developing countries.

Since the entry into force of the 1999 Regulations, the EU has acquired a strong legal basis for the promotion human rights within external relations.¹⁰⁴³ Upon their expiration in 2004, the time-frame of these Regulations was extended by Council Regulation 2240/2004 and Council Regulation 2242/2004.¹⁰⁴⁴ The EIDHR is contained in Chapter 19.04 of the EU budget (previously B7-7 budget line) and is directed primarily towards non-governmental organisations and civil society.

2.5.2. Background to Council Regulation 975/1999: *UK v. Commission*

The background to the enactment of Council Regulations 975 and 976 of 1999 can be traced to the uncertainty with regard to the EU's funding of human rights activities through its budget lines following the case of the *UK v. Commission* in 1998.¹⁰⁴⁵ The background to this uncertainty can be also be traced to the judgment of *Opinion 2/94*.¹⁰⁴⁶ In this case, the ECJ confirmed that the general principles of human rights law are the main source of law for the Community:

...it is well settled that fundamental rights form an integral part of general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by the international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.¹⁰⁴⁷

democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries, 29th April 1999, [1999] OJ L 120, 8th May 1999. The legal basis for Regulation 975/1999 is Article 179 EC Treaty and Regulation 976/1999 is based on Article 308 of the EC Treaty. Upon its expiration in 2004, the time-frame of this Regulation was extended by Regulation (EC) No 2240/2004 of the European Parliament and of the Council of 15th December 2004 amending Council Regulation (EC) No. 975/1999, [2004] OJ L 390, 31st December 2004.

¹⁰⁴³ Bulterman, M., 'European Union,' 12 *NQHR* (1999), p. 81. Both Regulations entered into force on 11th May 1999.

¹⁰⁴⁴ Council Regulation (EC) No. 2240/2004; Council Regulation (EC) No. 2242/2004 of 22nd December 2004 amending Regulation (EC) No 976/1999, [2004] OJ L 390, 31st December 2004.

¹⁰⁴⁵ Case C-106/96, *United Kingdom v. Commission* [1998] ECR I-2729.

¹⁰⁴⁶ *Opinion 2/94 (re Accession to the ECHR)* [1996] ECR I-1759. In this case, the ECJ concluded that although the ECHR has 'special significance' in EC law, the Community has no competence to accede to the Convention as the law stands.

¹⁰⁴⁷ *Ibid.*, para. 33.

However, this admission was accompanied by the ruling that: “[n]o treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.” The effect of the ruling in *Opinion 2/94*, contributed to the uncertainty surrounding Community action in other areas of external relations. Furthermore, although the legal basis for the insertion of a human rights clause within development cooperation agreements had been accepted in *Portugal v. Council*,¹⁰⁴⁸ some ambiguity still remained due to the passage which indicated that human rights could not be a specific field of cooperation.¹⁰⁴⁹

As a result of this ambiguity, the Commission proposed the drafting of a Council Regulation on the promotion of respect human rights and democracy in third countries to provide a legal basis for Community activities in these areas.¹⁰⁵⁰ However, these proposals were cast into doubt following the case of *UK v. Commission*, which represented a direct challenge to the Commission’s competence to fund activities in the area of poverty and social exclusion in 1995 and arose as the result of an action by the UK, with the support of Denmark, Germany and the Council. The ECJ held that ‘significant’ new Community action required both an entry into the relevant budget authority and in addition, the prior adoption of a basic act.¹⁰⁵¹ However, it was only ‘non-significant’ Community actions that could be executed without this requirement.¹⁰⁵² Although the Court did not define ‘non-significant’ action, it declared that neither a modest amount of funding nor a short duration were necessarily the decisive criteria.¹⁰⁵³

Following this judgment, the Commission suspended many budget lines that lacked a specific legal basis and a major review of these budgets was announced.¹⁰⁵⁴ This decision affected the human rights budget lines B7-70 in external assistance. As a result of the increased activity being undertaken by the EC/EU in the field of human rights in external

¹⁰⁴⁸ Case C-268/94 *Portugal v. Council* [1996] ECR I-6177.

¹⁰⁴⁹ *Ibid.*, para. 28. Eeckhout, P., *External Relations of the European Union. Legal and Constitutional Foundations*, (Oxford, 2004), p. 468.

¹⁰⁵⁰ Commission Proposal to the Council on the development and consolidation of democracy, the rule of law and respect for human rights and fundamental freedoms, COM (1997) 357 fin., [1998] OJ C-282/14 1998.

¹⁰⁵¹ *UK v. Commission*, para 26.

¹⁰⁵² *Ibid.*

¹⁰⁵³ Van der Klaauw, J., ‘European Union,’ 16 *NQHR* (1998), p. 378.

relations, it became clear that there was no explicit legal competence for action in this sphere, apart from the specific treaty provisions for developing countries.¹⁰⁵⁵ It also highlighted the failure of the Union to adopt a coherent human rights policy in both internal and external policy.¹⁰⁵⁶

In the review of Commission funding activities in the aftermath of *UK v. Commission*, decisions relating to human rights and democracy projects were delayed due to disagreement over the appropriate legal basis for Community action. The Commission proposed the use of Article 130w (now Article 179) of the EC Treaty relating to development cooperation policy, however, the Parliament objected to this as it would exclude human rights activities in Central Eastern European countries, which were not classified as developing countries. For this reason, the Parliament advocated the use of Article 235 (now Article 308) of the EC Treaty.¹⁰⁵⁷ According to Brandtner and Rosas, Article 235 (now Article 308) of the EC Treaty would have provided a legal basis for Community action in the field of human rights as it provides for a general competence to take action, if this is “necessary to attain, in the course of the operation of the common market, one of the objectives of the Community” and if other Treaty provisions have not provided, explicitly or implicitly, the necessary powers.¹⁰⁵⁸ This was the justification for environmental action, which was outside the explicit objectives of the EC Treaty in *Procureur de la République v. ADBHU*.¹⁰⁵⁹ Article 235 (now Article 308) was also invoked in the *E.R.T.A.* judgment, which affirmed the ability of the Council to take any “appropriate measures” in the sphere of external relations.¹⁰⁶⁰

The judgment of *UK v. Commission* confirmed that ‘significant’ funding would require a legal act and a legal basis within the Treaty.¹⁰⁶¹ The negotiations which followed ultimately led to the drafting of two separate regulations, one on the basis of Article 130w EC Treaty (now Article 179) with regard to developing countries, and the other on the

¹⁰⁵⁴ Ibid.

¹⁰⁵⁵ Although this legal uncertainty did not affect the human rights activities in developing countries, including the ACP countries, which already had a legal basis, it is relevant as it provides the background for the enactment of Council Regulation 975/1999.

¹⁰⁵⁶ Alston and Weiler, *op. cit.*, (1998), pp. 690-691.

¹⁰⁵⁷ Van der Klaauw, *op. cit.*, p. 379.

¹⁰⁵⁸ Brandtner, and Rosas, *op. cit.*, (1998), p. 471.

¹⁰⁵⁹ Case 240/83 *Procureur de la République v. ADBHU* [1985] ECR I-531.

¹⁰⁶⁰ Case 22/70 *Commission v. Council (E.R.T.A.)* [1971] ECR 263.

¹⁰⁶¹ Eeckhout, *op. cit.*, (2004), p. 469.

basis of Article 235 EC Treaty (now Article 308) for the remaining third countries.¹⁰⁶² Council Regulations 975/1999 and 976/1999 laid down the requirements for the consolidation of human rights, democracy and the rule of law within developing and non-developing countries, respectively. This was included under three categories: promoting and defending those rights proclaimed in the Universal Declaration of Human Rights and other international instruments; supporting the process of democratisation; and supporting human rights and democratisation by preventing conflict and dealing with its consequences, including support for *ad hoc* international criminal tribunals and the international criminal court.

2.5.3. The Scope of Human Rights in Council Regulation 975/1999

The introduction of Council Regulation 975/1999 provided the EU's most elaborate description of positive measures for the promotion of human rights. This regulation details the obligations regarding the promotion of human rights and democracy in developing countries, including the ACP states. In contrast with previous documents, this instrument offers a comprehensive list of human rights activities in Article 2(1) which include measures to promote: civil and political rights; economic, social and cultural rights; protection against poverty and social exclusion; support of minorities, ethnic groups and indigenous peoples; support for human rights institutions including NGOs; resources for victims of torture and measures to prevent against torture and ill-treatment; human rights education, training and consciousness-raising; human rights monitoring missions; equality and non-discrimination and measures aimed at protecting specific civil and political rights, including freedom of opinion, expression and religion.¹⁰⁶³

The second sub-category specifies measures in support of democratisation which include the promotion of the rule of law, the independence of the judiciary, the separation of powers, political pluralism and participation in decision-making, strengthening civil

¹⁰⁶² Council Regulations 975 and 976/1999.

¹⁰⁶³ Article 2(1)(a)-(j), Council Regulation 975/1999.

society, good governance, and fair election processes.¹⁰⁶⁴ Support is also given to conflict prevention through institutional development, capacity-building, group conciliation, confidence building measures, the promotion of humanitarian law and support for international criminal tribunals.¹⁰⁶⁵ The final sub-category refers to human rights and democratisation operations that may be financed under this regulation in the interests of conflict prevention.¹⁰⁶⁶ This includes measures to promote capacity-building among local communities and support for the peaceful resolution of conflict.¹⁰⁶⁷

Apart from providing a legal basis for Community operations to promote human rights, these Regulations were welcomed as a further insight into the objectives of Community action in this sphere. Human rights are enumerated in three subsections of this Regulation, namely, Article 2(1)(a), Article 2(1)(b) and Article 2(1)(j). Firstly, reference is made to activities that promote and protect civil and political rights and economic, social and cultural rights.¹⁰⁶⁸ Specific human rights are also referred to in Article 2(1)(j) which include the promotion and protection of ‘the fundamental freedoms mentioned in the ICCPR, in particular the freedom of opinion, expression and conscience and the right to use one’s own language’.

The specific actions to promote human rights and fundamental freedoms include support for: Article 2(1)(d) support for minorities, ethnic groups and indigenous peoples; Article 2(1)(e) support for local, national, regional or international institutions, including NGOs; Article 2(1)(f) support for rehabilitation centres for torture victims and for organisations offering concrete help to victims of human rights abuses or help to improve conditions in places where people are deprived of their liberty in order to prevent torture or ill-treatment; Article 2(1)(g) support for education, training and consciousness-raising in the area of human rights; Article 2(1)(i) the promotion of equality of opportunity and non-discriminatory practices, including measures to combat racism and xenophobia; Article 2(1)(h) action to monitor human rights, including the training of observers.

¹⁰⁶⁴ Article 2(2)(a)-(g), *ibid.*

¹⁰⁶⁵ Article 2(3)(a)-(e), *ibid.*

¹⁰⁶⁶ Article 3 (a)-(g), *ibid.*

¹⁰⁶⁷ *Ibid.*

¹⁰⁶⁸ Article 2(1)(a) and Article 2(1)(b), Regulation 975/1999.

2.5.4. Critique of Regulation (EC) 975/1999: Improved Insight into the Normative Framework for Human Rights Activities in Developing Countries or a Missed Opportunity?

According to some commentators, the 1999 Regulations are inadequate.¹⁰⁶⁹ Despite providing an insight into the types of activities and projects that the EU will be engaged with in the context of contributing to the general objective of promoting ‘human rights, democratisation and the rule of law’, they fail to expose the essence of the EU’s interpretation of the concept of human rights.¹⁰⁷⁰ According to Alston and Weiler, the Regulations are problematic in several ways.¹⁰⁷¹ Firstly, Alston and Weiler argue that the objectives contained within Article 2 contain a list of both human rights and activities to promote human rights and to reduce poverty, thus obscuring the distinction between human rights norms and general operations to promote poverty reduction. Secondly, they state that it is not clear why reference is made to both civil and political rights and the ‘fundamental freedoms contained within the ICCPR’. This can either be explained as the product of poor drafting or else as a deliberate effort to highlight the EU’s priorities in this area. Furthermore, the latter provision can be compared with Article 2(1)(i) which refers to ‘the promotion of equality of opportunity and non-discriminatory practices, including measures to combat racism and xenophobia’, without explicit mention given to the right to non-discrimination contained within either the ICCPR or the ICESCR.

The third problematic issue relates to Article 2(1)(c), which refers to ‘the promotion and the protection of the human rights of those discriminated against or suffering from poverty or disadvantage, which will contribute to the reduction of poverty and social exclusion’. According to Alston and Weiler, this provision adds nothing to the normative substance of this Regulation, as the human rights of ‘those discriminated against’ or ‘suffering from poverty or disadvantage’ are covered by reference to civil and political rights and economic, social and cultural rights. Furthermore, the opportunity to take a

¹⁰⁶⁹ See Alston and Weiler, *op. cit.*, (1998), p. 704.

¹⁰⁷⁰ Bulterman, *op. cit.*, (2001), p. 181; Alston and Weiler, *op. cit.*, (1998).

tangible step to include specific human rights which relate to poverty reduction and social exclusion, such as non-discrimination and the rights of minorities, was avoided. Finally, Alston and Weiler also point out that the content of Regulations 975 and 976/1999 are identical, despite the fact that the former applies to developing countries, including the ACP States, whereas the latter relates largely to the provision of assistance to Central and Eastern European countries,¹⁰⁷² such as the PHARE and TACIS programmes and the Regulation on the reconstruction of Bosnia and Herzegovina. Nevertheless, despite the concerns raised by Alston and Weiler, it is contended that there is an adequate legal basis for the promotion of a holistic conception of rights within Council Regulation 975/1999, including socio-economic rights.¹⁰⁷³

It should also be noted that following its expiration at the end of 2004, Council Regulation 975/1999 was amended in 2004 and extended until December 2006.¹⁰⁷⁴ A separate Regulation was provided for the amendment of Council Regulation 976/1999.¹⁰⁷⁵ The substance of these Regulations remained the same, which provides for the promotion of human rights including both civil and political rights and economic, social and cultural rights. It is interesting to note that during the drafting procedure, the UK Minister for International Development recommended that the Regulation should be adapted to provide for an increased emphasis on socio-economic rights in line with the idea of rights-based programming,¹⁰⁷⁶ however, the scope of the Regulation was left unchanged. In light of the political sensitivity in implementing the human rights instrument, along with the difficulties in managing and disbursing the funding, the European Parliament recommended that it should not be involved in the establishment of priorities, target countries and programming objectives.¹⁰⁷⁷ As a result, Article 11(1) of

¹⁰⁷¹ Alston and Weiler, *ibid.*, (1998) p. 704. The analysis in this section seeks to elaborate upon the issues raised by these authors.

¹⁰⁷² *Ibid.*

¹⁰⁷³ Again, this has been confirmed through qualitative interviews. Interview with Mr. Timothy Clarke, Head of Unit, Human Rights and Democratisation (EIDHR), EuropeAid, Brussels, 3rd November 2003.

¹⁰⁷⁴ Draft proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 975/1999. COM (2003) 639 fin., 28th October 2003; Regulation (EC) No 2240/2004 *op. cit.* According to Article 10(1), the financial framework for the implementation of the Regulation extends from 1st January 2005 to 31st December 2006 and the funding allocated amounts to €134 million.

¹⁰⁷⁵ Council Regulation (EC) No 2242/2004 of 22nd December 2004 amending Regulation (EC) No 976/1999, [2004] OJ L 390, 31st December 2004.

¹⁰⁷⁶ Letter of UK Minister of International Development, 17th February 2004, quoted in UK House of Commons, Select Committee on European Security, Eleventh Report, para. 14(8) and (9).

¹⁰⁷⁷ European Parliament Report on the proposal for a European Parliament and Council Regulation amending Regulation (EC) 975/1999, COM (2003) 639, A5-0279/2001, 20th April 2004, p. 8.

Council Regulation 2240/2004 was amended to provide for a more efficient procedure.¹⁰⁷⁸

2.5.5. Other Relevant Community Initiatives and Unilateral Regulations

The following section provides a brief insight into some relevant initiatives of the European Commission, which indicate that the promotion of socio-economic rights is an integral part of its relations with developing countries. This section also provides an insight into the extent of the provisions relating to social rights within the GSP system. Although the GSP scheme does not relate to the ACP countries,¹⁰⁷⁹ it provides an interesting example of the scope of human rights promoted in the unilateral system of trading preferences.

2.5.5.1. Community Initiatives in the area of Economic and Social Rights

In the context of labour rights and sexual health rights, the Commission has recently shown increased willingness to incorporate economic, social and cultural rights within policy documents relating to developing countries. An illustration of the integration of social rights within the EU's relations with third countries can be found in the Communication on the promotion of core ILO labour standards and improving social governance in the context of globalisation.¹⁰⁸⁰ In this document, the Commission states that a stronger link should be made between trade, labour standards and EU development cooperation policy, which could be achieved through the provision of development aid to provide technical and financial assistance to encourage compliance with international labour standards and with the special incentives measures in the Generalised System of Preferences.¹⁰⁸¹ These documents can be viewed in contrast to other Communications in

¹⁰⁷⁸ Article 11 of Regulation 2240/2004 states that: 1) The Commission shall adopt the framework for the programming and identification of Community activities. The framework shall consist, in particular, of (a) multiannual indicative programmes and annual updates of these programmes; (b) annual work programmes.

¹⁰⁷⁹ As mentioned in chapter three, the tariff preferences granted to the ACP countries are contractual in nature and are granted under a separate WTO waiver.

¹⁰⁸⁰ Commission Communication, Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM (2001) 416, 18th July 2001.

¹⁰⁸¹ *Ibid.*, p. 12 and 17-19.

the area of health and poverty reduction in developing countries,¹⁰⁸² including action on HIV/AIDS¹⁰⁸³ and action on major communicable diseases within the context of poverty reduction,¹⁰⁸⁴ in which there is no reference to the link between human rights and health. This is also similar to the issue of food security and education.¹⁰⁸⁵

2.5.5.2. Unilateral Regulations

Other unilateral regulations also provide an insight into the scope of the EU's external human rights policy. The recent Commission proposal for a Council Regulation on sexual health rights¹⁰⁸⁶ makes explicit reference to the right to health in Article 25 of the UDHR and Article 35 of the European Charter on Fundamental Rights.¹⁰⁸⁷ According to Article 1(1), 'the Community shall support actions to improve reproductive and sexual health in developing countries and to secure respect for the rights related thereto'. This would be provided in the form of financial and technical assistance to promote the universal access to safe reproductive and sexual health care and services¹⁰⁸⁸ and the creation of operational frameworks for the 'progressive realisation of people's rights to adequate basic health services and accountable service providers.'¹⁰⁸⁹

2.5.5.3. Generalised System of Preferences

As mentioned above, the Generalised System of Preferences (GSP) provides a clear example of Community recourse to positive conditionality in developing countries. The GSP consists of a scheme of unilateral acts between the EC and third countries which grant additional tariff preferences to certain countries upon the fulfillment of specific criteria.¹⁰⁹⁰ These preferences may be of a non-reciprocal nature and are based upon Article 133 of the EC Treaty. A notable feature of the GSP Regulations is the existence

¹⁰⁸² Commission Communication on Health and Poverty Reduction in Developing Countries, COM (2002) 129 fin., 23rd March 2002.

¹⁰⁸³ Commission Communication on Accelerated Action on HIV/AIDS, Malaria and Tuberculosis in the Context of Poverty Reduction, COM (2001) 96, fin., 21st February 2001.

¹⁰⁸⁴ Commission Communication on Accelerated action targeted at major communicable diseases within the context of poverty reduction, COM (2000) 585 fin., 20th September 2000.

¹⁰⁸⁵ Commission Communication on Food Security, COM (1994) 165 fin., 4th May 1994; Commission Communication on Education and Training, COM (1994) 399 fin., 26th September 1994.

¹⁰⁸⁶ Regulation (EC) No. 1567/2003 of the European Parliament and of the Council on Aid for Policies and Actions on Reproductive and Sexual Health and Rights in Developing Countries, [2003] OJ L 224/1, 6th September 2003.

¹⁰⁸⁷ Para. 3 of preamble, *ibid.*

¹⁰⁸⁸ Article 2(2), *ibid.*

¹⁰⁸⁹ Article 3(1)(a), *ibid.*

of the ‘special incentives clause’, which has the potential to enforce both positive and negative conditionality with respect to compliance with fundamental rights contained within the Conventions of the International Labour Organisation (ILO).¹⁰⁹¹ The inclusion of this clause represents a form of positive conditionality, which denotes the granting of additional preferences that is contingent upon respect for the adoption of core ILO labour standards in national legislation and proof of the establishment of monitoring mechanisms to ensure the effective implementation of these rights.

Initially, two separate Regulations were drafted in 1994 and 1996 covering industrial products and agricultural products from third countries respectively.¹⁰⁹² According to Article 7 of these Regulations, additional preferences could be granted to countries that have adopted and effectively applied national legislation in line with the international labour standards as laid down in the International Labour Organisation Conventions.¹⁰⁹³ This includes the incorporation of the standards contained within ILO Conventions Nos. 87 and 98 concerning the freedom of association and the right to organise and bargain collectively and Convention No. 138 on the minimum age for admission to employment.¹⁰⁹⁴ Additional preferences are granted to countries that adhere to the environmental standards contained within international agreements, including the sustainable management of forests contained within the International Tropical Timber Organisation (ITTO).¹⁰⁹⁵

These instruments were replaced by Council Regulation (EC) No. 2820/98, which incorporated both industrial and agricultural goods in a single multiannual scheme,¹⁰⁹⁶ and included a similar social clause on labour and environment.¹⁰⁹⁷ The Regulation of

¹⁰⁹⁰ The background to the introduction of the GSP scheme was described in the previous chapter of this thesis, section 3.1. (There are presently 178 GSP beneficiary countries).

¹⁰⁹¹ Bartels, L., ‘The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Programme’, 6 *Journal of International Economic Law* 2 (2003).

¹⁰⁹² Council Regulation (EC) No. 3281/94 of 19th December 1994, applying a four year scheme on generalised preferences, in respect of certain industrial products originating in the developing countries’, [1994] OJ L 348/1, 31st December 1994; Council Regulation (EC) No. 1256/96 of 20th June 1996, ‘applying a three years scheme on generalised preferences on respect to certain agriculture products originating in developing countries’, [1996] OJ L 160/1, 29th June 1996.

¹⁰⁹³ Brandtner and Rosas *op. cit.*, (1998), p. 478.

¹⁰⁹⁴ Article 7 of Regulations 975/1999 and 976/1999.

¹⁰⁹⁵ Brandtner and Rosas, *op. cit.*, (1999).

¹⁰⁹⁶ Council Regulation (EC) No. 2820/98 of 21st December 1998, applying a multiannual scheme of generalised tariff preferences for the period of 1st July to 31st December 2001, [1998] OJ L 357, 30th December 1998.

¹⁰⁹⁷ Article 8 of Regulation No. 2820/98.

2001 contains new rules on procedural implementation and also contains a ‘special incentive clause’.¹⁰⁹⁸ This refers to respect for labour rights contained in ILO Conventions Nos. 87 and 98 on the Freedom of Association and Collective Bargaining, Convention No. 138 on the Elimination of Exploitative Forms of Child Labour and Conventions Nos. 29 and 105 on the Prohibition of Forced Labour and Conventions Nos. 100 and 111 on Non-Discrimination in Employment,¹⁰⁹⁹ and the adoption of national legislation and effective monitoring mechanisms.¹¹⁰⁰ Under this provision, special incentives have been granted to Moldova and Sri Lanka.¹¹⁰¹ Preferences may also be allocated for the implementation of national legislation on international environmental standards.¹¹⁰² Measures taken in the fight against drug production and trafficking will also be taken into consideration in the granting of additional preferences¹¹⁰³ and the ILO Declaration on the Fundamental Principles and Rights at Work.¹¹⁰⁴

Negative conditionality was enshrined in Article 9 of the 1994 and 1996 Regulations, which provided that the GSP scheme could be temporarily withdrawn, either in whole or in part, in the event of any form of forced labour or the export of goods made by prison labour.¹¹⁰⁵ The withdrawal of preferences is also provided for in the present 2001 regulation, and covers serious and systematic breaches of the freedom of association, the right to collective bargaining, non-discrimination in employment and the use of child labour.¹¹⁰⁶ The Commission is empowered to examine complaints in consultation with the Generalised Preferences Committee and to open investigations into the alleged breach in the country concerned which may lead to the eventual suspension of tariff preferences.¹¹⁰⁷

¹⁰⁹⁸ See Fierro, *op. cit.*, (2003), p. 363. Council Regulation (EC) No. 2501/2001, applying a scheme of generalised tariff preferences for the period from 1st January 2001 to 31st December 2004, [2001] OJ L 346, 31st December 2001, Title III.

¹⁰⁹⁹ Article 14, *ibid.*

¹¹⁰⁰ Article 15(1), *ibid.*

¹¹⁰¹ European Commission Staff Working Document, Implementation of the Commission’s Communication on the EU’s Role in Promoting Human Rights and Democratisation in Third Countries COM (2001) 252, SEC (2004) 1041, 30th July 2004, p. 9. At the time of the Communication, there were four requests pending.

¹¹⁰² Article 21, Council Regulation (EC) No. 201/2001.

¹¹⁰³ Article 25(1).

¹¹⁰⁴ Article 25(2).

¹¹⁰⁵ Article 9 of Regulation No. 3281/94 and No. 1256/96. The definition of forced labour is based on the Geneva Conventions of 25th September 1926 and 7th September 1956 and the ILO Conventions Nos. 29 and 105.

¹¹⁰⁶ Article 26(a)-(c), Council Regulation 2501/2001, *op. cit.*

¹¹⁰⁷ Articles 27-30, *ibid.*

In 1996, the Commission opened an investigation into alleged forced labour in the Union of Myanmar (Burma), pursuant to Regulations 1994 and 1996, upon the receipt of a complaint from trade unions including the International Confederation of Free Trade Unions (ICFTU) and the European Trade Union Confederation (ETUC) during the previous year.¹¹⁰⁸ The investigations resulted in the withdrawal of tariff preferences to the Union of Myanmar in 1997.¹¹⁰⁹ Investigations were carried out into ‘systematic and serious violations’ of the freedom of association and collective bargaining in Belarus, which were due to be completed by the end of 2004.¹¹¹⁰

There are currently five types of GSP schemes including the general GSP scheme which applies to the imports of both sensitive and non-sensitive products from developing countries.¹¹¹¹ There are two special incentive systems allowing for additional preferences if compliance with labour rights and environmental standards are met. Furthermore, there is a special GSP dealing with the fight against drug trafficking and drugs produced which benefits all Central American countries, the Andean Community and Pakistan. Fourthly, there is a special scheme relating to the least-developed countries (LDCs) called the ‘Everything But Arms’ (EBA) scheme.

The new GSP Regulation of 2005 revises the current system by streamlining the number of schemes from five to three.¹¹¹² This includes, firstly, a general scheme, which extends the number of products particularly in the area of agriculture and fisheries. Secondly, there is a new GSP Plus scheme for vulnerable developing countries, however, this requires the ratification and effective implementation of twenty-seven international conventions relating to sustainable development and good governance. The third system, the EBA, has not been revised. The new GSP Plus system clearly incorporates the principle of positive conditionality through its requirement of the ratification and

¹¹⁰⁸ Notice of 16 January 1996. Council Regulation (EC) No. 552/97 of 24th March 1997, Temporarily withdrawing access to generalized tariff preferences from the Union of Myanmar, [1997] OJ L 85, 27th March 1997, p. 8.

¹¹⁰⁹ Council Regulation No. 552/97, *ibid*.

¹¹¹⁰ SEC (2004) 1041, *op. cit.*, p. 9.

¹¹¹¹ This relates to imports from developing countries that pay duty upon entering the EU market and are not already covered under the MFN clause.

¹¹¹² Council Regulation (EC) No. 980/2005 applying a scheme of generalised tariff preferences, [2005] OJ L 169/1, 30th June 2005. For the list of beneficiary countries see Annex I.

compliance with key international law treaties.¹¹¹³ This includes sixteen conventions relating to human rights and labour rights and eleven relating to good governance and sustainable development. Compliance with these Conventions is measured on the basis of the information that is made available from international organisations such as the UN and the ILO. The EU has already decided to accord GSP Plus benefits to the following countries: Moldova, Georgia, Mongolia and Sri Lanka; five Andean countries (Bolivia, Columbia, Ecuador, Peru and Venezuela) and six Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama).¹¹¹⁴

It should also be noted that the future of the GSP system is uncertain due to questions over the legality of the preferences under WTO law.¹¹¹⁵ On 28th October 2003, a WTO dispute panel upheld claims by India on the EU's GSP system that grants preferences to countries "combating the illicit drugs trade", which was deemed to be contrary to the Most Favoured Nation (MFN) obligation laid down in Article 1(1) of the GATT.¹¹¹⁶ It also upheld India's objection that the preferences constituted a violation of the so-called Enabling Clause of GATT.¹¹¹⁷ India initially sought to challenge the GSP preferences that are granted for the respect of environmental and labour standards, however, this challenge was withdrawn in March 2003. In a review of the Panel findings, the report of the WTO Appellate Body found the special incentives for countries combating drug production and trafficking to be in violation of the WTO Enabling Clause as it discriminated between developing countries.¹¹¹⁸

2.6. Conclusions on the Normative Framework for a 'Positive Approach' to Human Rights in EU Development Policy

¹¹¹³ Article 9 of Council Regulation 980/2005. See also Annex III for the list of Conventions referred to in Article 9.

¹¹¹⁴ See Annex I of Council Regulation 980/200.

¹¹¹⁵ An in-depth analysis of this case and the legality of GSP under WTO law are beyond the scope of this thesis.

¹¹¹⁶ 'WTO Panel Final Ruling Upholds India Case Against EU GSP Program,' *WTO Reporter*, 31st October 2003.

¹¹¹⁷ It was held to have violated Articles 2(a), 3 (a) and 3(c) of the GATT Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (also known as the 'Enabling Clause'), Decision of 28th November 1979, GATT Doc. L/4903, BISD 26S/203.

¹¹¹⁸ *EC-Tariff Preferences*, (WTO Appellate Body Report) WT/DS246/AB/R, adopted 20th April 2004. For further reading see Mathis, J.H., 'Benign Preferences and the General System of Preferences (GSP),' 31 *Legal Issues of Economic Integration* 4 (2004), pp. 289-304.

The EU's development *acquis* contains a strong legal basis for the promotion of human rights as a general objective of EU development cooperation policy. Article 177(2) of the EC Treaty states that action in this domain will contribute to the general objective of 'developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'. This is supplemented by Article 9 of the association agreement between the EU and the ACP countries and secondary legislation, most notably, Regulation 975/1999. Furthermore, there are a range of soft law documents such as European Commission Communications, which elaborate on the EU's priorities and policy objectives in this domain.

As mentioned in the second chapter of this thesis, most of the literature in the area of donor human rights policies points to a bias towards civil and political rights. The second chapter of this thesis has illustrated, however, that this situation is changing with most donors moving towards the acceptance of a more holistic conception of human rights, at least at a rhetorical level. The EU adopts a broad definition of human rights in its treaty provisions with the ACP countries (Article 9 of the Cotonou Agreement). A broad definition of human rights is also contained within the human rights budget line known as the EIDHR. Furthermore, the protection and promotion of social rights in third countries is not inconsistent with EU external policy. For example, it is already an established part of Community practice through the scheme of Generalised System of Preferences and in several other unilateral Regulations. Although some commentators have sought to highlight the subordinate position of socio-economic rights in EU development policy, it is argued that the human rights clause is sufficiently broad to encompass a holistic conception. Nevertheless, this debate continues. In this regard, the possibility of including a specific social clause into cooperation agreements has been proposed, however, this has been criticised by several commentators on the grounds that it would undermine the indivisibility of human rights and would indicate that social rights are not included in the general human rights clause.¹¹¹⁹ The interrelationship between human rights and the broader political dimensions of the Cotonou Agreement was also discussed. In line with the views advanced in chapter two of this thesis, it was argued that

¹¹¹⁹ Riedel and Will, *op. cit.*, (1999), pp. 744-745.

human rights, democracy and good governance are interdependent and mutually reinforcing concepts. At the same time however, it was argued that due to the variations in the definitions of these terms, they should not be used interchangeably.

The precise contours of the EU's human rights policy in developing and third countries can also be discerned from the normative framework of Council Regulation 975/1999 and 976/1999. As mentioned above, these Regulations were drafted against the background of significant question marks over the Community competences to enact rules or conclude international conventions on human rights following the ruling in *Opinion 2/94*. Furthermore, the ruling in the *UK v. Commission* laid down that any 'significant expenditure' of the Community would require a separate legal basis, which led to the suspension of many human rights and democratisation activities that were funded from the Community budget. Whilst a firm legal basis had been provided in Article 177(2) of the EC Treaty for the promotion of human rights in developing countries since the Maastricht Treaty, much of the ambiguity in the broader sphere of external relations was removed with the introduction of Article 181(a) EC Treaty in the Treaty of Nice.¹¹²⁰ Although some commentators have pointed to a normative bias towards civil and political rights, as it has been argued above, the mandate of EIDHR is sufficiently broad to allow for a holistic interpretation of human rights.¹¹²¹

In light of the strong legal basis for a positive approach to the integration of human rights in EU-ACP relations, the following section seeks to inquire into the cleft between the internal normative framework and the operational framework for the implementation of human rights in development. Writing almost a decade ago, it was stated that, "[d]espite increased emphasis on a positive approach ... it proves in practice to be extremely difficult to give shape to such approach in a concrete and meaningful way. Generally, it is problematic, if not impossible, to clearly define the various conditionalities applied: human rights, democracy and good governance and to distinguish them from each

¹¹²⁰ There are still some controversial issues outstanding on the scope of the EU's powers in the field of human rights in external relations, however, these questions are beyond the scope of this thesis due to the solid legal framework for human rights in EU competences in relation to developing countries. For further reading, see Eeckhout, *op. cit.*, pp. 469- 473.

¹¹²¹ This view has also been confirmed in an interview with Mr. Timothy Clarke, Head of Unit, Human Rights and Democratisation (EIDHR), EuropeAid, Brussels, 3rd November 2003.

other.”¹¹²² It is hoped that the following analysis will illustrate whether these criticisms are still valid under the present-day Cotonou Agreement. In addition to examining the gap between rhetoric and practice in the area of support for human rights, the final part of this chapter seeks to examine the extent to which human rights are promoted as part of the process of EU-ACP development strategies. More specifically, it seeks to establish whether human rights are considered instrumental for the achievement of development objectives. This encompasses an analysis of human rights conditionality (Articles 96 and 97), political dialogue and technical and financial support for human rights.

3. The Practical Application of Human Rights within EU-ACP Relations

3.1. Human Rights Conditionality in the Practice of EU-ACP Relations

This section analyses the recourse to the human rights conditionality procedures within EU-ACP relations. Following this analysis, some concerns are outlined, firstly, with regard to transparency in the recourse to suspension measures and secondly, with regard to the controversial issue of good governance conditionality. This will be followed by an analysis of whether there is evidence to suggest that a positive ethos has been adopted in cases of human rights conditionality to date.

3.1.1. Recourse to the Human Rights Clause and Suspension Procedures in EU-ACP Relations

Before 1995, there was no legal basis for the suspension of cooperation with the ACP countries, however, in some cases, *de facto* suspensions of EU-ACP cooperation were carried out. For example, in 1994, eight ACP States were subject to unilateral suspension and restrictions due to security concerns and violations in the area of human rights and

¹¹²² Arts, K., European Community Development Cooperation, Human Rights, Democracy and Good Governance: at Odds or at Ease with Each Other?, from Ginther, K., *et al* (eds.), *Sustainable Development and Good Governance*, (Dordrecht, 1995).

democracy.¹¹²³ These *de facto* cases include countries such as Sudan and the Democratic Republic of Congo, in which aid was suspended in 1990 and 1992, respectively.¹¹²⁴ However, in line with the EU's positive approach, aid continued to be provided for humanitarian relief operations in these countries. Furthermore, in cases of instability and conflict, aid was also *de facto* suspended in Somalia, Sierra Leone, Burundi and Equatorial Guinea. With regard to the latter, the EU has been engaged in political dialogue since 1996 with a view to reinstating cooperation.¹¹²⁵ Nigeria has also been subject to various sanctions between 1993 and 1999, following the annulment of the presidential elections by the military in June 1993.¹¹²⁶ It should be noted, however, that a full suspension of EU aid only occurred two years after the military coup.¹¹²⁷ Democratic rule was finally restored in May 1999.

Since 1995, a legal basis for the suspension of cooperation in light of human rights violations has been included within the EU-ACP agreement. Following this, the human rights clause has been invoked on many occasions including thirteen countries within the ACP countries.¹¹²⁸ The EU has been criticised for its reluctance to invoke suspension measures against third countries that are suspected of breaching the essential elements clauses. According to Youngs, in the case of suspension of EU aid, suspension has only occurred in cases of gross human rights violations and serious breaches of the democratic process. He contends that there is no punishment for incremental weakening of democracy or the absence of democratic structures, and points out that democratic conditionality is not taken into consideration for the receipt of EU aid.¹¹²⁹ Furthermore, it

¹¹²³ Ibid., p. 29.

¹¹²⁴ Mbadinga, M.I., 'The Non-Execution clause in the Relationship between the European Union (EU) and the African, Caribbean and Pacific States (ACP)', 3 *German Law Journal* 11 (November 2002), para. 19. [Online version] [Source: http://www.germanlawjournal.com/article.php?id=210](http://www.germanlawjournal.com/article.php?id=210)

¹¹²⁵ Ibid.

¹¹²⁶ These sanctions taken by the EU included: suspension of military cooperation and arms sales; suspension of visits from military officials and intelligence services; visa restrictions for military and security forces personnel (along with their family members); a sports boycott; and the suspension of development cooperation.

¹¹²⁷ Youngs, *op. cit.*, (2001b), pp. 21 and 23. Youngs also notes that this ban only occurred after the execution of Ken Saro-Wiwa and other Ogoni environmental activists.

¹¹²⁸ This includes: Niger, Guinea Bissau, Sierra Leone, Togo, Cameroon, Haiti, Comoros, Côte d'Ivoire, Fiji, Liberia, Zimbabwe, the Republic of Guinea and Mauritania. The most recent consultations were opened in Mauritania, see European Commission, Communication from the Commission to the Council on the opening of consultations with Mauritania under Article 96 of the Cotonou Agreement, COM (2005) 546, 28th October 2005.

¹¹²⁹ Youngs, R., 'European Union Democracy Policies: Ten Years On,' 6 *EFAR* (2001a), pp. 356-357.

is only in the case of development cooperation that the suspension of external agreements has been carried out.¹¹³⁰

With regard to the ACP countries, the first example of suspension since Lomé IV-bis came in response to concerns raised over alleged electoral fraud by the authorities in Togo during the presidential elections in 1998. Consultations were held between the EU and the Togolese government under the procedures of Article 366a of the Lomé Convention.¹¹³¹ As a result of consultations, the EU suspended cooperation on the basis of breaches of ‘human rights, democratic principles and the rule of law’ within Article 5.¹¹³² However, Community aid continued to be channeled indirectly through decentralised cooperation.¹¹³³ Further cases of suspension have occurred for breaches of the electoral and democratic process.

Aid has also been suspended in cases of coup d’état in the ACP countries. By virtue of Article 366a, consultations took place with Niger on 18th May 1999 as a result of a coup d’état in April of that year. Following consultations, the Niger government committed itself to undertaking democratic reform.¹¹³⁴ Furthermore, in 1999, Article 366a consultations were also held with Guinea-Bissau and Comoros for breaches of the democratic process and violation of the essential elements clause.¹¹³⁵ In 2001, measures were also taken against Fiji in response to the coup d’état on 19th May 2000.¹¹³⁶ However, the delay in holding consultations and the EU’s unwillingness to respond immediately to the crisis has been criticised by Holland who stated that official statements condemning this situation were not issued by the EU during the crisis in 2000.¹¹³⁷ This can be contrasted with the immediate condemnation of the coup d’état in

¹¹³⁰ Bulterman, *op. cit.*, (2001), p. 252.

¹¹³¹ Declaration by the Presidency on behalf of the EU on the conduct of the Presidential elections in Togo, 26th June 1998, PESC/98/70.

¹¹³² Reply to written question P-1550/99 by Graham Watson (ELDR) to the Commission on presidential elections in Togo, OJ C 27/127, 1st September 1999.

¹¹³³ *Ibid.*

¹¹³⁴ UK House of Commons, *op. cit.*, 2004, p. 29. See also EU, ‘Annual Report on Human Rights 1998-1999.’ Source: <http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eu-annual-report-1999-en.pdf>

¹¹³⁵ EU Annual Report on Human Rights 1998-1999, *ibid*; Bulterman, *op. cit.*, (2001), p. 254-257.

¹¹³⁶ Council Decision 334/2001 of 9th April 2001 concluding the consultation procedure with the Fiji Islands under Article 96 of the ACP-EC Partnership Agreement, [2001] OJ L 120, 28th April 2001. This coup led to the deposing of President Ratu Sir Mara Kamese, holding the government hostage and the repeal of the 1997 Constitution of Fiji. Council Decision 334/2001 of 9th April 2001 concluding the consultation procedure with the Fiji Islands under Article 96 of the ACP-EC Partnership Agreement, [2001] OJ L 120/134, 28th April 2001, p. 2.

¹¹³⁷ Holland, M., *The European Union and the Third World*, (Palgrave, 2002), p. 138.

the Solomon Islands and the discussion of the pre-election irregularities in Zimbabwe in the General Affairs Council and by the European Parliament in May and June 2000.¹¹³⁸ Although the Development Council did “exchange views on conflict crisis situations in developing countries”, reference was not made to Fiji, nor were any conclusions drawn on the conflict in this country.¹¹³⁹ It should be noted, however, that Fiji had been informally chosen by the ACP group to host the signing of the post-Lomé Agreement (which was informally known as the Suva Agreement), however, it was moved to the Cotonou in Benin as a result of the political situation in this country. Nevertheless, the EU’s soft response can also be seen in the participation of Fiji at the signing of the Cotonou Agreement in June 2000.¹¹⁴⁰ According to Holland, the discrepancy between the swift response to the Zimbabwe crisis in 2000 and the absence of condemnation in the case of Fiji “presents a confusing image of the EU’s development and foreign policies.”¹¹⁴¹ Consultations were eventually held with the Fijian authorities under Article 96 of the Cotonou Agreement on 19th October 2000 due to the violation of the essential elements.¹¹⁴² The EU emphasised its positive approach and its preference for political dialogue in the case of Fiji by stating that full cooperation would resume following the holding of free and fair elections.¹¹⁴³

In 2001, the Article 96 procedure was used in Haiti for breaches of human rights and the democratic process due to electoral irregularities.¹¹⁴⁴ Haiti failed to take the EU up on its request for consultations, therefore “appropriate measures” were undertaken which resulted in the partial suspension of budgetary aid and EDF funding. The restrictive measures which were taken against Haiti were regarded as excessive by some commentators as only one meeting had taken place between the parties.¹¹⁴⁵ At the ACP-EU Joint Parliamentary Assembly in Libreville, ACP Parliamentarians also called for renewed political dialogue and claimed that the measures taken by the EU were contrary

¹¹³⁸ Ibid.

¹¹³⁹ Development Council, 18th May 2000, quoted in *ibid*.

¹¹⁴⁰ Ibid. The Cotonou Agreement also provided for the accession of six Pacific island states to the ACP group, which included the Cook Islands, Palau, Nauru, the Marshall Islands, Niue and the Federated States of Micronesia.

¹¹⁴¹ Ibid., p. 139.

¹¹⁴² The EU invited the Fijian authorities to hold consultations on 4th August 2000. Council Decision 334/2001, *op. cit.*, p. 2.

¹¹⁴³ Ibid., pp. 2 and 3.

¹¹⁴⁴ Council Decision 131/2001 of 29th January concluding the consultation procedure with Haiti under Article 96 of the Cotonou Agreement of the ACP-EC Partnership Agreement, [2001] OJ L 048, 17th February 2001.

¹¹⁴⁵ Mbadinga, *op. cit.*, (2003), para. 11.

to its positive approach.¹¹⁴⁶ This decision was renewed several times, however, in 2003, on the occasion of the fourth renewal, the Commission decided to fund civil society groups.¹¹⁴⁷ In September 2004, in light of an improvement of the human rights situation and restoration of democratic rule in Haiti, the EU concluded consultations with Haiti and agreed to begin discussions on the preparation of the country strategy paper for the 9th EDF.¹¹⁴⁸

The swift resort to suspension measures in Haiti can be contrasted with the case of Côte d'Ivoire. In line with the new procedures in the Cotonou Agreement, consultations were initiated with the authorities in the Côte d'Ivoire in 2000, as a result of the military-coup.¹¹⁴⁹ At the end of consultations, it was agreed that there would be a gradual resumption of cooperation and that political dialogue would continue owing to positive initiatives taken by the authorities.¹¹⁵⁰ According to Mbadinga, the softer approach taken against Côte d'Ivoire indicates the arbitrary and *ad hoc* nature of EU suspension mechanisms.¹¹⁵¹

Measures were taken against Zimbabwe in 2001 under Article 96 of the Cotonou Agreement in response to increasing violence and insecurity in light of the occupation of agricultural land and limitations on radio broadcasting laws. In response, aid was suspended in all areas except social assistance.¹¹⁵² On 25th July 2001, the Council of Ministers referred to “the lack of substantial progress in the on-going political dialogue with the Government of Zimbabwe and expressed its deep concern over recent developments in Zimbabwe.”¹¹⁵³ Targeted sanctions were imposed by the EU on 18th February 2002, which were largely influenced by the encouragement of the British

¹¹⁴⁶ See ACP Press Release 146b042e, 5th February 2001 and ACP Press Release 146b050, 17th March 2001. Quoted in Mbadinga, *ibid.*, para. 11.

¹¹⁴⁷ The decision was renewed in December 2001, 2002 and 2003. Source: UK House of Commons Report, *op. cit.*, (2004), p. 30.

¹¹⁴⁸ Council Decision 681/2004 of 24th September 2004 amending Decision 2001/131 concluding the consultation procedure with Haiti under Article 96 of the ACP-EC Partnership Agreement, [2004] OJ L 311, 8th October 2004.

¹¹⁴⁹ European Commission, Communication to the Council concerning the opening of consultations with Côte d'Ivoire under Article 96 of the Cotonou agreement, COM (2004) 547, 10th August 2004.

¹¹⁵⁰ Council Decision 510/2001/EC of 25th June 2001 concluding consultations with the Côte d'Ivoire under Article 96 of the ACP-EC Partnership Agreement, [2001] OJ L 183, 25 June 2001.

¹¹⁵¹ Mbadinga, *op. cit.*, (2003), para. 24. See Press Release 146b044e, 16th February 2001.

¹¹⁵² Communication from the Commission on the opening of consultations with Zimbabwe in accordance with the provisions of Article 96 of the Cotonou Agreement, COM (2001) 623 (*not yet published*).

¹¹⁵³ Council Press Release, 25th June 2001. Source: <http://ue.eu.int/newsroom/newmain.asp?LANG=1>

authorities.¹¹⁵⁴ These restrictive measures have subsequently been extended on several occasions and aid continues to be suspended.¹¹⁵⁵ Most recently, the restrictive measures against Zimbabwe were extended in 2006 for a further twelve months.¹¹⁵⁶ Although the channels of communication have broken down between the EU and Zimbabwe, the Council reiterated that the application of Article 96 measures should not be an obstacle to political dialogue.¹¹⁵⁷

The European Parliament has also taken a strong stance on the Zimbabwean issue, culminating in a diplomatic incident, which led to the collapse of the fifth Joint Assembly of the ACP-EU Institutions.¹¹⁵⁸ In November 2002, the European Parliament prevented the entry of two delegates from Zimbabwe to its buildings, namely, Mr. Paul Mangwana, the Deputy Minister of Finance and Economic Development, and Mr. Chris Kuruneri, the Minister of State for Enterprises and Parastatals.¹¹⁵⁹ Although the EU had imposed a visa ban on Zimbabwean officials, including the aforementioned individuals, the Belgian authorities had permitted the Ministers to enter its territory stating that it had done so under “legal obligation”. According to the Council Common Position of 18th February 2002, exemptions to the travel ban may be granted for the purposes of attending the meetings of international bodies. This led to disagreement between the EU and the ACP group, firstly, as it was felt that the decision should not have been taken unilaterally by the Parliament but instead that it should have been dealt with by the Bureau of the Joint Assembly and secondly, there was also some disagreement in light of the exemption within the Council Common Position for participation at international meetings.¹¹⁶⁰

¹¹⁵⁴ Taylor, I. and Williams, P., ‘The Limits of Engagement: British Foreign Policy and the Crisis in Zimbabwe,’ 78 *International Affairs* 3 (2002), p. 555.

¹¹⁵⁵ Council Decision 157/2004 of 19th February 2004 extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-ECP Partnership Agreement, [2004] OJ L 50, 20th February 2004; Council Decision 139/2005 of 17th February 2005 extending the period of application of the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-ECP Partnership Agreement, [2005] OJ L 48, 19th February 2005.

¹¹⁵⁶ Council Decision 114/2006 of 14th February 2006 extending the period of application on the measures in Decision 2002/148/EC concluding consultations with Zimbabwe under Article 96 of the ACP-EC Partnership Agreement, [2006] OJ L 48, 18th February 2006.

¹¹⁵⁷ Annex of *ibid*.

¹¹⁵⁸ Mouradian, A.-M., ‘ACP-EU Parliamentary Assembly: Cancellation of the 5th Session,’ *The Courier* No. 196, (January-February 2003).

¹¹⁵⁹ Interview with Mr. John Bryan Rose, European Parliament, European Parliament DG for Research, Head of Division, Agriculture, Fisheries, Regional Cooperation and Development Cooperation, Brussels, 12th June 2003.

¹¹⁶⁰ *Ibid*.

In March 2004, consultations were opened with Togo as a result of breaches of the democratic process during parliamentary and presidential elections.¹¹⁶¹ The consultations were opened with the aim of deciding whether the Council Decision of 14th December 1998 to suspend EDF support should remain in force.¹¹⁶² In concluding these negotiations with the Togolese authorities, the European Commission noted that serious human rights reforms were required, in spite of on-going progress. As a result, it proposed that “appropriate measures” should take the form of “enhanced dialogue” over a twenty-four month period¹¹⁶³ and a decision would be made on the 9th EDF funding following the implementation of these reforms and the holding of transparent and democratic elections.¹¹⁶⁴ This further indicates the EU’s willingness to engage in positive political dialogue throughout the consultation process. However, the EU has recently encouraged the holding of democratic and transparent presidential elections in 2005,¹¹⁶⁵ with the Parliament taking a stronger stance in the aftermath of these elections.¹¹⁶⁶

Consultations were opened on 31st March 2004 between the European Commission and the Republic of Guinea in light of political deadlock and the on-going violation of Article 9 of the Cotonou Agreement.¹¹⁶⁷ Following consultations which began in July of that year, the Commission noted that although some progress had been made, “appropriate measures” would need to be taken in line with Article 96(2)(c). Compliance with the requirements laid down in the Council decision would allow for the disbursement of EU funding if the Republic of Guinea fulfilled certain objectives, including decentralisation, liberalisation of the media and good governance and financial management reform.¹¹⁶⁸ The EU would also continue to fund civil society organisations and humanitarian aid

¹¹⁶¹ European Commission, Proposal for a Council Decision concluding consultations with Togo under Article 96 of the Cotonou Agreement, COM (2004) 576, 31st August 2004, p. 7.

¹¹⁶² European Commission, Communication from the Commission to the Council on the opening of consultations with the Togolese Republic under Article 96 of the Cotonou Agreement, COM (2003) 850 fin., 1st January 2003.

¹¹⁶³ COM (2004) 576, *op. cit.*, p. 4.

¹¹⁶⁴ *Ibid.*, p. 11.

¹¹⁶⁵ Declaration by the Presidency on behalf of the European Union on Togo, PESC/05/39, 25th April 2005.

¹¹⁶⁶ European Parliament, ‘European Parliament says fresh elections needed in Togo,’ Press Release EP05-047EN, Strasbourg, 12th May 2005; Déclaration du Commissaire européen Louis Michel au sujet du résultat de l’élection présidentielle au Togo,’ Press Release EC05-180FR, Brussels, 10th May 2005.

¹¹⁶⁷ These on-going issues related to the constitutional referendum in 2001, parliamentary elections in 2002 and presidential elections in 2003. See Communication from the Commission to the Council and the European Parliament on the opening of consultations with the Republic of Guinea under Article 96 of the Cotonou Agreement, COM (2003) 517, 19th August 2003; Council Decision 321/2005 of 14th April 2005 concluding consultations with the Republic of Guinea under Articles 96 of the Cotonou Agreement, [2005] OJ L 104, 23rd April 2005, p. 2.

¹¹⁶⁸ *Ibid.*, p. 3.

operations in order to support the basic needs of the most disadvantaged sections of society. Political dialogue would also continue with a view to eventually allowing for the disbursement of funds from the 9th EDF and the finalisation of the country strategy and national indicative programme. However, this would be linked to fulfillment of the conditions laid down in Council Decision 321/2005 and the holding of free and fair local and parliamentary elections.¹¹⁶⁹

More recent cases have indicated the EU's willingness to have recourse to the good governance provisions of the EU-ACP Partnership Agreement, although this is not always made explicit at the beginning of consultations. In 2001, consultations were held with Liberia in line with Article 96 and Article 97 of the Cotonou Agreement. This resulted from human rights abuses that were committed by security forces against the civilian population during the pre-election period, the absence of a political opposition and limitations on the freedom of expression. Appropriate measures were also taken as a result of a failure to comply with good governance requirements in line with Article 97(3) due to a lack of transparency in public accounting, serious corruption and the exploitation of monopolies and natural resources.¹¹⁷⁰ This is a significant development as it highlights the first example of *de jure* recourse to good governance conditionality. These consultations were concluded in 2002 due to positive steps taken by Liberia to remedy the situation, although it was noted that substantial progress would need to be made and dialogue would continue under Article 8.¹¹⁷¹ Nevertheless, recourse was made to the immediate provisions under the "case of special urgency" in Liberia in 2003.¹¹⁷² Although it was recognised that progress had been made in the area of human rights and some improvement in the security situation, serious concern was raised over the failure to comply with good governance conditionality, particularly with the management of the public finances, macro-economic management and on-going corruption.¹¹⁷³

¹¹⁶⁹ Ibid., p. 4.

¹¹⁷⁰ Council Decision 274/2002 of 25th March 2002 concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement, [2002] OJ 96, 13th April 2002.

¹¹⁷¹ Ibid., p. 1.

¹¹⁷² Council Decision 631/2003 of 25th August 2003 concerning Liberia under Article 96 of the ACP-EC Partnership Agreement in a case of special urgency, [2003] OJ L 220, 3rd September 2003.

In the context of good governance conditionality, another interesting case is that of Guinea-Bissau. In 2003, EU assistance was suspended in Guinea-Bissau due to a military coup in that country.¹¹⁷⁴ In concluding consultations with Guinea-Bissau, the Council Decision recognised that steps had been taken to improve the situation including the holding of free and fair elections in March 2004 and judicial reform, along with the appointment of an independent prosecutor. However, the Decision highlighted the lack of progress made in the area of public finances and absence of accountability and it was stipulated that “appropriate measures” would follow in the form of political dialogue on this issue.¹¹⁷⁵ It is interesting to note that Article 97 did not appear to have been raised in either the opening or conclusion of consultations.

Furthermore, the conclusion of consultations under Article 96 of the Cotonou Agreement with the Central African Republic in 2003 following a military coup,¹¹⁷⁶ also referred to the fact that the reinstatement of partially-suspended EDF funding depended not only on human rights and democratic reform, but also on measures to combat corruption, improve transparency in the public services and ensure the regular payment of salaries.¹¹⁷⁷

Evidence of the positive ethos of assistance was seen in various other cases, for example, the commitment to decentralised cooperation in Somalia through civil society and non-governmental channels in the absence of a central government.¹¹⁷⁸ In addition, the ethos of engagement was evident in the EU’s willingness to re-engage directly with the Sudanese government following the signing of a peace agreement in January 2005, agreed at Machakos in Kenya in the previous year.¹¹⁷⁹ This direct cooperation with the

¹¹⁷³ Council Decision 16/2005 of 22nd December 2004 amending Decision 2003/631/EC adopting measures concerning Liberia under Article 96 of the ACP-EC Partnership Agreement in a case of special urgency, [2005] OJ L 8, 12th January 2005. Council Decision 631/2003 was thus extended for a further eighteen months.

¹¹⁷⁴ Council Decision 680/2004 of 24th September concluding consultations with Guinea-Bissau under Articles 96 of the ACP-EC Partnership Agreement, [2004] OJ L 311, 8th October 2004.

¹¹⁷⁵ *Ibid.*, p. 2.

¹¹⁷⁶ Communication from the Commission to the Council and the European Parliament on the opening of consultations with the Central African Republic under Article 96 of the Cotonou Agreement, COM (2003) 222, 28th April 2003; Proposal for a Council Decision concluding the consultation procedure opened with the Central African Republic under Article 96 of the Cotonou Agreement, COM (2003) 629, 22nd October 2003.

¹¹⁷⁷ Council Decision 837/2003 of 24th November 2003 concluding the consultation procedure opened with the Central African Republic under Article 96 of the Cotonou Agreement, [2003] OJ L 319, 4th December 2003, p. 3.

¹¹⁷⁸ European Commission Strategy for the Implementation of Special Aid to Somalia 2002-2007. Source: http://europa.eu.int/comm/development/body/csp_rsp/_print/so_csp_en.pdf#zoom=100

¹¹⁷⁹ The Republic of Sudan and the EC, ‘Country Strategy Paper and National Indicative Programme 2005-2007’. Source: http://europa.eu.int/comm/development/body/csp_rsp/_print/sd_csp_en.pdf#zoom=100

Sudanese government is noteworthy, as the government has been the subject of global criticism for its on-going role in the human rights violations committed by the militia in the Darfur region. However, it was stated that the resumption of EU aid would be conditional upon the peaceful resolution of the situation in Darfur.¹¹⁸⁰

3.1.2. Analysis of Recourse to the Human Rights Clause

3.1.2.1. Balancing Transparency and Flexibility

According to Tomaševski, EU human rights conditionality has been both “punitive and arbitrary.”¹¹⁸¹ In this context, there has been a lack of information on how the clause should be implemented which has resulted in a very subjective process.¹¹⁸² In a similar vein, according to Arts, “it is precisely this phase of decision-making that lacks transparency and suffers from the absence of clearly formulated and publicised criteria. This leads to the unavoidable charges of community bias between (politically) small and big countries, and application of conditionality in a highly politicized manner.”¹¹⁸³ As early as 1993, the Development Council stated that human rights conditionality is “generally carried out on an *ad hoc* basis and operates without an internationally agreed institutional framework.”¹¹⁸⁴ The often informal basis upon which conditionality is carried out has been noted by Riedel and Will.¹¹⁸⁵ The arbitrary nature of conditionality has been attributed to the role of political will. For example, the suspension of EU aid has almost always concerned poor and marginalised states in Africa (with the exception of Nigeria), in contrast with the absence of human rights conditionality in Egypt and Indonesia despite clear human rights violations.¹¹⁸⁶ The factors which impact on political

¹¹⁸⁰ European Commission, ‘Resumption of Cooperation with Sudan linked to evolution of situation in Darfur,’ Press Release EC05-140EN, Brussels, 11th April 2005; European Parliament, ‘European Parliament on Conditional Reintroduction of Aid in Sudan,’ Press Release EP 06-046EN, Strasbourg, 12th April 2005.

¹¹⁸¹ Tomaševski, *op. cit.*, (1997), p. 49. In this context, she compares conditionality with China which were short-lived and Sudan which were prolonged.

¹¹⁸² *Ibid.*, p. 49.

¹¹⁸³ Arts, K., ‘European Community Development Cooperation Policy, Human Rights, Democracy and Good Governance: At Odds or at Ease with Each Other?’, p. 266, from Ginther, K., *Sustainable Development and Good Governance*, (Dordrecht, 1995).

¹¹⁸⁴ ‘Implementation of the November 1991 Resolution on human rights, democracy and development,’ Doc. No. 6023/93 of 21st April 1993, p. 6. Quoted in Tomaševski, *op. cit.*, (1997), p. 50.

¹¹⁸⁵ Riedel and Will, *op. cit.*, (1999), p. 739.

¹¹⁸⁶ Smith, *op. cit.*, (2003), pp. 116-117.

decision-making include commercial interests, foreign policy and national security interests.

As noted above, human rights conditionality has often been criticised for the *ad hoc* basis upon which it is carried out and the lack of verifiable indicators for the identification of human rights abuses. The European Parliament has been at the forefront in calling for stricter conditionality in the implementation of human rights conditionality on a general basis, not simply in the ACP countries.¹¹⁸⁷ In 2001, the European Parliament passed a resolution on ‘Conditionality and International Diplomacy for Human Rights,’ in which it recognised the need for flexibility, but also stated that this should not be an excuse for inaction.¹¹⁸⁸ In this way, it has called for a narrow and restrictive interpretation of situations in which an agreement may be suspended. Equally, the European Parliament made proposals for improving the effectiveness of human rights clauses in its Annual Report of 2002,¹¹⁸⁹ and in the following year, both the Parliament and NGOs made further such recommendations at the Human Rights Forum in Copenhagen in 2002.¹¹⁹⁰

In addition, the European Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy adopted a resolution in May 2003 reiterating their request for stricter implementation measures.¹¹⁹¹ This document included the following recommendations:

5) Calls on the Council and the Commission effectively to implement restrictive measures adopted by the EU...; 6) Considers that the implementation of the human rights clause in association and cooperation agreements depends primarily on the political will of the EU to exert adequate pressure on the country concerned, and on assigning priority to human rights issues, over economic,

¹¹⁸⁷ Tomaševski, *op. cit.*, (1997), pp. 41 and 44-48.

¹¹⁸⁸ European Parliament Resolution, ‘Conditionality and International Diplomacy for Human Rights’, 2001. Source: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61994J0268

¹¹⁸⁹ European Parliament, ‘Annual Report on Human Rights in the World in 2002 and European Union’s Human Rights Policy,’ Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy, 16th July 2003 at <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+REPORT+A5-2003-074+0+DOC+XML+V0//EN&LEVEL=3&NAV=S&LSTDOC=Y>

¹¹⁹⁰ Reference to this can be found at: http://www.europarl.eu.int/compairl/afet/droi/hrwg/pv_hrwg_28012003en.pdf

security and other political interests; 7) Stresses, however, that the lack of a clear implementation mechanism further hinders the effectiveness of the clause; considers the implementation mechanism of the Cotonou Agreement as exemplary for its provisions on consultations, suspensions and participation by civil society; ... 9) Calls on the Commission and the Council to set up and make public guidelines available for incentive and restrictive measures to be applied, in order to enhance openness and credibility in the process of implementing the clause; 10) Urges the Council and the Commission to set in motion structured dialogue procedures for the regular assessment of compliance by partner states with their human rights obligations;...14) Deplores once again the fact that the Parliament is not involved in the decision-making process for initiating consultations or suspending an agreement; strongly insists, therefore, on being fully informed in good time of any such measures being taken.¹¹⁹²

Furthermore, in 2003, the appeal for the stricter application of human rights clauses was made through a written question to the former EU Commissioner of External Relations.¹¹⁹³ In response, Commissioner Patten highlighted the need for the Commission to maintain its flexibility in responding to situations. Accordingly, he stated that: “[s]tructured exchanges on the basis of the clause with third countries offer a more realistic way of realising the goals of the human rights clause than the application of rigid criteria for the suspension of parts of an agreement.”¹¹⁹⁴ He also noted that the Commission gives priority to positive dialogue, rather than strict sanction mechanisms, which also justified a more flexible approach.

...the Commission avoided employing any “mechanistic” or “typological” approach, which would have failed to provide the necessary comprehensive appreciation of a precarious situation in third country concerned. The

¹¹⁹¹ European Parliament, Draft Annual Report on Human Rights in the World in 2002 and European Union’s Human Rights Policy, (2002/201 1(INI), Committee on Foreign Affairs, Human Rights, Common Security and Defence, 6th May 2003. Source: <http://www.europarl.eu.int/meetdocs/committees/afet/20030616/493327en.pdf>

¹¹⁹² Ibid.

¹¹⁹³ Written Question by Miet Smet (PPE-DE), September 2003. Written Question E-2903/03, 23rd September 2003. [“suspension of cooperation agreements and postponement of their signature.”] Source: <http://www2.europarl.eu.int/omk/sipade2?PUBREF=-//EP//TEXT+WQ+E-2003-2903+0+DOC+XML+V0//EN&L=EN&LEVEL=3&NAV=S&LSTDOC=Y>

Commission pursues the same approach in deciding on whether to slow down or suspend negotiations on a bilateral agreement or the signature of such an agreement...

Whilst the European Parliament has sought stricter measures on the implementation of human rights clauses, it has described the Cotonou human rights clause as “exemplary”.¹¹⁹⁵ In particular, this is due to the fact that consultations can be initiated by either party, which it believes should be held up as an example for others.

3.1.3. Good Governance Conditionality in Practice

The Cotonou Agreement introduced good governance as a fundamental element of EU-ACP cooperation. According to Arts, the EU has previously taken measures against countries for failing to respect good governance measures prior to the inclusion of a legal basis in 2000.¹¹⁹⁶ The background to the negotiation of this clause could also be attributed to serious corruption in the health services in the Ivory Coast in 1998, which were financed by the EU. Therefore, the EU was subsequently forced to partially suspend cooperation due to the extent of corruption.¹¹⁹⁷ Due to the disagreement between the EU and the ACP states over the inclusion of good governance as an essential element of cooperation in the Cotonou Agreement, it was enshrined as a ‘fundamental element’, which could be invoked in serious cases of corruption.

As noted above, the Article 97 procedure was invoked in the case of Liberia in 2003 and extended in 2005 for a failure to comply with good governance conditionality. Reference was also made to the failure to respect good governance issues in the case of Guinea-Bissau in 2004, however, reference was not made to Article 97 during the consultation procedures. As mentioned in the second chapter of this thesis, good governance lacks a

¹¹⁹⁴ Reply to EP Written Question by Chris Patten for the European Commission, 25th November 2003. Source: http://www2.europarl.eu.int/omk/sipade2?L=EN&OBJID=69875&LEVEL=4&SAME_LEVEL=1&NAV=S&LSTDOC=Y

¹¹⁹⁵ Ibid.

¹¹⁹⁶ See Arts, *op. cit.*, (2000), pp. 339-348. This included the Central African Republic, Congo, Cameroon, Kenya, Madagascar, Malawi, Surinam and Tanzania.

legal basis in international law and doubts have been raised as to whether it constitutes an international legal principle.¹¹⁹⁸ For this reason, Arts and Dickson have criticised the EU for forcing the ACP countries to accept this provision.¹¹⁹⁹ According to these authors, “...the Community has now engaged in strong efforts to legalise its unlawful practice by attempting to incorporate detailed good governance provisions in newly negotiated cooperation agreements”.¹²⁰⁰

On the other hand, it should be noted that African governments have agreed to good governance principles through the framework of the African Union and the good governance peer-review mechanism of the New Partnership for African Development (NEPAD).¹²⁰¹ In addition, it was argued in the second chapter of this thesis that human rights and good governance are distinct, yet inter-related concepts.¹²⁰² Nevertheless, whilst the good governance agenda may impact positively upon human rights, it cannot be denied that in the absence of a legal basis in international law, the promotion of good governance conditionality is a controversial issue.

3.1.4. Conclusions on the Practical Implementation of Negative Conditionality

The above section outlined the cases in which aid was *de facto* suspended to ACP countries prior to the existence of a legal basis in 1995. It also surveyed the cases in which recourse has been made to the human rights clause. Since 1995, this procedure has been carried out under Article 366a of the Lomé IV-bis Convention and under Article 96 and/or Article 97 of the Cotonou Agreement (2000). As noted in this chapter, most of the cases involving the use of Article 366a of Lomé IV and Article 96 of the Cotonou

¹¹⁹⁷ Santiso, C., ‘The Reform of EU Development Policy: Improving Strategies for Conflict Prevention, Democracy Promotion and Governance Conditionality,’ *CEPS Working Paper No. 182*, (2002), p. 19.

¹¹⁹⁸ Arts, K., and Dickson, A., (eds.), *EU Development Policy: From Model to Symbol*, (Manchester, 2004), p. 10; Arts, *op. cit.*, (2000), pp. 40-41 and 50; Fierro, *op. cit.*, (2003), pp. 129-130.

¹¹⁹⁹ *Ibid.*, (2004), p. 10.

¹²⁰⁰ *Ibid.*

¹²⁰¹ African Union, ‘Vision of the African Union and Mission of the African Union Commission,’ Final Draft, March 2004; NEPAD, Declaration on Declaration on Democracy, Political, Economic and Corporate Governance’; NEPAD, The African Peer Review Mechanism (APRM). NEPAD resulted from a merger of Millennium African Programme (MAP) and the Omega Plan formulated by African Heads of State. It was approved by the OAU on 11th July 2001 at the Lusaka Summit and later at the first African Union (AU) summit in Durban in 2002.

¹²⁰² See also Arts, *op. cit.*, (2000), p. 339.

Agreement have involved cases of coup d'état, flagrant abuses of the democratic process and flawed elections.¹²⁰³ Within the context of the Cotonou Agreement, is there any evidence to suggest that a positive approach is adopted in the case of political dialogue by exhausting all opportunities for dialogue before taking restrictive measures? Does the process of dialogue continue before, during and after Article 96 consultations? In the case of 'appropriate measures', were there any steps taken to ensure that humanitarian aid and assistance to social sectors would continue?

In the analysis of recourse to the human rights clause, inconsistencies were noted in relation to the EU's positive approach, particularly due to a lack of transparency. For example, the swift measures taken against Haiti have been contrasted with the softer approach in the case of Côte d'Ivoire and Fiji.¹²⁰⁴ However, in contrast to the often *ad hoc* nature of political conditionality, the case of Togo is interesting for the purposes of this discussion as the Togolese made several démarches requesting the opening of consultations prior to the EU's official move to initiate the procedure in 2003.¹²⁰⁵ In this case, the measures taken were initially successful due to the willingness of the Togolese authorities to undertake constructive dialogue with the EU. Despite the commitments of both parties to the process of dialogue, it became difficult to achieve a positive outcome due to a lack of agreement and common ground during consultations, particularly, on the EU's proposed reforms.¹²⁰⁶

Political dialogue was deemed to have proved particularly useful for achieving a positive outcome to consultations in the case of Guinea-Bissau in 2004.¹²⁰⁷ This was largely due to the government of Guinea-Bissau's willingness to comply with political reforms that were encouraged by the EU during consultations. During the period of consultations, the EU did not suspend funding and programmes under the EDF continued.¹²⁰⁸ Coordination among the donor community continued and the active role of the ACP Group played a

¹²⁰³ Mbangu, L., 'Recent Cases of Article 96 Consultations,' ECDPM Discussion Paper No. 64C, (August 2005), p. 17.

¹²⁰⁴ Mbadinga, *op. cit.*, para. 11 and Holland, *op. cit.*, (2002).

¹²⁰⁵ Mbangu, *op. cit.*, (2005), p. 20.

¹²⁰⁶ *Ibid.*, p. 12.

¹²⁰⁷ *Ibid.*, p. 13 and p. 19.

¹²⁰⁸ *Ibid.*, p. 6.

role in finding a positive outcome for the parties.¹²⁰⁹ The increasingly active role played by the ACP group and neighbouring ACP countries was also seen during consultations with the Central African Republic following a military coup in 2003.¹²¹⁰ However, due to a lack of coordination among these actors, this participation did not prove to be useful in achieving a positive outcome to consultation.¹²¹¹

In the case of Liberia, recourse was made to Articles 96 and 97 in 2001, however, the EU continued to provide support for institutional reform, regional projects and the holding of elections.¹²¹² However, recourse was made to the ‘special urgency’ procedures in 2003, which provides an exception to the requirement of holding of consultations prior to taking restrictive measures.

Despite the commitment to dialogue throughout the consultation procedure, this proved impossible in the case of Zimbabwe. Following the decision to take restrictive measures in 2002, Zimbabwe informed the EU of its decision to invoke Article 98 on dispute proceedings.¹²¹³ Consequently all channels for dialogue were blocked following the EU’s decision to invoke Article 96.¹²¹⁴ Zimbabwe’s decision to invoke dispute proceedings was revoked in 2004 after receiving a guarantee that the political dimensions of the partnership would be reviewed.¹²¹⁵ EDF funding continued to be channeled through non-governmental organisations to assist the most vulnerable sections of the population in most cases.¹²¹⁶

In recent cases of suspension measures, it was shown that the EU has invoked Article 97 on the failure to respect good governance criteria in the case of Liberia in 2002.¹²¹⁷ This case concerned consultations on Article 96 as a result of human rights violations, as well as Article 97 due to discrepancies in public accounting, corruption and the exploitation of

¹²⁰⁹ Ibid., p. 8.

¹²¹⁰ Ibid.

¹²¹¹ Ibid., p. 5 and p. 10.

¹²¹² Bradley, A., ‘An ACP Perspective and Overview of Article 96 Cases,’ ECDPM Discussion Paper No. 64D (August 2005), p. 10.

¹²¹³ Ibid., p. 12.

¹²¹⁴ Mackie, J. and Zinke, J., ‘When Agreement Breaks Down, What Next? The Cotonou Agreement’s Article 96 Consultation Procedure’, ECDPM Discussion Paper No. 64A (August 2005), p. 8.

¹²¹⁵ Bradley, *op. cit.*, (2005), p. 12.

¹²¹⁶ This can be noted in the case of Zimbabwe, Liberia, Côte d’Ivoire, Togo, Haiti and the Republic of Guinea. See *ibid.*, pp. 4 *et seq.*

monopolies and natural resources. Reference to the failure to meet good governance requirements was also made during recent consultations with the Central African Republic and the Republic of Guinea, however, as it was shown, Article 97 procedures were not invoked.¹²¹⁸ In the interests of accountability and transparency, it was argued that the EU should avoid using Article 96 procedures to raise questions with regard to good governance, particularly in light of the sensitive and controversial nature of this issue, as noted by Arts and Dickson.¹²¹⁹

In the context of negative conditionality, the EU-ACP case study noted the difficulties in maintaining a balance between transparency and flexibility. The literature in this area has highlighted the *ad hoc* basis upon which human rights conditionality is carried out and the absence of verifiable indicators in this regard. EU consultations have been launched in thirteen cases involving the ACP countries. Whilst the European Parliament has been at the forefront of efforts to enforce stricter conditionality procedures, the European Commission has sought to balance the need for transparency with a flexible approach in order to encourage political dialogue and a positive approach before imposing sanctions. The Cotonou Agreement is a good example of this as it emphasises a positive approach through consultations in both the provisions of the treaty and also in practice as shown above. The revision of Cotonou in 2005 further reinforces the emphasis on a positive approach by extending the time-limits for consultations under Articles 96 and 97 and by stating that all possibilities for dialogue should be exhausted through Article 8 before initiating consultations. Nevertheless, as it will be shown in chapter five on EU-Kenya cooperation, despite the existence of elaborate provisions on political dialogue and consultation procedures, there continues to be cases of *de facto* or informal conditionality.¹²²⁰

¹²¹⁷ Council Decision 274/2002 of 25th March 2002 concluding consultations with Liberia under Articles 96 and 97 of the ACP-EC Partnership Agreement, [2002] OJ 96, 13th April 2002.

¹²¹⁸ Council Decision 837/2003 of 24th November 2003 concluding the consultation procedure opened with the Central African Republic under Article 96 of the Cotonou Agreement, [2003] OJ L 319, 4th December 2003; Council Decision 321/2005 of 14th April 2005 concluding consultations with the Republic of Guinea under Articles 96 of the Cotonou Agreement, [2005] OJ L 104, 23rd April 2005.

¹²¹⁹ Arts and Dickson, *op. cit.*, (2004), p. 10.

¹²²⁰ The issue of *de facto* conditionality will be considered in the case study of EU-Kenya cooperation in chapter five.

3.2. Political Dialogue within EU-ACP Cooperation

Human rights are taken into account during negotiations for accession to the ACP group, however, respect for human rights and democratic principles is not a precondition for membership.¹²²¹ Upon accession to the ACP group, political dialogue on the subject of human rights, the rule of law, democratic principles and good governance constitutes a central feature of EU-ACP cooperation. Through political dialogue, human rights are taken into account during negotiations for accession to the ACP group, however, as mentioned above, respect for human rights and democratic principles are not a precondition for membership.¹²²² During negotiations on the admission of Haiti to the Lomé Convention in 1989, the Netherlands sought to include human rights commitments as a condition for membership.¹²²³ However, this was rejected by the majority of Member States who stated that the human rights situation had not been a precondition for the accession of existing ACP states and many of the Member States argued that accession to Lomé would be a positive step towards improving the human rights conditions in Haiti.¹²²⁴ More recently, Cuba had indicated its willingness to accede to the Cotonou Agreement,¹²²⁵ nevertheless, this application was subsequently withdrawn regarding alleged interference in internal affairs on the issue of human rights.¹²²⁶ Currently, EU assistance is channeled to Cuba on the basis of the Common Position adopted in 1996, which also provides a framework for dialogue on human rights and democracy.¹²²⁷ Although it was envisaged that membership of the Cotonou Agreement would strengthen democratic reform and the respect for human rights in Cuba, it was made clear respect for the essential elements in Article 9 would only be measured upon accession.

¹²²¹ This is based on Article 94 of the Cotonou Agreement, which provides that membership, will be considered for any 'independent State whose structural characteristics and economic and social situation are comparable to those of the ACP States.'

¹²²² See section 3.2 above on political dialogue.

¹²²³ Arts, *op. cit.*, (2000), p. 303.

¹²²⁴ *Ibid.*, pp. 302-303.

¹²²⁵ Carbone, M., 'EU-Cuba: Taking Further steps towards Cotonou Membership,' *The Courier*, No. 196, (January-February 2003), p. 6. Cuba has been a member of the ACP group since December 2000, however, it has not signed the ACP-EC Partnership Agreement. See Mouradian, 'EU-Cuba: Renewing the Dialogue,' *The Courier*, No. 188, September 2001.

¹²²⁶ 'Caribbean: Cuba Withdraws Bid to Enter Cotonou Following EU Human Rights Criticism,' Press Release, 26th May 2003. Source: http://europa.eu.int/comm/development/body/news/news_en.htm#5

¹²²⁷ *Ibid.*

...The two phases must be kept distinct. Whether it meets the democracy and human rights criterion is to be decided once Cuba becomes a full member of the Agreement and not at the moment of the application.¹²²⁸

Upon accession to the ACP group, political dialogue on the subject human rights, the rule of law, democratic principles and good governance constitutes a central feature of EU-ACP cooperation. The notion of enhanced political dialogue was strongly endorsed in the Green Paper on relations between the European Union and the ACP countries.¹²²⁹ According to Article 8(4) of Cotonou Agreement, 'the dialogue shall also encompass a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance.' Along with the consideration of alleged violations of human rights, regular dialogue on human rights and democratic principles also takes place in order to promote the accession, ratification and domestic implementation and monitoring of international legal instruments.¹²³⁰ Human rights dialogue may also encompass thematic issues such as the abolition of the death penalty, the prohibition of racism and xenophobia, women's rights and the elimination of all forms of discrimination.¹²³¹ In addition, a specific 'human rights dialogue' may also be initiated by the EU with a third country, including ACP states, or upon request of the country itself.¹²³² As mentioned above, in the event of serious breaches of human rights and democratic principles in the ACP states, political dialogue is the first step towards avoiding negative sanctions.¹²³³

3.2.1. Implementing the EU's Positive Approach and Prospects for Political Dialogue

¹²²⁸ Ibid., p. 7.

¹²²⁹ COM (1996) 570 fin., at 13.

¹²³⁰ 'European Union Guidelines on Human Rights Dialogues,' Annex 15 adopted on 13th December 2001. Excerpted in EU 'Annual Report on Human Rights 2002,' (Luxembourg, 2002), p. 259.

¹²³¹ Ibid.

¹²³² Ibid., pp. 258-9.

¹²³³ See above.

Article 8 dialogue was clearly envisaged to include the subject of human rights.¹²³⁴ In this context, it has been suggested that Article 8 should be used as an ‘early warning’ facility for the on-going assessment of respect for fundamental and essential elements of EU-ACP cooperation.¹²³⁵ However, it is, firstly, legitimate to question whether this provision adds anything new to existing dialogue which takes place through the regular ACP-EU fora. Could this new provision provide any added value to the on-going dialogue which already takes place in an informal manner through EU-ACP exchanges, for example, at the EU-ACP Council of Ministers? Secondly, in line with the EU’s mainstreaming policy on human rights which was announced in 2001, human rights already form part of regular meetings and exchanges with third countries.¹²³⁶ Furthermore, the issue of human rights has been taken into consideration in the design of country strategy papers, in close cooperation with the EU delegations, and similarly, in the mid-term assessments of performance, therefore, it is not clear to what extent it is necessary to invoke Article 8 dialogue in the area of human rights.

Thirdly, it could be argued that a potential confusion could arise between dialogue on Article 8 and Article 96. Although it is clear that the procedures under Article 8 and Article 96 are separate,¹²³⁷ the use of Article 8 as an ‘early warning system’, as mentioned above, conveys the idea that dialogue will only be initiated in cases of perceived violation of human rights, rather than on-going dialogue on the protection and promotion human rights. Furthermore, the EU has previously conveyed the idea that human rights dialogue will take only place following a ‘human rights assessment’, further compounding the confusion in Article 96 procedures.¹²³⁸ However, despite the range provisions for human rights dialogue which already existed in EU-ACP cooperation, a reference to human rights in Article 8 of Cotonou may have been included due to perceived gaps or limitations in on-going dialogue. The following section will consider

¹²³⁴ See for example, ACP-EU Joint Parliamentary Assembly, Committee on Political Affairs, Note to Members, ‘Political Dialogue,’ 23rd November 2003, FdR CM\511496EN.doc, p. 6.

¹²³⁵ *Ibid.*, p. 7.

¹²³⁶ See COM (2001) 252 and ‘EU Guidelines on Human Rights Dialogues,’ para. 6.6.

¹²³⁷ The Guidelines on Article 8 make it clear that Article 8 is separate from consultations from Article 96, by stating that Article 8 dialogue may take place during, before and after consultations and furthermore, that dialogue may take place during cases of suspension.

¹²³⁸ See ‘EU Guidelines on Human Rights Dialogues,’ *op. cit.*

some of the reasons for enhanced dialogue in the area of human rights and put forward some recommendations for future developments in this area.

Enhanced political dialogue in the area of human rights could assist in creating greater partnership in the design of EU-ACP human rights priorities. It could be argued that the EU external priorities in the area of human rights have been dominated by the European Parliament, who have campaigned for specific human rights issues, such as the abolition of the death penalty, rather than engaging in a more general human rights dialogue.

Human rights dialogue has a negative image due to a traditional emphasis upon human rights violations. The clearest example of this can be seen in the consultations on alleged human rights abuses which are initiated through Article 96 proceedings. In addition, it could be argued that a somewhat negative image of human rights assistance is conveyed through the *ad hoc* human rights budget line of the EU, the EIDHR. For example, it is stated that the merit of this budget line is that it can be used without the consent of states. Similarly, human rights funding is concentrated on a number of 'focus countries' which serves to stigmatise the provision of human rights funding.¹²³⁹ In contrast, it could be argued that regular two-way dialogue in the area of human rights could remedy the over-emphasis on a negative conception of human rights dialogue.

Political dialogue with non-state actors and civil society organisations is also envisaged as an integral part of dialogue under Article 8.¹²⁴⁰ This provision could have a positive impact in the following ways. Firstly, since 2000, the Cotonou Agreement allows for the unprecedented cooperation of civil society actors. However, this has been greeted with some caution from the ACP group, which has called for greater clarification on the eligibility of non-state actors for EDF funding.¹²⁴¹ In light of this new feature of Cotonou, increased political dialogue between the ACP group and civil society actors could

¹²³⁹ See European Initiative for Democratisation and Human Rights (EIDHR) at http://europa.eu.int/comm/europeaid/projects/eidhr/eidhr_en.htm#eidhraddedvalue

¹²⁴⁰ According to Article 8(7) regional and sub-regional organisations and representatives of civil society shall be associated with this dialogue.

¹²⁴¹ Karl, K., 'ACP-EU Council of Ministers: Preparing for the Next Set of Deadlines,' *ACP-EU Courier* No. 194, (September-October 2001), p. 19.

provide an avenue to create a greater understanding of civil society goals and objectives and the role in which they could play within EU-ACP cooperation.

Secondly, from the wider perspective of EU human rights funding in the ACP countries, it could be contended that the EU is out of touch with the network of NGOs on the ground. Some evidence for this can be seen from the recent programming activities of the EIDHR in the ACP countries. From the 79 ACP countries, several of these were chosen as priority countries within the EIDHR “focus countries” for the purposes of funding allocation. However, following its appeal for proposals from NGOs and other civil society organisations, the Commission failed to receive appropriate responses for two of the ACP countries, Eritrea and Fiji, which ultimately resulted in an inability to disburse allocated human rights funding.¹²⁴² This example could indicate that there is a lack of communication between the EU and human rights organisations on the ground.

Political dialogue could also assist in the exchange of information regarding recent changes and developments in intra-ACP cooperation and inter-African initiatives. The potential power of the ACP group was highlighted in 2003, for example, when it joined forces with the African (AU) and least developed countries (LDCs) in protest at trade negotiations at the WTO 5th Ministerial Summit in Cancún, Mexico. Apart from strengthening EU-ACP cooperation, political dialogue in the area of human rights could also be used to facilitate greater intra-ACP relations. This could lead, for example, to increased funding of regional human rights operations which are occurring in the context of the African Union and measures to improve democratic governance in the context of NEPAD. However, although these developments are in their nascent stages and it remains to be seen how the enhanced position of human rights within the founding documents of the AU and innovative features such as the NEPAD ‘peer review’ system on democratic governance will be implemented in practice. For example, in the context of the OAU, the forerunner to the AU, there has been long-standing criticism of the

¹²⁴² Interview Mr. Timothy Clarke, Head of Unit, Human Rights and Democratisation (EIDHR), EuropeAid, Brussels, 3rd November 2003.

overriding position of non-interference in domestic affairs and its failure to speak out about human rights abuses in its Member States.¹²⁴³

3.2.2. Conclusions on Political Dialogue

The above section has shown that the EU's emphasis on a positive approach to conditionality through political dialogue, (both through the consultation procedure under Article 96 and also through Article 8), sets it apart from other donors. In this context, some recommendations were made with regard to improving recourse to Article 8. Rather than being viewed simply in terms of human rights violations, it was argued that Article 8 should be used in a flexible and effective manner that is independent from the consultation procedure under Article 96. More importantly, it is recommended that any future dialogue in this area should not only take human rights issues of mutual concern for EU and ACP groups, but also give priority to inter-ACP and intra-ACP human rights concerns. The Revision of Cotonou in 2005 appeared to take some of these issues on board by outlining detailed guidelines for holding political dialogue and guaranteed a role for the ACP group in the consultation procedure. It remains to be seen how the new provisions in Annex VII of the Cotonou Agreement relating to political dialogue will be put into effect. Furthermore, despite providing for a more systematic and regular dialogue on the essential elements, it is important that the modalities for political dialogue do not become overly structured in order to ensure that all channels for dialogue remain open. In addition to transparency concerns, it was also argued that enhanced recourse could be made to the political dialogue provisions within Article 8 to ensure that on-going dialogue is viewed as distinct from the consultation procedures. Furthermore, it was also argued that on-going dialogue should allow for discussion on intra-ACP and inter-ACP human rights concerns and not simply those which affect the European Union.

3.3. Measures to Promote Human Rights

¹²⁴³ Evans, M.D. and Murray, R., *The African Charter on Human and Peoples' Rights: The System in Practice*, (Cambridge, 2002).

3.3.1. EU-ACP Cooperation

In the context of ACP countries, the EU supports measures for the promotion of human rights and democratisation through two main channels: firstly, through the Cotonou Agreement which are financed by the European Development Fund (EDF), and secondly, through the *ad hoc* programmes of the European Initiative for Democratisation and Human Rights (EIDHR) which operates in third countries, including the ACP states. In this context, the term ‘positive measures’ denotes both the direct granting of technical and financial assistance for the promotion of human rights, and also the integration of positive human rights norms and standards within the general framework of EU-ACP development assistance. This may take place through projects, which usually refer to clearly defined activities with clearly defined objectives and outcomes and are carried out within a limited time-frame.¹²⁴⁴ In contrast, programmes are carried out over a multi-annual basis and may link in with more long-term strategies including national programmes through sector-wide support programmes and budgetary assistance.¹²⁴⁵

Technical and financial measures for the promotion of human rights are pursued through a dual approach which combines both direct and indirect funding. This involves, firstly, the direct funding of technical and financial programmes and targeted projects. Specific funds are also made available under the Cotonou Agreement for human rights and democratisation activities upon the request of the ACP states. In addition, the direct funding is complemented by an indirect approach to the promotion of human rights through the Cotonou Agreement. This takes place, for example, through the consideration of human rights in the programming and planning of the development activities,¹²⁴⁶ political dialogue with ACP states, and through the general country strategy papers (CSP). The country support strategies (CSS) offer a general indication of the amount of technical and financial assistance that will be provided by the EU to the individual ACP states.¹²⁴⁷ These strategies include a country strategy paper (CSP) and a national

¹²⁴⁴ See European Commission, Project Cycle Management Manual and Handbook. Source: European Commission, Evaluation Guidelines, p. 8. Source: <http://europa.eu.int/comm/europeaid/evaluation/methods/index.htm> [Hereinafter PCM Manual 2004].

¹²⁴⁵ Ibid., pp. 12 and 25.

¹²⁴⁶ On the mainstreaming of human rights in development policy, see COM (2001) 252.

¹²⁴⁷ Article 2, Annex IV of the Cotonou Agreement. The CSS usually lasts for five years.

indicative programme (NIP). They are jointly negotiated between the EU and the ACP states and, in principle, the ACP countries are responsible for drawing up the draft indicative programme, and the identification and preparation of projects.¹²⁴⁸ However, in practice, the European Commission, together with the Delegations are strongly involved in the drafting of the NIPs, in conjunction with the National Authorising Officer.¹²⁴⁹

The following section details the implementation of the EU's commitment to 'positive measures' in development cooperation. As mentioned above, the legal basis for the support of human rights and democratisation activities can be found in Article 9 of the Cotonou Agreement. In particular, according to Article 9(4), 'the Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance.' The financing of ACP-EU cooperation is carried out through the European Development Fund (EDF), which is funded by the contributions of the Member States on a geographical basis and through the national indicative programmes (NIPs) and regional indicative programmes (RIPs).¹²⁵⁰ Funding for positive measures may be sought by the national authorities of the ACP states and is allocated through the indicative programmes.

3.3.1.1. Direct Financing of Measures: Human Rights as a Subset of Governance Reform

In the context of the Cotonou Agreement, the European Community provides direct funding for the promotion of human rights and democratisation activities which are financed from the EDF. Between 1997 and 2000, €182m was provided to finance human rights and democracy related programmes under the EDF.¹²⁵¹ This figure can be placed in context, however, as the total funds allocated to positive measures to promote human rights during 1995-1999 represents 1% of the total figure for EU external assistance.¹²⁵²

¹²⁴⁸ Article 4, *ibid*.

¹²⁴⁹ Court of Auditors, 'Special Report No. 21/2001 on the management of the Commission's external aid programmes (in particular on country programming, project preparation and the role of Delegations), together with the Commission's replies,' [2002] OJ C 57, 22nd February 2002, para. 23.

¹²⁵⁰ €13.5 bn is available under the ninth EDF fund for the initial five-year period. Council of European Union, 'Financial Regulation of 27th March 2003 applicable to the 9th European Development Fund,' [2003] OJ L 83, 1st April 2003.

¹²⁵¹ In addition, €115m was allocated for election assistance under the EDF, including €71m for Africa between 1996-1999. Figures taken from Communication from the COM (2001) 252, p. 11, fn. 12.

¹²⁵² Synthesis Report, *op. cit.*, p. 3.

This amount comprises funds from budget line B7-70 and the 8th EDF, and includes funding for ACP countries, Central and Eastern Europe, Newly Independent States and Mongolia, South Africa, Asia and Latin America, and the Mediterranean.¹²⁵³

Between 1986 and 1998, the general instruments of community assistance to the ACP countries were comprised as follows: programme aid (Stabex, Sysmin, structural adjustment); food aid; humanitarian assistance; aid to NGOs; natural resources; other productive sectors; economic infrastructure and services; social infrastructure and services (education, health services and water supply), government and civil society, multi-sector and non-specified.¹²⁵⁴ From these budget headings, human rights activities were funded principally through ‘government and civil society’ or ‘social infrastructure projects in education and training’ or ‘assistance to NGOs’.

From 2000 onwards, EDF funding for human rights has been included within the framework of support for the consolidation of ‘institution building’.¹²⁵⁵ This aims to improve the effectiveness and accountability of governance structures and administrative institutions in the ACP states, through support for human rights, election processes, legislative and judicial systems and also through measures to promote good governance through support for public administration, capacity building and decentralisation.¹²⁵⁶ In 2001, there were two hundred and fifty-four EDF-funded projects (either new or on-going) in the field of promoting ‘human rights, democratisation, good governance and capacity building’.¹²⁵⁷

The majority of country strategies refer to enhanced complementarity with human rights budget lines and co-ordination with other donors in the area of human rights, however, the earmarking of specific funds is less prevalent. In this way, human rights are usually

¹²⁵³ Ibid.

¹²⁵⁴ Cox, A. and Chapman, J., *The European Community External Cooperation Programmes: Policies, Management and Distribution*, (London, 1999), p. 53.

¹²⁵⁵ On this point see European Commission, *Annual Report on the Implementation of the European Commission’s External Assistance 2001*. Source: http://europa.eu.int/comm/europeaid/reports/aidco_2001_big_annual_report_en.pdf, p. 118; Evaluation of Community Aid Concerning Positive Measures in the Field of Human Rights and Democracy in the ACP Countries, 1995-1999, Synthesis Report Phase 3, 28th August 2000, SCR Evaluation, 951518, p. 29. [hereinafter SCR Evaluation].

¹²⁵⁶ European Commission, *Annual Report on the Implementation of the European Commission’s External Assistance 2000*, p. 92. Source: http://europa.eu.int/comm/europeaid/reports/aidco_2000_annual_report_acp_en.pdf

¹²⁵⁷ Annual Report 2001, *op. cit.*, p. 118. A total of €727 million has been allocated to these projects.

allocated on the basis of ‘available resources’, rather than through indicative amounts. However, some of the strategies go further than this and make provisions for either direct or indirect resources in the national indicative programme. For example, in Congo-Brazzaville, the eighth and ninth EDF contain funds explicitly earmarked for the promotion of human rights, democratisation and the rule of law.¹²⁵⁸ EDF funding is allocated for human rights through the thematic cross-cutting budget in Namibia;¹²⁵⁹ human rights funding is directly provided for under the title of good governance and institutions in Chad;¹²⁶⁰ specific funds are earmarked for justice and human rights (€5-10m) in Angola from the eighth EDF¹²⁶¹ and within the good governance title of the ninth EDF,¹²⁶² and a minor allocation is made to support human rights in Guinea.¹²⁶³ With regard to indirect funding, some examples include human rights activities that are carried out through the EDF funds allocated to non-state actors and civil society programmes in Ghana, Lesotho, Djibouti, and Guinea¹²⁶⁴ and through good governance and institution-building projects in Suriname, Somalia, and Burkina Faso,¹²⁶⁵ however, there is no indication of the amount in the indicative programmes.

As human rights funding is contained under general titles such as government and civil society, or institution building, it is difficult to clearly discern the human rights priorities of the EU. Furthermore, due to the sectoral breakdown of human rights funding in the Community budget, the figures relating to individual ACP countries are often difficult to obtain. It should also be noted that there is no clear distinction between the funding activities for human rights, democracy and rule of law.¹²⁶⁶ From the overview of positive measures in ACP countries, it was shown that although human rights are increasingly included as horizontal themes in activities of the Cotonou Agreement, there is often an absence of a clear definition of human rights in the programmes funded by the European Development Fund (EDF), as they are often included as subsets of the promotion of

¹²⁵⁸ Congo-Brazzaville-CE, *CSP*, p. 17-18, 32. This includes 23.2% (€10m) of the EDF allocation to Congo-Brazzaville which is reserved for the promotion of democratisation, rule of law and good governance, see p. 32.

¹²⁵⁹ Namibia, *CSP* Appendix V, p. XXV.

¹²⁶⁰ Tchad-CE, *CSP* p. 28 - 29. See also Annex 1.6, p. 38.

¹²⁶¹ Angola-EC, *CSP*, pp. 26 and 39

¹²⁶² *Ibid.*, pp. 24, 32, 60.

¹²⁶³ Guinée-Bissau-CE, *CSP* p. 27. This is financed from a €5m allocation to ‘other programmes’.

¹²⁶⁴ Ghana-EC, *op. cit.*; Kingdom of Lesotho-EC, *CSP* p. 24; Djibouti-EC, *CSP* p. 23; Guinée-CE, *CSP* p. 32.

¹²⁶⁵ Suriname-EC, *CSP* and NIP for 2001-2007, p. 28; Somalia-EC, *CSP* p. 16; Burkina Faso-CE, *CSP*, p. 23.

democracy, governance, the rule of law and institution building. According to Crawford, this practice has existed for many years.¹²⁶⁷ It has been argued throughout this thesis that support for human rights should be viewed as a separate, yet interlinked objective of donor political reform. The promotion of human rights through the wider spectrum of political reform may be motivated by the desire to improve the broader governance structures within a specific country. This is akin to the broad definition of good governance outlined in chapter two, which incorporates human rights aspects. The incorporation of human rights into broad-based governance strategies renders it more difficult to evaluate and draw clear conclusions on the extent of direct measures for human rights in EU development cooperation policy, however, this is merely an observation, rather than a criticism of the practice. The issue of channeling human rights as a subset of more general governance reform strategies will be discussed in greater detail in the case study on Kenya.¹²⁶⁸ However, the fact that funds are rarely earmarked for governance activities and depend upon the ‘availability of resources’ is obviously more problematic as it indicates a clear gap between rhetoric and practice.

On another note, Crawford also demonstrates that the EU often classifies programmes in this field incorrectly. For example, projects supporting rural development, women in development, vocational training and poverty reduction were often re-included in the EU’s implementation reports from 1994-1995 under the title of democracy and human rights,¹²⁶⁹ despite the fact that a ‘human rights’ element was absent from these programmes.¹²⁷⁰

3.3.1.2. Indirect Measures to Support Human Rights

Along with direct financial measures to promote human rights and democratisation, the EU also undertakes indirect action by incorporating human rights as cross-cutting themes

¹²⁶⁶ On the overlap between human rights and rule of law activities see Youngs, R., ‘European Approaches to Democracy Assistance: Learning the Right Lessons?’, 1 *Third World Quarterly* 24 (2003), p. 129.

¹²⁶⁷ Crawford, G., ‘European Union Development Cooperation and the Promotion of Democracy’, from Burnell, P., (ed.), *Democracy Assistance: International Cooperation for Democratisation*, (London, 2000), p. 103.

¹²⁶⁸ See chapter five of this thesis.

¹²⁶⁹ Crawford, *op. cit.*, (2000), p. 104.

¹²⁷⁰ Crawford, G., ‘European Union Development Cooperation and the Promotion of Democracy,’ p. 103, from Burnell, P., (ed.), *Democracy Assistance: International Cooperation for Democratisation*, (London, 2000).

in development policies and through the mainstreaming of human rights in country strategy papers. With respect to cross-cutting themes, the Cotonou Agreement incorporates specific issues as cross-cutting themes in ACP-EU cooperation. These include gender, the environment, institutional development and capacity building.¹²⁷¹ Gender issues are also mainstreamed in EU development cooperation policy as a whole, as laid down in the Council Resolution on the integration of equality between men and women of 1995.¹²⁷² The mainstreaming of gender equality is also an integral part of the 2001-2006 Action Plan in the field of development cooperation.¹²⁷³ As mentioned above, gender equality and women's rights also form a key component of the human rights dialogues between the EU and the ACP countries.¹²⁷⁴

In line with the promotion of human rights as an essential element of partnership, ACP-EU cooperation also allows for the mainstreaming of fundamental social rights in the area of trade and internationally agreed core labour standards. These are derived from the conventions of the International Labour Organisation (ILO) and encompass rights such as 'the freedom of association, the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and non-discrimination with respect to employment'.¹²⁷⁵ The Parties aim to protect these rights through enhanced cooperation, in particular, through the exchange of information on their respective legislation, the formulation of national labour legislation and stronger adherence to existing national legislation and work regulation.¹²⁷⁶ It is also stipulated that labour standards should not be used for protectionist purposes.¹²⁷⁷

In addition, mainstreaming strategies are also employed to integrate human rights into the design of country strategy papers (CSP) for the ACP countries.¹²⁷⁸ Mainstreaming involves the integration of human rights norms into all aspects of policy-making and

¹²⁷¹ Article 20(2) Cotonou Agreement.

¹²⁷² Council Resolution on 'Integrating Gender Issues in Development Cooperation', 20th December 1995. This resolution is largely based on Commission Communication on 'Integrating Gender Issues in Development Cooperation, COM (1995) 423 fin., 18th September 1995.

¹²⁷³ For details of this programme see Commission Communication to the Council and to the Parliament, Programme of Action for Mainstreaming Gender Equality in Community Development Cooperation, COM (2001) 295 fin., 21st June 2001.

¹²⁷⁴ EU Guidelines on Human Rights Dialogues, *op. cit.*, p. 259.

¹²⁷⁵ Article 50(1), Cotonou Agreement.

¹²⁷⁶ Article 50(2), *ibid.*

¹²⁷⁷ Article 50(3), *ibid.*

implementation.¹²⁷⁹ Since Cotonou, an analysis of the situation relating to human rights, democratisation and the rule of law and also a review of governance structures of each ACP country is included within the strategy papers.¹²⁸⁰ These strategy papers are used to analyse the political, economic and social conditions of beneficiary countries and to design medium term development strategies, taking into account the changing conditions and constraints upon their development.¹²⁸¹ The priorities for human rights mainstreaming in country strategy papers have been identified in a recent policy document¹²⁸² and joint programming is encouraged among EU Member States in the formulation of country strategies.¹²⁸³ From an analysis of the way in which human rights have been included in the overall political, economic and social situation of the ACP countries,¹²⁸⁴ it is argued that the content of these analyses is not particularly detailed and largely depends on the initiative of the EU delegation.¹²⁸⁵

3.3.1.3. Conclusions on Measures to Promote in the Cotonou Agreement

From the above depiction of positive measures within the Cotonou Agreement, there is a wide scope for the promotion of human rights by virtue of the broad definition of human rights contained within Article 9(2). From the perspective of measures to promote human rights reform, the EU engages in a wide range of activity in this area, including the mainstreaming of human rights in the country strategy papers of the ACP countries and the earmarking of direct and indirect funding for human rights activities from the

¹²⁷⁸ COM (252), *op. cit.*, p. 12.

¹²⁷⁹ See COM (2001) 252, *op. cit.*, pp. 11 and 21.

¹²⁸⁰ Article 2(a), Annex IV of the Cotonou Agreement. This follows the approach of the Common Position of 25th May 1998 defined by the Council on the basis of Article J.2 of the TEU concerning human rights, democratic principles, the rule of law and good governance in Africa 98/350/CFSP.

¹²⁸¹ Cox and Chapman, *op. cit.*, p. 69. See also European Parliament, 'Report on the Report from the Commission on the Implementation of Measures Intended to Promote the Observance of Human Rights and Democratic Principles for 1995, COM (1996) 672, C4-0095/97.

¹²⁸² 'Programming Guide for Country Strategy Papers', Internal Document. Five themes are integrated in all country strategy papers: i) respect for human rights and democracy; ii) children's rights; iii) gender equality; iv) environment; v) culture. A further three cross-cutting themes will be integrated if relevant: vi) migration; vii) conflict prevention; viii) indigenous peoples' rights.

¹²⁸³ European Commission, Communication from the Commission to the Council and the European Parliament on Increasing the Impact of Aid: A Common Framework for Drafting Country Strategy Papers and Joint Multiannual Programming, COM (2006) 88 fin., 2nd March 2006.

¹²⁸⁴ This is in line with Commission Staff Working Document, Community Cooperation: Framework for Country Strategy Papers, SEC (2000) 1049, s., B.3.

¹²⁸⁵ Survey of EC-ACP Country Strategy Papers and National Indicative Programmes, Source: http://europa.eu.int/comm/development/body/csp_rsp/csp_en.cfm The sources for the individual CSPs can be found in the bibliography.

European Development Fund (EDF). In this regard, the EU adopts a dual approach through direct funding, along with indirect measures. What conclusions can be drawn on the extent to which the activities undertaken live up to the commitments made to promote actively promote human rights within EU-ACP cooperation?

Direct funding includes amounts earmarked through the country and regional strategy papers from the European Development Fund. However, as it was shown in this chapter, the evaluations have shown that only 1% of the total EU external assistance is allocated to the ‘political dimensions’ of the EU-ACP partnership¹²⁸⁶ and that these amounts vary between countries. In addition, in the context of the Cotonou Agreement, it was shown that human rights funding is not an automatic entitlement of the indicative programmes of the ACP country support strategies, but instead depends upon the availability of resources. Since 2000, human rights funding has been included in the general titles such as ‘institution building’ and ‘governance reform’, therefore, evaluations of the priorities of the EU in this domain are difficult to carry out. This practice could be viewed in a negative light as it could be argued that the mainstreaming of human rights through governance reform may lead to the omission of certain human rights concerns. However, as mentioned above, the promotion of human rights should be pursued through broad-based governance reforms as a prerequisite for achieving sustainable development objectives.¹²⁸⁷

Despite the broad definition of human rights in EU development policy, a certain bias towards civil and political rights has been recognised by the Commission in the Communication of 2001.¹²⁸⁸ This occurred as it is assumed that economic, social and cultural rights are implemented indirectly through social sector programmes.¹²⁸⁹ Rather than undermining the indivisibility of human rights, the underlying rationale of this strategy is stated as follows:

¹²⁸⁶ Evaluation of Community Aid Concerning Positive Measures in the Field of Human Rights and Democracy in the ACP Countries, 1995-1999, Synthesis Report Phase 3, 28th August 2000, SCR Evaluation, 951518, p. 3. For example, whilst 1% of the EDF allocation is spent on the political dimensions of partnership in Kenya, this can be compared with 6% in Uganda. Interview with Vanessa Nagel-Dick, EU Delegation, Nairobi, Kenya, 5th October 2004.

¹²⁸⁷ See section 2.2.1.3 above.

¹²⁸⁸ COM (2001) 252 fin.

¹²⁸⁹ Ibid., p. 18.

...it reflects the fact that significant material support for the promotion of social, economic and cultural rights should generally be pursued through the Community's main development assistance programmes (e.g. health, education and food security).¹²⁹⁰

In considering these three areas mentioned above in the Commission communication, namely, health, education and food, it appears that the EU seeks to promote economic, social and cultural rights in an indirect manner. Whilst it is recognised that it has been reported that a bias has been given to civil and political rights in donor policies, this thesis seeks to move beyond a sharp dichotomy between civil and political and economic, social and cultural rights. Instead, it argues that there is some inconsistency between the rhetoric and practice of donors in the general sphere of promoting human rights – rather than exclusively between categories of rights. Whilst economic, social and cultural rights are often not explicitly mentioned in EU development policy, these rights may be promoted indirectly through support to governance and institution building, as well as financing to international and national human rights organisations and non-governmental bodies. However, as it was shown, due to the fact that the direct financing of positive measures is considered predominantly within general programmes to improve governance, strengthen civil society, the process of institution building and the rule of law, a complete investigation of the human rights programmes is difficult to carry out.

Similarly, in the national indicative programmes, human rights funding is usually channeled through indirect means, for example through civil society or frequently, its allocation is contingent upon the availability of resources.

The indirect measures to promote human rights through cross-cutting issues and country strategies were also considered in this section. The indirect approach involves the 'mainstreaming' of human rights within the programming and planning of development activities and the monitoring of cross-cutting themes such as gender equality and labour

¹²⁹⁰ Ibid.

standards. In the above analysis, it was shown that the extent to which human rights mainstreaming, political dialogue and analysis of the human rights situation is undertaken depends largely on the initiative of the Delegation on the ground. The integration of human rights in country strategy papers has only been taking place since 2000 and from the above survey of a select number of country strategies, it appears that these analyses are rather brief. The former Commissioner of External Relations, Mr. Patten, stated that there needed to be improvements in the integration of human rights into the country strategy papers (CSPs).¹²⁹¹ He also indicated that the development of human rights fact sheets might contribute to this aim.¹²⁹²

3.3.2. European Initiative for Democratisation and Human Rights (EIDHR)

3.3.2.1. Operational Framework of EIDHR

The EIDHR is a financial instrument that is contained under Chapter 19.04 (formerly B7-70) of the EU budget. EuropeAid and the EU Delegations are responsible for the administration and management of EIDHR funding.¹²⁹³ The funding is directed primarily towards non-governmental organisations and civil society through the calls for proposals that are issued regularly by EuropeAid. In addition, targeted projects are financed in cooperation with other actors, including national governments and international organisations, in particular, the Council of Europe, OSCE-ODHIR and UNHCHR. Finally, the European Commission delegations also administer minor funds to grassroots organisations and local civil society organisations through the system of micro-projects. The increasing importance attached to the role of this budget line is witnessed in the rise in its budget from €200,000 in 1987 to €102m in 2001.¹²⁹⁴ Responsibility for the administration of micro-projects has been deconcentrated to the EU Delegations.¹²⁹⁵ It is envisaged that responsibility for calls for proposals will be increasingly deconcentrated to

¹²⁹¹ Speech by Mr. Chris Patten, 'Current and Future Trends in the Human Rights Agenda,' 14th July 2003. Quoted in SEC (2004) 1041, *op. cit.*, p. 10.

¹²⁹² *Ibid.*

¹²⁹³ See Annex 8(b) of this thesis on the structure of EuropeAid.

[EIDHR funding is based on Comprehensive Order for Service to the EuropeAid Cooperation Office in accordance with the Inter-service Agreement of 13th December 2000.]

¹²⁹⁴ EP Opinion, *op. cit.*, (2001), p. 4.

the Delegations to address concerns relating to the rigidity of the calls for proposal system and delays in the disbursement of funding.¹²⁹⁶ It is also envisaged that deconcentration will enable the calls for proposals to become more flexible and more responsive to local needs.

As described in the first part of this chapter on the normative framework for the EU's human rights policy in developing countries, the legal basis for the activities carried out by the EIDHR in the ACP countries is found in Council Regulation 975 of 1999.¹²⁹⁷ EIDHR funding is channeled in the form of grant assistance to a diverse range of actors, including national regional and local authorities, along with regional and international organisations, non-governmental organisations (NGOs), community-based organisations (CBOs), and both public and private sector institutions.¹²⁹⁸ According to Article 11, the Commission retains the power to devise, plan, administer and evaluate the operations undertaken and is obliged to submit annual reports to the European Parliament on activities.¹²⁹⁹

3.3.2.2. EIDHR Support for Positive Measures: Mandate and Thematic Priorities

According to Article 2 of Council Regulation 975/1999, the EIDHR is mandated to undertake operations which work towards: the promotion of human rights and fundamental freedoms proclaimed within the Universal Declaration on Human Rights (UDHR) and other international instruments concerning the development and consolidation of democracy and the rule of law; secondly, processes of democratisation and thirdly, support for measures to promote respect for human rights and democratisation by preventing conflicts. Since its inception, the thematic priorities of the EIDHR have varied, however, it will be considered whether there has been a bias towards

¹²⁹⁵ EIDHR Programming Document 2005-2006, 6th December 2004, pp. 29. Source: http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eidhr-programming-2005-2006_en.pdf

¹²⁹⁶ Youngs, R., *et al.*, 'No Lasting Peace and Prosperity without Democracy and Human Rights. Harnessing Debates on the EU's Future Financial Instruments,' Report Commissioned by the European Parliament and carried out under the auspices of the Netherlands Institute for Multiparty Democracy,' July 2005, p. 13.

¹²⁹⁷ Council Regulations 975 and 976/1999 of 29th April 1999, OJ L 120, 8th May 1999 on the consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms. As mentioned above, these Regulations were enacted following the ECJ ruling in *United Kingdom v. Commission*.

¹²⁹⁸ Article 4(1), Regulation 975/1999. Article 10 provides that €260m is available during the duration of this Regulation 1999-2004.

¹²⁹⁹ Article 18(2), *ibid.*

civil and political rights and the procedural aspects of democratisation as claimed in the literature.¹³⁰⁰

In a detailed survey of the human rights and democratisation actions in ACP countries from 1991 to 1997, Arts discerned the priority themes of the EU, which centred on the following areas. Firstly, support was given to election processes and support for the holding of elections. A variety of human rights initiatives were funded to promote and protect human rights including support for independent media, the training of journalists and improved access to freedom of information and general human rights education. Support was also included under broad themes aimed at promoting good governance and the rule of law, civil society and support for the International Criminal Tribunal of Rwanda.¹³⁰¹ Tangible examples of these priority areas included, for example, logistical and technical assistance and the sending of independent observers to support free and fair electoral processes; direct support for legal and judicial reform, support to ministries of justice, constitutional courts and the provision of legal aid to strengthen the rule of law; civic education programmes involving human rights training for administrators, judges, the army and police officers and the funding of Human Rights Commissions.¹³⁰²

These thematic trends have continued to be reinforced in the ACP countries, although it should be noted that in proportional terms, funding for the support of election processes has been reduced.¹³⁰³ Between 1998 and 1999, from the eleven budget titles of EIDHR, the following had the clearest relevance for the ACP countries: support for human rights and democracy in developing countries, especially ACP countries (B7-702); human rights and democracy in southern African countries (B7-7021) and a special programme for democracy and good governance in Nigeria (B7-7022). Other general initiatives also provided assistance to this group including: grants to human rights organisations, including the rehabilitation of torture victims (B7-704); support for international criminal tribunals and the setting up of the International Criminal Court (ICC) (B-706) and

¹³⁰⁰ Alston and Weiler, *op. cit.*, (1998).

¹³⁰¹ Arts, *op. cit.*, (2000), pp. 308-313 and Annex 4.

¹³⁰² *Ibid.*, Annex 4.

¹³⁰³ According to Youngs, EIDHR funds for electoral assistance have fallen from 50% in the mid-1990s to 15% in 2002. See Youngs, *op. cit.*, (2003), p. 129.

support for and supervision of electoral processes (B7-709).¹³⁰⁴ In 2000, the funding areas which related to the ACP group were virtually unchanged, apart from the discontinuation of the special programme for Nigeria and the inclusion of a special budget line for support for the prevention of discrimination of children (B7-612).¹³⁰⁵

3.3.2.3. Commission Reform of 2001 and the Simplification of Budget Lines: An Issue of Transparency?

In the previous years as detailed above, specific budget headings of EIDHR had a clear relevance to ACP countries, thus demonstrating a clear demarcation of funding for this group. However, in 2001, the number of budget lines was reduced to five and these covered the following themes: the promotion and defence of human rights and fundamental freedoms; support for the democratisation process and rule of law; promotion of respect for human rights by preventing conflict; support for the activities of the international criminal tribunals and the establishment of the International Criminal Court and support for democratic transition and the supervision of electoral processes.¹³⁰⁶ The adoption of fewer general budget headings than previously, renders it more difficult to determine the human rights assistance allocated to the ACP states, therefore a more detailed summary of the activities funded in 2001 will now be undertaken in order to give a clearer insight into the EU priorities in this region.¹³⁰⁷

With regard to the first budget line, namely support for activities to promote human rights and fundamental freedoms, a wide variety of initiatives were financed world-wide. In relation to the ACP countries, the most significant amount of funding was received by Sierra Leone in support of parliamentary and presidential elections (over €1.5m) and furthermore, in the provision of resources for the rehabilitation of torture victims. Support was also given to media efforts to promote human rights in this country. Projects that

¹³⁰⁴ EU, 'Annual Report on Human Rights 1998-1999,' p. 25; EU, 'Annual Report on Human Rights 2000,' Annex 16, p. 104. Source: http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eu-annual-report-2000_en.pdf. The five remaining budget lines relate to human rights and democracy promotion in other third countries, including Central and Eastern Europe and former Yugoslavia (B7-700), NIS and Mongolia (B7-701), Latin America (B7-703), MEDA (B7-705) and Asia (B7-707).

¹³⁰⁵ EU, 'Annual Report on Human Rights 2001'. Source: <http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eu-annual-report-2001-en.pdf>. The remaining budget headings were identical to those of 1998 and 1999, see *op. cit.*

¹³⁰⁶ Budget lines B7-701, B7-702, B7-703, B7-704 and B7-709. Source: http://europa.eu.int/comm/europeaid/projects/eidhr_en.htm; See also SEC (2001) 891 of 6th June 2001.

were aimed towards the protection of the rights of the child received support in Benin and Mozambique. A general human rights awareness campaign was funded in Malawi, along with support for a specific campaign to eradicate Female Genital Mutilation (FMG) in several ACP countries, including, Benin, Gambia, Burkina Faso, Nigeria, Mali, Ethiopia and Tanzania. In addition, a large project for the promotion of women's rights was financed in West Africa, including, Togo, Senegal, Nigeria, Mali, Ghana, Burkina Faso and Benin. General human rights programmes were undertaken in Haiti and Jamaica and a proposal for improving the electoral processes was financed in the latter. Finally, funding was provided for the creation of a regional masters degree in several locations, including South Africa, which was given strong financial support in order to advance consciousness-raising and education in the area of human rights law.

The second budget line concerned the promotion of the rule of law and democratic principles. This translated into support for women's participation projects in Kenya and civil society groups involved in the fight against corruption in Sub-Saharan Africa. A legal aid project was also financed in Uganda and training of the Justice and Peace Commission and local groups were supported in the Democratic Republic of the Congo (DRC). This budget heading was also used to promote the free and independent media in Chad and in several southern African countries including Zimbabwe, Zambia, Tanzania, Swaziland, South Africa, Namibia, Mozambique, Lesotho, Angola and Botswana. In Rwanda, support for the judiciary and the information agency of the International Criminal Court for Rwanda also benefited from this budget. With regard to conflict prevention and the restoration of civil peace, Sierra Leone, DRC and Sudan received funding support for victims of war, ex-combatants and the fostering of dialogue among local groups. The fifth budget line was also used in ACP countries to finance electoral assistance and observation in Togo, Zambia and Zimbabwe.

In 2002, the EIDHR priorities were further streamlined under two budget headings. These consisted of the development and consolidation of democracy and the rule of law, and respect for human rights (B7-701) and fundamental freedoms and, secondly, support for

¹³⁰⁷ This summary is compiled from Annex 23 of EU Annual Report on Human Rights 2002 and the Compendium of EIDHR Macro-

the activities of international criminal tribunals and the setting-up of the International Criminal Court (B7-702).¹³⁰⁸ Furthermore, in the same year, proposals were actively sought for the following four areas of support: the abolition of the death penalty; the prevention of torture and the provision of support for the rehabilitation of torture victims; the promotion of International Justice through support for the work of international tribunals and the establishment and operation of an international criminal court; and combating racism and xenophobia.¹³⁰⁹ Several ACP countries, including Congo Brazzaville and Sierra Leone benefited from support for electoral observation missions in 2002.¹³¹⁰

3.3.2.4. The Evolution of EIDHR Priorities

The evolution of the EIDHR's priorities could be seen the 2002-2004 strategy and further clarified in the Commission Staff Working Document of January 2003. Following the 2001 Communication on the EU's role in promoting human rights in third countries,¹³¹¹ the EIDHR has adopted some of the Commission's recommendations, in particular, the commitment to fostering a more long-term and multi-annual strategic approach, combined with the adoption of key thematic areas of action and focus countries.¹³¹² The specific priority areas which have been laid down for this period are similar to those of preceding years. This includes broad-based support to strengthen democratisation, good governance and the rule of law under the first priority. The three remaining priorities relate to activities in support of the abolition of the death penalty, support for the fight against torture and international tribunals and the International Criminal Court and combating racism and xenophobia against minorities and indigenous peoples.¹³¹³

projects 2001. Source: <http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/compendium2001macro.pdf>

¹³⁰⁸ EU, 'Annual Report on Human Rights 2002,' (Luxembourg, 2002).

¹³⁰⁹ Commission Staff Working Document, European Initiative for Democracy and Human Rights Programming Update 2003, 20th January 2003. Four Calls for Proposals were issued by EuropeAid in April 2002 and a fifth call for proposals was subsequently launched on 7th August 2002 for proposals for strengthening democratisation, good governance and the rule of law.

¹³¹⁰ EU Annual Report 2002, *op. cit.*, p. 57.

¹³¹¹ COM (2001) 252, *op. cit.*

¹³¹² Commission Staff Working Document, *op. cit.*, (2003); EU Annual Report on Human Rights 2004, *op. cit.*, p. 54.

¹³¹³ Commission Staff Working Document, European Initiative for Democracy and Human Rights Programming Document 2002-2004, 20th December 2001, pp. 25-29.

Although not explicitly mentioned in the list of specific priorities, human rights funding is allocated as a subset of these budget lines. In the context of support for ‘democratisation, good governance and the rule of law,’ human rights will be promoted through support for civil society organisations involved in the collection, analysis and dissemination of human rights information and human rights monitoring, human rights education and training, freedom of expression, strengthening of legal systems and institutions (including support for quasi-judicial bodies including National Human Rights Commissions, Human Rights Ombudspersons, ‘truth and reconciliation’ committees and the incorporation of human rights conventions into national law).¹³¹⁴

The promotion of fundamental rights proclaimed in the context of the European Union and Council of Europe will be supported in third countries. For example, support for the abolition of the death penalty as laid down in Article 2 of the EU Charter on Fundamental Rights will be promoted through the second priority area.¹³¹⁵ Programmes which provide support for training on the 2nd Optional Protocol of the ICCPR and the 6th Protocol to the European Convention on Human Rights (ECHR) are also included as a specific area of focus.¹³¹⁶ Furthermore, in the third priority area, the position adopted in the EU Guidelines on torture and the prevention of torture as laid down in the EU Charter will be promoted.¹³¹⁷ Assistance will also be given to projects that centre upon lobbying and consciousness-raising with regard to the Draft Optional Protocol to the Convention on Torture.¹³¹⁸ Continued support will be provided for the International Criminal Court (ICC) and tribunal in Rwanda and the establishment of a special criminal court for Sierra Leone.¹³¹⁹ Finally, human rights will be promoted in the fourth priority area through support for advocacy on minority rights and funding for anti-discrimination bodies such as Ombudspersons. Civil society organisations, which campaign for the rights of indigenous peoples, will also receive financial backing.¹³²⁰

¹³¹⁴ Ibid., pp. 25-30.

¹³¹⁵ Ibid., p. 32.

¹³¹⁶ Ibid., p. 33. The 2nd Optional Protocol to the ICCPR and Protocol No. 6 of the ECHR relate to the abolition of the death penalty.

¹³¹⁷ Ibid.

¹³¹⁸ Ibid., p. 34.

¹³¹⁹ Ibid., p. 35.

¹³²⁰ Ibid., p. 38-39.

Until the end of its previous mandate in 2004, EIDHR funding was primarily allocated to thirty-one focus countries. This includes the following countries from the ACP group, namely, Burundi, DRC, Rwanda, Angola, Mozambique, Eritrea, Ethiopia, Sudan, Ivory Coast, Nigeria, Sierra Leone, Haiti, Fiji and Zimbabwe.¹³²¹ On a regional basis, support was provided for requests from the African Commission on Human and Peoples' Rights and the African Union (AU) with regard to election monitoring and the creation of a Gender Human Rights Charter.¹³²²

The 2002-2004 programme was updated in 2004, which reinforced conflict prevention and conflict resolution as an objective of EIDHR.¹³²³ The majority of projects relate to strengthening civil society, human rights education and monitoring, along with financing for conflict prevention measures in Angola.¹³²⁴ It should also be noted that funding was allocated to Nigeria for the harmonisation of laws, along with good governance assistance including budget monitoring, transparency and accountability in the public system.¹³²⁵ There was also reference to cooperation with international organisations, for example, between EIDHR and OHCHR. This involves cooperation between 2003 and 2005 on a strategic level, including devising thematic priority areas for country and regional systems, legal systems and strengthening institutions. In 2005, three calls for proposals were launched for the Regional Human Rights Masters programme, support for indigenous peoples' rights and combating racism and xenophobia and promoting the rights of minorities.¹³²⁶

The breakdown of funding during this period (2002 and 2004) indicates that the majority of funding was channeled through the first broad-based priority area for democratisation, governance and the rule of law (67%), whilst the remaining funding was divided between the remaining three thematic priorities.¹³²⁷ This included funding for torture, impunity

¹³²¹ Commission Staff Working Document, Update 2003, *op. cit.*; EU Annual Report on Human Rights 2004, *op. cit.*, p. 54.

¹³²² *Ibid.*, pp. 6-7.

¹³²³ Commission Staff Working Document, European Initiative for Democracy and Human Rights Programming Update 2004, Approved by Commission Decision of 1st December 2003, p. 5. In 2004, the available EIDHR budget was €106 million.

¹³²⁴ *Ibid.*, pp. 12-13.

¹³²⁵ *Ibid.*

¹³²⁶ See <http://europa.eu.int/comm/europeaid>

¹³²⁷ For an analysis of EIDHR funding between 2002 and 2004, see EIDHR Programming for 2005-2006, *op. cit.*, p. 8. See also Annex 6 of this thesis for a breakdown of EIDHR funding for the same period.

and international justice (15%); abolition of the death penalty (2.2%); racism, minorities and indigenous peoples (10.6%) and other contingencies (5.4%).

Since 2004, the EIDHR been placed in the budget lines Chapter 19.04 of the EU budget.¹³²⁸ The mandate was also extended until 2006.¹³²⁹ For the period 2005-2006, funding is channeled through four broad themes including, firstly, the promotion of justice and the rule of law, which will focus on the promotion of international criminal justice and the abolition of the death penalty. The second priority focuses on promoting a culture of human rights through awareness-raising and human rights education, whilst the third area focuses on the democratic process including support for underpinning and developing democratic electoral processes and support for civil society dialogue. The fourth priority centres on advancing equality and tolerance through the promotion of equal rights, the rights of minorities and indigenous peoples and engagement with civil society in conflict prevention and resolution.¹³³⁰

3.3.2.5. Conclusions on EIDHR

The Chapter 19.04 (previously B7-70) budget line is regarded as a powerful tool for the provision of direct funding for human rights and democratisation activities by NGOs and other civil society organisations through calls for proposals and micro-projects. Support is also given to international and regional organisations through the mechanism of targeted projects.

Much of the research that has been carried out on EIDHR activities has claimed that priority is given to civil and political rights, in an almost exclusive manner.¹³³¹ However, it was argued in this chapter that it is not possible to draw such a clear-cut distinction, due to the fact that the majority of EIDHR funding is channeled through the first priority

¹³²⁸ 19.04.03: (ex B7-710 “development and consolidation of democracy and the rule of law – respect for human rights and fundamental freedoms.”); 19.04.04: (ex B7-702 “support for the activities of international criminal tribunals and the International Criminal Court.”); 19.01.04.11 (ex B7-7010A “development and consolidation of democracy and the rule of law – respect for human rights and fundamental freedoms – expenditure on administrative management.”)

¹³²⁹ The amount allocated under Regulation 975/1999 for the period between 1st January 2005 and 2006 is €134 million. Article 10(1) of the amended Regulation 975/1999 (as amended by Regulation 2240/2004). This amount is for the period from 1st January 2005 to 31st December 2006. [The amount for Council Regulation 976/1999 is €78 million].

¹³³⁰ EIDHR Programming for 2005-2006, *op. cit.*, pp. 14-19.

(democratisation, governance and the rule of law). Alston and Weiler have pointed to the bias towards civil and political rights, both in terms of the normative provisions of the Regulation and in the implementation of EIDHR activities.¹³³² From the above analysis, it is clear that economic, social and cultural rights have been largely absent from its funding priorities, as exemplified in the thematic priorities to date.¹³³³ However, whilst socio-economic rights may be absent from its funding priorities, this does not necessarily lead to the conclusion of a bias towards first generation rights as opposed to second generation rights. In contrast, it was shown that the EIDHR increasingly prioritises certain themes as opposed to specific generations of human rights. Whilst early trends certainly indicate that priority was previously given to the funding of elections (50 per cent of the EIDHR was spent on the procedural aspects of democratisation such as election monitoring), however, this situation has changed considerably.¹³³⁴ Furthermore, the funding priorities have increasingly shifted to highly visible themes such as the abolition of the death penalty and support for the International Criminal Court.

It was also shown that criticism has been directed towards the EIDHR as its human rights activities are undertaken on an *ad hoc* basis, with little emphasis on strategic or long-term objectives. As mentioned above, a decision was made to limit its funding to four priority areas to improve the effectiveness of the EIDHR.¹³³⁵ The articulation of future priorities assists in providing accountability and transparency in EIDHR action, however, an explicit reference to human rights should be included in these priorities in line with the objectives laid out in Article 2(1) of Regulation 975/1999. Similarly, the decision to channel the majority of EIDHR funds through ‘focus countries’ could also be questioned as this list only includes thirteen of the seventy-nine ACP states, thus severely limiting the potential for the direct financing of human rights and democratisation activities in the remaining countries. The European Commission has recently indicated that the human rights budget line will be increasingly used in the period between 2005 and 2006 for the

¹³³¹ Alston and Weiler, *op. cit.*, (1998).

¹³³² *Ibid.*, p. 704.

¹³³³ This confirms the previous position of Alston and Weiler as mentioned above.

¹³³⁴ As stated above, this had fallen to 15% by 2002.

¹³³⁵ The Commission Programming Document for the EIDHR 2002, Annex 24 of the EU Annual Report on Human Rights 2002, *op. cit.*, p. 299. This included support to strengthen democratisation, good governance and the rule of law; activities in support of the abolition of the death penalty; the fight against torture and impunity and for international tribunals and criminal courts and combating racism and xenophobia and discrimination against minorities and indigenous peoples.

EU's Neighbourhood Policy, thus indicating that priority will be given to countries closer to the EU borders rather than the ACP countries.¹³³⁶

The shortcomings of this budget line clearly relate to the *ad hoc* and fragmented nature in which these programmes are carried out as they depend largely on the initiative of civil society.¹³³⁷ For example, in 2002, there were no applications for funding submitted by civil society organisations in Fiji and Eritrea, despite the fact that these were priority countries, thus illustrating the high level of dependence on the initiative of non-governmental actors.¹³³⁸ Furthermore, it would be an overstatement to suggest that the human rights funding is significant. For example, only thirteen of the seventy-nine ACP countries were eligible for funding in 2005. This includes Angola, Burundi, DRC, Eritrea, Ethiopia, Côte d'Ivoire, Mozambique, Nigeria, Rwanda, Sierra Leone, Somalia, Sudan, Uganda and Zimbabwe.¹³³⁹ The European Commission has taken these criticisms on board and responsibility for the implementation of the human rights budget line is currently being delegated to the European Commission Delegations as part of the deconcentration process. Furthermore, the *ad hoc* nature of these projects has also been noted by the European Commission and in the independent assessments of the EU Regulations.¹³⁴⁰ After its expiration in 2006, the prospects for the future of the human rights budget line in the ACP countries is unclear, however, as the European Commission has indicated that it may concentrate on the new European Neighbourhood Policy from 2007 onwards, which includes the Western Newly Independent States (NIS), Russia and the Mediterranean countries.¹³⁴¹

¹³³⁶ See EIDHR, 'Programming for 2005-2006,' *op. cit.* ; EIDHR Annual Work Programme 2005. Source: http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eidhr-annual-work-programme-2005_en.pdf

¹³³⁷ Interview with Mr. Timothy Clarke, Head of Unit, Human Rights and Democratisation (EIDHR), EuropeAid, 54 Rue Joseph II, Brussels, 3rd November 2003.

¹³³⁸ *Ibid.*

¹³³⁹ Europeaid, 'Eligible Countries and Regions per EIDHR Campaign 2005,' Annex I. Source: http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eidhr-annual-work-programme-2005-annex1_en.pdf

¹³⁴⁰ Extended Impact Assessment on Council Regulations 975/1999 and 976/1999. Version 11/08/2003. Source: http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/human-rights-regulations-impact-assessment_en.pdf This was decided following the Communication from the Commission on 'Impact Assessments to amend Council Regulation (EC) No. 975/1999 and Council Regulation (EC) No. 976/1999,' 5th June 2002.

¹³⁴¹ European Commission, Communication to the Council and the European Parliament on Paving the Way for a New Neighbourhood Instrument, COM (2003) 393, 1st July 2003.

3.3.3. Evaluation of Measures to Promote the ‘Essential Elements’ of EU-ACP Partnership

As a final note, the fact that the external evaluation of positive measures under both the EDF and the EC budget line of B7-70 is rarely undertaken should not be overlooked. Internal evaluations are carried out by the European Commission under the reporting requirements laid down in the 1991 Resolution¹³⁴² and a recent evaluation of EIDHR initiatives was carried out for activities in 2000,¹³⁴³ however, these reports are descriptive, rather than critical in nature. Only two significant external studies have been commissioned by the EU to investigate the impact of its human rights and democratisation programmes in third countries.¹³⁴⁴ The first of these was carried out by the German Development Institute between 1994 and 1995.¹³⁴⁵ This report deals with only two of the EU human rights budget lines, therefore, it does not investigate EDF funding.¹³⁴⁶ Furthermore, of the six countries researched in detail, only two of these relate to the ACP group, namely, Malawi and Uganda.

With regard to human rights, this report was specifically concerned with civil and political rights and, secondly, democratisation was considered in light of the existence, in particular, of free and fair elections, political participation and civil and political liberties, including freedom of association, freedom of speech and the rule of law.¹³⁴⁷ According to the findings, the European Commission objective of securing free and fair elections in Malawi had a largely positive impact on the human rights situation, however, there were some delays in the disbursement of funds for activities such as elections and referenda which

¹³⁴² European Commission, Report on the implementation of the resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, adopted on 28th November 1991, covering 1991-October 1992, SEC (1992) 1915 fin., 21st October 1992; European Commission, Report on the implementation in 1993 of the resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, adopted on 28th November 1991, covering January-October 1993, COM (1994) 42, fin., 23rd February 1994; European Commission, Report on the implementation of measures intended to promote observance of human rights and democratic principles (for 1994), COM (1995) 191 fin.; European Commission, ‘Report on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995),’ COM (1996) 672, fin.; European Commission, The implementation of measures intended to promote observance of human rights and democratic principles in external relations (1996-1999), COM (2000), 726 fin., 14th November 2000.

¹³⁴³ Commission Staff Working Document, Report on the Implementation of the European Initiative for Democracy and Human Rights in 2000, 22 May 2001, SEC (2001) 801.

¹³⁴⁴ Heinz, W., Lingnau, H., and Waller, P., ‘Evaluation of EC Positive Measures in Favour of Human Rights and Democracy 1991-1993’, (German Development Institute, 1995) [*hereinafter* the Heinz Report]; SCR Evaluation, *op. cit.*; See also Synthesis report, *op. cit.*

¹³⁴⁵ Heinz Report, *ibid.*

¹³⁴⁶ B7-75220: Support for Human Rights and Democracy in Developing Countries and B7-5230: Democratisation in Latin America.

¹³⁴⁷ Heinz, *op. cit.*, pp. 15-16.

require strict timeframes.¹³⁴⁸ Similarly, the evaluation findings were positive with regard to progress in the area of human rights and democratisation through EC assistance in Uganda.¹³⁴⁹

The most recent external report covered a wider scope in its evaluation of positive measures in the ACP countries during the period 1995-1999. The outcome of this research was largely positive, however it was found that there was nothing to indicate the translation of legal norms into the operational activities of development cooperation with the ACP countries.¹³⁵⁰ It also noted the priority given to institution building, civil and political rights and the holding of free and fair elections and recommended that support should be provided to a wider range of human rights. In particular, it argued that increased support for economic and social rights and vulnerable groups would be more appropriate in the pursuit of the EC's development assistance objectives.¹³⁵¹

Criticism directed towards the management of EU efforts to promote human rights and democratisation is a common feature of the external evaluation reports. For example, the SCR report noted the large role of initiative given to NGOs, in particular, through the call for proposals mechanism, which contributed to the fragmentation of efforts in this domain as each NGO had its own agenda.¹³⁵² Furthermore, this report also recommended reform of EU programming and strategic planning in human rights and democratisation activities.¹³⁵³ The Court of Auditors, which carries out independent reports on Community development expenditure on an annual basis, also drew attention to this issue. In its special report on the EU's support for human rights in third countries in 2000,¹³⁵⁴ criticism was directed towards the Commission's management in the sphere of human rights and democratisation programmes, in which it was stated:

¹³⁴⁸ Ibid., pp. 99-101.

¹³⁴⁹ Ibid., pp. 114-116.

¹³⁵⁰ SCR Evaluation, *op. cit.*, p. 29.

¹³⁵¹ Ibid., pp. 6 and 13.

¹³⁵² Ibid., p. 29.

¹³⁵³ Ibid., p. 79.

¹³⁵⁴ Court of Auditors, 'On the Management by the Commission of the European Union Support for Development of Human Rights in Third Countries, together with the Commission's Replies,' Special Report No. 12/2000, [2000] OJ C 230/1, 10th August 2000.

...the Court found little evidence that the Commission had effectively assessed the democracy and human rights situation and needs of the beneficiary countries and that it had developed a strategy specifically tailored to the requirements of the country (identifying key problems and proposing solutions).¹³⁵⁵

In addition, disapproval was also voiced at the failure of the Commission to take long-term commitments into account,¹³⁵⁶ and also for the inadequate management of funds and the lack of capacity to carry out evaluations.¹³⁵⁷ The Court of Auditors' report also pointed to the absence of performance indicators in the area of human rights and democratisation.¹³⁵⁸

The difficulties in evaluating measures to promote human rights and democratisation have been raised by many donor governments.¹³⁵⁹ For example, according to the Swedish Department for international development, it seems unlikely that consensus can be reached on methods for evaluating human rights and democratisation projects, or that verifiable indicators exist that can be applicable in all situations.¹³⁶⁰ The EU has taken significant steps in the reform of its external assistance in 2001, which were sparked by the Commission White Paper and sharp criticism from many commentators.¹³⁶¹ The institutional changes which followed led to the creation of Europe-Aid, a single unit charged with responsibility for the identification of programmes and their implementation.¹³⁶² The centralisation of project management, the development of a single methodology and selection criteria was undertaken to improve the coherence, efficiency and evaluation of EU aid. As human rights performance may be taken into consideration in the assessment of performance for EDF allocation, the creation of clear and verifiable indicators represents a crucial challenge for the future of EU development

¹³⁵⁵ Ibid., para. 22. .

¹³⁵⁶ Ibid., para 47.

¹³⁵⁷ Ibid., paras. 45-46.

¹³⁵⁸ Ibid., para 25.

¹³⁵⁹ Sørbo and Tostensen, *op. cit.*, (2001), pp. 218 - 219.

¹³⁶⁰ ITAD Ltd., 'Logframe-related evaluation of SIDA's democracy and human rights support: Phase 1 Evaluability Assessment, Main Report,' (Stockholm, 1999), p. 3, unpublished report. Quoted *ibid.*, p. 218.

¹³⁶¹ European Commission, White Paper on Reforming the Commission, COM (2000) fin. 200, 1st May 2000. See also European Commission, Green Paper COM (1996) 570; OECD-DAC, *DAC Peer Review of the European Community*, OECD Development Cooperation Review Series, (2002); Santiso, *op. cit.*, (2002).

¹³⁶² European Parliament, Resolution on setting up a single coordinating structure within the European Commission responsible for human rights and democratisation, [1998] OJ C 14, 19th January 1998, para. 19.

cooperation policy. As mentioned above, the recent Draft Guidelines on Promoting Good Governance are a useful step in this direction, and it remains to see whether they will be endorsed by the European Commission through the publication of a final draft.

3.4. Observations on the Practical Implementation Human Rights in EU-ACP Relations

3.4.1. Addressing Potential Internal Incoherence between Normative and Practical Application of the EU's Positive Approach

In light of the conclusions drawn in the second part of this chapter on the shortcomings of the practical application of the 'positive approach' and more particularly, in response to the failure of political dialogue with Zimbabwe, the Cotonou framework for political dialogue was substantially enhanced with the introduction of new commitments to hold on-going dialogue under Article 8. Therefore, whilst it does not appear that the overall normative framework needs to be improved, some commentators have pointed to the added value of institutional reform as a means of ensuring coherence between EU rhetoric and practice.

3.4.1.1. Institutional Reform: The Potential Contribution of an EU Fundamental Rights Agency (FRA) to Relations with the Group of ACP States

The adequacy of the EU's human rights policy in external relations more generally has been the subject of on-going academic debate, not least since the report of the European Parliament's Lenz Report of 1997¹³⁶³ and the publication of the 'Human Rights Agenda' of the Comité des Sages in 1998.¹³⁶⁴ A large part of this debate has focused on the

¹³⁶³ European Parliament, 'Report on setting up a single coordinating structure within the European Commission responsible for human rights and democratization,' Committee on Foreign Affairs, Security and Defence Policy, A40393/97, 4th December 1997. [*hereinafter*, the Lenz Report].

¹³⁶⁴ 'Leading by Example: A Human Rights Agenda for the European Union for the Year 2000,' Report of the Comité des Sages, (Florence, 1998).

potential of institutional reforms to improve coherence within the EU's human rights policy in external relations. In the following section, some of the proposed institutional reforms will be discussed with particular emphasis on the recent proposal for a Council Regulation establishing an EU Fundamental Rights Agency (FRA) and the potential impact of this Agency on EU-ACP relations.

Firstly, the background to discussions on the reform of the EU's institutional framework for human rights can be traced to the 1997 Lenz Report of the European Parliament.¹³⁶⁵ The Lenz Report recommended the establishment of a single coordinating structure for human rights and democratisation within the European Commission.¹³⁶⁶ It was argued that this body could take the form of a European Agency for Human Rights and Democratisation with overarching responsibility for coordinating human rights within the Commission. Further institutional changes included the possibility of appointing a Commissioner for Human Rights and Democracy, whose mandate would include coordinating the EU's sanctions policy, ensure coherence between institutions and administer projects and programmes.¹³⁶⁷ There was also support for setting up a European Network for human rights and democratisation for the purpose of analysing and collecting information that would be available on the internet, which would be funded from the EU human rights budget line B7-70 (now Chapter 19.04).¹³⁶⁸

The Human Rights Agenda of the Comité des Sages echoed many of these concerns and criticised the lack of a coherent human rights policy within the EU. The report of the Comité des Sages recommended the appointment of a Commissioner for Human Rights, the establishment of a Human Rights Office to support human rights activities in the CFSP-related areas, surveys of the human rights situation world-wide and the adoption of criteria for the application of the human rights clause.¹³⁶⁹ Many of the recommendations

¹³⁶⁵ Lenz Report, *op. cit.*, (1997).

¹³⁶⁶ 'Motion for a resolution,' point 5. See Lenz Report, *op. cit.*, (1997), p. 7.

¹³⁶⁷ *Ibid.*, p. 8, para. 7. In the Lenz Report, it was envisaged that the structure this Agency would be modeled on ECHO.

¹³⁶⁸ *Ibid.*, p. 9, para. 22.

¹³⁶⁹ Report of the Comité des Sages, reprinted in Alston, *op. cit.*, (1999), pp. 919-927. The EU High Representative, Javier Solana, appointed a Personal Representative on Human Rights, Mr. Michael Matthiessen, on 17th January 2005.

of the Agenda for Human Rights, which was published in 1998, have yet to be taken on board.¹³⁷⁰

Other commentators have argued that reform of the institutional structure for human rights could improve the practical management of EU human rights activities. Reiterating the calls for a single institutional focus in the European Commission structure for human rights, Riedel and Will have argued that a separate Commissioner for Human Rights could be a useful addition.¹³⁷¹ According to Arts, institutional reform could be more specifically tailored towards the EU development priorities by taking the form of an EU-ACP Human Rights Office to facilitate the “3C’s” of development cooperation policy, namely, ‘coherence, coordination and complementarity.’¹³⁷² This institution could have a broad mandate and facilitate joint responses to human rights issues and provide an information base to assist the joint EU-ACP institutions. It would also provide a means of backing up internal commitments to human rights in the Maastricht and Amsterdam treaties.¹³⁷³

This debate has regained momentum following the European Council Decision of 13th December 2003 on the proposal to reform the European Monitoring Centre on Racism and Xenophobia (EUMC) by transforming it into a Fundamental Rights Agency (FRA).¹³⁷⁴ Many commentators, including Alston and de Schutter, supported the Proposal.¹³⁷⁵ In particular, the creation of an independent agency has been welcomed as a means of strengthening the EU’s external policy on human rights. According to Bulterman, despite the existence of an elaborate legal framework and operational instruments, the EU still doesn’t have a “human rights policy that stands the test of criticism.”¹³⁷⁶

¹³⁷⁰ Bulterman, *op. cit.*, (2005), p. 264.

¹³⁷¹ Riedel and Will, *op. cit.*, (1999), p. 752.

¹³⁷² Arts, *op. cit.*, (2000), p. 371.

¹³⁷³ *Ibid.*

¹³⁷⁴ Council Regulation (EC) No. 1035/97 provides a legal basis for the EUMC. Its mandate expires on 31st December 2006.

¹³⁷⁵ Alston, P., and de Schutter, O., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, (Oxford, 2005); Proposals for the establishment of the FRA also made by Alston at Finnish Presidency EU Human Rights Discussion Forum (1999).

¹³⁷⁶ Bulterman, *op. cit.*, (2005), p. 264.

In the public consultation procedure set up to discuss the potential role of this Agency, it was clear that data collection and analysis would be a key priority. The question of whether the mandate of the Agency would cover both internal and external aspects of human rights in the application of Community law was also subject to debate.¹³⁷⁷ During the public consultation process, the Commission appeared to be in favour of restricting the geographical scope of the FRA.

Confining the Agency's scope to the Union would clearly underline the will to emphasise the importance of fundamental rights in the Union ... This message might be diluted if the Agency's remit were to be extended to third countries. The Commission rejected this option in its Communication on the EU's role in promoting human rights and democratisation in third countries, and the Council shared its approach in its conclusions of 25 June 2001. In addition, respect for human rights in the Union's foreign policy is already taken into account in the context of cooperation with third countries.¹³⁷⁸

For Bulterman, this restriction "...seems to suggest that the role of the FRA should be confined to (making a contribution) to ensuring that the Union's external policies comply with the fundamental rights laid down in the EU Charter of Fundamental Rights."¹³⁷⁹ In examining the potential contribution of a Fundamental Human Rights Agency to the EU's position on human rights in its external policies, Bulterman has been critical of the limited scope of the Commission proposal in relation to third countries.¹³⁸⁰ These restrictions are based on the following assumptions: i) that the monitoring of the human rights situation in third countries would undermine the work of the FRA; ii) that it is not clear how the human rights situation in third countries affects the Union; iii) that

¹³⁷⁷ SEC (2004) 1281/COM (2004) 693 fin.; Responses to the Public Consultation process can be found at http://europa.eu.int/justice_home/news/consulting_public/fundamental.../index_en.htm

¹³⁷⁸ See Communication on 'The Fundamental Rights Agency - Public Consultation Document,' SEC (2004) 1281/COM (2004) 693 fin., p. 8.

¹³⁷⁹ Bulterman, M., 'The Contribution of the Agency to the External Policies of the European Union,' p. 273, from Alston, P., and de Schutter, O., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, (Oxford, 2005).

¹³⁸⁰ Ibid.

sufficient information sources exist on the human rights situation in third countries (e.g. US State Department country reports).¹³⁸¹

Bulterman argues, however, that the justification for these restrictions is unconvincing. Firstly, she argues that an independent assessment of the human rights situation of third countries would lead to greater transparency in the application of the human rights clause. Secondly, the FRA could be mandated to monitor compliance with the ‘essential elements’ of association agreements and could play an advisory role by making recommendations to the Council on alleged violations of human rights and thereby, contribute to depoliticising decision-making in relation to human rights conditionality.¹³⁸² It may be easier for an independent agency to make human rights assessments, as it would not have to take competing political objectives into consideration. In this respect, the Agency could be accorded an advisory role with respect to the application of Article 96 of the Cotonou Agreement.¹³⁸³ Thirdly, the FRA could assist by ensuring compatibility between the EU’s human rights commitments and its external policy activities, including development cooperation, by engaging in information-gathering on the impact of EU external action on the human rights situation in third countries.¹³⁸⁴ This may lead to greater coherence between the EU and Member States in the area of human rights activities in third countries. Furthermore, the Agency could be called upon to play an advisory role in the application of measures to promote human rights in the ACP countries.¹³⁸⁵ A final rationale for extending the mandate of the Agency to third countries rests on the obligation to ensure that EU policies do not conflict with fundamental rights. This obligation is based firstly, on the general rule that EU institutions and Member States must respect fundamental rights when implementing (or derogating from) Community law and in principle, also applies to acts outside the territory of the EU.¹³⁸⁶

¹³⁸¹ Ibid., pp. 273-4.

¹³⁸² Ibid., pp. 267 and 275. See section 1.1 above.

¹³⁸³ Ibid., p. 276.

¹³⁸⁴ Ibid., p. 272.

¹³⁸⁵ Ibid., p. 275. See also Bartels, L., Study on ‘The Competences of the Proposed Fundamental Rights Agency with Respect of Human Rights Violations outside of EU Territory’, DGExPo/B/PolDep/STUDY/2005_21, 11th January 2006, p. 5. (This 2006 report was drafted at request of the European Parliament.)

¹³⁸⁶ Bulterman, *ibid.*, (2005); Bartels, *ibid.*, (2006), p. 5.

Similarly, the EU is obliged to respect human rights in its external activities by virtue of treaty and customary international law.¹³⁸⁷

The results of the preparatory impact assessment and *ex ante* evaluation also indicate the policy options open to the European Commission prior to the publication of the Proposed Regulation.¹³⁸⁸ The final report of the EPEC advanced several policy recommendations for the scope of the Fundamental Rights Agency.¹³⁸⁹ This included firstly, the possibility of maintaining the ‘status quo’ by retaining the EUMC and the network of independent experts. Secondly, a ‘focused observation agency’ that would concentrate on a number of thematic themes or thirdly, a ‘general observation agency’ that would focus on a broader range of thematic priorities. Fourthly, the possibility of a ‘focused observation and assessment agency on Union policies’ would address both a broad range of thematic priorities and assess EU institutions and EU Member States policies in the implementation of EU law. Fifthly, the option for the ‘widest possible observation and assessment agency’ would empower the Agency to carry out the functions in the fourth option, and in addition, to monitor the policies of the Member States for the purposes of Article 7 TEU. This would also have an external dimension as the Agency would also have the power to monitor Member States when they act in other areas, beyond the implementation of EU law.¹³⁹⁰ The European Commission ultimately favoured the fourth policy option as the most appropriate for achieving the needs and objectives identified.¹³⁹¹ This would enable the FRA to pursue a broad variety of thematic priorities, carry out assessments of EU institutions and Member States in the implementation of EU law and deliver opinions to EU institutions and Member States.¹³⁹²

¹³⁸⁷ Bartels, *ibid.*, (2006), p. 7.

¹³⁸⁸ European Commission Staff Working Paper, Annex to the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights, and to the Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities referred to in Title VI of the Treaty on European Union, COM (2005) 280, 30th June 2005. Impact Assessment Report’, SEC (2005) 849, 30th June 2005. [*hereinafter* Impact Assessment (2005)]

¹³⁸⁹ European Policy Evaluation Consortium (EPEC), ‘Preparatory Study for Impact Assessment and *Ex Ante* Evaluation of Fundamental Rights Agency. Final Report,’ Brussels, February 2005. Source: http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_end.htm The findings of this report are summarised in the SEC (2005) 849, 30th June 2005.

¹³⁹⁰ Impact Assessment, *op. cit.*, (2005), p. 13.

¹³⁹¹ See *ibid.*, pp. 5-11.

¹³⁹² *Ibid.*, p. 14.

Following the public consultation process, the Commission presented a proposal for the establishment of an EU Agency for Fundamental Rights in 2005. According to the Commission Proposal, the objective of the Agency “shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.”¹³⁹³ The proposed Regulation would operate under the first pillar competences of the European Community.¹³⁹⁴ Its scope would also extend to police and judicial affairs in criminal matters by virtue of a parallel Council Decision.¹³⁹⁵ The remit of the Agency has been confined to assistance and expertise in the application of Community law to avoid any potential overlap or duplication of efforts with human rights bodies and institutions, particularly, the Council of Europe.¹³⁹⁶ The participants of the Agency include the Member States of the European Union, candidate countries and potential candidate countries.¹³⁹⁷

Article 3 lays out the scope of the Regulation. The term ‘fundamental rights’ refers to the Charter of Fundamental Rights and fundamental rights as defined in Article 6(2) of the TEU.¹³⁹⁸ This extends the focus of the EUMC, which dealt exclusively with the fight against racism and xenophobia. The Agency is competent to deal with fundamental rights for the purposes of fulfilling the objectives provided in Article 2¹³⁹⁹ and is required to

¹³⁹³ Article 2 of the ‘Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities referred to in Title VI of the Treaty on European Union,’ COM (2005) 280 fin., 30th June 2005. [*hereinafter* the Proposed Regulation for a Fundamental Rights Agency].

¹³⁹⁴ The legal basis for the proposed Regulation is Article 308 EC Treaty. According to the Explanatory Memorandum, “[i]t is a general objective of the Community to ensure that its own action fully respects fundamental rights. The Agency’s establishment will further that objective, without there being specific powers provided for in the Treaty to achieve that aim. See also Para. 3 of the Preamble of the Proposed Regulation, which states that “the Community and its Member States must respect fundamental rights when implementing Community Law.”]

¹³⁹⁵ The legal basis for the Council Decision is Articles 30, 31 and 34 of the TEU.

¹³⁹⁶ It should be noted that cooperation with the Council of Europe is provided for in Article 9 of the Proposed Regulation on the Fundamental Rights Agency.

¹³⁹⁷ Article 27 of the Proposed Regulation expands on the scope of the mandate of the FRA in relation to candidate and potential candidate countries, according to which, participation is open to “countries that have concluded an association agreement with the Community and have been identified by the European Council as candidate countries or potential candidate countries for accession to the European Union. The modalities of participation shall be decided by a decision of the relevant Association Council. Article 27(2), *ibid.*

¹³⁹⁸ Article 3(2) of the Proposed Regulation for a Fundamental Rights Agency. The Charter of Fundamental Rights of the EU as proclaimed in Nice on 7th December 2000. Charter of Fundamental rights of the European Union [2000] OJ C 364/01, 18th December 2000.

¹³⁹⁹ Article 3(1), *ibid.*

focus its efforts on the situation of fundamental rights in the Member States of the European Union when implementing Community law.¹⁴⁰⁰ If adopted, the FRA would be operational from 1st January 2007 onwards and would operate under a pluri-annual framework for activity.¹⁴⁰¹

The tasks outlined for the Agency are varied, with particular emphasis on its role as an advisory body including collecting and comparing data, disseminating information, carrying out research and surveys, publishing annual and thematic reports, enhancing cooperation between relevant bodies in the area of fundamental rights and awareness-raising.¹⁴⁰² The tasks of the Agency also extend to formulating conclusions and opinions for the Union institutions and Member States in the application of Community law.¹⁴⁰³ The extent to which the Agency would be empowered to take part in proceedings under Article 7 of the Treaty of the European Union was a particularly controversial issue during the consultation period.¹⁴⁰⁴ According to Article 4(1)(e), the Council has the possibility of requesting the Agency's technical expertise in the context of proceedings under Article 7 of the TEU. However, the Agency's competence does not extend to the systematic and permanent monitoring of fundamental rights for the purposes of Article 7.¹⁴⁰⁵ It should also be noted that it is not envisaged that the FRA would have a complaint mechanism.¹⁴⁰⁶ By virtue of Article 3(4), the Commission may ask the Agency to submit information and analysis on "third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements, in particular countries covered by the European Neighbourhood Policy."¹⁴⁰⁷

¹⁴⁰⁰ Article 3(3), *ibid.*

¹⁴⁰¹ Article 33 of the Proposed Regulation for a Fundamental Rights Agency.

¹⁴⁰² Article 4 (1)(a), (b), (c), (f), (g), (i), (j) and (k) of the Proposed Regulation for a Fundamental Rights Agency.

¹⁴⁰³ Article 4 (1)(d), *ibid.* This can be carried out at its own initiative or at the request European Parliament, Commission or Council.

¹⁴⁰⁴ SEC (2004) 1281/COM (2004) 693 fin. On the whole, Member States were reluctant to permit an extensive role for the Agency in this domain, whereas NGOs were largely in favour.

¹⁴⁰⁵ Explanatory Memorandum of COM (2005) 280 fin., p. 6.

¹⁴⁰⁶ Article 30 of the Proposed Regulation for a Fundamental Rights Agency.

¹⁴⁰⁷ According to Bartels, the Commission should have relied on a more appropriate legal basis for the activities envisaged in Article 3(4), for example, by using Article 179 EC Treaty for measures relating to the general objective of promoting human rights in the context of development cooperation or Article 181(1)(a) EC Treaty in the context of other third countries. Bartels, L., Study on 'The Competences of the Proposed Fundamental Rights Agency with Respect of Human Rights Violations outside of EU Territory', DGExPo/B/PolDep/STUDY/2005_21, 11th January 2006, p. 12, fn. 4.

For the purposes of this thesis, the crucial issue centres on how the proposed Agency would affect EU relations with the ACP states, rather than EU external relations as a whole. As mentioned above, the FRA's mandate relates to "fundamental rights in the Union and the Member States when implementing Union law and in those candidate countries and potential candidate countries which participate in the Agency."¹⁴⁰⁸ Therefore, participation does not appear to refer to association countries that are not potential candidates for accession to the European Union. Article 3(4) is an exception to the territorial principle in Article 2 of the Regulation and would apply to ACP countries. Although not explicitly mentioned in the Proposed Regulation, it could be inferred that this provision may enable the FRA to play a role in human rights conditionality by providing information on the human rights situation in an ACP country at the request of the Commission for the purposes of Article 96 proceedings. As it stands, this would be an indirect role as the FRA does not have the authority to deliver opinions in relation to non-candidate third countries.¹⁴⁰⁹ In addition, the Commission may request information under Article 3(4) for the purposes of carrying out activities for the promotion of human rights, thus, indicating the potential for an indirect role in 'positive measures'. Nevertheless, it was not explicitly envisaged in the text of the Proposed Regulation or in its Explanatory Memorandum that the FRA would be involved in providing information for the purposes of Article 96 consultations or positive measures. Therefore, it remains to be seen whether these recommendations relating to non-candidate third countries will be reflected in the final Regulation.

It has also been argued that the provisions relating to the provision of information and technical expertise with regard to compliance with Article 6(1) of the TEU may have an external dimension.¹⁴¹⁰ In this respect, Article 4(1)(e) could be interpreted as requiring the Agency to provide information on whether a Member State is complying with the principles set out in Article 6(1) in its external action.¹⁴¹¹ This proposition would have several repercussions, firstly the geographical scope in Article 2 should not be limited to

¹⁴⁰⁸ Explanatory Memorandum of COM (2005), *op. cit.*, p. 5.

¹⁴⁰⁹ Bartels, *op. cit.*, (2006), p. 8. This can be viewed in contrast to the advisory role advocated by Bulterman.

¹⁴¹⁰ Bartels, *op. cit.*, (2006), p. 9.

¹⁴¹¹ *Ibid.*

EU.¹⁴¹² Secondly, this function would go beyond the objectives of Article 2, which is limited to matters arising in the context of EC law and would therefore exceed the legal basis of Article 308.¹⁴¹³

From the Annex to the Proposal, it is clear that the FRA was not expected to have an extensive remit for non-candidate third countries due to the high financial burden and the risk of duplicating existing international information sources and monitoring mechanisms.¹⁴¹⁴ Therefore, rather than a systematic analysis of the human rights situation in third countries, it was deemed more appropriate that the FRA should provide information on non-candidate third countries on a case-by-case basis at the request of the Commission.¹⁴¹⁵ Despite the legal rationale for extending the scope of the FRA to non-candidate third countries, there are some clear difficulties in extending the scope of the FRA to third countries, particularly, the ACP countries. Firstly, the mandate of the Fundamental Rights Agency would need to be adapted as it only refers to the Charter on Fundamental Rights, which is of little relevance to non-candidate third countries.¹⁴¹⁶ Secondly, the monitoring of human rights in third countries would place huge financial burdens on the FRA, which is expected to be a lightweight structure in terms of staff and budgetary expenditure.¹⁴¹⁷ Equally, problems may arise in the area of information gathering and data-sharing as some countries may be unwilling to provide the EU with the information requested.¹⁴¹⁸ Furthermore, it could be argued that the provision of information and analysis would be unnecessary due to the wide range of sources relating to the situation of fundamental rights in the ACP countries and this particular issue has already been recognised by the Commission.¹⁴¹⁹

3.4.2. Human Rights as Instrumental in the Process of Development?

¹⁴¹² Ibid.

¹⁴¹³ Ibid.

¹⁴¹⁴ Impact Assessment, *op. cit.*, (2005), p. 13. For an overview of the existing monitoring mechanisms and information sources for human rights, *ibid.*, p. 7.

¹⁴¹⁵ Ibid.

¹⁴¹⁶ Bulterman, *op. cit.*, (2005), p. 277).

¹⁴¹⁷ Ibid., p. 277.

¹⁴¹⁸ Ibid.

¹⁴¹⁹ This was acknowledged by the Commission in COM (2001) 252.

3.4.2.1. Mainstreaming: Strategic Policy Objectives of EU Development Aid

Mainstreaming has been defined as systematically integrating a specific theme or value in programmes and strategies.¹⁴²⁰ The mainstreaming strategy pursued by the European Commission has a dual objective by promoting specific values and themes for their own sake and at the same time, as part of the means of achieving more general development outcomes.¹⁴²¹ Some weaknesses in the EU's mainstreaming strategies were discussed in relation to the country strategy papers – particularly, the correlation of mainstreaming human rights with a short paragraph on the human rights situation in third countries. The EU has recently issued new guidelines for the integration of human rights as cross-cutting themes through joint frameworks on Country Strategy Papers.¹⁴²² Apart from reiterating the need to take the human rights situation of the partner country into consideration, these guidelines add little to the substance of existing mainstreaming documents. The document itself was produced as a response to the Paris Declaration on Aid Effectiveness and Harmonisation,¹⁴²³ and seeks to promote joint approaches between Community and Member State bilateral aid policies and to align donor's multiannual programming frameworks.

Nevertheless, whilst it is easy to pass judgement on the outcome of the EU's mainstreaming strategies in policy documents, it is contended that the success or failure of mainstreaming strategies cannot be measured simply by the practical implementation of policy tools. Beyond the explicit policy documents on mainstreaming, it is contended that the human rights clause has made the most significant contribution to the mainstreaming agenda. Whilst it may be difficult to discern the impact in quantitative terms, the inclusion of the human rights clause has helped to shape the entire character of EU development cooperation policy and relations with the ACP states. By virtue of this clause – human rights can at last potentially permeate all aspects of the relationship between the EU and ACP states. This is increasingly the case with the revised provisions

¹⁴²⁰ IQSG, 'Programming Guide for Country Strategy Papers. Mainstreaming in Country Strategy Papers,' Information Note. (Internal document on file with author)

¹⁴²¹ Ibid.

¹⁴²² COM (2006) 88 fin., *op. cit.*, Annex: Common Format for Country Strategy Papers (CSPs), pp. 12-13.

¹⁴²³ Paris Declaration on Harmonising and Aligning of Aid, *adopted on 2nd March 2005*.

in the Cotonou Agreement relating to enhanced dialogue. Whilst accession to the Cotonou Agreement does not require compliance with human rights instruments, engagement in the ACP group is predicated upon dialogue in the area of human rights. For this reason, it is argued that the human rights clause acts as a mainstreaming tool that shapes the entire character of development aid strategies and sets the rules of engagement between the EU and ACP countries. This claim is made, notwithstanding, the fact that the practical application of human rights varies to a considerable degree on a case by case basis.

The creation of the Inter-service Quality Support Group (IQSG), which is situated within DG Development and also reports to DG Relex¹⁴²⁴ has improved the overall level of quality control by vetting all project and programmes. This ensures that the design of country strategy papers and programmes conforms to the new framework strategy and verifies that the core values of EU development policy are mainstreamed at all levels.¹⁴²⁵ Whilst many internal policy documents claim that the IQSG has contributed to improving the mainstreaming of the EU's values, some caution has been noted by Dearden, who claims that "...its authority within the internal Commission structure remains sensitive and its future role unclear."¹⁴²⁶

3.4.2.2. Evidence of Human Rights in the Programming of Development Activities

Whilst human rights have shaped the overall architecture of EU-ACP cooperation, is there any evidence to suggest that human rights have been incorporated in the methodology of EU development aid programming? Furthermore, is there any evidence to suggest that the EU has moved towards the adoption of human rights-based methodologies as outlined in chapter two of this thesis?

¹⁴²⁴ Dearden, S., 'The Future Role of the European Union in Europe's Development Assistance,' 16 *Cambridge Review of International Affairs* 1 (2003), p. 109.

¹⁴²⁵ OECD DAC, *Development Cooperation Review. European Community*, (Paris, 2002), pp. 64-65.

¹⁴²⁶ Dearden, *op. cit.*, (2003), p. 114.

In responding to this question, it is necessary to outline the methodology adopted by EuropeAid in the implementation of projects and programmes.¹⁴²⁷ Project cycle management refers to the management activities and decision-making procedures during the life-cycle of projects.¹⁴²⁸ The project cycle includes five stages: identification, formulation, programming implementation and evaluation. The logical framework approach (LFA) has been used as the underlying methodological tool of EU development projects since 1993. Logical framework analysis is an analytical and management tool that is used by many bilateral and multilateral agencies, international NGOs and partner governments.¹⁴²⁹

The Logical Framework Approach consists of a process that enables stakeholder analysis, problem analysis and the setting of objectives. The outcome of this analysis is then used to design a Log Frame Matrix (LFM) The LFM further elaborates on the objectives of the project, the modalities for monitoring and evaluating projects including indicators and assumptions relating to the outcomes of the project such as external factors that are critical for the projects success.¹⁴³⁰ If used appropriately, this approach should allow for the development of common principles and terminology and participatory approaches among stakeholders leading to dialogue on project scope, rather than externally designed projects. The guidelines emphasise the use of LFA as a *process* and LFM as a *product* in order to avoid sticking too rigidly to the matrix and to ensure that there is adequate flexibility to adapt the project if the situation changes during the implementation stages.¹⁴³¹

The LFA approach involves the following stages. Firstly, it requires the identification of problem analysis and priority setting, which involves negotiating priorities among the various stakeholders in an effort to gain consensus. The problem analysis is essential as a means of placing the project in the overall development context and assessing risk management and the means of ensuring accountability.¹⁴³² Secondly, there is a need to

¹⁴²⁷ PCM Manual, *op. cit.* (2004). It should be noted that sector aid or budget support is not covered in this section.

¹⁴²⁸ *Ibid.*

¹⁴²⁹ The Logical Framework Approach was first used in 1960s by USAID. See *ibid.*, p. 57.

¹⁴³⁰ *Ibid.*

¹⁴³¹ *Ibid.*, p. 58.

¹⁴³² *Ibid.*, p. 59.

develop the core quantitative and qualitative indicators for analysis and source of verification to assess the impact of projects. These guidelines recognise that it may be difficult to achieve consensus on the development of measurable indicators in capacity-building projects or more process-oriented projects.¹⁴³³ Similarly, the sources of verification and means of evaluating progress on objectives in these areas may also be more difficult to achieve.¹⁴³⁴ Thirdly, the stakeholders need to devise the format and application of projects as a means of linking the problem analysis to objectives. The guidelines recommend that this stage should not be viewed as a bureaucratic checklist.

The LFA methodology used by the EU has come under sharp criticism with respect to the evaluation of human rights, democracy and good governance activities.¹⁴³⁵ Crawford argues that although the LFA methodology may be appropriate for “‘blueprint’ type projects” such as infrastructure projects and where “hard data and quantifiable indicators are available,”¹⁴³⁶ it is not suitable for governance-related programmes. He also points to the fact that the problems associated with LFA have been recognised in several evaluations,¹⁴³⁷ however, the evaluation of human rights and democratisation programmes in the ACP countries failed to indicate possible shortcomings in the methodology used in the report. This criticism centres on the use of LFA which is “...based on a rigidly preconceived framework and hierarchy of objectives, inverting evaluation inwards towards project documents and programme management...”¹⁴³⁸ For the purposes of evaluation, a more rigorous critique of programmes and projects has been called for through a participatory approach to the evaluation of projects.¹⁴³⁹ This approach would be people-centred, with the project stakeholders and beneficiaries as both the subject and the object of the evaluation.¹⁴⁴⁰ Participatory methods would also encourage domestic ‘authorship’ of human rights and democracy programmes, rather

¹⁴³³ Ibid., 59.

¹⁴³⁴ Ibid.

¹⁴³⁵ Crawford, G., ‘Evaluating European Union Promotion of Human Rights, Democracy and Good Governance: Towards a Participatory Approach,’ 14 *Journal of International Development* (2002).

¹⁴³⁶ Ibid., p. 918.

¹⁴³⁷ This includes the Evaluation of Phare and Tacis Democracy Programmes 1992-1997 (European Commission, 1997) and the Evaluation of the MEDA Programme, (European Commission, 1999). Quoted *ibid*.

¹⁴³⁸ Ibid.

¹⁴³⁹ Ibid., p. 925.

¹⁴⁴⁰ Ibid., p. 923.

than bequeathing ‘ownership’ of donor initiatives.¹⁴⁴¹ As noted above, the PCM guidelines of 2004 have recognised some of these shortcomings illustrating the difficulties in developing process-oriented indicators. This could also include the human rights aspects of projects and programmes that may be directed towards long-term and process-oriented objectives that are not capable of being measured by hard data.

The most recent PCM manual recognises that the log frame analysis may not be an appropriate methodological tool for measuring process-oriented activities such as capacity building. The promotion of respect for human rights also falls under this category as it is not always possible to identify whether benchmarks have been achieved or to evaluate progress in quantifiable terms. It also appears that efforts have been made to address some of the criticisms raised by Crawford by including a specific section on governance indicators.¹⁴⁴² EuropeAid has recently published a draft handbook outlining the modalities for integrating good governance indicators into the project cycle management approach.¹⁴⁴³ In this handbook, human rights are given a broad interpretation and at the same time, human rights are conceived as a sub-set of good governance. Although a definition of good governance is not provided, it broadly includes six clusters, namely: democratisation; human rights; rule of law and administration of justice; civil society; public administration reform; decentralisation and local government. The human rights cluster includes the promotion of protection for human rights defined in the ICCPR and the ICESCR, respect for human rights norms and non-discrimination.¹⁴⁴⁴

According to these guidelines, the EU advocates a dual approach to the integration of human rights in development through both direct and indirect measures. Indirect measures include the mainstreaming of good governance throughout the project cycle of all EU-funded programmes and projects, whilst the direct approach consists of EU-funded projects and programmes which explicitly address the good governance objectives

¹⁴⁴¹ Ibid., p. 925.

¹⁴⁴² This incorporates the good governance indicators contained within the Draft Handbook on Good Governance (2004). Human rights are defined as a subset of good governance and at the same time, a comprehensive set of individual human rights indicators are provided in conjunction with a range of indicators relating to good governance, democratisation and the rule of law.

¹⁴⁴³ Europeaid, ‘(Draft) Handbook,’ *op. cit.*, (2004).

¹⁴⁴⁴ Draft Handbook, *op. cit.*, (2004), pp. 47-56.

as elaborated upon in the six clusters. The good governance activities can be implemented at the three operational levels, namely at policy, programme and project levels. This handbook also provides guidelines on mainstreaming as well as the development of indicators and tools for evaluation.¹⁴⁴⁵ It should be noted, however, that this handbook has not yet been endorsed and still remains in draft form. Nevertheless, EuropeAid has taken steps to integrate human rights in the project cycle management guide of 2004.¹⁴⁴⁶ Empirical analysis is undoubtedly required to determine whether these guidelines are utilised in practice therefore, this issue will be addressed in the following chapter on EU-Kenya cooperation.

Is there any evidence to suggest that human rights-based methodologies have been adopted in EU development cooperation policy? In other words, are human rights viewed as part of the methodology for achieving development outcomes? The above analysis indicates that steps are being made to integrate human rights indicators (both individually and through the broad spectrum of good governance) into the project management activities of EuropeAid. Human rights are referred to as cross-cutting themes and indicators have been developed to incorporate human rights into the overall project cycle. The approach adopted confirms the centrality of the EU's mainstreaming approach. Whilst the recent EU policy document on aid acknowledges the growth in rights-based approaches,¹⁴⁴⁷ there is nothing to suggest that human rights-based methodologies have been endorsed in the programming of EU development assistance.

3.4.2.3. Mainstreaming Programming versus Standalone Projects

The mainstreaming strategies described above require the integration of human rights within the wider development framework by embedding human rights in the programming framework or as cross-cutting themes in development projects. However, what is the relationship between the standalone activities of the human rights budget line and the mainstreaming objectives of the Cotonou Agreement? Does the EIDHR

¹⁴⁴⁵ Ibid., pp. 115-118.

¹⁴⁴⁶ PCM Guide, *op. cit.*, pp. 5-6.

complement the objective of mainstreaming human rights in development cooperation? Is there any evidence of synergy between EDF and EU budget lines?

In line with its mainstreaming strategy of 2001, the European Commission recommended that the EIDHR should adopt a more strategic and long-term approach to human rights and democratisation.¹⁴⁴⁷ This should lend itself to creating greater complementarity between the short-term EIDHR programmes and the long-term development strategies and country strategy papers relating to the ACP states. The lack of synergy between the geographical and thematic instruments has also been recognised more recently by the European Commission.¹⁴⁴⁸ As noted above, the EIDHR has chosen to focus on a number of focus countries in the interests of maximising its resources. However, the fact that this only covers fourteen of the seventy-nine ACP states provides a clear indication of the limited scope of application and thereby, its limited impact on the mainstreaming objectives of the European Commission. Furthermore, it has also been indicated that EIDHR funding will be increasingly directed towards the countries within the Neighbourhood Policy,¹⁴⁴⁹ thus, indicating that it is not intended to act as a complementary tool in development cooperation policies.

The lack of synergy between the EIDHR and the EDF could be viewed as a criticism, insofar as it fails to live up to the mainstreaming agenda proposed by the Commission. However, the benefits of mainstreaming are not universally accepted due to the fact that there is a risk that human rights may become ‘mainstreamed out of existence’. This is due to the wide range of themes that donors are encouraged to mainstream such as gender equality and the protection of the environment. For this reason, a standalone strategy may provide a more useful means of ensuring complementarity between the EDF and the EIDHR.

¹⁴⁴⁷ European Commission, Communication from the Commission to the Council and the European Parliament on Thematic Programme for the Promotion of Democracy and Human Rights Worldwide under the Financial Perspectives (2007-2013), COM (2006) 23 fin., 25th January 2006, p. 4.

¹⁴⁴⁸ COM (2001) 252, *op. cit.*, pp. 13-18.

¹⁴⁴⁹ Commission Staff Working Document, Update 2004, *op. cit.*, (2003).

¹⁴⁵⁰ See EIDHR, ‘Programming for 2005-2006,’ *op. cit.*; EIDHR Annual Work Programme 2005, *op. cit.*

The current debate on the future orientation of Regulations 975 and 976/1999 illustrate the tensions between the European Commission (which favours mainstreaming) and the European Parliament (which advocates standalone activities). As mentioned in the third chapter of this thesis, the European Commission has proposed that the EU budget lines for external relations should be restructured into three thematic and three geographical budget lines.¹⁴⁵¹ In addition, the proposals to restructure the instruments for external relations has provided an opportunity to re-evaluate the current structure of the thematic Regulations. The Commission has also put forward a proposal for integrating the thematic budget lines into new budget lines for external relations.¹⁴⁵² This means that the EIDHR would no longer have a separate legal basis.¹⁴⁵³ The Commission argues that this would ensure greater efficiency and flexibility by mainstreaming funding for human rights and democratisation within two of the geographical instruments and two of the thematic instruments.¹⁴⁵⁴

However, the European Parliament is strongly opposed to this suggestion and has called for a separate Regulation for human rights and democratisation to remain in place.¹⁴⁵⁵ This would ensure that the EIDHR could continue to be targeted at civil society in countries that have a ‘difficult relationship’ with the EU. In view of the fact that EIDHR is a political act, the Parliament seeks to maintain the high visibility of the EIDHR,¹⁴⁵⁶ which would be rendered more difficult if it was not covered under a separate legal basis. Furthermore, the Parliament is conscious to ensure that specific funding would be protected for developing countries and to ensure full Parliamentary oversight over the budget. In this regard, it could be said that there is a potential tension between the perceived benefits of visibility through a separate Regulation, on the one hand, as advocated by the European Parliament and the quest for streamlined and efficient budget

¹⁴⁵¹ See chapter three of this thesis.

¹⁴⁵² European Commission, Communication from the Commission to the Council and the European Parliament, ‘External Actions through Thematic Programmes under the Future Financial Perspective 2007-2013’, COM (2005) 324, 3rd August 2005.

¹⁴⁵³ Youngs, *op. cit.*, (2005), p. 8. According to the Commission, “...these instruments will provide the basic legislative acts for Community expenditure in support of external cooperation programmes including thematic programmes and will replace the existing thematic regulations.” COM (2006) 23, p. 1.)

¹⁴⁵⁴ *Ibid.*, p. 8. The global amount available would be €170 million.

¹⁴⁵⁵ *Ibid.*, p. 9. See Böge Report adopted on 8th June 2005.

¹⁴⁵⁶ *Ibid.*

lines through the mainstreaming approach, on the other hand, as put forward by the European Commission.¹⁴⁵⁷

3.4.3. Concluding Observations

A case study of EU relations with the African, Caribbean and Pacific (ACP) countries was undertaken in this chapter to critically assess whether a positive approach to the application of human rights in development is adopted in practice. In the final section, consideration was given to the potential role of the Fundamental Rights Agency to address the gap between the EU's internal rhetoric and practice – particularly with regard to the *ad hoc* nature of human rights conditionality. In this respect, it has been argued that as an independent agency, the FRA could play a role in human rights conditionality procedures by making recommendations to the Council regarding alleged infringements of Article 96. The FRA could also be mandated to collect information on third countries and draft more detailed human rights profiles to ensure coherence in external policies. These recommendations are motivated by the assumption that the Agency would be an impartial actor. However, it was argued above that it is not clear whether the independence of the Agency would be beyond doubt and furthermore, due to the wide range of existing sources in these areas, it is doubtful whether the further extension of the FRA's mandate to non-candidate third countries including the ACP countries would assist in addressing any gaps between rhetoric and practice in the area under examination this study.

This thesis aims to trace the constituent and instrumental role of human rights in development cooperation policy. It was demonstrated in the third chapter that human rights have become a constituent element of the normative definition of development in EU-ACP relations, however, what conclusions can be drawn on the instrumental role of human rights in the process of development? As illustrated above, the strategy employed by the European Commission for the integration of human rights in development

¹⁴⁵⁷ Meeting with René Vandermosten, (on leave from DG Budget, EU Commission), European Commission Research Fellow, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, 11th October 2005.

cooperation centres on the mainstreaming of human rights as specific values in development strategies. In conjunction with measures to promote human rights, the mainstreaming strategy acts as an instrumental tool by viewing human rights as part of the overarching architecture (enabling environment) for development and by incorporating human rights in the process of development.

In the following chapter, empirical research is carried out through a case study of EU-Kenya cooperation to obtain first-hand insight into the role of human rights in the practice of EU development policy. This case study revisits the themes explored in the previous chapters and examines the extent to which human rights have infiltrated the overall development agenda and at a more practical level, through the implementation of human rights in EU-Kenya cooperation.

CHAPTER FIVE: THE DYNAMICS OF HUMAN RIGHTS IN EU-KENYA COOPERATION FROM LOMÉ TO COTONOU

1. Introduction

In this chapter, the dynamics of human rights in development cooperation policy are explored through a targeted case study on EU-Kenya cooperation. This chapter merges the two principle themes explored in the previous chapters on EU-ACP cooperation policy by analysing the impact of human rights on the changing trends in EU-Kenya development policy and the practical application of the EU's commitment to promoting human rights as a general objective of cooperation. To this end, this chapter analyses the role of human rights in EU-Kenya cooperation from the initial stages of cooperation in the 1960s to the present-day Cotonou Agreement.¹⁴⁵⁸ An analysis of the practical implementation of human rights is examined through three main areas, human rights conditionality, political dialogue and measures to promote human rights.

This chapter firstly provides a background to Kenya's membership of the ACP group. Within this context, an analysis of the early Lomé Conventions unsurprisingly reveals that human rights were not a core feature of the EU cooperation. During the first two decades following independence, trade and the promotion of national economic growth was the imperative of the then EEC and other external donors during the 1960s and 1970s. Nevertheless, it will be shown that human rights issues became increasingly intermingled with development relations under the Moi regime in the early 1990s, which resulted in the EU's *de facto* suspension of aid in 1991 in line with other donors and was a contributing factor in the (re-) introduction of multi-party democracy in Kenya shortly afterwards.

¹⁴⁵⁸ It should be noted that the scope of this chapter is strictly limited to an analysis of EU-Kenya co-operation within the framework of the Cotonou Agreement and the activities of the European Commission in the management of EDF funding.

Throughout the 1990s, donors continued to express concern over Kenya's human rights record. It will be shown that this decade witnessed the disengagement of many donors from direct cooperation with the government of Kenya and instead donors sought to channel funds through non-governmental and civil society actors. Due to the unique nature of the EU-ACP Conventions, the close relationship between both contractual parties is an integral element of cooperation, therefore, it will be considered whether the European Commission followed this trend by working outside the state, for example, through the funding of non-governmental actors and activities such as election monitoring and civic education during this period.

If donors were willing to 'bypass' the state in favour of civil society organisations in the 1990s, there was a clear change in donor policy following the 2002 elections, which brought about the end of thirty-nine years of Kenya African National Union (KANU) rule. The final section of this chapter analyses the role of human rights in the new EU-Kenya country support strategy from 2003 onwards. In this context, it will be shown that the issue of good governance conditionality, as introduced in the Cotonou Agreement of 2000, has been at the fore of cooperation with Kenya in recent times. Whilst the EU has not resorted to explicit conditionality measures through Article 97, it has invoked a type of implicit conditionality in this area by linking certain types of disbursements to the enactment of good governance legislation. This section will also evaluate the promotion of human rights through Cotonou, including the plans made for tripartite cooperation between the government, civil society and donors through the GJLOS (Governance, Justice, Law and Order) project and support for civil society through the DGSP (Democratic Governance Strengthening Programme). Although the EU has always maintained a close working relationship with the government of Kenya, this section will also address the implications for civil society funding following the 're-engagement' of many donors following the 2002 shift in the political spectrum.

Finally, on the basis of interviews carried out with both donors and civil society actors in Kenya, conclusions will be drawn regarding the impact of human rights and the broader political dimensions of the partnership including the recent emphasis of good governance

reform. This chapter also assesses the extent to which the EU's human rights mainstreaming policy operates in practice and also to enable a critical assessment of the way in which human rights have influenced trends in development thinking.

2. The Origins of EU-Kenya Cooperation

2.1. Association and the Treaty of Rome

As described in chapter three, the relationship between the developing world and the European Economic Community (EEC) originally centred on the overseas colonies and territories of the six founding members, at the request of France. As noted in the above chapters on EU-ACP development cooperation policy, the original members of the EEC were eager to institutionalise the relationship between the Community and their overseas territories. Part IV (Articles 131-136) of the Treaty of Rome dealt with the “association” of former colonies, in particular, those of France. By virtue of Article 131, the original six Member States agreed to “associate with the Community the non-European countries and territories which have special relations with Belgium, France, Italy and the Netherlands.”¹⁴⁵⁹ This cooperation was geared towards maintaining trade links, particularly in light of the developed world's dependence on raw materials and commodities from their former colonies. In addition, Part IV of the Treaty and the Implementing Convention¹⁴⁶⁰ extended the tariff measures of the EEC to the overseas territories. This ensured that goods originating from these countries would enter EEC markets duty free during the transitional period, which was due to end on 31st December 1962.¹⁴⁶¹

Human rights were not a consideration in the development of cooperation with the association states. The Preamble of the Treaty of Rome referred to “... the solidarity

¹⁴⁵⁹ Article 131 EC Treaty. Treaty establishing the European Community, *signed* in 1957, *entered into force* on 1st January 1958. The origins of EU-ACP cooperation were detailed in chapter three of this thesis and therefore, will not be repeated in this chapter.

¹⁴⁶⁰ The Implementing Convention was annexed to the EC Treaty. As they were not recognised as states under international law, the OCTs did not sign this agreement.

¹⁴⁶¹ Djamson, E.C., *The Dynamics of Euro-African Cooperation: Being an Analysis and Exposition of Institutional, Legal and Socio-Economic Aspects of Association/Cooperation with the E.E.C.*, (The Hague, 1976), p. 4.

which binds Europe and the overseas countries and ... to ensure the development of their prosperity, in accordance with the Charter of the United Nations.”¹⁴⁶² This reference was not expanded upon in the operative parts dealing with EU association agreements with third countries and it was clear that the economic dimensions of cooperation were paramount.¹⁴⁶³ This was not unsurprising as many of the association states had not yet achieved independence at this time and the issue of human rights and self-determination would have been controversial in this light.¹⁴⁶⁴ Furthermore the issue of human rights was not a concern of the drafters of the Treaty of Rome.¹⁴⁶⁵

2.2. The Yaoundé Conventions

At the time of the Yaoundé Convention, which replaced the Implementing Convention in 1963, many of the association states had attained their independence.¹⁴⁶⁶ This treaty was concluded between the then EEC and eighteen Francophone countries. The objectives were ‘economic, social and cultural progress’ and similar to its predecessor, it continued the policy of preferential access for imports into the EEC. Priority lay with trade, cooperation and the promotion of inter-African integration. As with the Implementing Convention, there was no reference to human rights. These objectives were also maintained in Yaoundé II of 1969, which was known as the Convention of Association.¹⁴⁶⁷

2.3. Kenya and the EEC: The Arusha Convention 1968

¹⁴⁶² Preamble of the Treaty of Rome.

¹⁴⁶³ Williams, A., *EU Human Rights Policies. A Study in Iron*, (Oxford, 2002), p. 19. In particular, Article 3(k) of the Treaty of Rome deals with the association of ‘overseas countries and territories’ ... ‘to increase trade and promote jointly economic and social development.’ According to Article 131 EC Treaty, Part IV, it seeks ‘to promote economic and social development of the countries and territories and to establish close economic relations between them and the Community as a whole.’

¹⁴⁶⁴ Williams, *op. cit.*, (2002), p. 20.

¹⁴⁶⁵ *Ibid.* See chapter three of this thesis.

¹⁴⁶⁶ Yaoundé Convention, signed on 20th July 1963, [1964] OJ 93/1431, 11th June 1964, entered into force on 1st June 1964.

[Yaoundé I]

¹⁴⁶⁷ Djamson, *op. cit.*, (1976), p. 8. Yaoundé II, signed on 1st January 1969 [1970] OJ 282/2, 28th December 1970, entered into force on 1st January 1971.

The background to development aid in Kenya can be traced to the period of colonialism under the indirect rule of the United Kingdom which had declared a protectorate over Kenya since 1895. From the 1920s onwards, the UK delivered economic assistance to Kenya under the Colonial Development Acts (1929 and 1945). This economic assistance was given the new label of ‘aid’ following the attainment of independence in 1963.¹⁴⁶⁸ During its first decade of independence (*uhuru*), Kenya followed the major trends in development policy in the post-independence period under Kenyatta, which emphasised the importance of national developmentalism. At the same time, however, it should be noted that there was a significant continuation with colonial economic policies,¹⁴⁶⁹ and the position of the post-colonial elite and the interests of global capital remained of paramount importance to Kenya.¹⁴⁷⁰ During the early 1960s, opponents of Kenyatta’s economic policies, including Oginga Odinga and Bildad Kaggia, criticised the failure to redistribute wealth despite the end of colonialism and voiced their opposition to one-party rule.¹⁴⁷¹ By the end of the 1960s, Kenya pursued economic policies based on a mixture of Keynesian economics and import-substitution industrialisation, which fit with the accepted orthodoxy in development thinking but were justified domestically on the basis of African traditions and the imperative for national unity.¹⁴⁷² The economic policies pursued by Kenya in the 1960s met with the satisfaction of the allied powers during this period and the excesses of the Kenyatta regime went unchecked in return for support during the Cold War.¹⁴⁷³ As it can be recalled, the Minister for Planning, Tom Mboya, was requested to write an article for the *Foreign Affairs* journal, extolling the virtues of the one-party state.¹⁴⁷⁴

Upon independence, Kenya was bequeathed with a Westminster-style democracy¹⁴⁷⁵ and the 1963 Constitution provided for a multiparty democracy, elections for a bicameral Parliament and judicial independence. At the same time, upon independence, Kenya

¹⁴⁶⁸ Cumming, G., *Aid to Africa. French and British Policies from the Cold War to the New Millennium*, (Aldershot, 2001), p. 242.

¹⁴⁶⁹ Gathii, J.T., ‘The External Interest in Kenya’s Impending Change,’ from Mute, L.M., Kioko, W. and Akivaga, K., *Building an Open Society. The Politics of Transition in Kenya*, (Nairobi, 2002), p. 240.

¹⁴⁷⁰ Ibid. See 1965 Sessional Paper No. 10 on *African Socialism and Its Application to Planning in Kenya*.

¹⁴⁷¹ Odinga, O., *Not Yet Uhuru*, (London, 1967); Kaggia, B., *The Roots of Freedom: 1921-1963*, (Nairobi, 1975).

¹⁴⁷² Gathii, *op. cit.*, (2002), p. 241; Ochieng’, W.R., ‘Independent Kenya’s Development Strategies,’ p. 83, from Ogot, B.A., and Ochieng’, W.R., *Decolonization & Independence in Kenya 1940-93*, (London, 1996).

¹⁴⁷³ Gathii, *op. cit.*, p. 241.

¹⁴⁷⁴ Mboya, T., ‘The Party System and Democracy in Africa,’ 41 *Foreign Affairs* (1963), pp. 650-52.

¹⁴⁷⁵ Kibwana, K., ‘Constitution-Making and the Potential for a Democratic Transition in Kenya,’ p. 272, from Mute, *et al.*, (2002).

inherited the culture of a colonial state, which was highly centralised and authoritarian.¹⁴⁷⁶ In 1964, President Jomo Kenyatta, transformed Kenya into a *de facto* one-party state under the leadership of the Kenya African National Union (KANU). As the major donor at the time, the UK government ignored the excesses of the Kenyatta period and therefore, it did not react when Kenyatta transformed the country from a “Westminster-style democracy into a *de facto* one-party state”¹⁴⁷⁷ and issued privileges to his own Kikuyu tribe, particularly, in the award of government positions and the system of patronage which developed under his rule. In line with the trends noted in chapter one, the excesses of the Kenyatta regime and absence of political pluralism, went unnoticed by the donor community, including the UK.¹⁴⁷⁸ This may have resulted from the fact that despite the absence of multi-party democracy, Kenya is purported to have remained relatively democratic under Kenyatta with open and competitive elections every five years.¹⁴⁷⁹ An example of this relative openness can be seen in the brief return to political pluralism in the ‘little general election of 1966’, however, this was followed by the reinstatement of one-party rule in the elections of 1969 and 1975.¹⁴⁸⁰ Viewed within the context of the Cold War period, one-party states were endorsed as a buffer against Communism and therefore, escaped the criticism of Western donors.¹⁴⁸¹

During the first decade of independence, Kenya adopted an outward-looking economic approach and sought to promote its self-determination through regional alliances and cooperation with Western donors. Cooperation between Kenya and the then EEC was initiated at the end of the 1960s through the conclusion of an association agreement. Although some of the former African colonies were initially cautious of the idea of “association” with the EEC due to suspicions of the continuation or indeed new forms of imperialism, including for example, Ghana and Zambia,¹⁴⁸² this skepticism did not

¹⁴⁷⁶ Mutua, M., ‘Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,’ 23 *HRQ* (2001), p. 97.

¹⁴⁷⁷ Cumming, *op. cit.*, p. 242.

¹⁴⁷⁸ *Ibid.*

¹⁴⁷⁹ O’Brien, F.S., and Ryan, T.C.I., ‘Kenya’, from Devarajan, S., Dollar, D.R. and Holmgren, T., (eds.) *Aid Reform in Africa: Lessons from Ten Case Studies*, (Washington DC, 2001), p. 483.

¹⁴⁸⁰ Cumming, *op. cit.*, p. 242.

¹⁴⁸¹ Huntington, S., *Political Order in Changing Societies*, (New Haven, CT, 1968). Gathii notes that Kenya’s government aligned itself with America’s Cold War campaign against Communism.

¹⁴⁸² Djamson, *op. cit.*, (1976), p. 8.

prevail as Nigeria¹⁴⁸³ and the East African Community both signed agreements with the EEC in the late 1960s. As a member of the East African Community, Kenya signed an association agreement with the EEC on 26th July 1968.¹⁴⁸⁴ This agreement with the East African Community included Kenya, Uganda and Tanzania, which was known as the Arusha Convention, and formalised EEC-Kenya relations for the first time.¹⁴⁸⁵ It was envisaged that this Convention would deal principally with trade relations between both regional groups. This Agreement provided for “reverse preferences “ which allowed for the duty free entry of EEC exports into the EAC.¹⁴⁸⁶

It was clear that Kenya’s relationship with the EEC through the Arusha Agreement would be short-lived. Firstly, both Yaoundé and the Arusha Convention were due to expire on 31st January 1975, therefore, the renegotiation of the terms of cooperation assumed a certain urgency. Secondly, with the accession of the UK to the EEC in 1973, it was clear that Kenya’s trading relationship would need to be compatible with the solution found to accommodate the former British colonies and Commonwealth countries. In this regard, it quickly became evident that new rules would need to be negotiated as the UK would have to apply the Common External Tariff (CET) to all non-EEC States, thus bringing an end to the Commonwealth preferential scheme which allowed for similar preferences to access to British markets.¹⁴⁸⁷

In order to accommodate the so-called Commonwealth “Associables”,¹⁴⁸⁸ options for future association were laid out in Protocol 22 of the Treaty of Accession (Treaty of Brussels).¹⁴⁸⁹ In order to conduct these discussions, the EEC invited the states that were party to the Yaoundé II Convention, the parties to the Arusha Convention (including Kenya) and the so-called Commonwealth “Associables” to discuss the changing nature of

¹⁴⁸³ The Association Agreement between Nigeria and the EEC (the Lagos Agreement) was signed on 16th July 1966. This agreement was not ratified. *Ibid.*, p. 8.

¹⁴⁸⁴ Negotiations between the EEC and the EAC began in February 1964. Djamson, *ibid.*, p. 8; ‘An outward-looking country on the international stage. Talking to Kenya’s “Mr. Lomé”,’ *The Courier*, No. 43 (May-June 1977) p. 30. This Association Agreement was due to last for a period of five years until 31st May 1969. This was followed by a second Convention was signed on 1st July 1969 and came into force on 1st January 1971 and was due to expire on 31st January 1975. Djamson, *op. cit.*, (1976), p. 8. Kenya became a member of the East African Community (EAC) with Tanzania and Uganda in 1967.

¹⁴⁸⁵ Salzmann, L., ‘EEC-Kenya Cooperation,’ *The Courier*, No. 96 (April-March 1986), p. 51.

¹⁴⁸⁶ Djamson, *op. cit.*, (1976), p. 8.

¹⁴⁸⁷ *Ibid.*, p. 23.

¹⁴⁸⁸ *Ibid.*

¹⁴⁸⁹ Protocol 22 to the Acts of Accession of the UK, Ireland and Denmark.

this relationship.¹⁴⁹⁰ This ultimately led to negotiations between the EEC and the African, Caribbean and Pacific (ACP) states. The ACP group was formed as a negotiating bloc, which began to act together as a group from July 1973 onwards.¹⁴⁹¹ The future ACP states were anxious that the new relationship would not adversely affect their preferential treatment with the EEC and rejected the proposal that was put forward in Protocol 22 and instead called for the adoption of the Principles of Addis Ababa.¹⁴⁹² These principles were included in the ACP requests when negotiations began on 20th November 1973¹⁴⁹³ and their demands clearly reflected the equality of status sought by developing countries, along with the importance given to negotiated rather than unilateral prescriptions.

Kenya acceded to the first Lomé Convention in 1975,¹⁴⁹⁴ which it signed as a member of the original group of forty-six ACP states.¹⁴⁹⁵ This went further than the previous association agreement by providing more liberal access for identified agricultural products and the stabilisation fund for the export of specified agricultural products and some manufactured goods,¹⁴⁹⁶ which became known as Stabex.

2.4. Kenya and Lomé I (1975-1980)

The first Lomé Convention¹⁴⁹⁷ allowed for the transfer of programmable resources from the fourth European Development Fund for the Financial and Technical Cooperation Programme for Kenya.¹⁴⁹⁸ These were primarily allocated to rural and agricultural sectors and were supplemented by loans from the European Investment Bank (EIB).¹⁴⁹⁹ Kenya

¹⁴⁹⁰ Djamson, *op. cit.*, (1976), p. 25.

¹⁴⁹¹ *Ibid.*

¹⁴⁹² These were drawn up in 1973. *Ibid.*, p. 26, fn. 92.

¹⁴⁹³ These issues included non-reciprocity for trade, access for goods – even if conflicting with the Common Agricultural Policy (CAP). See *Ibid.*, p. 26 and chapter three of this thesis.

¹⁴⁹⁴ Kenya's accession to Lomé was negotiated by Dr. Julius Kiano, Minister for Water Development. Kenya signed the Lomé Convention in Togo, 1975. 'An outward-looking country ...', *op. cit.*, (1977), p. 30.

¹⁴⁹⁵ Salzmann, *op. cit.*, (1986), p. 51.

¹⁴⁹⁶ 'An outward-looking country ...', *op. cit.*, (1977), p. 30.

¹⁴⁹⁷ ACP-EEC Convention, signed on 29th February 1975, [1976] OJ L 25/2, 30th January 1976. [*hereinafter* Lomé I].

¹⁴⁹⁸ Programmable resources for Kenya under the Fourth EDF amounted to ECU 72 million. Source of these figures: 'Kenya and the Lomé Convention,' *The Courier*, No. 62 (July-August 1980), p. 12; Salzmann, *op. cit.*, (1986), p. 51; Rohrstead, *op. cit.*, (1991), p. 28.

¹⁴⁹⁹ Loans amounted to ECU 53.6 million. The total aid to Kenya under the first Lomé Convention also included emergency interventions (ECU 1.34 million), EDF interest subsidies to EIB operations (ECU 9.55 million for regional programmes financed by EDF (ECU 11.4 million). Salzmann, *op. cit.*, (1986), p. 51.

was the first Anglophone country to receive an EIB loan.¹⁵⁰⁰ As mentioned above, this agreement allowed for freer market access and stabilisation mechanisms for export earnings for primary products. There were also special provisions relating to the sale of beef and veal exports in the EEC,¹⁵⁰¹ the importation of cut flowers, horticulture, and free access for identified agricultural products.¹⁵⁰² Market access and export earnings stabilisation mechanisms were seen at the time as a breakthrough in EEC-Kenya negotiations,¹⁵⁰³ as the EEC was the most important market for Kenya's imports and exports.¹⁵⁰⁴ In 1976, the EU Delegation Office in Kenya was established and since 1978, Kenya has had an ambassador in Brussels, accredited to the European Commission.

The first Lomé Convention was designed to give the ACP countries non-reciprocal preferential access to the EU's markets for specific goods. In addition, the Stabex and Sysmin instruments were designed to compensate developing countries, including Kenya, for the loss of export earnings in the case of unfavourable circumstances. In the context of Kenya, rural development was the priority area of focus for the EEC,¹⁵⁰⁵ along with the promotion of national economic growth through industrialisation.¹⁵⁰⁶ Lomé I did not refer specifically to human rights.¹⁵⁰⁷ In the third chapter of this thesis on EU-ACP cooperation, the underlying reasons for the absence of human rights were detailed, including, for example, the fact that the then EEC was formed as an economic association and the promotion of human rights was largely peripheral to this objective.¹⁵⁰⁸ More specifically with regard to the ACP countries, it is worth noting some of the reasons for the omission of human rights in the first Lomé Convention. Firstly, in the 1970s, the developing countries occupied a prominent position on the international arena and became increasingly vocal regarding the establishment of more equitable North-South economic relations, although their attempts to create a fairer international trading system

¹⁵⁰⁰ Interview with Mwai Kibaki, Minister for Finance and Economic Planning in 'Kenya. Pushing Ahead with the Right Strategy,' *The Courier*, No. 43 (May-June 1977), p. 29.

¹⁵⁰¹ McMahon, J., A., *The Development Cooperation Policy of the European Community*, (The Hague, 1998), p. 61.

¹⁵⁰² Interview with Mwai Kibaki, *op. cit.*, (1977), p. 29.

¹⁵⁰³ 'An outward-looking country...', *op. cit.*, (1977), p. 30.

¹⁵⁰⁴ Interview with Mwai Kibaki, *op. cit.*, (1977), p. 29.

¹⁵⁰⁵ Rohrstead, T., 'Financial Cooperation between Kenya and the EEC,' *The Courier*, No. 130 (Nov-Dec 1991), p. 28-29.

¹⁵⁰⁶ Interview with Mwai Kibaki, *op. cit.*, (1977), p. 26.

¹⁵⁰⁷ Marantis, D.J., 'Human Rights, Democracy, and Development: The European Community Model,' 7 *Harvard Human Rights Journal* 1 (1994), p. 5; Arts, K., *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention*, (The Hague, 2000), p. 167.

¹⁵⁰⁸ See chapter three of this thesis.

were unsuccessful. Secondly, many EEC members were reluctant to raise human rights concerns in their associated territories. Whilst the strong position of the ACP states on the international arena prevented the inclusion of human rights conditionality in the Lomé Convention, by the end of the 1970s, it had become clear that the issue of human rights would inevitably have to be faced by donors, including the EEC. As mentioned in chapter three, the EEC carried out the *de facto* suspension of aid as a result of human rights abuses sanctioned by the Idi Amin regime in Uganda. Furthermore, with questions from the European Parliament regarding alleged human rights violations in Liberia, Zaire and Equatorial Guinea,¹⁵⁰⁹ it was clear that its policy would have to move to address the issue of human rights violations sooner, rather than later.¹⁵¹⁰

Kenya's strong position on the international arena on the 1970s can be largely attributed to its geostrategic position as a regional base for many international organisations in the Horn of Africa from the 1970s and at this time, it became the darling of the West, particularly during the Cold War, as it was viewed by Western powers as a bulwark against the spread of Communism.¹⁵¹¹ This support was reflected in high levels of development aid. The Kenyan economy experienced relative economic success in the late 1960s and early 1970s. The period between 1964 and 1975 has been described as the 'golden age' of Kenya's economy.¹⁵¹² This can be explained by the maintenance of a general level of economic stability in 1970s, its suitability for foreign direct investment in light of its membership of the regional East African Community (EAC) and furthermore, due to pro-Western alliances during the Cold War.¹⁵¹³ The import substitution approach and centrally controlled economy was favoured by both the international financial institutions and UN agencies, such as UNCTAD.¹⁵¹⁴

¹⁵⁰⁹ Arts, *op. cit.*, (2000), p. 167.

¹⁵¹⁰ Williams, *op. cit.*, (2002), p. 27.

¹⁵¹¹ Gathii, *op. cit.*, p. 241.

¹⁵¹² Maxon, R. and Ndege, P., 'The Economics of Structural Adjustment,' p. 151, from Ogot, B.A., and Ochieng', W.R., *Decolonization & Independence in Kenya 1940-93*, (London, 1996). For an alternative view of Kenya's economic 'success' during this period, see Leys, C., *Underdevelopment in Kenya. The Political Economy of Neo-Colonialism 1964-1971*, (Nairobi, 1975).

¹⁵¹³ O'Brien, F.S., and Ryan, T.C.I., 'Kenya', p. 474, from Devarajan, S., Dollar, D.R. and Holmgren, T., (eds.) *Aid Reform in Africa: Lessons from Ten Case Studies*, (Washington DC, 2001).

¹⁵¹⁴ *Ibid.*

2.5. Lomé II-III: Structural Adjustment and Basic Needs

After the death of Kenyatta in 1978, Daniel Arap Moi became President of Kenya in 1978, thus maintaining KANU's stronghold in Kenya. The second Lomé Convention was signed between the EU and ACP States in the following year. This Convention¹⁵¹⁵ was designed to assist the "take-off" of the Kenyan economy.¹⁵¹⁶ Sectoral activity was primarily directed towards rural development and transport.¹⁵¹⁷ Under the fifth EDF, regional projects were carried out, including funding for the building of the Northern Transport Corridor Scheme. Kenya also received compensation for the loss of export earnings through the Stabex instrument during this period. The period of the Second Lomé Convention coincided with the transformation of Kenya from a *de facto* one-party state to a *de jure* one-party state following the repeal of section 2a of the Constitution.¹⁵¹⁸ As with the response to the authoritarian rule of the Kenyatta era, the Moi regime went uncriticised by the international community for many years. The system of personal rule established by Daniel Arap Moi, coupled with the rigging of elections in 1988 and widespread political intolerance and repression, were also ignored by the UK and other donors, including the European Union.¹⁵¹⁹ Due to Kenya's position at a regional level and the geostrategic importance as an ally of the US during the Cold War, the issue of human rights conditionality was simply not on the table. Britain and other large donors in the region were reluctant to voice concern over human rights violations in order to preserve their trade and diplomatic links.¹⁵²⁰ It will be recalled that the second Lomé Convention did not refer to human rights. The Commission had tried to include a human rights clause within Lomé II, however, this again was rejected by the ACP governments.¹⁵²¹

¹⁵¹⁵ Second ACP-EEC Convention, signed on 31st October 1979, [1980] OJ L 347/1, 22nd December 1980. [hereinafter Lomé II]. Under Lomé II, Kenya was allocated funds as follows: 5th EDF ECU 88 million (programmable); EIB loans 47.2 million; EDF interest rebates to EIB operations ECU 8.6 million; Emergency aid ECU 2.4 million; Stabex (coffee 1980 ECU 10m, coffee 1981 16.5m, balance unspent funds 4.6m, coffee 1985 ECU 13.8m), Regional projects ECU 36.4 million. This amounted to ECU 227.5 million. Figures in Salzmann, *op. cit.*, (1986), p. 51; Rohrstead, *op. cit.*, (1991), pp. 28 and 29.

¹⁵¹⁶ 'Kenya and the Lomé Convention,' *op. cit.*, (1980) p. 12.

¹⁵¹⁷ Rohrstead, *op. cit.*, (1991), p. 29.

¹⁵¹⁸ Section 2a stated that there shall be only one political party in Kenya, namely KANU. (1982 Amendment Act No. 7).

¹⁵¹⁹ Cumming, *op. cit.*, (2002), p. 243. UK aid allocations to Kenya actually increased during this period.

¹⁵²⁰ Robinson, M., 'Aid, Democracy and Political Conditionality in Sub-Saharan Africa,' 5 *EJDR* 1 (1993), p. 94.

¹⁵²¹ Marantis, *op. cit.*, (1994), p. 5. See Young-Anawaty, A., 'Human Rights and the ACP-EEC Lomé Convention: Business as Usual at the EEC,' 13 *N.Y.U. J. Int'l L. & Pol.* (1980). See chapter three of this thesis for a more thorough discussion of this issue.

The position of human rights in EU development cooperation policy began to change, albeit in a modest way, following the introduction of the third Lomé Convention. In Lomé III, human rights were included as a general objective of development cooperation policy.¹⁵²² The Preamble reaffirmed the Parties' commitment to the UN Charter, along with Joint Article 4 of Annex I which stated that "...[t]he Contracting Parties hereby reiterate their deep attachment to human dignity ..."¹⁵²³ Despite these references, human rights objectives were clearly outside the priority areas of EU focus during the third Lomé Convention. Regarding EDF funding, Lomé III (1985-1990)¹⁵²⁴ focused on the dual objectives of rural and agricultural development and food self-sufficiency.¹⁵²⁵ Notably, however, 'first generation' economic conditionality became a central feature of cooperation with Kenya during the third Lomé Convention. Economic conditionality was the remedy proposed by the international financial institutions, which necessitated macro-economic reform through the stabilisation policies of the IMF and structural adjustment policies of the World Bank. The background to the introduction of economic conditionality in Kenya can be traced to the impact of the oil shocks of 1973 and 1979. Whilst Kenya fared well after the first shock due to the rise in coffee prices, the second shock led to a fall in the price of tea and coffee and Kenya began to experience economic difficulties. The break-up of the East African Community in 1977 removed the favourable access to the markets of its neighbours, Uganda and Tanzania. Despite Moi's motto, *Nyayo*, which indicated his plans to follow in the footsteps of Kenyatta, Moi was unable repeat or recreate the economic successes of his predecessor.¹⁵²⁶

Economic conditionality became a feature of EC-Kenya cooperation in the form of structural adjustment following the debt problems and economic downturn due to global trends. This encouraged macro-economic reform and the liberalisation of the cereals sector. Economic conditionality came in the form of structural adjustment support for the

¹⁵²² Third ACP-EEC Convention, signed on 8th December 1984, [1986] OJ L 86/3, 31st March 1986. [*hereinafter* Lomé III], entered into force on 1st May 1986.

¹⁵²³ Article 4 of Annex I, Lomé III.

¹⁵²⁴ Lomé III – 6th EDF ECU 128 million (programmable); EIB loans - ECU 78.5 million. (ECU 65 million for CSRP). EDF interest rebated to EIB ECU 12.6 million; Special Debt Programme ECU 7 million; Stabex (coffee 1987 ECU 40.7m, coffee 1988 ECU 19.1m, coffee 1989 ECU 11.1m); regional projects (including EIB) ECU 33.5 million. Rohrstead, *op. cit.*, (1991), p. 28. See also Salzmann, *op. cit.*, (1986), p. 53.

¹⁵²⁵ Rohrstead, *op. cit.*, (1991), p. 28.

¹⁵²⁶ Asingo, P.O., 'The Political Economy of Transition in Kenya,' pp. 22-23 from Mute, *et al* (2002); On the mixed performance of Kenya's economy in the 1980s, see O'Brien and Ryan, *op. cit.*, (2001), pp. 490-92.

cereals sector (CRSP), which was initiated by the EC.¹⁵²⁷ The aim of this policy was to liberalise the marketing of grain and to abolish the monopoly of the National Cereals and Produce Board (NCPB).¹⁵²⁸ The structural adjustment policies imposed by donors were combined with a new emphasis on basic needs and equitable development. The basic needs agenda, covering issues such as food, housing, education, nutrition and health care, was also incorporated into Kenyan national development planning during this period.¹⁵²⁹

3. Lomé IV and Political Conditionality in Kenya

3.1. The End of Cold War and the Quest for Multi-Party Democracy in Kenya

As described in the second chapter of this thesis, there was an unprecedented shift towards political and economic liberalisation in Central and Eastern Europe and also in Africa at the end of the 1980s and early 1990s. This historical development has been attributed to the end of the Cold War, which brought with it a curbing of the ideological confrontation between East and West and also the opening up of channels for the promotion of Western values and democracy in former Communist countries. This ensured that countries that had formerly been under the ‘iron curtain’ were now in a position to negotiate with the West and, as described in chapter two, these partnerships led to the imposition of new conditionalities in the sphere of development aid. In the context of Africa, Cold War ‘allies’ such as Kenya, which had been amongst the highest recipients of development aid, lost much of their geostrategic importance. Consequently, the lack of strategic importance of these countries meant that it was now easier to attach political conditionalities to aid and indeed to justify a reduction of aid in light of perceived shortcomings with regard to political reform and human rights violations.

During the early 1990s, aid became explicitly linked to political conditionality. In this context, Robinson notes the direct correlation between donor conditionality and the

¹⁵²⁷ Ibid.

¹⁵²⁸ Ibid.

¹⁵²⁹ See Republic of Kenya, *Development Plan 1984 to 1988*, pp. 57-28. Quoted in Maxon and Ndegwe, *op. cit.*, (1996), p. 157.

introduction of multi-party elections in Kenya. Following the staunch position adopted by donors as a result of the new ethos governing aid, the suspension of aid in 1991 was followed in a period of days by the legalisation of opposition parties and pledges to allow for multi-party elections and progress towards liberalisation.¹⁵³⁰ It should also be acknowledged that donor activities were not solely responsible for the reinstatement of multi-party democracy, and the existence of a strong opposition movement known as FORD, constituted a significant contributing factor.¹⁵³¹ The following section examines the role of the external donors during this period of aid conditionality.

3.2. Donor Conditionality and Political Transition in 1991

Kenya had been a *de jure* one-party state since the introduction of section 2a in the Constitution by President Daniel Arap Moi in 1982.¹⁵³² Before the end of the 1980s, external interest in political change in Kenya was limited, apart from some criticism of 1988 elections, in particular, the issue of queue-voting.¹⁵³³ The factors that led to the expression of donor concern for human rights issues resulted not only from the alleged violations, but also the favourable climate at the time, which gave rise to political conditionality. As mentioned above, this coincided with increased donor selectivity and conditionality following the end of the Cold War.

Donors were openly critical of these events and this was made explicit in October 1991 in 'the Harare Communique' of the Commonwealth meeting of Heads of Government.¹⁵³⁴ In the same month, diplomatic links between Norway and Kenya were cut off following the former's criticism of the arrest of a political dissident and former detainee, Koigi wa Wamwere. This led to the closure of the Norwegian embassy and the suspension of aid.¹⁵³⁵ The US became increasingly critical of the absence of multi-party democracy and

¹⁵³⁰ Ibid., p. 95.

¹⁵³¹ See Oyugi, W.O., *et al*, *The Politics of Transition in Kenya. From KANU to NARC*, (Nairobi, 2003); Mute *et al*, *op. cit.*, (2002); Anderson, D.M., 'Briefing: Kenya's Elections 2002 – the Dawning of a New Era', 102 *African Affairs* (2003).

¹⁵³² This provision contravened Article 22 of the ICCPR, which provides for the right to freedom of association with others.

¹⁵³³ Source.

¹⁵³⁴ Commonwealth Secretariat, 'The Harare Communique October 1991,' Commonwealth Heads of Government Meeting, Harare, Zimbabwe, 16th-21st October 1991, (Commonwealth Secretariat, Marlborough House, London).

¹⁵³⁵ Gathii, *op. cit.*, (2002), p. 250.

more vocal through the statements of US Ambassador to Kenya, Smith Hempstone.¹⁵³⁶ According to the British Overseas Development Minister, Linda Chalker, “we want to see multi-party democracy in Kenya: we have been told that it might happen early next year. That must happen in fact.”¹⁵³⁷

The most significant decision was taken at the Consultative Group (CG)¹⁵³⁸ meeting of donors between 25th and 26th November 1991, when most Western aid donors¹⁵³⁹ suspended balance of payments support and an adjustment loan which had already been approved for Kenya. It was stated that the reinstatement of support would be dependent upon reform in the area of governance and corruption along with “clear progress in economic and social reforms.”¹⁵⁴⁰ These statements imposed conditionalities in the form of requirements of liberal democracy in terms of multi-party democracy, political pluralism and the respect for civil and political rights (in particular, Article 21 on the right to political participation) and also good governance conditionality in the area of privatisation of state enterprises, control of the budget deficit and the reduction of civil service.¹⁵⁴¹ The action taken by donors at this time reflected the new orientations in donor political conditionality as articulated in the UK’s Minister for Overseas Development, Douglas Hurd in 1990 as described in chapter two. Donor action in Kenya set a new precedent in Africa,¹⁵⁴² and provided firm evidence of the post-Cold War shift towards political conditionality. It also illustrates the World Bank and IMF’s ability to ‘reinterpret’ their non-political mandate to impose conditionality measures in Kenya.¹⁵⁴³

Less than a week after the Consultative Group meeting, the formal provisions providing for a one-party state in Kenya were repealed. In December 1991, a decision was made at the KANU National Convention and all-KANU Parliament to allow for a multi-party

¹⁵³⁶ Hempstone, S., *Rogue Ambassador: An African Memoir*, (Swanee, Tenn., 1997).

¹⁵³⁷ Quoted in ‘Moi’s Road to Damascus,’ 32 *Africa Confidential* 24 (December 1991); ‘Kenya. A Miracle Laid Bare,’ 33 *Africa Confidential* 1 (January 1992).

¹⁵³⁸ The Consultative Group (CG) was set up by World Bank in 1970s to coordinate diverse strategies and agendas of multiplicity of donors.

¹⁵³⁹ It should be noted that France did not participate in the suspension. Waller, P.P., ‘Aid and Conditionality: The Case of Germany, with Particular Reference to Kenya,’ from Stokke, O., (ed.), *Aid and Political Conditionality*, (London, 1995), p. 110.

¹⁵⁴⁰ O’Brien, and Ryan, *op. cit.*, p. 479. It should be noted that this did not result in a complete aid freeze as emergency aid continued to flow into Kenya.

¹⁵⁴¹ Ibid. This World Bank suspended funding that amounted to USD 350 million. See Akivaga, S. K., ‘Towards a National Movement for Democratic Change in Kenya,’ from Mute *et al*, *op. cit.*, (2002), p. 24.

¹⁵⁴² Tomaševski, K., *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*, (London, 1997), p. 181.

system and the need to amend the constitution was recognised, although it was clear that the ruling party was still vehemently opposed to the idea. On 10th December 1991, section 2a of the Constitution was repealed which had previously been in violation of Article 22 of the ICCPR that provides for “the right to freedom of association with others”. The repealing of this provision allowed for the right to form political parties and witnessed the registration of ten opposition parties in the aftermath of this amendment.¹⁵⁴⁴ The elections that followed were marred by ethnic violence and although they were not deemed to be free and fair, local and external observers agreed that the results broadly reflected the wishes of the Kenyan population.¹⁵⁴⁵

It should be noted that the November decision to withhold balance of payments support to Kenya constituted a *de facto* suspension and did not result from the legal application of human rights conditionality.¹⁵⁴⁶ Many donors resumed cooperation with Kenya after 1993 and much of the suspended aid was eventually disbursed between 1993 and 1995.¹⁵⁴⁷ Norway took a stronger stance and diplomatic links were cut off until the change of government in 2002.¹⁵⁴⁸

3.2.1. Lomé IV and the EU’s Role in 1991 Donor Conditionality

In 1990, the programming objectives for EU-Kenya cooperation under Lomé IV¹⁵⁴⁹ were drawn up. These objectives included support for rural development and food security, along with roads and construction sectors.¹⁵⁵⁰ Structural adjustment remained on the agenda with the last phase of the reform of the cereals sector due to be completed.¹⁵⁵¹ As mentioned above, the introduction of Article 5 of the fourth Lomé Convention highlighted the central position of human rights in EU-ACP relations. The fourth Lomé

¹⁵⁴³ Gathii, *op. cit.*, (2002), p. 243.

¹⁵⁴⁴ This was allowed for the first time since 1966.

¹⁵⁴⁵ Andreassen, B.-A., ‘Kenya’, pp. 202-213, from Andreassen, B.-A. and Swinehart, T., (eds.), *Human Rights in Developing Countries Yearbook 1993*, (Oslo, 1993).

¹⁵⁴⁶ Smith, K.E., *European Union Foreign Policy in a Changing World*, (Cambridge, 2003), Appendix I, p. 207.

¹⁵⁴⁷ Emergency aid continued to be provided due to the problems arising from the severe drought 1992-1993.

¹⁵⁴⁸ Diplomatic links were not restored until 2002. Interview with Ms. Annika Jayawardena, Human Rights, SIDA, Nairobi, Monday, 18th October, 2004.

¹⁵⁴⁹ First Financial Protocol of Lomé IV allocated funding to Kenya as follows: (NIP) ECU 140 million (programmable); Structural Adjustment Loans ECU 3.5 million; EIB loans ECU 90 million. Source: Rohrstead, *op. cit.*, (1991), p. 29.

¹⁵⁵⁰ *Ibid.*

Convention, which was signed in 1989, provided a legal basis for human rights in EU-ACP relations.¹⁵⁵² This was a revolutionary step as it placed human rights as the central aspect of EU-ACP relations and it also allowed for the promotion of human rights within development cooperation programmes. However, Lomé IV did not go as far as to provide a human rights clause which would give the necessary legal basis for responding to human rights violations, instead it only provided for recourse to consultations.¹⁵⁵³ In the case of Kenya, the changing nature of development aid was felt immediately through explicit human rights conditionality and the *de facto* suspension of aid in the early 1990s.

In 1991, the EU suspended structural funds in October/November 1991 and justified this move in light of human rights and good governance concerns,¹⁵⁵⁴ citing a “lack of progress” in political reform.¹⁵⁵⁵ It (also) suspended the disbursement of a Stabex grant that was withheld until 1992.¹⁵⁵⁶ European Community aid was reinstated in Kenya in 1993, with the exception of support for structural adjustment aid. Since the 1990s, human rights have been a decisive factor in EU-ACP cooperation and the Kenya case demonstrates the willingness of donor countries to impose conditionality at this time.

Many commentators have pointed to the *ad hoc* nature and lack of consistency in the application of conditionality procedures.¹⁵⁵⁷ It should be noted that consultations were not held with the government prior to the suspension of aid for balance of payments and as mentioned above, Lomé IV did not provide a legal basis for the suspension of aid. In this way, the EU implemented *de facto* conditionality for the lack of progress in the area of human rights and democracy and therefore, Kenya is not included in the list of countries which the EU has engaged in conditionality.¹⁵⁵⁸ This necessarily raises questions regarding the transparency and accountability of EU conditionality and also highlights the tenuous nature of the ‘partnership’ between the EU and ACP states. In 1993, EU-ACP

¹⁵⁵¹ Ibid.

¹⁵⁵² Article 5 of the Fourth ACP-EEC Convention, signed on 15th December 1989, [1989] OJ L 229/3, 17th August 1989. [hereinafter Lomé IV].

¹⁵⁵³ Marantis, *op. cit.*, (1994), p. 9; Riedel, E., and Will, M., ‘Human Rights Clauses in External Agreements of the EC,’ from Alston, P., *The European Union and Human Rights*, (Oxford, 1999), p. 727.

¹⁵⁵⁴ Arts, *op. cit.*, (2000), p. 341. See also Tomaševski, K., *Between Sanctions and Elections Aid Donors and their Human Rights Performance*, (London, 1997), p. 188; Percival, D., ‘Kenya beating poverty with growth,’ *The Courier*, No. 157 (May-June 1996).

¹⁵⁵⁵ Smith, *op. cit.*, (2003), p. 207.

¹⁵⁵⁶ O’Brien and Ryan, *op. cit.*, (2001), p. 479. This Stabex grant amounted to US \$26 million.

¹⁵⁵⁷ See Arts, *op. cit.*, (2000), chapter eight.

aid was resumed, however, the structural adjustment facility was not reinstated.¹⁵⁵⁹ By 1994, however, EU-Kenya development cooperation relations were returning to normal, as the following quote from the European Commission review of EU-ACP aid for that year demonstrates:

The implementation of cooperation programmes with Kenya remained in a state of crisis during the past year [1994], which led to a very low level of decisions. Implementation of programmes under way continued, but with some difficulty. The structural adjustment programme has been suspended since 1991 for political reasons, as does the implementation of frameworks of mutual obligations for Stabex programmes (1991, 1992 and 1993). However, there are prospects for improvement in 1995.¹⁵⁶⁰

3.3. Lomé IV-bis (1995-2000)

3.3.1. The Human Rights Clause and Negative Conditionality

The fourth Lomé Convention was extended upon its expiration in 1995.¹⁵⁶¹ At this time, Kenya was getting back on track with the EU in light of perceived progress in economic reforms. This resulted in the revision of the programming for EDF funds of ECU 140m from Lomé IV in 1995 through the ‘Memorandum of Understanding’,¹⁵⁶² which led to the redirection of funds towards the roads sector.¹⁵⁶³ It was also envisaged that in the future areas such as conservation, human resources, private sector and institutional development would play a larger role in EU-ACP cooperation.¹⁵⁶⁴

¹⁵⁵⁸ Ibid., p. 340.

¹⁵⁵⁹ Ibid., p. 341.

¹⁵⁶⁰ ‘EU-ACP Cooperation in 1994,’ Special Issue, *The Courier*, No. 76 (July 1995), p. 42.

¹⁵⁶¹ The associated Financial Protocol resulting from the mid-term review and the second Financial Protocol associated with Lomé IV was signed on November 1995. Lomé IV Convention as revised by the agreement signed in Mauritius on 4th November 1995, *The Courier*, No. 155 (January-February 1996). [hereinafter Lomé IV-bis].

¹⁵⁶² ‘EU-Kenya Cooperation,’ *The Courier*, No. 157 (May-June 1996), p. 36.

¹⁵⁶³ Ibid.

¹⁵⁶⁴ Ibid.

During the negotiations for the extension of the Lomé IV (Lomé IV-bis), human rights, democratic principles and the rule of law continued to be included as ‘essential elements’ of cooperation¹⁵⁶⁵ and Article 366a provided a firm legal basis for the suspension of cooperation in light of human rights violations.¹⁵⁶⁶ The EU-ACP treaty now had a fully-fledged human rights clause.¹⁵⁶⁷ During the five-year period of Lomé IV-bis, recourse was not made to the consultation procedures, nor was aid suspended, despite on-going concerns regarding human rights violations.¹⁵⁶⁸ For example, as with the elections of 1992, the second multi-party general elections of 1997 were tainted with violent clashes, police brutality and intimidation of the opposition. Although these were alleged to have been instigated by government forces, these events did not arouse the wrath of donors who, according to some, largely ignored human rights abuses after repeal of section 2a to allow for multi-party democracy.¹⁵⁶⁹ In these elections of December 1997, Moi won a higher percentage of the popular vote but gained less Parliamentary seats. The opposition failed to make an impression due to the divisive and fractured nature of their campaign.

Prior to these elections and in response to alleged human rights abuses, donors continued to exert pressure through diplomatic channels by issuing statements on the human rights situation. In February 1997, several donors (including the US, UK, Japan, and European Union) called for the government of Kenya - “to allow political leaders, candidates and all citizens freedom of speech which are essential to free and fair elections.”¹⁵⁷⁰ In July 1997, the US Ambassador Prudence Bushnell kept up the criticism, declaring that “the pre-conditions for free and fair elections were not in place: ... “the government’s actions limit the choice of the people and do not reflect great efforts to strengthen democracy.”¹⁵⁷¹ In the following month, Bushnell issued a more explicit statement on human rights violations, which stated that, “[t]he US will not be a silent witness to human rights abuses” ... “we will condemn the use of excessive force. We call on the

¹⁵⁶⁵ Article 5, Lomé IV-bis.

¹⁵⁶⁶ Article 366a, Lomé IV.

¹⁵⁶⁷ Riedel and Will, *op. cit.*, (1999), p. 731.

¹⁵⁶⁸ Mutua, *op. cit.*, (2001), p. 97.

¹⁵⁶⁹ Akivaga, S. K., ‘Towards a National Movement for Democratic Change in Kenya,’ in Mute *et al*, *op. cit.*, (2002), p. 42.

¹⁵⁷⁰ Human Rights Watch, *World Report of 1998*, p. 3. Source: <http://www.hrw.org/worldreport/>

¹⁵⁷¹ *Ibid*.

government and opposition alike to respect the rights guaranteed to Kenyans under the constitution and international conventions.”¹⁵⁷²

Kenya’s human rights situation came under criticism at this time from the European Parliament. In May 1997, a resolution on Kenya called for the end of human rights violations, in particular, the restrictions on the freedom of speech and also for the holding of free and fair elections.¹⁵⁷³ A further resolution was adopted on 17th July 1997 condemning human rights violations in Kenya and urging the European Commission to carry out election monitoring during the forthcoming elections.¹⁵⁷⁴ This resolution “...urged the Commission and Council to express the EU’s great disquiet...and to ensure that all violations of the human, civil and political rights of the people are swiftly brought to an end.”¹⁵⁷⁵ In contrast to the urgency of donors in calling for the introduction of multi-party democracy in the early 1990s, criticism of the human rights situation at this time was of a softer nature.¹⁵⁷⁶

During the 1990s, some donors sought to work outside the state by financing civil society actors. The establishment of a one-party state in 1982 outlawed the creation of opposition parties and also seriously curtailed the functioning of most civil society groups and non-governmental organisations through restrictions on the freedom of association and freedom of expression.¹⁵⁷⁷ Throughout the period of Moi’s rule, freedom of association was severely restricted and only a small number of organisations, such as ethnic organisations and the gender-based *Maendeleo Ya Wanawake Organisation (MYWO)*, were permitted to operate without interference as they were not perceived to pose a threat to state control.¹⁵⁷⁸ Church-based organisations, which acted as an umbrella group for other organisations, were also permitted to operate as they were not considered to be confrontational.¹⁵⁷⁹ However, political liberalisation in the post-Cold World climate led

¹⁵⁷² Ibid.

¹⁵⁷³ EU Bulletin 5-1997, OJ C 167, 26th May 1997. (‘Kenya. Parliament Resolution on Kenya’)

¹⁵⁷⁴ EU Bulletin 7/8-1997, OJ C 286, 22nd September 1997. (‘Kenya. Parliament Resolution on the violation of human rights in Kenya’.)

¹⁵⁷⁵ Ibid.

¹⁵⁷⁶ Brown, S., ‘Authoritarian Leaders and Multiparty Elections in Africa: How Foreign Donors Help to Keep Kenya’s Daniel Arap Moi in Power,’ 22 *Third World Quarterly* 5 (2001).

¹⁵⁷⁷ Mutunga, W., *Constitution-Making from the Middle: Civil Society and Transition Politics in Kenya, 1992-1997*, (Nairobi, 1999).

¹⁵⁷⁸ Nzomo, M., ‘Civil Society in the Kenyan Political Transition: 1992-2002,’ p. 190 from Mute *et al*, *op. cit.*, (2002).

¹⁵⁷⁹ Ibid., p. 185.

to the mushrooming of civil society groups. This was reflected in the emergence of new groups within civil society but also the re-emergence of former groups that had ceased to operate for a certain time.¹⁵⁸⁰ Donors sought to engage with civil society groups, particularly non-governmental organisations as it was believed that these groups could act as an alternative vehicle for achieving development objectives and promoting democratic reform.¹⁵⁸¹ Support for civic education programmes was intensified in the run up to the 2002 elections. The European Commission contributed to the funding of the country-wide national civic education programme (NCEP) and some donors believe that these programmes had a direct impact on the outcome of elections.¹⁵⁸²

4. The EU and Kenya in the post-Lomé Era

4.1. The Political Dimensions of the EU-ACP Cotonou Agreement

As explored in chapters three and four, human rights, democratic principles and the rule of law constitute an essential element of the Cotonou Agreement.¹⁵⁸³ There is also a legal basis for the suspension of aid in the event of human rights violations, following political dialogue and consultation between the Parties.¹⁵⁸⁴ The inclusion of good governance as a ‘fundamental element’ of cooperation constituted a notable innovation in the Cotonou Agreement of 2000.¹⁵⁸⁵ The Cotonou Agreement also contained provisions on enhanced political dialogue between the Parties¹⁵⁸⁶ and called for the greater involvement of civil society and the private sector.¹⁵⁸⁷ It also became clear that performance would be taken into consideration during the mid-term reviews, thus indicating that compliance with the

¹⁵⁸⁰ Ibid., pp. 189-190. The post-Cold War era also witnessed another side to the growth of associational life in the form of the privatisation of security provision and the other organised forces of social control such as the *Mungiki* sect and vigilante groups. The emergence of these non-state actors led to increased levels of personal security, violence and crime. See Ndegwa, S.N., *The Two Faces of Civil Society: NGOs and Politics in Africa*, (Connecticut, 1996).

¹⁵⁸¹ Nzomo, *op. cit.*, (2002), p. 188.

¹⁵⁸² See ‘NCEP National Civic Education Programme Phase II (NCEP II) Framework Report,’ Report produced by David Everett, Strategy and Tactics, July 2004. (unpublished, on file with author).

¹⁵⁸³ Cotonou Agreement, ACP-EC Partnership Agreement, *signed on* 23rd June 2000 in Cotonou, Benin, [2000] OJ L 317/3. Article 9 provides that “[r]espect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.”

¹⁵⁸⁴ Article 96, *ibid.*

¹⁵⁸⁵ Article 9(3), *ibid.* Article 97(3) appropriate measures may be taken which do not preclude suspension.

¹⁵⁸⁶ Article 8, *ibid.*

¹⁵⁸⁷ Article 10(1), *ibid.*

political dimensions of this Agreement could be reflected in aid allocations. The changing political dimensions of the Cotonou Agreement will now be examined in light of the European Commission's activities in Kenya.

4.2. Shifting Policy Objectives in EU-Kenya Co-operation

The current framework for EU-ACP co-operation is laid down in the Country Strategy Paper (CSP) 2003-2007.¹⁵⁸⁸ This paper is guided by the political objectives of the partnership as enshrined in Article 9 of the Cotonou Agreement. However, before delving into this issue, the more general changes in the ethos of EU-ACP co-operation through the new Partnership of 2000 will firstly be considered. Until 1995, EU-Kenya co-operation concentrated on the cereals sector, taking up almost half of the programmable resources and all of the Stabex funds.¹⁵⁸⁹ Since then, however, it should be noted that there has been a discernible shift in approach to focus on policy and institutional reform.¹⁵⁹⁰ With regard to Stabex, there was a reorientation of funding to focus on the coffee sector and economic diversification. However, this will no longer continue with the introduction of Cotonou Agreement, which brought an end to both the Stabex and Sysmin instruments. The bulk of the 9th EDF programmable resources is divided between sectoral policies, macroeconomic support and other projects and programmes in focal and non-focal areas¹⁵⁹¹ The sectoral policies cover productive sectors (53% of sectoral policy funding),¹⁵⁹² public sector reform and governance (15%),¹⁵⁹³ human resource development (16%),¹⁵⁹⁴ the private sector, trade and tourism (11%).¹⁵⁹⁵

¹⁵⁸⁸ Kenya-European Community, Country Strategy Paper for the period 2003-2007. Source: http://europa.eu.int/comm/development/body/csp_rsp/scanned/ke_csp_en.pdf#zoom=100 [hereinafter Kenya-EC CSP] The CSP and NIP was signed on 15th October 2003. The amount available under the A allocation (macroeconomic support, sectoral policies and programmes and projects in focal and non-focal areas) is €170m and €55m under the B allocation (unforeseen expenditure such as emergency assistance).

¹⁵⁸⁹ Until this period, 50% of the EDF programmable resources was spent on the cereals sector, as well as 100% of STABEX funds. Source: Kenya-EC CSP, *op. cit.*, (2003), p. 20.

¹⁵⁹⁰ *Ibid.*

¹⁵⁹¹ Article 3(2)(a) of Annex IV Cotonou Agreement. Kenya-EC CSP, *op. cit.*, (2003), p. 2. The focal sectors are agricultural and rural development and the roads and transport sector. *Ibid.*, pp. 30-31.

¹⁵⁹² This includes support for agriculture and rural development 10% and the roads sector 43%. *Ibid.*, p. 21.

¹⁵⁹³ This includes budget support for public sector reform, institutional capacity and development and good governance. Kenya-EC CSP, *op. cit.*, (2003), p. 21.

¹⁵⁹⁴ This includes health sector support, education and research (e.g. research) and capacity building. *Ibid.*, p. 22.

It is envisaged that almost half of the programmable resources (i.e. of the total A-allocation of €170 million) will be spent on macroeconomic support.¹⁵⁹⁶ This will be allocated to the public sector reform programme and the implementation of the World Bank Poverty Reduction Strategy Paper (PRSP) as incorporated in the Government of Kenya's development strategy, the Economic Recovery Strategy.¹⁵⁹⁷ The PRSP provides the framework for economic growth and poverty reduction strategies in Kenya.¹⁵⁹⁸ The Kenya-EC country assistance strategy is designed in line with this document. This issue of macroeconomic support features is important due to the EU's commitment to budget support allocations, which depend upon stability in this area and on-going reform in line with IMF requirements.¹⁵⁹⁹ Compliance with the PRSP recommendations imposes a significant degree of conditionality in the area of economic policy, good governance and institutional reform and this will be discussed in detail in the following chapter.¹⁶⁰⁰ In 2002, Kenya was part of the so-called 'first wave' of Delegations in which the deconcentration of activities (i.e. the decentralisation of implementation) was carried out.¹⁶⁰¹

4.3. The Political Dimensions of Co-operation between the European Commission and the NARC Government

The year 2002 brought about a fundamental change in Kenyan politics witnessing the first break in KANU rule since independence in 1963.¹⁶⁰² The December 2002 elections witnessed the defeat of KANU under the leadership of Uhuru Kenyatta's KANU,¹⁶⁰³ and

¹⁵⁹⁵ It includes funding for recent capacity building for Kenya's negotiations of the European Partnership Agreements (EPAs). The remaining 5% is spent on other areas such as natural resource conservation and cultural heritage.

¹⁵⁹⁶ This will consist of between 40-50% of the A-Allocation. Ibid., pp. 29 and 33.

¹⁵⁹⁷ Ibid., p. 21. Republic of Kenya (2003), 'Economic Recovery Strategy for Wealth and Employment Creation: 2003-2007,' Source: http://www.planning.go.ke/pdf/economic_recovery_plan.pdf. See also <http://www.treasury.go.ke/prsp.htm>

¹⁵⁹⁸ 'Interim Poverty Reduction Strategy Paper, 2000-2003,' Prepared by Government of Kenya, July 2000. Source: <http://poverty.worldbank.org/files/Kenya%20IPRSP.pdf>

¹⁵⁹⁹ Kenya-EC CSP, *op. cit.*, (2003), p. 33.

¹⁶⁰⁰ Ibid. This conditionality includes the introduction on legislation of economic financial management, compliance with PRSP priorities, realignment of budget in line with PRSP priorities and good governance measures including the continued campaign against corruption.

¹⁶⁰¹ European Commission, 'Annual Report from the Commission to the Council and the European Parliament on EC Development Policy and the Implementation of External Assistance in 2002,' 3rd September 2002, COM (2003) 527 fin., p. 36.

¹⁶⁰² Anderson, *op. cit.*, (2003); Brown, S., 'Theorising Kenya's Protracted Transition to Democracy,' 22 *Journal of Contemporary African Studies* 3 (2004).

¹⁶⁰³ Uhuru Kenyatta is the son of Jomo Kenyatta and was appointed by Moi as his predecessor. See Anderson, *op. cit.*, (2003).

the victory of the National Rainbow Coalition (NARC) under Mwai Kibaki.¹⁶⁰⁴ Indeed, this change in government represented a ‘re-engagement’ on behalf of donors¹⁶⁰⁵ and with the donors back on side, it was anticipated that foreign aid would contribute to at least twelve per cent of the 2004-2005 budget.¹⁶⁰⁶ Upon coming to power, one of the key aims of the NARC government was to rebuild the relationship with donors especially the IMF,¹⁶⁰⁷ a relationship that was regarded as being at its “lowest ebb.”¹⁶⁰⁸ The first Consultative Group (CG) meeting after almost a decade was held on 21st November 2003 and pledges of over \$41 million were made by donors.¹⁶⁰⁹

Since the change of government in 2002 and the end of KANU rule, human rights have not been a focal issue of the EU-Kenya co-operation. The human rights performance of the new government is generally regarded as positive,¹⁶¹⁰ therefore, support was provided through the on-going constitutional review process, which had been envisaged to bring lasting change in the area of human rights.¹⁶¹¹ Similarly, the issue of democracy is not high on the agenda. Since the re-introduction of multi-party democracy, the EU and other donors have taken a hands-off approach, notwithstanding some criticism in 1997, however, this did not result in conditionality measures. The EU sent a monitoring mission to observe the general elections of 2002, which was generally favourable to the level of democratic participation and declared that these elections were free and fair¹⁶¹² and indeed an example for other countries to follow.¹⁶¹³

The same cannot be said about the issue good governance, which constitutes a key feature of EU-Kenya cooperation. This is particularly focused on the financial

¹⁶⁰⁴ NARC was composed of 16 parties. It involved the merger two of the largest opposition parties, namely Mwai Kibaki’s National Alliance Party of Kenya (NAK) and Raila Odinga’s Liberal Democratic Party (LDP) in October 2002. On the factors behind KANU’s defeat, see *ibid.*, (2004), pp. 329-333.

¹⁶⁰⁵ Interviews with Mr. Otieno Aluoka, Consultant (Human Rights), Royal Netherlands Embassy, Wednesday, 14th October 2004; Interview with Ms. Mavis Nathoo, Canadian International Development Agency (CIDA), Governance Adviser, Nairobi. Monday 11th October 2004.

¹⁶⁰⁶ ‘Kenya: On the Trail,’ 45 *Africa Confidential* 16 (August 2004), p. 8.

¹⁶⁰⁷ Republic of Kenya, Budget Speech for the Fiscal Year 2004-5 by Hon. David Mwiraria, Minister of Finance. 10th June 2004.

¹⁶⁰⁸ *Ibid.*

¹⁶⁰⁹ *Ibid.*, p. 4. See also. <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/KENYAEXTN/0,,contentMDK:20217726%7EmenuPK:454383%7EpagePK:141137%7EpiPK:217854%7EtheSitePK:356509,00.html>

¹⁶¹⁰ Interview with Vanessa Nagel-Dick, Programme Manager (Governance), EU Delegation in the Republic of Kenya, 5th October 2004.

¹⁶¹¹ Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶¹² EU Election Observation Mission, ‘Kenya General Elections 27 December 2002,’ Final Report, p. 4. http://europa.eu.int/comm/external_relations/human_rights/eu_elections_ass_observ/ken...

management aspects of good governance.¹⁶¹⁴ In the literature on conditionality, the ‘stick and carrot’ metaphor is an oft-used expression. If the EU is not so strong on human rights or democratic conditionality, it is perhaps indicative of the EU’s lack of political weight in Kenya. On the other hand, the EU is the second largest donor in Kenya, and due to its willingness to engage in the provision of direct budget support, it does appear to have significant weight to ensure that the macro-economic and good governance conditionalities are implemented.

EU budget support to Kenya is conditional upon good governance reforms and in particular, on the implementation of IMF macro-economic reform.¹⁶¹⁵ The good governance agenda is high on the priorities of the new NARC government. As a signal of its commitment to reform in this area, the anti-corruption czar, John Githongo, was appointed as the Permanent Secretary (PS) of Governance and Ethics. Furthermore, the EU was encouraged by other legislative reforms such as the Public Officer Ethics Act, the Anti-Corruption Act, the Economic Crimes Act and the establishment of the Kenya Anti-Corruption Commission.¹⁶¹⁶

4.4. EU Good Governance Conditionality under Cotonou

Following a tenuous relationship with donors during the previous decade, by mid-May 2004, the IMF showed its approval for the implementation of reform in Kenya and urged bilateral donors to increase their funding.¹⁶¹⁷ Accordingly, most donors reaffirmed their commitment to Kenya in October 2004.¹⁶¹⁸ Kenya is also back in the World Bank’s good books and has moved from “low-case” to “base-case” status.¹⁶¹⁹ However, in light of

¹⁶¹³ Kenya-EC CSP, *op. cit.*, (2003), p. 1.

¹⁶¹⁴ Interview with Ms. Mavis Nathoo, Canadian International Development Agency (CIDA), Governance Adviser, Nairobi, 11th October 2004.

¹⁶¹⁵ Kenya-EC CSP, *op. cit.*, (2003), p. 6.

¹⁶¹⁶ National Authorising Officer-Head of Delegation of the European Commission, Kenya, ‘Joint Annual Operational Review of Cooperation between the Republic of Kenya and the European Community in 2003,’ 23rd March 2004, p. 9.

¹⁶¹⁷ ‘Graft Tide Turns Against Kibaki in US’, *The East African*, Monday, 26th July 2004. Sources: <http://www.nationmedia.com/estafrican/current/Regional/RegionalMain.html>

¹⁶¹⁸ Namunane, B., and Mugonyi, D., ‘Donors: Fight Graft or Lose Cash,’ *Daily Nation*, Thursday, 14th October 2004.

¹⁶¹⁹ The “low case” indicates that reform is not being undertaken at the level expected by the World Bank and lending activities are reduced as a result. This will be discussed in greater detail in the following chapter.

recent revelation regarding so-called “Anglo-Leasing” scandal,¹⁶²⁰ the IMF has shown that it is “obviously concerned”,¹⁶²¹ which is significant as compliance with IMF conditions is regarded as the benchmark for other donors to follow. The European Commission, along with other donors, has not unsurprisingly expressed similar sentiments. As a result of the Government of Kenya’s failure to take the appropriate anti-corruption actions, many donors hinted at suspension, which would result in Kenya losing a combined \$100 million from the US and Great Britain.¹⁶²² As external donor funds are estimated at 12-15% of the Government of Kenya’s budget,¹⁶²³ the issue of donor conditionality became a topical issue once again in Kenya.¹⁶²⁴ Unlike the conditionality of the past decade which related to human rights, this is specifically linked to good governance conditionality.

Following the emergence of information relating to the Anglo-Leasing scandal, the British High Commissioner, Edward Clay, launched a scathing attack on Kibaki’s administration and their failure to take the issue of corruption seriously.¹⁶²⁵ DfID reaffirmed that aid would be made contingent on good governance and anti-graft reform.¹⁶²⁶ This was followed by statements from other foreign donors in Kenya such as the German Ambassador and the Norwegian embassy.¹⁶²⁷ In the same month, diplomats from nineteen EU missions presented Kibaki with a list of demands to ensure compliance with good governance commitments.¹⁶²⁸ Donors again reiterated their concern at a conference on anti-corruption in October 2004.¹⁶²⁹

4.4.1. EU Good Governance Conditionality

¹⁶²⁰ The Anglo-Leasing affair relates to contracts which were awarded during Moi’s Presidency in 2001 for the purchase of immigration documents and passport issuing equipment for the Criminal Investigation Department (CID). For further reading see ‘Kenya: Fighting Mighty Magendo,’ 45 *Africa Confidential* 11 (May 2004), p. 1.

¹⁶²¹ ‘Graft Tide Turns Against Kibaki in US,’ *The East African*, Monday, 26th July 2004. See also ‘Clay’s Feat,’ 45 *Africa Confidential* 15 (July 2004), p. 7.

¹⁶²² *Ibid.*

¹⁶²³ *Ibid.*

¹⁶²⁴ ‘Graft Tide Turns Against Kibaki in US,’ *op. cit.*, (2004).

¹⁶²⁵ For example, see ‘Clay’s Feat,’ *op. cit.*, (2004), p. 7; ‘Donors set acid test for Kibaki,’ *op. cit.*, (2004).

¹⁶²⁶ Interview with Ms. Sue Lane, Senior Governance Adviser, DfID-Kenya, British High Commission, 4th October 2004.

¹⁶²⁷ Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶²⁸ ‘Envoys Give Kibaki Seven Key Demands,’ *The Daily Nation*, Thursday, 22nd July 2004.

¹⁶²⁹ Namunane, E. and Mugonyi, D., ‘Donors: Fight graft or lose cash,’ *Daily Nation*, Thursday, 14th October 2004.

Good governance is included as a fundamental element of the Cotonou Agreement and serious cases of corruption may lead to “appropriate measures” being taken, which do not preclude suspension. In Article 9(3), good governance is defined as ‘...the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption.’

Whilst human rights are not a focal issue in terms of expenditure within the context of the European Commission’s strategy in Kenya, it is clear that political conditionality (including human rights), provides the fulcrum upon which cooperation turns. In the early 1990s, the repeal of the constitutional provision providing for multi-party system led to the suspension of cooperation. Furthermore, the centrality of political conditionality was reaffirmed in the essential elements of partnership of the Cotonou Agreement and the inclusion of good governance as a fundamental element.

The issue of good governance conditionality became a pertinent issue in July 2004 when the EDF Committee chose to withhold a decision on the allocation of budget support to the government of Kenya.¹⁶³⁰ The Head of the European Commission Delegation in Kenya, Gary Quince, expressed “concern at the prevailing governance situation in Kenya, particularly, the Anglo Leasing affair.”¹⁶³¹ Quince made it clear that the EDF Committee was merely withholding a decision and that this did not amount to a suspension of aid.¹⁶³² The decision by the EDF Committee was taken seriously by the Kenyan side of the ‘partnership,’ which had already included €51 million earmarked by the EU in the budget 2004-2005.¹⁶³³ Budget support was also made conditional on criteria linked to IMF approval. Subsequently, the EU Delegation put increased pressure on Kenya to enact the

¹⁶³⁰ This led to the deferral (not suspension) of a decision on budget support (€125m) which was due to be paid over a three year period.

¹⁶³¹ ‘Graft Tide Turns Against Kibaki in US,’ *op. cit.*, (2004); ‘Kenya: On the Trail’, *op. cit.*, (2004).

¹⁶³² ‘Key Donor Denies Aid Freeze Talk,’ *The Daily Nation*, Thursday, 21st July 2004.

¹⁶³³ See Mwiraria speech on budget day 2004-2005, *op. cit.*

Public Procurement Bill and it eventually came into law in November 2005.¹⁶³⁴ Budget support was finally approved in December 2005.¹⁶³⁵

4.5. Critiquing EU Good Governance Conditionality

Although the European Commission did not resort to using Article 97 in the above case by simply withholding a decision, it nevertheless constitutes implicit conditionality as the disbursement of budget support is linked to the implementation of good government reform. There are some points of concern which deserve to be raised in this regard.

Firstly, although good governance conditionality is imposed with the intention of preventing corruption, the impact of this type of reform is not as neutral as it is presented, and may indeed infringe on controversial areas. A good example of this is the reform of procurement laws which is necessitated by good governance conditionality. The issue of public procurement is a highly charged issue in Kenya due to corruption, which is purported to be endemic.¹⁶³⁶ The aim of public procurement legislation is to ensure transparency and accountability. As a member of the WTO, Kenya has signed up to the Plurilateral Agreement on Government Procurement (GPA) at Uruguay Round of WTO talks in 1994.¹⁶³⁷ The objective of this agreement is to ensure that government decisions are fair, transparent and not based on affiliations to certain suppliers. WTO members first established the “non-discrimination” policy at Singapore 1996.

Nevertheless, despite these worthy reforms, the Kenya Human Rights Commission (KHRC) has raised some concerns. Whilst the public procurement bill seeks to ensure transparency and accountability in the procurement process, as it stands, the current bill

¹⁶³⁴ The Head of the EU Commission Delegation in Kenya, Mr. Eric van der Linden, was quoted as having issued an ultimatum for the enactment of the Public Procurement Bill on 24th October 2005. Source: ‘EU issues ultimatum on E125 million aid to Kenya, *Daily Nation*, 26th October 2005.’

¹⁶³⁵ European Commission Delegation to Kenya, Press Release, 6th December 2005. <http://www.delken.cec.eu.int/en/news.asp?menuid=0&submenuid=48&newsid=11&Newscat=>

¹⁶³⁶ See reports of Transparency International, Kenya, for example, Mwalimu, M., ‘Beyond illusions. A report on the status of the struggle against corruption in Kenya’, 27th December 2002. Transparency International. Source: http://www.tikenya.org/pub/Monitoring_Government.doc

¹⁶³⁷ This agreement is based on Tokyo Round GPA of 1979. There are 26 signatories including EU, US, Canada, and the UK. Kenya Human Rights Commission, *op. cit.*, (16th September 2004). See also Mosoti, V., ‘Reforming the Laws on Public Procurement in the Developing World: The Example of Kenya,’ 54 *ICLQ* 3 (2005).

facilitates market access to foreign companies to the detriment of local suppliers and firms, which could impact on the generation of local capacities and capital and job creation.¹⁶³⁸ According to the KHRC, “[t]he general rule established by this bill is that foreign firms must be invited to bid for public sector contracts. ... Therefore the bill establishes international competitive tendering as the norm, and national competitive tendering as the exception.”¹⁶³⁹

Apart from such sensitive issues, some donors have expressed the view that the EU appears to be concerned with a narrow definition of good governance, relating mainly to the financial management aspects of good governance, rather than a broader and more political interpretation of good governance reform.¹⁶⁴⁰

5. EU-Kenya Support for Human Rights, Rule of Law and Governance Activities

5.1. EDF Funding

5.1.1. Governance, Justice, Law and Order Sector (GJLOS) Reform Programme

The EU undertakes to support programmes which promote human rights and the essential elements requirements in line with Article 9 of the Cotonou Agreement – the so-called ‘positive measures’. As shown above, donors focused on the civil society sector in the previous decade through what has been described as efforts to create a parallel state.¹⁶⁴¹ With the window of opportunity provided by the reform-oriented NARC government, donors have seized the moment to move ahead with reform in the governance realm through the Governance, Justice, Law and Order Sector (GJLOS) programme which is implemented through the Government of Kenya’s Ministry of Justice.

¹⁶³⁸ Kenya Human Rights Commission, ‘Recommendation for the Procurement and Disposal Bill 2003’, Presentation to Ministry of Finance, 25th May 2004. Posted on the web, 16th September 2004. Source: <http://www.khrc.or.ke/news.asp?ID=15>

¹⁶³⁹ Ibid., p. 2.

¹⁶⁴⁰ Interview with Mavis Nathoo, CIDA Governance Adviser, 11th October 2004; Ms. Sue Lane, Senior Governance Adviser, DfID-Kenya, British High Commission, 4th October 2004.

¹⁶⁴¹ Interview with Ms. Nancy Thuo, Human Rights Programme Officer, MS Kenya, 21st October 2004.

The background to the GJLOS programme can be traced to the legal sector and judicial reform programmes under the previous regime. For example, previous donor reform initiatives in this area included the Expanded Legal Sector Reform Programme, which proposed a sector-wide approach and was endorsed by the Moi government in September 2002. However, this programme was never implemented as the momentum was overtaken by the impending elections and many stakeholders felt that the process was not sufficiently inclusive.¹⁶⁴² Following the success of the NARC government in December 2002, this type of reform was again on the agenda. The creation of the new Ministry of Justice and Constitutional Affairs and the appointment of Kiraitu Murungi as the Minister for Justice were both seen as promising steps by the donor community. Upon taking up office, the Minister invited donors to participate in the design of the strategic planning for the Ministry and also called for the involvement of civil society in the process.¹⁶⁴³ This collaboration ultimately led to the GJLOS programme.

In the draft programming document for the GJLOS programme, it is envisaged that there will be a short term (one-year) and medium term (five-year) plan for governance and legal sector reform.¹⁶⁴⁴ The GJLOS programme is heralded as an innovation in Kenya as it presents a forum for government, donor and civil society cooperation. It is also designed as a sector-wide programme to create a more holistic approach, rather than respond to *ad hoc* requests for funding.¹⁶⁴⁵ The Government of Kenya institutions involved includes the Ministry of Justice, the Judiciary, the Police, the Prosecution, Prisons, Probation Services, the Kenya Anti-Corruption Commission and the Kenya National Commission on Human Rights.¹⁶⁴⁶

GJLOS also seeks to encourage donor coordination and avoid duplication of activities in line with commitments under the Rome Declaration.¹⁶⁴⁷ There are at least sixteen donor organisations involved. Some of these donors have signed the Joint Statement of Intent

¹⁶⁴² M'Inoti, K., 'Widening the Knowledge Base of the Governance Justice Law and Order Sector (GJLOS) Reforms and Its Short Term Priorities Programme', Discussion Notes for the Consultative Forum for Civil Society and Private Sector Participation, Kenya College of Communication and Technology (KCCT), Mbagathi, 27th-29th September 2004.

¹⁶⁴³ Interview with Ms. Sue Lane, Senior Governance Adviser, DfID-Kenya, British High Commission, 4th October 2004.

¹⁶⁴⁴ Republic of Kenya, 'Governance, Justice Law and Order Sector Reform Programme. Medium Term Programme. (A Working Draft), January 2004.

¹⁶⁴⁵ Republic of Kenya, 'GJLOS Working Draft', *op cit.*, (2004), p. 14.

¹⁶⁴⁶ *Ibid.*

which replaces the previous donor Memorandum of Understanding. Donor funding for a sector-wide approach is usually administered through a basket fund.¹⁶⁴⁸ Although many donors will contribute to the GJLOS basket fund, rather than channeling the funding directly through the Government, this programme is a hybrid as the budget for the short term project is managed by a Fund Management Agent (FMA).¹⁶⁴⁹ This was carried out at the request of the Government as an acknowledgement of some of the difficulties in the public procurement process in Kenya. The basket fund is the preferred option of the Government of Kenya as it cuts down on administration costs and saves time.¹⁶⁵⁰

At present, the Short Term Priorities Programme has been devised with the overall objective of improving the administration of the judicial and legal sector, access to justice and increased transparency and accountability. It is implemented by an Inter-Agency Steering committee and technical coordination committee,¹⁶⁵¹ which includes representation from the government and civil society. There are seven thematic groups: ethics, integrity and anti-corruption; democracy, human rights and rule of law; justice, law and order; public safety and security; constitutional development; legal services; leadership and management development.¹⁶⁵² Both donors and civil society are involved in the working groups.

5.1.2. The European Commission and the GJLOS Programme

It was recommended to the EU as far back as 1997 to undertake sector-wide approaches to justice reform in order to adopt a more holistic approach to human rights funding and

¹⁶⁴⁷ Rome Declaration on Harmonisation, 25th February 2003.

¹⁶⁴⁸ The donors which have contributed to the basket fund include: SIDA (chair), Austria, Canada, Denmark, Finland, Germany, the Netherlands, Norway, UK. (funding through FMA). The non-basket fund donors include: World Bank (chair), USAID (deputy chair) GTZ, UNDP, UN-Habitat, UNICEF, UNODC. (Funding through Legal Sector Reform Donor Coordinating Committee (LRSC). Source: Interview with Ms. Sue Lane, Senior Governance Adviser, DfID-Kenya, British High Commission, 4th October 2004.

¹⁶⁴⁹ The management agent is KPMG Kenya. The cost of the FMA will be paid by the lead donor, SIDA. The FMA has been used for other donor coordination programmes – e.g. National Civic Education Programme (NCEP), Kenya Domestic Observation Programme (K-DOP), Donor Information Centre on Elections Kenya (DICE-K) and the Engendering Political Processes Programme. Interview with Mavis Nathoo, CIDA Governance Adviser, 11th October 2004.

¹⁶⁵⁰ Some countries cannot for procedural requirements – e.g. USAID.

¹⁶⁵¹ The overall implementation involves: 1) Inter Agency Steering Committee (overall strategic leadership, chaired by Vice President and Minister for Home Affairs); (2) Technical Coordinating Committee (technical guidance, GoK representative, CSOs, private sector. Chaired by PS MoJCA); (3) Thematic Groups (work plans, priorities, specialised – FMA disburses funds according to plans); (4) Programmes Co-ordination Office (project management and coordination); (5) MoJCA (overall implementation leadership)

¹⁶⁵² See Annex 9 of this thesis for the list of thematic group convenors and leading implementation agencies.

move beyond a narrow focus on civil and political rights and election processes.¹⁶⁵³ Along with other donors, the European Commission Delegation has contributed to the preparation of GJLOS and short term programme,¹⁶⁵⁴ however, it has not taken a leading role in this process. The main donors are SIDA, CIDA and DfID. The European Commission does not contribute directly to the basket fund for procedural reasons.

The idea behind sector-wide programming is to move beyond the funding of multiple projects with individual ministries or organisations, which often tend to either duplicate or overlap with each other, or else lack coherence. The governance and legal programme (GJLOS) was designed as a sector-wide programme to overcome this difficulty and was welcomed by the then Minister of Justice, Mr. Murungi.¹⁶⁵⁵ It should be noted that sector-wide approaches is a development aid term, which is promoted by the World Bank, as noted by Mr. Murungi.¹⁶⁵⁶ It could be argued that the use of World Bank and development terminology is perhaps indicative of a donor driven agenda, however, this was countered during interviews by some of the stakeholders in the process, including Mr. Kathurima M’Inoti.¹⁶⁵⁷

Some NGOs have been critical of the use of the Financial Management Agent (KPMG-Kenya) as it is believed that it would have been more cost-effective and beneficial to channel these funds through another organisation. For example, Oxfam believe that they could have administered the basket fund as they have previous experience in this domain.¹⁶⁵⁸ There has also been some criticism of the actual extent of CSO participation,¹⁶⁵⁹ and indeed some concern that previous allocations to non-governmental organisations will now be redirected for the GJLOS programme and handpicked NGOs.

¹⁶⁵³ Report for the European Commission DG VIII on ‘The Reinforcement of Democracy and Human Rights in Kenya: Suggestions for a Programme of Action,’ prepared by Marguerite Garling, August 1997, para. 4.2. Interview with Ms. Margaret Garling, Human Rights Adviser, DfID-Kenya, British High Commission, 4th October 2004.

¹⁶⁵⁴ Delken has contributed from DGSP programme funds – see NAO-EC, ‘Joint Annual Operational Review,’ *op. cit.*, (2004), p. 17; Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁵⁵ ‘Kenya Paper by Hon. Kiraitu Murungi, Minister of Constitution and National Affairs on SWAP, June 2003,’ Annex 3 of Republic of Kenya, ‘GJLOS Working Draft,’ *op. cit.*, (2004), p. 83.

¹⁶⁵⁶ “A SWAp is a (government)-managed approach by which development partners support country-led programmes whose scale is greater than that of traditional projects.” World Bank, ‘Fiduciary Arrangements for Sector Wide Approaches (SWAs): Interim Guidelines to Staff,’ (November, 2002). Noted in ‘Kenya Paper by Hon. Kiraitu Murungi,’ *op. cit.*, p. 83.

¹⁶⁵⁷ Interview with Mr. Kathurima M’Inoti, Chairman, Kenya Law Reform Commission, 19th October 2004.

¹⁶⁵⁸ Interview with Eve Odete, Oxfam, 22nd October 2004.

5.1.3. Democratic Governance Strengthening Programme (DGSP)

In Kenya, activities to promote the political aims of development are carried out through the Democratic Governance Strengthening Programme (DGSP), which was approved in 2000.¹⁶⁶⁰ This programme is designed to support the Government of Kenya institutions, including the Parliament and the Judiciary. In practice, much of this support involved the purchase of equipment and payment of services for the judiciary. Due to some delays in starting up, the project only began in 2004. Support to Parliament also involved the funding of library and legal research, along with improved resource services. This project was also funded by DfID.

In 2003-2004 period, the EC funded the Kenya Law Reform Commission (KLRC), an independent agency under the chairmanship of Kathurima M’Inoti.¹⁶⁶¹ The aim of this project was to promote respect and awareness of human rights through policy and institutional reform. This was carried out through advocacy, capacity building, the assessment of government activities and the KLRC’s participation in the development of legislation (particularly in the area the rights of disabled persons). The DGSP also assisted in the drafting of legislation (for example, the Political Parties Bill 2004).

There is also a flexible fund for civil society organisations, NGOs and state institutions involved in governance, democracy and human rights reform. This includes the Electoral Commission of Kenya (ECK) which is active in the area of voter education and voter registration. It also provided support for the on-going Constitutional Review Process in Kenya by paying lawyers to assist with drafting and providing technical assistance. Other donors indirectly supported the *Basic Needs as Basic Rights* campaign of local NGO branches such as Oxfam and Action-Aid.¹⁶⁶² This initiative sought to ensure that economic and social rights would be given constitutional protection.

¹⁶⁵⁹ M’Inoti, *op. cit.*, pp. 8-9.

¹⁶⁶⁰ EC-Kenya CSP, *op. cit.*, (2003), p. 22. This funding (€6 million) comes from the 8th EDF. Interview with Carl Wesselink, EU Commission Delegation in the Republic of Kenya, DGSP, 5th October 2004.

¹⁶⁶¹ This amounted to Ksh 12,000,00. The duration of this project is one year. Source: Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

With regard to the funding of NGOs and civil society organisations, activities are focused on advocacy.¹⁶⁶³ This funding is only available to domestic organisations, eight of which are active in the area of human rights.¹⁶⁶⁴ Following some initial delays, a call for proposals was issued in 2003 under the DGSP Flexible-Fund¹⁶⁶⁵ and this was due to be followed by a second call for proposals.¹⁶⁶⁶ The Commission Delegation also aims to encourage closer networking and coordination among these NGOs and furthermore, it would appreciate if it were able to negotiate with civil society through a “one-stop shop”.¹⁶⁶⁷ For example, it would like to encourage human rights umbrella organisations such as K-Hurinet to be part of the overall coordination process.

The Government of Kenya was initially reluctant to agree to the use of EDF funding for civil society and non-governmental organisations.¹⁶⁶⁸ This results from the unique nature of the EU-ACP relationship, which requires direct cooperation with the Government of Kenya, and for this reason, the approval of funding for non-state actors can prove to be problematic.¹⁶⁶⁹ Consultations between the Parties and stakeholders under the framework of a steering committee and workshops were held in order to determine the priorities of DGSP funding. Although most NGOs are based in Nairobi, with nine from outside the capital, the Delegation believes that they have covered most of the areas in Kenya.¹⁶⁷⁰ A recurring criticism that was voiced regarding the DGSP concerned the lack of continuity and gaps between calls for proposals and the implementation of projects. These delays may reflect a lack of understanding on behalf of the EU that certain organisations cannot continue to operate without donor funding.¹⁶⁷¹

¹⁶⁶² Interview with Ms. Eve Odete, Oxfam, Nairobi. 22nd October 2004 (formerly of ActionAid and Basic Rights Campaign); Interview Mr. Peter Kariuki, Basic Rights Campaign Coordinator, ActionAid, Nairobi, 21st October 2004.

¹⁶⁶³ There were 23 NGOs that benefited from €2.9 million under the DGSP programme. Interview with Carl Wesselink, DGSP, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁶⁴ These include FIDA (Federation of Women Lawyers) and LSK (the Law Society of Kenya).

¹⁶⁶⁵ DGSP is in operation since July 2003.

¹⁶⁶⁶ Interview with Carl Wesselink, DGSP, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁶⁷ Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁶⁸ Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004. Kenya’s human rights funding from the EDF can be compared to €8 million in Uganda. Interview with Carl Wesselink, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁶⁹ Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁷⁰ Interview with Carl Wesselink, DGSP, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁷¹ Ibid.

Apart from funding to civil society organisations, the DGSP also provides institutional capacity for the National Authorising Officer (NAO) and line ministries dealing with EC implementation, which is called the services support programme.¹⁶⁷² A study is currently being carried out at the request of NAO on their institutional capacity. It should also be noted that the EC Delegation's contribution to the GJLOS short-term programme (12 months STPP) will also be made from DGSP funds.¹⁶⁷³ As there were some delays in the start-up of the programme, the NAO requested that the project could be extended by twelve months in order to run beyond its 31st December 2004 deadline for completion.¹⁶⁷⁴ It should be noted that the Democratic Governance Strengthening Programme will not be extended further as there is no funding allocated under the 9th EDF for this type of activity.¹⁶⁷⁵ There is a modest amount available (€2 million) for non-state actors,¹⁶⁷⁶ however, this covers a much broader range of actors than civil society organisations.

5.1.4. Civil Society Post-2002

Since the arrival of the NARC government to power in 2002, there has been some concern voiced that civil society has become closely intertwined with political authority. In a similar vein, it has also been noted that civil society has lost some of its key individuals as they have become part of the new government. The most oft example cited is the appointment of lawyer and former civil society activist, Kiraitu Murungi, as the new Minister of Justice and Constitutional Affairs, although he is no longer in office. Others also lament the departure of former civil society actors to government bodies.¹⁶⁷⁷ This includes, for example, the appointment of Maina Kiai as the chairperson of the government-sponsored Kenya National Human Rights Commission.¹⁶⁷⁸

¹⁶⁷² NAO-Delegation of Kenya, *op. cit.*, (2003), p. 17.

¹⁶⁷³ NAO-EC, 'Joint Annual Operational Review,' *op. cit.*, (2004), p. 17.

¹⁶⁷⁴ *Ibid.* This programme started on 15th July 2004. Interview with Carl Wesselink, EU Commission Delegation, 5th October 2004.

¹⁶⁷⁵ There will be €2 million to non-state actors generally. (Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁷⁶ *Ibid.*

¹⁶⁷⁷ Interview with Ms. Nancy Thuo, Human Rights Programme Officer, MS Kenya, 21st October 2004.

¹⁶⁷⁸ *Ibid.* Maina Kiai was a former Executive Director of the Kenya Human Rights Commission (NGO) and has now become the chairperson of the Kenya National Human Rights Commission (KNHRC).

The NARC government has embraced many of the demands of civil society (e.g. the opening of prisons, the creation of the Ministry of Justice and the GJLOS sector-wide approach). In this way, it has been suggested that civil society is going through an unexpected transition and needs to reinvent itself as an alternative voice and adopt a watchdog role.¹⁶⁷⁹ According to Nancy Thuo, one of the ways in which civil society could regain its position would be through the creation of networks and working together (for example, by following the approach of existing networks such as Basounet, Khurinet and the sub-sector on torture through a coordinated approach).¹⁶⁸⁰ The lamenting of the changing face of civil society is refuted by others.¹⁶⁸¹ For example, Dr. Willy Mutunga, a veteran of Kenyan civil society, dispels the myth that the loss of specific individuals will lead to a crisis in civil society. For Mutunga, civil society organisations will continue to thrive, despite the loss of individuals, as long as the organisations retain a strong popular base and remain relevant and responsive to their members. Furthermore, he argues that this type of analysis reveals quite a static view of civil society, as well as being gender-biased as it overlooks the contribution of many women to civil society.¹⁶⁸²

5.1.5. Conclusions on EC Support to Civil Society Organisations post-2002 Elections

As shown above, the European Commission Delegation has supported civil society organisations through the Democratic Governance Strengthening Programme under the 8th EDF. As it will be shown below, with only two projects funded by EIDHR in Kenya to date, along with one regional programme, it would be a stretch to say that the EDF funds are complemented by other budget lines. The 9th EDF has set aside funds for non-state actors generally as noted above, but not specifically for the human rights and democracy-type NGOs that were funded under the DGSP flexible fund.

¹⁶⁷⁹ Ibid. This sense of being out of place was illustrated at 2004 commemoration of Nyayo Day when some individuals from NGOs defaced Moi monument.

¹⁶⁸⁰ Ibid.

¹⁶⁸¹ Interview with Dr. Willy Mutunga, Human Rights Programme Officer, Ford Foundation, Office for Eastern Africa, 21st October 2004 (former Executive Director of Kenya Human Rights Commission and Chair of ICJ-Kenya); Interview with Mr. Jeremiah Owiti, Executive Director, Center for Independent Research, Nairobi, 21st October 2004.

¹⁶⁸² Interview with Dr. Willy Mutunga, Ford Foundation, 21st October 2004.

5.2. Kenya and the EU Human Rights Budget Line (EIDHR)

EIDHR funding has been allocated to Kenyan NGOs on two occasions. Firstly, in 2001, a grant was made to fund a women's governance and national leadership programme,¹⁶⁸³ which was initiated by the non-governmental Federation of Women Lawyers (FIDA). The aim of the project was to promote the equal participation of both men and women in the political process, decision-making and civil society. Activities included civic education, workshops for members of parliament, and 'training for trainers' sessions with women politicians and local leaders. In 2002, support was given to the Independent Medico Legal Unit in Kenya to support victims of torture, rehabilitation centres and anti-torture awareness raising campaigns.¹⁶⁸⁴

According to official sources, Kenya was not deemed to be eligible for the financial year 2005/2006 as it does not fall under the EIDHR country or thematic focus.¹⁶⁸⁵ This fits with the conclusions drawn in a previous chapter of this thesis, namely, that EU human rights priorities and funding are geared towards so-called 'negative' approach, rather than positive human rights funding.

6. The European Commission in Kenya: Prospects for the Adoption of Human Rights-Based Programming Methodologies and Mainstreaming?

In this chapter, the EU's approach to development policy was analysed through a case study of Kenya cooperation. As shown above, the European Commission Delegation works towards the promotion of essential elements as enshrined in Article 9.¹⁶⁸⁶ However, as noted above, human rights are not a priority area with funds channeled indirectly through support for good governance through various initiatives such as GJLOS and DGSP, and to a very limited extent through the EIDHR human rights budget

¹⁶⁸³ This grant was provided from budget line B7-702 of 2001. The EC contributed €328,080, which amounted 80% of the cost of the project for the duration of 36 months (total €410,1000). Interview with Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁸⁴ Budget line B7-701 of 2002. The legal basis was Article 11 and 12(2) of Council Regulation 975/1999. Source: Interview with Ms. Vanessa Dick, EU Commission Delegation in Kenya, 5th October 2004.

¹⁶⁸⁵ Interview with Ms. Vanessa Nagel-Dick, EU Commission Delegation in Kenya, 5th October 2004.

line. This is in line with the findings of the previous chapter which indicate that human rights are increasingly promoted through broad-based good governance reform, rather than as standalone objectives. That being said, through interviews carried out at the Commission Delegation, the mainstreaming of human rights in development programmes can sometimes be prioritised at the initiative of the individuals within the Delegation.¹⁶⁸⁷ However, there is no evidence to suggest that systematic mainstreaming takes place as a general policy rule.

This can be contrasted, for example, with the Swedish development agency (SIDA) which explicitly adopts a human rights-based approach to development planning in Kenya and allocates extensive resources to this domain.¹⁶⁸⁸ The language of the human rights-based approach is also adopted by several NGOs including Care International, ActionAid and Oxfam.¹⁶⁸⁹

It should also be noted that less than 1% of the budget of the European Commission Delegation Kenya is spent on human rights and governance programmes.¹⁶⁹⁰ Furthermore, country specific human rights and good governance indicators have not been developed,¹⁶⁹¹ which is significant as the Country Strategy Paper highlights the fact that EDF funding is not an automatic entitlement,¹⁶⁹² in accordance with Article 5(7) of Annex IV of the Cotonou Agreement. Therefore, it remains to be seen whether human rights will be taken into consideration in the mid-term review of Cotonou in 2005,¹⁶⁹³ however, it is clear that good governance requirements will continue to remain high on the agenda.

¹⁶⁸⁶ Kenya-EC CSP, *op. cit.*, (2003), p. 2.

¹⁶⁸⁷ Interview with Vanessa Nagel-Dick, EU Delegation in Kenya, 5th October 2004.

¹⁶⁸⁸ Interview with Ms. Annika Jayawardena, Human Rights, SIDA, Nairobi, Monday, 18th October, 2004.

¹⁶⁸⁹ Interview with Mr. Aswani Adams, Programme Officer (Global Human Rights Initiative), Care International, Nairobi. Tuesday, 19th October 2004; Interview with Mr. Peter Kariuki, Basic Rights Campaign Coordinator, ActionAid, Thursday, 21st October 2004; Interview with Ms. Eve Odete, Oxfam, Nairobi. Friday, 22nd October 2004. On human rights-based approaches and NGOs in Kenya, see Cornwall, A. and Nyamu-Musembi, C., 'Putting the 'rights-based approach' to development into perspective,' 25 *Third World Quarterly* 8 (2004); Nyamu-Musembi, C., and Musyoki, S., 'Kenyan Civil Society Perspectives on Rights, Rights-Based Approaches to Development, and Participation', IDS Working Paper 236 (December 2004). On Sweden and human rights-based approaches in Kenya, see Piron, L-H., with O'Neill, T., 'Integrating Human Rights into Development. A Synthesis of Donor Approaches and Experiences,' Prepared for the OECD DAC Network on Governance (GOVNET), (September 2005b).

¹⁶⁹⁰ Interview with Vanessa Nagel-Dick, EU Delegation in Kenya, 5th October 2004.

¹⁶⁹¹ Ibid.

¹⁶⁹² See General Provisions of Kenya-EC CSP, *op. cit.*, (2003), p. 2.

¹⁶⁹³ This mid-term review will be undertaken in 2005 (two years from date of signature) and end of term review within four years from date of signature.

7. Conclusions

In this chapter, the European Commission's approach to the integration of human rights and development was considered through a case study analysis of cooperation with Kenya. In the first part of this chapter, it was shown that during the first decade of development, human rights did not feature in Lomé cooperation, which was initially focused on industrialisation and agricultural strategies and later in the 1980s, it centred largely on structural adjustment and support for the cereals sector.

In response to international criticism of Moi's rule, the popular approach of linking aid and political reform became the norm in the 1990s. By suspending aid in 1991, the European Commission, along with other donors, sent a strong political message to the KANU government, which had an impact on the change in government policy to reinstate multiparty democracy shortly afterwards. The human rights conditionality of the EU and other donors can be contrasted with their approach in neighbouring countries. It also fit with the 1993 OECD recommendations that aid should be directed towards the promotion the triad of 'human rights, democracy and the rule of law'.

Following the hard conditionality of the early 1990s and the introduction of multi-party democracy, it was shown that the reaction of some donors regarding alleged violations of human rights was more muted, preferring to disengage somewhat from direct co-operation with the Government of Kenya and to channel funds through non-governmental actors, a considerable part of which was focused on civil society and democratisation activities. Due to the nature of the ACP-EU agreements, the EU continued to deal directly with the Government, however, it also became involved in funding civil society projects. At the same time, in 1995 (Lomé IV), a discernable shift in EU-Kenya co-operation was witnessed through a move towards political and institutional reform. This fit with the new aid orthodoxy, which emphasised the role of institutions as an agent of economic development.

Following the election of the NARC coalition in 2002, many donors chose to re-engage with the Kenyan government. The relationship between the international financial institutions (IFIs) was also restored through the drawing up of the poverty reduction strategy paper with the World Bank and the incorporation of these objectives within the Government's own strategy for economic growth. In terms of conditionality, good governance is high on the agenda of both the IFIs and all donors that currently engage directly with the government of Kenya. Within civil society and NGOs, there is some concern that funds will be redirected from these organisations in light of the perceived changes in the ruling party, however, the extent to which this occurs remains to be seen.

In line with the political conditionality objectives of Cotonou, the EU-Kenya strategy paper includes human rights as an overarching element of co-operation, however, it does not feature as a focal area of co-operation. In contrast, good governance conditionality is particularly relevant for the European Commission due to its policy on the provision of budget support to the Government of Kenya, which is made conditional on meeting the macro-economic and good governance prescriptions of the international financial institutions, as well as its own conditionality criteria. The issue of good governance conditionality has become a contentious issue, particularly, in light of the recent corruption scandals, most recently, the Anglo-Leasing affair. This is exemplified by the decision to withhold budget support in light of fresh corruption scandals and the failure to make progress on anti-corruption reform. Although recourse was not made to Article 97, it is clear that conditionality in the area of the good governance is at the forefront of co-operation. The EU ultimately agreed to provide budget support, however, it was made explicit that support would be linked to the passage of good governance legislation.

Although human rights is not a focal sector or even highlighted as a cross-cutting concern, donor funding for human rights is provided through various programmes such as the GJLOS programme which consists of cooperation between donors, civil society and the government through a sector-wide approach to governance and legal reform. The EU also contributes to this process, although not directly through the basket fund at this stage for procedural reasons. The EU also provides funding through the programme for support

to democracy and governance (DGSP) and civil society. Whilst these programmes, in themselves, demonstrate the EU's willingness to engage in human rights, governance and law reform, the actual extent of funding should be taken into consideration as it amounts to less than 1% of EDF funding for Kenya. In contrast, compliance with PRSP objectives and macro-economic reform comprises almost half of the funds allocated in the new strategy paper. In addition, it was shown that there was no funding available for human rights NGOs and civil society actors in the 9th EDF and the DGSP will not be continued. Furthermore Kenya is not deemed to be eligible for EIDHR funding, and in fact, has only received funding on two occasions in the past.

Therefore, in conclusion, it has been shown that the issue of human rights is central to EU-Kenya co-operation. However, in light of these research findings, it is clear that human rights are often promoted through broad-based governance reform. Furthermore, the new agenda of good governance conditionality highlights the EU's concern for compliance with the more financial management aspects of governance, rather than a more holistic conception of governance, as included in the human development conceptions.

CHAPTER SIX: CONCLUSIONS ON THE LEGACY OF HUMAN RIGHTS IN DEVELOPMENT POLICY AND PRACTICE AND THE EXPERIENCE OF EU RELATIONS WITH THE GROUP OF ACP STATES

1. Introduction

This thesis examined the impact of human rights on international development thinking, policy and practice. This objective was analysed through the spectrum of EU development policy, focusing in particular on its relations with the group of African, Caribbean and Pacific (ACP) states.¹⁶⁹⁴ The justification for this case study lay in the firm legal basis for human rights in EU development policy as outlined in chapter three, coupled with the EU's rhetorical commitment to promote a positive approach to the integration of human rights in development. The long-standing nature of cooperation between the EU and the group of ACP states provided an appropriate avenue to examine the changing trends in development cooperation including the impact of human rights on the development agenda.

The final chapter of this thesis draws together the most pertinent findings and observations made throughout this work and makes specific recommendations in relation to the role of human rights in EU-ACP cooperation. In drawing these findings together, the chapter addresses the legacy of human rights in development thinking, policy and practice at the international level. Thereafter, an assessment of the current position of human rights within the policies of OECD donors is undertaken. This chapter endeavours to draw conclusions on the role of human rights within EU development policy (including relations with the ACP states) at a macro level in order to determine where the EU fits into the wider debates on the integration of human rights and development. This analysis will consider the imprint of human rights on EU development policy as a whole and analyse the extent to which human rights have shaped the changing trends in EU development policy.

¹⁶⁹⁴ This case study focused on the Community aspects of the EU's development policy contained in Articles 177-181 EC Treaty.

This is followed by a critique of the practical application of human rights in EU-ACP development cooperation policy, given the pertinence of the observations made in chapter four. In particular, the analysis of the practical application hinges on a number of themes. This includes key observations relating to the adequacy of the EU's normative human rights policy as a framework for the positive application of the human rights clause. Following on from this, the issue of negative conditionality is considered in light of the criticisms that human rights conditionality is carried out on an *ad hoc* basis. The practice of political dialogue will be discussed both in connection with and independently from Article 96 procedures. In addition, an assessment of the measures to promote human rights within the context of EU-ACP relations will be considered to determine whether the EU's commitment to actively promote human rights as an integral part of its development strategies is followed through in practice.

This analysis will also draw on the findings of the Kenya case study in chapter five. On the basis of original research carried out within the framework of this thesis, some key observations relating to the practical application of human rights can be made with regard to the history of EU-Kenya cooperation and also drawing from the experience of other donors and development agencies. Finally, from the findings on the practical application of human rights in EU-ACP cooperation, conclusions will be drawn relating to the major themes explored above.

2. The Legacy of Human Rights in International Development Thinking, Policy and Practice

In tracing the trajectory of human rights through the changing trends in international development thinking, policy and practice, a chronological analysis of the history of official development assistance was carried out in chapter one. This covered an analysis of the changing trends in development policy since the end of World War Two and it was illustrated that the integration of human rights in donor development thinking has profoundly influenced the landscape of development policy and practice. Since the onset

of development cooperation in the 1950s, this domain has undergone a series of transformations from the modernisation paradigm of development, which emphasised national state planning and controlled industrialisation, to the dependency critiques of the 1970s, which called for a radical reconceptualisation of the international economic order. This was followed by the dominance of the Washington Consensus in mainstream development thinking in the 1980s. At the same time, alternative development strategies were put forward, which emphasised the role of basic needs of individuals.

Until the end of the 1980s, there was a clear development/rights trade-off, as it was assumed that respect for human rights should be suspended until economic growth had been achieved. This can also be explained by Cold War rivalries as aid was often given to authoritarian regimes as a result of geostrategic and national security interests. For this reason, the human rights record of developing countries was often ignored to facilitate the domestic interests of donors. In addition, human rights were the subject of ideological disputes between the 'West' and 'East'; whilst the former supported civil and political rights as negative rights that required non-interference from the state to preserve individual liberty (freedoms from), the latter promoted socio-economic rights that required positive intervention from the state to guarantee these rights (freedoms to). Equally, the failure to meet human rights standards (particularly civil and political rights) was justified by developing countries as something that had to 'wait' until a certain level of economic development had been achieved.

Despite the long-standing trade-off between human rights and development, these agendas became interlinked at the end of the 1980s and early 1990s. In this thesis, it was argued that human rights and development became compatible for several reasons. This includes the changing normative conception of development, as witnessed in the Declaration on the Right to Development in 1986. The Right to Development belongs to the so-called 'third generation' rights and although this Declaration is non-binding, it put forward a new conception of the individual as the active beneficiary of development and shifted the emphasis of the outcome of development towards the fulfillment of human rights, rather than economic growth. During the same period, the negative social impact

of the structural adjustment policies imposed by the Washington Consensus came under attack leading to the calls for ‘development with a human face’.¹⁶⁹⁵ As a consequence, alternative approaches in economics such as the ‘human development approach’ sought to challenge dominant mainstream thinking. The human development approach was advanced as an alternative to the narrow conceptions of development based on criteria relating to GNP, industrialisation, technological progress, and social modernisation. Instead, it incorporates alternative variables such as the freedoms that people enjoy. This intellectual turning point in economic thinking was reflected in the work of economist, Amartya Sen, who argued that (economic) development should move beyond the traditional utility-maximising criteria and instead focus on the entitlements and rights of individuals.¹⁶⁹⁶ He also challenged the view that civil and political rights were a luxury for developing countries, and furthermore, argued that human rights were both instrumental and constitutive aspects of development. The human development approach was given practical application through the Human Development Index (HDI), which first appeared in the Human Development Report of 1990. The HDI put forward new aggregate indicators to rival the traditional measure of GNP per capita such as life expectancy at birth, the rate of adult literacy, and income per capita. In this way, the HDI challenged dominant development indicators and clearly reflected the changing definition of development in terms of the individual.

In this thesis, it was argued that the increasingly individualised conception of development facilitated the convergence between human rights and development at a practical level through the work of several UN agencies. These developments were harnessed by agencies such as UNICEF and UNDP and led to the promulgation of ‘human rights-based approaches’ which sought to move beyond the charity and basic needs approach by emphasising human rights principles such as participation, accountability, and non-discrimination in access to basics services. The convergence of human rights and development was seized upon by many human rights lawyers leading to the promulgation of “human rights-based approaches to development.” Along with earlier

¹⁶⁹⁵ Cornia, G.A., Jolly, R. and Stewart, F., (eds.), *Adjustment with a Human Face: Protecting the Vulnerable and the Promotion of Growth*, (Oxford, 1987).

attempts to create obligations through the right to development, these international lawyers envisaged a new paradigm for development based on the normative framework of human rights law, which would move beyond needs-based and charity-based approaches by emphasising issues of accountability and obligations emanating from international treaty documents. This approach sets the achievement of human rights as the main objective of development and uses the philosophy of human rights as the framework of development policy. The human rights-based approach relies upon existing, internationally recognised human rights guarantees to attain the fulfillment of development needs. It works toward the agenda of international development goals and emphasises the interdependence of civil, political, economic and social rights. Flowing from this, there has also been a plethora of policy papers and the burgeoning of standards and guidelines drawn up by international organisations, as well as by NGOs and civil society groups on the subject of human rights-based approaches.

Apart from developments at the UN level, it was also shown in this thesis that after the end of the Cold War, the development agenda was transformed as many developing countries, particularly in Sub-Saharan Africa, lost their geostrategic significance for Western donors. This led to the introduction of political conditionality, which linked the aid disbursements of OECD donors to respect for human rights, democratic principles and the rule of law.¹⁶⁹⁷ There was also a shift in World Bank policy, which sought to ensure that an appropriate policy environment would be put in place for development, thus leading to good governance conditionality. This was emphasised in the World Bank's publication on Sub-Saharan Africa in 1989 and urged bilateral donors to be more selective in the allocation of development assistance.¹⁶⁹⁸ This led to a shift from the classical economic conditionality of the 1980s to policy conditionality in the 1990s. Whilst the World Bank is bound by its non-political mandate, the good governance agenda overlaps with a certain extent with human rights principles such as transparency, accountability and the imperative of the rule of law.¹⁶⁹⁹

¹⁶⁹⁶ Sen, A. and Anand, S., 'The Concept of Human Development,' Background Paper for the Human Development Report, (New York, 1990).

¹⁶⁹⁷ The position of human rights in the policies of the OECD donors was further elaborated in the second chapter of this thesis.

¹⁶⁹⁸ World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth, A Long-Term Perspective Study*, (World Bank, 1989).

¹⁶⁹⁹ *Ibid.*, pp. 14, 183, 193

In this thesis, it was argued that the mainstream development thinking is reflected in the neoliberal policies of the international financial institutions, the IMF and the World Bank. In this regard, it has been contended that for the first time in history, there is agreement on the current approach to development thinking, for example, as witnessed in the synergy in the current debates on development as put forward by the international financial institutions and the New Partnership for Africa's Development (NEPAD), which has been incorporated into the structures of the African Union.¹⁷⁰⁰ This synergy can be seen in the convergence on neoliberal economic policies, the priority of good governance conditionality and the imperatives of poverty reduction in line with the Millennium Development Goals. Due to this convergence, it has been argued that there is currently a lack of serious 'alternatives' to the current dominant paradigm of development as described above. According to Pieterse, the 'sustainable human development' approach, which has been taken on board in policy and practice by various UN agencies, forms part of the mainstream alternative.¹⁷⁰¹ In this light, current mainstream development thinking could be described as the tension between the neoliberal versus human development approach. However, for the purposes of this research, the most pertinent question relates to the role of human rights in the current approaches to development thinking – and by extension, in policy and practice. The findings of this chapter can be divided in two parts, firstly, in relation to the neoliberal policies of the IFIs and, secondly, with regard to the human development approach promoted by the UN agencies. This issue will be described in more detail below.

As explored in this thesis, the current approach to mainstream development thinking and the underlying ethos of the World Bank/IMF policies has been described in the literature as the 'post-Washington Consensus.' This refers to an approach that combines neoliberal economic policies with a new emphasis on country ownership, good governance, the rule of law. In contrast to the previous Washington Consensus (which called for 'rolling back

¹⁷⁰⁰ Owusu, F., 'Pragmatism and the Gradual Shift from Dependency to Neoliberalism: The World Bank, African Leaders and Development Policy in Africa,' 31 *World Development* 10 (October 2003). NEPAD, 'The New Partnership for Africa's Development – NEPAD,' (2001a). Source: <http://www.nepad.org/AA0010101.pdf>; ; NEPAD, 'The Millennium Partnership for African Recovery – MAP,' Draft 3B, (2001b). Source: <http://www.nepad.org/AA0020102.pdf>

¹⁷⁰¹ Nederveen Pieterse, J., 'My Paradigm or Yours? Alternative Development, Post-Development, Reflexive Development,' 29 *Development and Change* 2 (1998).

the state'), the 'post-Washington Consensus' recognises a broader role for the state in creating an enabling environment for growth and the involvement of a wide range of actors including civil society and non-state actors.¹⁷⁰² At a more concrete level, this approach has been translated into substantive policies within the international financial institutions (the World Bank and the IMF). In particular, the recent emphasis on development compacts was noted within the financial institutions for example through the poverty reduction strategy papers (PRSP) framework. These strategies are part of the World Bank Comprehensive Development Framework, which was initiated under the former President of the World Bank, James Wolfensohn. The PRSP process is perceived to differ from previous conditional relationships by emphasising country ownership and compliance with good governance and poverty reduction targets.

The first chapter of thesis sought to explore the position of human rights in the PRSP process. On the one hand, the incorporation of human rights elements were noted insofar as some of the PRSPs integrate issues relating to civil and political rights and strong provisions on governance.¹⁷⁰³ In addition, there is an increased emphasis on the provision of social services and a commitment to the Millennium Development Goals (MDGs). That being said, some commentators have observed the fact that human rights are included as an element of good governance, rather than in individual terms.¹⁷⁰⁴ Whilst this is not necessarily a criticism of the PRSPs, it indicates that the language of 'human rights-based approaches' has not infiltrated the policy and practice of the international financial institutions. In addition, although the poverty reduction process is purported to have replaced the previous structural adjustment policies, some commentators have questioned whether there is a clear break with the past as these papers continue to be determined by the international financial institutions.¹⁷⁰⁵ The question of whether human rights norms have infiltrated the development agenda of the IFIs is thus called into question due to the lack of participation both through parliamentary debate and

¹⁷⁰² Darrow, M., *Between Light and Shadow: The World Bank, The International Monetary Fund and International Human Rights Law*, (Portland, 2003), p. 17.

¹⁷⁰³ Kaufmann, D., Kraay, A., and Mastruzzi, M., 'Governance Matters III: Governance Indicators for 1996-2002.' Source: <http://www.worldbank.org/wbi/governance/govdata2002>

¹⁷⁰⁴ Brimms, E., 'The United States, the European Union and International Human Rights Issues,' Washington DC, Center for Transnational Studies, 2002, pp. 23-24.

¹⁷⁰⁵ Pender, J., 'From Structural Adjustment to 'Comprehensive Development Framework', 22 *Third World Quarterly* 3 (2001).

representation from civil society.¹⁷⁰⁶ Furthermore, the failure to undertake impact assessments on the socio-economic effects of structural adjustment in the majority of cases raises serious questions over the extent to which the convergence of human rights and development has been achieved by the international financial institutions.¹⁷⁰⁷ Therefore, although human rights have undoubtedly infiltrated international development thinking, this convergence is limited in many respects and human rights continue to play a peripheral role in the agenda of international financial institutions.¹⁷⁰⁸

In contrast to the international financial institutions, the current ethos of the UN development activities continues to be informed by the human development paradigm advanced in the early 1990s, which is based on the role of capabilities and freedoms associated with the views of economists such as Amartya Sen and Frances Stewart. In this thesis, it was shown that the human development approach to development thinking has been translated at a more practical level into the policies of UN agencies such as UNDP. This led not only through the creation of the Human Development Index, but also the emergence of “human rights-based approaches”.¹⁷⁰⁹ Human rights-based approaches are viewed as providing a methodology or the means to achieving the end (namely, human development).¹⁷¹⁰ In this way, the human rights-based approach can be viewed as an expression of the human development approach and also as a methodological framework for implementing its key principles.

For the proponents of human rights-based approaches, international human rights law provides a normative framework for development activities. It goes beyond traditional needs-based approaches to poverty reduction by conceptualising development in ‘rights’ terms. The euphemisms of human development, human well-being, human security, basic needs, participation, good governance, which have become common in discourse on

¹⁷⁰⁶ Stewart, F., and Wang, M., ‘PRSPs within the Human Rights Perspective’, from Alston, P., and Robinson, M., *Human Rights and Development: Towards Mutual Reinforcement*, (Oxford, 2005); Stewart, F., and Wang, M., ‘Do PRSPs Empower Poor Countries and Disempower the World Bank, or is it the Other Way Round,’ *QEH Working Paper Series*, Working Paper No. 18, University of Oxford, (May 2003).

¹⁷⁰⁷ Ibid .

¹⁷⁰⁸ Gunduz, C., ‘Human Rights and Development: The World Bank’s Need for a Consistent Approach,’ *Working Paper Series*, No. 4-49, Development Studies Institute, London School of Economics, (2004).

¹⁷⁰⁹ Haüserman, J., ‘A Human Rights Approach to Development,’ (London, 1998). Alston, P., ‘What is in a Name: Does it really Matter if Development Refers to Goals, Ideals or Human rights?’, in Helmich, H., (ed.), *Human Rights in Development Cooperation*, SIM Special No 22, (Utrecht, 1998).

development have been criticised by Alston for avoiding the terminology of rights. He argues that rights, based on specific values, are the first step to the realisation of such meta-norms as ‘democracy’ and ‘development’.¹⁷¹¹ In contrast, it is purported that the human rights-based approach goes further by providing a normative legal basis in human rights law, and by emphasising core human rights principles such as non-discrimination with regard to access to basic services. It also highlights the need to establish duty-holders and create accountability mechanisms for the realisation of these rights.¹⁷¹²

Whilst many commentators have advocated a link between human rights and development,¹⁷¹³ others have presented the interrelationship between human rights and development as a *fait accompli*.¹⁷¹⁴ For example, according to Hamm, development cooperation should be viewed “as a common obligation based on the voluntary entry into human rights treaties ...”.¹⁷¹⁵ However, the tenuous nature of the link between human rights and development continues to be highlighted in the literature. For example, according to Schacter: “that human rights and economic development are significantly related is both platitude and enigma.”¹⁷¹⁶ Donnelly has explicitly shown that the relationship between human rights and development is not automatic.¹⁷¹⁷ Instead, the changing normative definition of development (for example, UNDP’s term ‘sustainable human development’) “simply redefines human rights, along with democracy, peace and justice as subsets of development.”¹⁷¹⁸ These views were also reflected in this thesis, as it was argued that the inter-relationship between human rights and development resulted from a variety of factors – including the changing normative definition of development in individual terms – rather than an automatic relationship between human rights and development.

¹⁷¹⁰ UNDP, *Human Development Report 2000*, (UNDP, 2000).

¹⁷¹¹ Alston, P., ‘The Rights Framework and Development Assistance,’ Human Rights Council of Australia Symposium Papers. Source: <http://members.ozemail.com.au/~hcra/symposium.htm>

¹⁷¹² Alston, P., ‘Towards a Human Rights Accountability Index,’ 1 *Journal of Human Development* 2 (2000).

¹⁷¹³ See for example Tomasevski, K., *Development Aid and Human Rights Revisited*, (London, 1993); Rosas, A., ‘The Right to Development,’ from Eide/Krause/Rosas, *Economic, Social and Cultural Rights: A Textbook*, (Dordrecht, 1995).

¹⁷¹⁴ See for example, Hamm, B.I., ‘A Human Rights Approach to Development,’ 23 *HRQ* (2001), p. 1005.

¹⁷¹⁵ *Ibid.*, pp. 1016 and 1030.

¹⁷¹⁶ Schacter, O., *International Law in Theory and Practice*, (Dordrecht, 1991), p. 348.

¹⁷¹⁷ Donnelly, *op. cit.*, (2003), p. 186. See also Rist, G., *The History of Development: From Western Origins to Global Faith*, (London and New York, 1997).

¹⁷¹⁸ *Ibid.*, (2003), p. 195; See also McCarthy-Arnolds, E., ‘Human Rights, Development and Democracy: Conceptual Challenges,’ p. 21, from Campbell, P.J., and Mahoney-Norris, K., (eds.) *Democratization and the Protection of Human Rights: Challenges and Contradictions*, (Westport, 1998).

Whilst the debate on the extent to which human rights and development are interconnected remains a contentious issue, it is clear that human rights and development have converged at a more practical level through the various initiatives within the UN agencies such as the United Nations Development Assistance Framework (UNDAF) and the Human Rights Strengthening Programme (HURIST) programmes, which represent joint cooperation between UNDP and OHCHR. Furthermore, the 2003 UN Inter-Agency Common Understanding on human rights-based approaches is also indicative of the convergence between human rights and development at a practical level.¹⁷¹⁹ Therefore, as human rights-based methods are already being used in practice by multilateral, bilateral development agencies and NGOs, it is clear that there has been a move from the realm of conceptual ideas to practical implementation.¹⁷²⁰ Furthermore, the human rights-based approaches have not only been used as a framework for development activities, but also as an advocacy tool. For example, it was shown in this thesis, that a leading role was taken by the former UN High Commissioner for Human Rights to ensure that the key elements of this approach would be taken into consideration by the international financial institutions, in particular, by emphasising that poverty reduction strategies should be viewed in terms of the fulfillment of individual rights including economic and social rights and non-discrimination with regard to access to services.¹⁷²¹ More recently, Alston has put forward recommendations for linking human rights standards with poverty reduction strategies such as the Millennium Development Goals (MDGs) as these were not drafted in individual rights terms.¹⁷²² Finally, whilst the human rights-based approach has become embedded in the language of many UN agencies, the implementation of human rights-based approaches should not necessarily be regarded as a *fait accompli*. For example, a recent and more sobering assessment of the impact of human rights-based approaches reveals that “honeymoon is over” for these approaches within the UN

¹⁷¹⁹ See Report of the Second Interagency Workshop on Implementing a Human Rights-based Approach in the Context of UN Reform (Stamford, Connecticut, 5th-7th May 2003), Source: http://www.undg.org/documents/4128-Human_Rights_Workshop_Stamford_Final_Report.doc

¹⁷²⁰ See Piron, L-H., ‘Rights-based Approaches and Bilateral Aid Agencies: More than a Metaphor?’, 36 *IDS Bulletin* 1 (2005a).

¹⁷²¹ Speech by Mary Robinson, Center for Human Rights and Global Justice and Ethical Globalization Initiative, Conference on ‘Human Rights and Development: Towards Mutual Reinforcement,’ NYU, New York, 1st March 2004.

¹⁷²² Alston, P., ‘Ships Passing in the Night. The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals,’ 27 *HRQ* 3 (2005).

system.¹⁷²³ In this respect, Darrow argues that although the value of this approach lies in its purported ability to address power relations and inequalities that affect processes of development,¹⁷²⁴ the credibility of the movement “demands a higher degree of conceptual rigor and clarity” and to engage in a more frank and critical assessment of its achievements.¹⁷²⁵ This should be accompanied by a greater emphasis on the creation of effective accountability mechanisms, which are still lacking in this domain.

3. A Consensus Among OECD Donors on the Role of Human Rights in Development?

Despite the various divergences between the international financial institutions and the UN agencies, the first chapter pointed to a general convergence of human rights and development at the international level. In light of this convergence, an inquiry into the level of consensus on the position of human rights in bilateral donor policies was undertaken in chapter two. This analysis was confined to the policies and practice of the members of the OECD Development Assistance Committee (DAC). This analysis was essential to gain an insight into the constituent and instrumental role of human rights in the practice of development donors. The notion of human rights as a constituent element refers to the role of human rights in the changing normative definition of development, whilst the instrumental role refers to the use of human rights as part of process of development or instrumental for achieving developmental objectives. This analysis also served a two-fold purpose by outlining key definitions and concepts relating to human rights and related elements such as democracy and good governance, which also proved useful for the case study on EU-ACP cooperation. Secondly, this analysis provided a key insight into the gap between donor rhetoric and practice on the practical application of human rights in donor policies at various levels including human rights conditionality and measures to promote human rights in development cooperation.

¹⁷²³ Darrow, M., ‘Power, Capture and Conflict: A Call for Human Rights Accountability in Development Cooperation,’ 27 *HRQ* 2 (2005), p. 475.

¹⁷²⁴ *Ibid.*, p. 537.

¹⁷²⁵ *Ibid.* Mac Darrow is the Coordinator of the HURIST programme.

The background to the recognition of human rights as part of the mainstream normative definition of development and also as part of the means and process of development was traced to the post-Cold War period. Whilst negative human rights conditionality has been carried by some donors since the 1970s, the end of the Cold War witnessed the widening of the scope of political conditionality. This led to the withdrawal of aid for the abuse of democratic principles such as the limitations on the freedoms of association, expression and the media, the detention of opposition leaders and the failure to hold elections or move towards a system of multi-party democracy. The latter allowed donors to link the disbursement of development assistance to reforms in the area of human rights, as well as democracy, the rule of law and good governance. This consensus among bilateral donors was reflected in the OECD Report of 1990 and the DAC Guidelines of 1995.¹⁷²⁶

Chapter two examined specific legal aspects of human rights conditionality. As mentioned above, many donors had introduced human rights conditionality (hard conditionality) from the 1970s onwards which allowed them to suspend aid in the event of serious and flagrant human rights abuses. However, this only concerned flagrant abuses of human rights and the discourse of human rights was not regarded as an integral part of the development agenda of bilateral donors. During the 1980s, macro-economic conditionality (first generation conditionality) characterised the aid scene through the imposition of structural adjustment and stabilisation programmes. In contrast, the following decade was dominated by political conditionality (second-generation conditionality), which linked the delivery of aid to reform in the area of human rights, democracy, the rule of law, and good governance. The new political orientation was expressed in the form of negative conditionality, which allowed for the suspension of aid in light of human rights violations and positive conditionality, which is an incentive-based system that is designed to ensure that the disbursement of aid is linked to the adherence to specific standards of political legitimacy or reform carried out in this domain. Conditionality may be carried out on an *ex ante* or an *ex post* basis. *Ex ante* conditionality refers to specific conditions that must be fulfilled before an agreement can be signed and

¹⁷²⁶ OECD, 'Development Cooperation: 1990 Report,' (Paris, December 1990), p. 12; OECD, 'Participatory Development and Good Governance', Development Cooperation Guideline Series, (Paris, 1995).

ex post conditionality refers to measures that can be taken for the failure to meet requirements laid down in a specific agreement.¹⁷²⁷

Many developing countries have objected to the principle of negative conditionality on the grounds that it is contrary to the principle of non-interference in the affairs of sovereign states contained within the UN Charter.¹⁷²⁸ However, it has been increasingly recognised that human rights transcend sovereignty and furthermore that the principle of sovereignty is not absolute. For this reason, it is no longer tenable to justify non-interference in the affairs of another country on the basis of sovereignty.¹⁷²⁹ It is also widely accepted that certain rights have become part of customary international law. This refers to the fact that specific rights have become binding on states through their practice, despite the fact that states may not have intended to become bound by these rights.¹⁷³⁰ This includes the prohibition of genocide, protection from slavery and racial discrimination.¹⁷³¹ Furthermore, human rights are recognised as an issue of ‘common concern’ for the international community by virtue of Articles 1(3) and 55 of the UN Charter.

The role of human rights in donor policies is normally associated with negative conditionality, which leads to the suspension or partial suspension of aid in light of human rights violations. In the absence of a specific clause that allows for human rights conditionality in agreements between donor governments and developing countries, international treaty law, contained within the Vienna Convention on the Laws of Treaties (VCLT), allows for exceptional circumstances that can lead to the termination of a treaty.¹⁷³² According to Articles 60(1) and (2) VCLT, a treaty may be suspended in light of a material breach. According to Riedel and Will, “such material breaches may consist, for example, in the violation of a provision essential to the accomplishment of the object

¹⁷²⁷ The Copenhagen criteria for the Member States that acceded to the European Union in May 2004 constitutes one of the clearest examples of *ex ante* conditionality, whilst the Cotonou Agreement contains *ex post* conditionality as respect for human rights is not a precondition of membership of the ACP group, yet appropriate measures can be taken following accession to this Agreement.

¹⁷²⁸ Articles 2(7) and 2(4) of the UN Charter, signed on 26th June 1945.

¹⁷²⁹ Nherere, P., ‘Conditionality, Human Rights and Good Governance,’ p. 294, from Ginther, K., *Sustainable Development and Good Governance*, (Dordrecht, 1995).

¹⁷³⁰ Tomuschat, C., *Human Rights: Between Idealism and Realism*, (Oxford, 2003); Meron, T., *Human Rights and Humanitarian Norms as Customary Law*, (1989).

¹⁷³¹ Barcelona Traction, Light and Power Company Limited, (Belgium/Spain) [1970] ICJ Rep. 3.

¹⁷³² VCLT of 23rd May 1969, 1155 UNTS 331.

or purpose of the treaty,” in line with Article 60(3)(b) VCLT.¹⁷³³ To amount to a material breach, the treaty in question would need to refer to human rights among its objects and purposes.¹⁷³⁴ The principle of *clausula rebus sic stantibus*, which denotes a fundamental change of circumstances, can also be invoked to suspend a treaty in exceptional circumstances.¹⁷³⁵

Whilst it can be argued that there is a legal basis in international law for the promotion of human rights, there is no international norm that lays down conditions for multiparty democracy or the delineates the precise contours of good governance.¹⁷³⁶ It could be argued that respect for democratic principles is justified by the overlap with human rights principles, particularly within Article 21 of the UDHR which refers to the freedom of thought, expression and association, as well as the right to participation and the right to choose a representative government.¹⁷³⁷ However, Article 21 explicitly avoids any reference to multi-party democracy. Furthermore, there is no international convention that lays down requirements relating to good governance.¹⁷³⁸ In light of the absence of a legal basis for democracy and good governance in international, it was shown that donors have tended to emphasise the human rights aspects of conditionality measures in the interests of legitimacy and legality under international law, and as a consequence, to de-emphasise the issue of democratic principles in their decision-making.¹⁷³⁹

Following the analysis of legal aspects of negative conditionality, chapter two moved to examine key concepts relating to human rights. In this regard, it was argued that the normative framework for the promotion of human rights in donor policies has a direct impact on the type of activities undertaken by donors. For this reason, an analysis of the legal and normative framework for human rights in international law was carried out, paying particular attention to the long-standing debate on the dichotomy between civil

¹⁷³³ Article 60(3), VCLT involving a violation of a “provision essential to the accomplishment of the object or purpose of the treaty.”

¹⁷³⁴ Ibid.

¹⁷³⁵ Article 62, *ibid*; Article 62(1), *ibid*.

¹⁷³⁶ Nherere, *op. cit.*, (1995), p. 300.

¹⁷³⁷ See also Franck, T.M., ‘The Emerging Right to Democratic Governance,’ 86 *AJIL* 1 (January 1992); Crawford, J., *Democracy in International Law*, (Cambridge, 1994).

¹⁷³⁸ Arts, K., *Integrating Human Rights and Development Cooperation: The Case of the Lomé Convention*, (The Hague, 2000), pp. 40-41 and 50.

¹⁷³⁹ Crawford, G., *Foreign Aid and Political Reform: A Comparative Analysis of Democracy Assistance and Political Conditionality*, (Houndmills, 2001), p. 33.

and political rights and economic, social and cultural rights. The relationship between human rights and other areas of political reform was also considered including democratisation and good governance. This was undertaken in recognition of the fact that support for human rights is often promoted as a subset of broader political reform activities.

Firstly, in relation to human rights, this chapter referred exclusively to the rights contained within the International Bill of Rights – namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In this thesis, it is argued that the traditional dichotomy between civil and political rights as negative rights and socio-economic rights as positive rights cannot be maintained. In contrast, it is argued that both sets of rights are inextricably interlinked and that both sets of rights demand both positive and negative action. For this reason, an attempt was made in this thesis to move beyond the traditional dichotomy between the generations of rights by emphasising the interlinkages between civil and political rights and economic, social and cultural rights.

Due to the strong overlap between the promotion of human rights and other areas of political reform in the policies of OECD donors, an analysis of the interlinkages between human rights related elements such as democratic principles and good governance was undertaken. Whilst the literature on the concepts of democracy is immense, the distinction between procedural and substantive democracy was regarded as particularly useful.¹⁷⁴⁰ Procedural conceptions of democracy emphasise the institutional and procedural aspects including the holding of multi-party elections. In contrast, the more substantive aspects of democracy relate to individual participation in decision-making and in political life, the role of civil society organisations, and the degree of individual control over government.¹⁷⁴¹ In this regard, it has been argued that although human rights do not necessarily form part of the minimal procedural aspects of democracy, human

¹⁷⁴⁰ See Beetham, D., 'Democracy and Human Rights: Contrast and Convergence,' Seminar on the Interdependence between Democracy and Human Rights, OHCHR, Geneva, 25th-26th November 2002; Simma, B., *et al*, 'Human Rights Considerations in the Development Cooperation Activities of the EC,' p. 596 from Alston, P., (ed.), *The European Union and Human Rights*, (Oxford, 1999).

¹⁷⁴¹ Simma, *et al*, *ibid*.

rights are part of the substance of democracy.¹⁷⁴² However, the extent to which human rights and democracy overlap continues to be a subject of debate on the basis of disagreements relating to ‘unification’ and ‘separationist’ ideas. In relation to the idea of ‘unification,’ some commentators have argued that the interlinkages between democracy and human rights are clear by virtue of the fact that both human rights and democracy can be seen as expressions of liberalism.¹⁷⁴³ The advocates of ‘unification’ argue that human rights cannot be protected without democracy and that in the absence of democracy, human rights would be reduced to the status of mere norms or standards.¹⁷⁴⁴ In addition, as noted above, there is a certain overlap between democratic principles and human rights law contained within the UDHR. Furthermore, whilst it was noted that a coherent set of democratic principles has not been enshrined in international human rights law, a number of UN Commission Resolutions have articulated guidelines for the promotion and consolidation of democracy.¹⁷⁴⁵

The ‘separationist’ thesis argues that human rights should be regarded as independent from democratic principles and democratic systems. This chapter quoted the views of Chun, who argues that human rights should be deduced from the right to life, which can be protected irrespective of the type of political system in place.¹⁷⁴⁶ Moreover, the politically neutral status of human rights is essential for the promotion of human rights as universal values.¹⁷⁴⁷ In a similar vein, others have argued that the acceptance of interlinkages between democracy and human rights would be harmful to the promotion of human rights in external affairs.¹⁷⁴⁸ In this regard, it has been argued that human rights should be promoted independently of democracy due to the absence of a firm legal basis for the latter in international law and also to avoid charges of neo-imperialism.¹⁷⁴⁹

¹⁷⁴² Beetham, *op. cit.*, (2002).

¹⁷⁴³ Beetham, *op. cit.*, (1999), p. 34. See also Donnelly, J., ‘Human Rights, Democracy and Development,’ 21 *HRQ* 2 (August 1999), p. 68; Langlois, A.J., ‘Human Rights Without Democracy? A Critique of the Separationist Thesis,’ 25 *HRQ* (2003).

¹⁷⁴⁴ Langlois, *op. cit.*, p. 1013.

¹⁷⁴⁵ For example, see UN Commission on Human Rights, Res. 2000/47 on Promoting and Consolidating Democracy, 56th Sess., 25th April 2000. Tomuschat, C., *Human Rights: Between Idealism and Realism*, (Oxford, 2003), p. 53.

¹⁷⁴⁶ Chun, L., ‘Human Rights and Democracy: The Case for Decoupling,’ 5 *International Journal of Human Rights* 3 (2001).

¹⁷⁴⁷ *Ibid.*, p. 20.

¹⁷⁴⁸ Nathan, A.J., ‘China: Getting Human Rights Right,’ 20 *Washington Quarterly* (1997).

¹⁷⁴⁹ See Monshipouri, M. and Welch, C.E., ‘The Search for International Human Rights and Justice: Coming to Terms with New Global Realities,’ 23 *HRQ* (2001).

It was shown that definitions of democratisation were equally as diverse as concepts of democracy. Democratisation has been defined as “a process of regime change that is directed towards a specific aim: the establishment and stabilization of substantive democracy.”¹⁷⁵⁰ Carothers has described donor activities in this domain as “aid specifically designed to foster opening in a non-democratic country to further a democratic transition in a country that has experienced a democratic opening.” Rather than seeking to provide a comprehensive or conclusive definition of democratisation, this chapter highlighted that the type of definitions adopted in donor policy documents has an impact of the types of efforts that it will undertake in this sphere. For example, it has been argued that donors have focused primarily on the procedural aspects of democratisation (especially the holding of elections) and failed to promote more substantive aspects such as the fostering of a democratic culture and respect for human rights norms.

The link between human rights and good governance was also explored in the second chapter of this thesis. Whilst any overlap between these concepts was less evident than between democracy and human rights, it was shown that the interpretation of good governance itself varies between broad or narrow concepts. The broad interpretation is often equated with democratic governance,¹⁷⁵¹ whilst the narrow definition is linked to a more technical conception of the public administration and transparent financial management.¹⁷⁵² Consequently, in relation to donor efforts to promote good governance, the type of definition adopted by donors is crucial for establishing whether there is a link with human rights. In certain areas, good governance reform may impact positively on human rights. For example, a broad definition would include civil and political rights as it would encompass the functioning of a democratic system and allow for participation in decision-making procedures, whilst even a narrow interpretation may assist in the promotion of the area of economic, social and cultural rights as it would seek to limit corruption and wasted public resources. Whilst the narrower version correlates with the

¹⁷⁵⁰ Schmitz, H.P. and Sell, K., ‘International Factors in Democratization,’ from Grugel, J., (ed.), *Democracy without Borders: Transnationalization and Conditionality in New Democracies*, (London, 1999), p. 25.

¹⁷⁵¹ Santiso, C., ‘Strengthening Democratic Governance and Preventing Crisis. The Challenges of ACP-EU Cooperation,’ Paper prepared for the 9th General Conference of EADI, Paris, France 22nd – 25th September 1999.

¹⁷⁵² This is closer to the World Bank’s definition of good governance. Stokke, O., (ed.), *Aid and Political Conditionality*, (London, 1995), p. 26.

more technical aspects of good governance and thereby, overlaps to a lesser extent with human rights, the general emphasis on accountability and the rule of law illustrates some consistency with human rights principles.

Following on from the legal analysis of negative conditionality and normative definitions of human rights and related elements such as the rule of law and good governance, some of the major gaps between the rhetorical commitment of OECD donors to human rights and the actual implementation of human rights in practice were highlighted. In this context, the most oft-cited inconsistencies in the practical application of negative conditionality relate to the *ad hoc* and fragmented nature of human rights conditionality.¹⁷⁵³ This results primarily from the arbitrary decision-making of bilateral donor agencies (depending on their level of independence), which are often required to take potentially competing issues on the domestic scene into consideration, such as commercial links or foreign policy objectives. Tomaševski's research has illustrated the absence of any coordination or synergy among donors – particularly in light of the lack of correlation between sanctions carried out by donors and the UN Security Council Resolutions.¹⁷⁵⁴ She also highlights the lack of verifiable indicators for establishing violations of respect for human rights, which further contributes to the *ad hoc* and arbitrary nature of donor activity in the area of human rights conditionality.¹⁷⁵⁵

The post-1989 commitments to link the disbursement of aid to countries which respect the liberal values of human rights, democratic principles and the rule of law has also come under scrutiny in the literature. In this regard, it is noted that the poor human rights record of aid recipients is not always reflected in donor policy and does not always lead to a reduction in aid.¹⁷⁵⁶ There is also some discussion in econometric analyses which have sought to establish whether there is a link between aid allocation and the human rights performance of donors. Recent studies produced by Neumayer indicates that there is a relationship between respect for human rights and the human rights of aid recipients at

¹⁷⁵³ Tomaševski, K., *Between Sanctions and Elections: Aid Donors and their Human Rights Performance*, (London, 1997); Tomaševski, K., *Responding to Human Rights Violations 1946-1999*, (The Hague, 2000).

¹⁷⁵⁴ *Ibid.*, (2000), pp. 369-388.

¹⁷⁵⁵ Tomaševski, *op. cit.*, (1997), p. xvi.

¹⁷⁵⁶ *Ibid.*

the gate-keeping stage (in other words before a decision is made to allocate aid), however, this relationship is less clear at the level stage (which refers to the situation after aid has been allocated).¹⁷⁵⁷

As mentioned above, the second chapter sought to examine the constituent and instrumental role of human rights in donor development policy. It was argued above that most donors have moved beyond a narrow conception of human rights in the normative definition of development by adopting a more holistic conception of human rights. However, to what extent are human rights integrated in the process of development? To this end, the chapter examined measures to promote human rights and the various ways in which donors have sought to embed human rights in the development strategies, for example, through mainstreaming and rights-based approaches. Firstly, with regard to measures to promote human rights, this chapter addressed the alleged priorities or biases in donor policies towards certain hierarchies or types of human rights activities. As illustrated in Crawford's study, the normative definitions adopted by donors vary considerably in relation to political conditionality encompassing the triad of human rights, democracy and the rule of law and to a lesser extent, good governance.¹⁷⁵⁸ In relation to human rights, Crawford established that the UDHR and the two international covenants of 1966 are utilised by donors as the source for their human rights policies. Nevertheless, donor conceptions of human rights varied between narrow views of human rights that correlate with civil and political rights and broader conceptions that include economic, social and cultural rights. This trend is significant as the incorporation of narrow definition of human rights impacts on the types of human rights activities that donors have undertaken in this area. Within the literature in this area, it has been noted there is a bias towards a narrow set of civil and political rights in the practice of donors.¹⁷⁵⁹ While this is not necessarily a negative observation, others have argued that increased attention should be given to the so-called 'second generation' rights. This could take the form of funding to civil society organisations working in this domain and also

¹⁷⁵⁷ Neumayer, E., 'Do Human Rights Matter in Bilateral Aid Allocation? A Quantitative Analysis of 21 Donor Countries,' 84 *Social Science Quarterly* 3 (2003c).

¹⁷⁵⁸ Crawford, *op. cit.*, (2001).

¹⁷⁵⁹ Tomaševski, *op. cit.*, (1997), p. 12; Crawford, *op. cit.*, (2001), p. 66; Stokke, *op. cit.*, (1995), p. 29.

funding for more general advocacy campaigns which seek to highlight the ‘rights’ element of basic needs and poverty reduction strategies.

This chapter examined the possible justification for a bias towards civil and political rights. Firstly, this dichotomy can be traced to the convenient distinction between civil and political rights as ‘negative’ rights (freedoms from) and socio-economic rights as ‘positive’ rights (freedoms to). Within donor policy, a bias towards civil and political rights may have been justified to the extent that civil and political rights are more easily identifiable and measurable (for example using benchmarks and indicators such as the Freedom House Index). In contrast economic, social and cultural rights are more ambiguous due to the requirements of ‘progressive realisation’ contained within the International Covenant on Economic, Social and Cultural Rights (ICESCR) and would require significant resources, thus, imposing unrealistic expectations on donors. In addition, the lack of progress on the adoption of an Optional Protocol to the ICESCR that would allow for an individual complaints mechanism reveals that there is still considerable reluctance on behalf of states to advance the agenda of economic, social and cultural rights at the international level. There has been little progress made on this issue since the drafting of this proposal and few states have made submissions to the Human Rights Commission with regard to the advancement of this protocol.¹⁷⁶⁰ Secondly, it was argued that the lack of attention afforded to economic, social and cultural rights may relate to the traditional dichotomy between the ‘first’ and ‘second’ generation rights since their codification in separate legal instruments in 1966. This textual separation is attributed to ideological conflicts during the Cold War, as the Western powers promoted the first generation civil and political rights, whilst economic, social and cultural rights were associated with the Communist ideals.

Furthermore, this chapter highlighted that the priority given to civil and political rights may have been justified in light of the primacy given to support for elections and democratisation during the 1990s. This period has been described as Tomaševski as the ‘era of electoralism’, during which donors pursued a delicate balance between carrot

(support for political reform, particularly electoral reform) and stick (conditionality) measures. However, it was also noted that during this period, donors over-emphasised a procedural conception of democratisation at the expense of a broader and more substantive understanding. Whilst human rights overlap with democratisation to some degree – even procedural democracy for example due to the requirement for the choice of political representation – a substantive definition would require a greater emphasis on the reduction of inequalities, political participation, and respect for economic, social and cultural rights.¹⁷⁶¹ It was therefore argued in this chapter that even if there has been a bias towards civil and political rights in donor funding, this finding should not overlook the fact that donors may have only focused on a narrow conception of civil and political rights.

Finally, it was argued that the bias towards civil and political rights may have arisen due to the interlinkages between political and economic conditionality. In particular, this links in with the promotion of the rule of law, which has become an integral part of the legal architecture of development.¹⁷⁶² The existence of respect for the rule of law, which overlaps with respect for civil and political rights, is essential for creating an enabling environment for growth, a secure legal environment for foreign direct investment, a clear regulatory framework for competition and a smooth transition to a market economy.¹⁷⁶³ In this respect, the promotion of civil and political rights is considered as an integral part of promoting the conditions for a favourable transition towards a market economy.

The thesis then questioned whether this bias towards civil and political rights still exists in practice. In the context of technical and financial assistance to support human rights, it was questioned whether priority is given to a narrow set of civil and political rights in donor development policies. The dichotomy between civil and political rights and socio-economic rights is a controversial issue. In this thesis, it was argued that the traditional dichotomy between civil and political rights as negative rights and socio-economic rights

¹⁷⁶⁰ Byrnes, A., 'An Effective Complaints Procedure in the Context of Human Rights Law,' p. 162, from Bayefsky, A., (ed.), *The United Nations Treaty System in the Twenty-First Century*, (The Hague, 2000).

¹⁷⁶¹ Crawford, *op. cit.*, (2001), p. 17.

¹⁷⁶² Sarkar, R., *Development Law and International Finance*, (Dordrecht, 1999), pp. 12-13; Sarkar, R., 'The Developing World in the New Millennium: International Finance, Development, and Beyond,' 34 *Vand. J. Transnat'l L.* (2001). p. 471.

¹⁷⁶³ *Ibid.*

as positive rights cannot be maintained. Instead it was argued that both sets of rights are inextricably interlinked and that both sets of rights demand both positive and negative action. In addition, the ideological confrontation of the Cold War has ceased to dominate the human rights agenda at the international level. A concrete example of this can be seen in the drafting of the Convention on the Rights of the Child of 1989, which transcends the dichotomy between the generations of human rights.¹⁷⁶⁴ Furthermore, efforts should be made to move beyond the traditional dichotomy between the generations of rights by emphasising the interlinkages between civil and political rights and economic, social and cultural rights.

An examination of the most recent policy documents of the majority of OECD donors reveals that the dichotomy between ‘first generation’ and ‘second generation’ human rights is no longer evident – at least at a rhetorical level.¹⁷⁶⁵ In this chapter, it was shown that most donors have moved to adopt a holistic conception of human rights, with the notable exception of US foreign assistance.¹⁷⁶⁶ A discussion of the recent OECD DAC initiative to achieve consensus between donors on the integration of human rights in development policies is also illustrative of the broad conceptualisation of human rights in donor policies – particularly among the core team of donors. In light of this development, it is difficult to maintain the view that donors prioritise one set of rights over another – at least at a rhetorical level. Whether this is the case in practice remains to be seen and this issue was later examined in the empirical chapters of this thesis.

Finally, this chapter considered whether there was any evidence of the adoption of human rights-based methodologies among OECD donors. It was noted that several donors have adopted explicit policies for the use of human rights provisions as a normative framework for development policy¹⁷⁶⁷ and that other donors are presently considering adopting

¹⁷⁶⁴ Arts, *op. cit.*, (2000), p. 22.

¹⁷⁶⁵ See also Piron, *op. cit.*, (2005a).

¹⁷⁶⁶ In this regard, it was noted that economic, social and cultural rights are explicitly mentioned in the development policies of the like-minded donors (the Nordic countries, the Netherlands and Canada), Denmark, Austria, Switzerland, Germany and Ireland.

¹⁷⁶⁷ DFID, ‘Realising Rights for Poor People,’ (London, 2000); Swedish Ministry of Foreign Affairs, ‘Democracy and Human Rights in Sweden’s Development Cooperation’, Government Communication SKR 1997/98, Stockholm, Swedish Ministry of Foreign Affairs, 1999.

policies in this area.¹⁷⁶⁸ However, it is also worth noting that previous DAC initiatives to achieve consensus have failed, not because of a perceived dichotomy between generations of rights but on the question of human rights based approaches.¹⁷⁶⁹ For this reason, it has been stated that there will not be any attempt to achieve consensus on the issue of human rights rights-based approaches during negotiations.¹⁷⁷⁰ Rather than pursuing an explicit ‘human rights-based approach’, the recommendations of the synthesis report of the OECD point to the added-value of integrating human rights within existing aid strategies and modalities such as mutual accountability and Millennium Development Goals (MDGs).¹⁷⁷¹ The further integration of human rights could also be pursued in the recent debates on development compacts. However, it should also be noted that a ‘rights’ element is also absent from the recent debate on development compacts, thus, leading us to question extent to which human rights have indeed infiltrated the development agenda and moreover, the viability of ‘rights-based approaches’ in general.

4. The Nexus between Human Rights and Development: The Experience of EU Development Policy and Relations with the Group of African, Caribbean and Pacific (ACP) States

A case study of EU relations with the African, Caribbean and Pacific (ACP) countries was undertaken in this thesis to provide a greater insight into the legacy of human rights in development cooperation policies and to critically assess the practical application of human rights in development. As a first step, the third chapter of this thesis sought to analyse the way in which human rights have infiltrated EU development policy as a whole and more specifically, in relations with the group of ACP states. The origins of the EU’s relationship with the ACP states were traced from the Treaty of Rome in 1957 until

¹⁷⁶⁸ For example, the Swiss Agency for Development and Cooperation (SDC) and the Canadian International Development Agency (CIDA). Piron, *op. cit.*, (2005a), p. 26.

¹⁷⁶⁹ Telephone interview with Mr. Sebastian Bartsch, OECD, Human Rights and Development Task Force, 14th April 2005 and follow-up interview on 30th September 2005.

¹⁷⁷⁰ *Ibid.*

¹⁷⁷¹ Piron, L-H., with O’Neill, T., ‘Integrating Human Rights into Development. A Synthesis of Donor Approaches and Experiences’, Prepared for the OECD DAC Network on Governance (GOVNET), (September 2005a), pp. 42 *et seq.*

the present-day Cotonou Agreement of 2000, which constitutes a consolidated system of cooperation between the EU and seventy-nine ACP states.

In this chapter, it was shown that the introduction of human rights has significantly altered the landscape of EU-ACP relations by moving from a relationship characterised by political neutrality to one based on liberal principles such as human rights, democracy and the rule of law. The background to EU relations with developing countries was traced to the policy of ‘association,’ which linked the overseas territories of the founding members of the then EEC (Articles 131-136 of the EC Treaty). This relationship was directed towards maintaining established trade links with the OCTs, therefore, the customs union was extended to these territories in particular to guarantee the EEC members’ access to raw materials and commodities. The spirit of the relationship between the EEC and the association states is reflected in the reference in Treaty of Rome, which referred to the “... the solidarity which binds Europe and the overseas countries and ... to ensure the development of their prosperity, in accordance with the Charter of the United Nations.” This reference was not expanded upon in the operative parts dealing with EU association agreements with third countries and it was clear that the economic dimensions of cooperation were paramount due to the dependence of the founding EEC Member States on the markets of their colonies.¹⁷⁷² Human rights did not feature as an aspect of this relationship, which was not surprising in light of the fact that many of the association states had not yet achieved independence at this time and the issue of human rights and self-determination would have been controversial in this context.¹⁷⁷³ Furthermore the issue of human rights was not a concern of the drafters of the Treaty of Rome. The notion of association reflected French attitudes towards its colonies as it was not envisaged at the time that many of its overseas colonies would become independent.¹⁷⁷⁴

¹⁷⁷² Williams, A., *EU Human Rights Policies. A Study in Irony*, (Oxford, 2002), p. 19.

¹⁷⁷³ *Ibid.*, p. 20.

¹⁷⁷⁴ Hewitt, A., and Whiteman, K., ‘The Commission and Development Policy: Bureaucratic Politics in EU Aid – From the Lomé Leap Forward to the Difficulties of Adapting to the Twenty-First Century,’ p. 134, from Arts, K., and Dickson, A.K., (eds.), *EU Development Policy: From Model to Symbol*, (Manchester, 2004).

In the following decade, the wave of decolonisation that swept through the African continent led to the negotiation of a separate treaty with eighteen Francophone states known as the Yaoundé Convention, which was signed in 1963 and subsequently renewed in 1969. The Yaoundé Treaties continued to provide preferential access for goods from the former colonies of the founding members and followed the similar objective of promoting ‘economic, social and cultural progress’. The accession of the UK to the EEC in 1973 led to the renegotiation of the Yaoundé Conventions to accommodate its special relations with former colonies and dominions. The preferential access to these countries was described as “reverse preferences”.¹⁷⁷⁵ They were reciprocal in nature, therefore, these members of Yaoundé also had to allow the preferential access of EEC goods into their markets.¹⁷⁷⁶ This led to the conclusion of the first Lomé Convention between the EEC and the group of African, Caribbean and Pacific States in 1975. In contrast with the previous treaties, the Lomé Convention was founded on the principle of partnership and resulted in the creation of joint institutional structures and decision-making procedures.¹⁷⁷⁷ Lomé I granted non-reciprocal trade preferences to the ACP group and the latter was only required to treat imports from EEC in the same manner as the most-favoured industrialised country source.¹⁷⁷⁸

Between 1975 and 2000, the Lomé Conventions I-V provided a legal basis for development cooperation between ACP countries and European Community. Upon the expiration of Lomé IV on 29th February 2000, the Cotonou Agreement was reached between the European Union and the group of ACP states for a period of twenty years.¹⁷⁷⁹ The third chapter emphasised the unique nature of the relationship that was established between the EU and the ACP states. The institutional framework for the EU-ACP partnership consists of the ACP-EU Council of Ministers as the main decision-making authority, the Joint Parliamentary Assembly with consultative functions and the Committee of Ambassadors. The Lomé Conventions and the Cotonou Agreement of 2000

¹⁷⁷⁵ Ravenhill, J., ‘Back to the Nest? Europe’s Relations with the African, Caribbean and Pacific Group of Countries,’ University of Berkely, Working Paper PEIF-9, 1st December 2002, p. 3.

Source: http://ies.berkeley.edu/pubs/workingpapers/PEIF-9-Back_to_the_Nest.pdf

¹⁷⁷⁶ Ibid.

¹⁷⁷⁷ As illustrated in the third chapter of this thesis, the bargaining power of the ACP group is far inferior to the EU institutions due the inequality of donor-recipient aid relationships.

¹⁷⁷⁸ Ravenhill, *op. cit.*, (2002), p. 3.

¹⁷⁷⁹ Cotonou Agreement, ACP-EC Partnership Agreement, *signed on* 23rd June 2000 in Cotonou, Benin, [2000] OJ L 317/3.

were concluded as association agreements on the basis of Articles 300 and 310 (ex Articles 228 and 238) of the EC Treaty. These agreements consist of bilateral agreements between the European Community and its Member States, on the one hand, and the Group of ACP states, on the other. Within the EC legal order, the Lomé Conventions and the current Cotonou Agreement were concluded as mixed agreements with both the Community and the Member States of the EU as contracting parties.¹⁷⁸⁰

The EU-ACP agreements were most likely concluded as mixed agreements due to the unusual status of the development cooperation financing system, the European Development Fund (EDF).¹⁷⁸¹ The EDF is a complex instrument and is further testament to the unique nature of the EU-ACP relationship in comparison to the external aid instruments within the EU budget. The EDF is outside the EU budget and is funded by on the basis of a separate internal agreement of the Member States. The EU Member States are keen to ensure that the EDF remains outside the EU budget as their individual contributions are weighted differently from the EU budget. In contrast, the European Parliament has long advocated the budgetisation of the EDF to ensure that it would have a role in the co-decision process. At the moment, it only has responsibility for granting the discharge of funds and is not involved in the decisions relating to the allocation of EDF funding. It has been argued that the budgetisation of the EDF would provide “a coherent political co-decision procedure involving the Council, the European Parliament and the Commission.”¹⁷⁸² The European Commission, which is largely responsible for the management of the EDF,¹⁷⁸³ put forward a proposal for budgetising the EDF in 2003, however, it has since emerged that budgetisation is not an option in the short-term and it was agreed that negotiations would begin for the 10th EDF.¹⁷⁸⁴

For the purposes of this thesis, however, what can be said about the role of human rights through the decades of EU-ACP cooperation? How does the EU-ACP relationship fit into

¹⁷⁸⁰ Martenczuk, B., ‘From Lomé to Cotonou. The ACP-EC Partnership Agreement in a Legal Perspective,’ 5 *EFAR* (2000), p. 484.

¹⁷⁸¹ *Ibid.*

¹⁷⁸² Karl, K., ‘The European Development Fund. Towards Integration in the Community Budget?’, *The Courier*, No. 201, (November-December 2003).

¹⁷⁸³ The Member States retain some oversight for the management of the fund through the EDF Committee.

¹⁷⁸⁴ European Commission Communication, ‘Towards the Full Integration of Cooperation with the ACP countries in the EU Budget,’ COM (2003), 590 fin., 8th October 2003.

the wider debate on the nexus between human rights and development? Firstly, the spirit and objectives of the first Lomé Convention can be viewed within the geopolitical context of the 1970s. In this context, it should be recalled that Lomé I was negotiated at a period of global economic crisis following the first oil shock of 1973. At this time many oil-producing developing countries were in a good bargaining position due to uncertainty surrounding the supply of natural resources¹⁷⁸⁵ and began to make their demands for a fairer global economic system known at the international level, particularly through the UN. The first Lomé Convention granted non-reciprocal trade preferences to the ACP countries, thereby responding to some of these demands.

The 1970s constituted a period of change for the EU's relationship with developing countries and for this time, the EU (then EEC) began to reflect on its general policy orientation in the area of development cooperation. A memorandum issued in 1971 revealed that the EU sought to move beyond trade relationships based on tariffs and quotas to a broader approach that would also seek to contribute to the improvement of social conditions in developing countries through technical and financial assistance. This reflected a new policy orientation and the impetus for this change in direction occurred particularly in light of the UK's accession. It also reflected the EU's desire to accommodate some of the demands of developing countries with regard to the establishment of a fairer economic trading system. As mentioned above, these demands had been made since the late 1960s leading to the creation of the preferential trading system, the Generalised System of the Preferences for developing countries in 1968. The establishment of the EC's GSP in 1971 and granting of preferential market access to the ACP countries were tangible manifestations of the EU's new policy orientation. It also created two instruments for the stabilisation of export earnings in the area of mining and agriculture (Stabex and Sysmin) for the latter group. In light of these innovations, it has been noted that the EU went against dominant thinking at this time by recognising some of the demands of developing countries proclaiming the need for an NIEO.¹⁷⁸⁶

¹⁷⁸⁵ Glaser, T., 'EEC-ACP Cooperation: The Historical Perspective,' *The Courier*, No. 120 (1990), pp. 24-26.

¹⁷⁸⁶ Ravenhill, *op. cit.*, (2002), p. 3.

Lomé I (1975-1979) and its successor, Lomé II (1979-1984) were largely devoid of any reference to human rights. Broadly speaking, the development agenda of Lomé I and II centred on the promotion of industrial development and wealth creation. These agreements dealt comprehensively with cooperation on aid, trade, technical assistance and the stabilisation of export earnings. Nevertheless, whilst the “ideological neutrality”¹⁷⁸⁷ of the initial Lomé Conventions was viewed as somewhat of a virtue as a means of focusing on the more technical developmental needs, it was clear that the political dimensions of cooperation between the EU and ACP countries would need to be addressed.

Human rights were peripheral to the objectives of the EU in the 1970s, which focused on the integration of the markets of the Member States.¹⁷⁸⁸ The EEC treaty was devoid of any reference to human rights. Moreover, the issue of human rights was particularly sensitive due to the recent phase of decolonisation that had taken place in the previous decade, however, it became clear that human rights issues would have to be put on the agenda. The *de facto* suspension of aid in response human rights violations committed by Idi Amin in Uganda in and subsequently in Equatorial Guinea in the late 1970s, clearly illustrated the EU’s inability to respond to human rights abuses in the ACP countries. These events undermined the EU’s image as a development actor.¹⁷⁸⁹ The EU attempted to include reference to human rights in Lomé II,¹⁷⁹⁰ however, these efforts were not successful. The European Parliament also called for the legal aspect of human rights to be strengthened within EC policy in 1985.¹⁷⁹¹ Although human rights were taken into consideration in the negotiations for Lomé III (1985-1989), this only resulted in modest references to human dignity and economic social cultural rights in the Preamble and Article 4. Within the more general trends in development cooperation policy, the EU introduced support for balance of payments and structural adjustment programmes in

¹⁷⁸⁷ Brown, W., *The European Union and Africa: The Restructuring of North-South Relations*, (London and New York, 2002), p. 4.

¹⁷⁸⁸ Marantis, D.J., ‘Human Rights, Democracy and Development: The European Community Model,’ 7 *Harvard Human Rights Journal* 1 (1994), p. 5.

¹⁷⁸⁹ The suspension of treaties is bound by the VCLT of 23rd May 1969, 1155 UNTS 331. In chapter three, it was noted that in cases of civil conflict and unrest, EU has relied on the ‘impossibility of performance’ of treaty obligations or more generally on the concept of *rebus sic stantibus* (a fundamental change in circumstances), however, the absence of a separate human rights clause was viewed as a limitation on the EU’s power in this domain. Riedel, E. and Will, M., ‘Human Rights Clauses in the External Agreements of the EC,’ pp. 724-725 from Alston, *op. cit.*, (1999).

¹⁷⁹⁰ European Commission, ‘Memorandum on the Linking of Economic Aid and Human Rights,’ COM (78) 47 fin., (1978).

Lomé III.¹⁷⁹² This was in line with the more general approaches at the time that emphasised the need to introduce macro-economic reform, which were promoted by the international financial institutions, the World Bank and IMF. However, it should be noted that this was motivated by the need to mitigate against the negative social impact of structural adjustment policies and to protect communities in ACP countries.¹⁷⁹³

By 1989, human rights had arrived on the EU-ACP agenda. The fourth Lomé Convention (1991-1995) referred to the link between respect for human rights and development. Article 5 provided a legal basis for promoting human rights in development, however, it did not provide for a suspension clause. Lomé IV emphasised the EU's positive approach to the integration of human rights and development, for example, through political dialogue. Lomé IV represented a break with the past ACP-EU Conventions by clearly stating that cooperation would be directed towards the promotion of democratic principles and human rights.¹⁷⁹⁴ The inclusion of Article 5 resulted from a series of factors such as the imperative to respond to allegations of human rights abuses in the ACP countries. Equally, by the 1980s, the European Union had significantly developed its internal position on human rights with the jurisprudence of the ECJ on human rights based on the inherent fundamental rights within the constitutional tradition of the Member States, which in turn influenced its external policies. Furthermore, human rights and democratisation initiatives were simultaneously gaining force in the developing world through the signature of the African Charter on Human and Peoples' Rights in 1981.

This development was also line with the changing trends among OECD donors at the end of the Cold War and it was illustrated in this chapter that the rhetoric of the EU also began to change during this time. The introduction of political conditionality in Council Resolution (the November Resolution) of 1991¹⁷⁹⁵ clearly illustrated that the EU would

¹⁷⁹¹ Resolution of the European Parliament on human rights in the world for the year 1984 and Community policy on human rights of 22nd October 1985, para. 5; Marantis, *op. cit.*, (1994), p. 5.

¹⁷⁹² Van Reisen, M., *EU 'Global Power'. The North-South Policy of the EU*, (Utrecht, 1999), p. 117.

¹⁷⁹³ *Ibid.*

¹⁷⁹⁴ Marantis, *op. cit.*, (1994), p. 2.

¹⁷⁹⁵ Council Resolution of the Council of the Member States of the Member States meeting in the Council of Human Rights, Democracy and Development', 28th November 1991, Bull. EC 11-1991.

follow dominant trends among OECD donors in this domain. The EU emphasised a dual approach to the role of human rights in development (both conditionality and measures to promote human rights) and referred to both first and second generation rights. The Maastricht Treaty of 1992 provided a firm legal basis for development cooperation policy in the EC Treaty.¹⁷⁹⁶ Human rights were integrated into these provisions through Article 177(2) of the EC Treaty, which stipulated that development policy must be directed towards the general objective of promoting human rights and consolidating democracy and the rule of law.

The EU's willingness to carry out restrictive measures for the failure to comply with political conditions, as stated in Council Resolution 1991, was followed up by the introduction of a non-compliance clause in the Lomé IV-bis, which allowed for the suspension of aid in the event of human rights violations. This provision satisfied the procedural requirements of international treaty law by including respect for human rights as an 'essential element' of cooperation.¹⁷⁹⁷ This included a non-compliance clause in Article 366a, which provided for suspension in the event of an alleged breach of the 'essential elements'. It was provided that consultations must be held by the contracting parties in the event of alleged violations and restrictive measures may be taken if these consultations did not lead to a satisfactory outcome. The requirement to hold consultations could be avoided in cases of special urgency. The introduction of the human rights clause in Lomé IV-bis occurred within the context of a broader trend in EU external relations. For over a decade, the EC has included a 'human rights clause' in its bilateral trade and cooperation agreements with third countries. The EU's insistence on the inclusion of a human rights clause as a non-negotiable aspect of cooperation prevented the conclusion of an agreement with Australia, and also prevented a follow-up agreement with China. In 1995, the European Commission provided guidelines on the modalities for including human rights in agreements with third countries¹⁷⁹⁸ and codified the format of the 'model clause' which includes the substantive 'essential elements clause' and the procedural 'non-compliance clause'.

¹⁷⁹⁶ Articles 177-181 of the EC Treaty.

¹⁷⁹⁷ Article 366a of Lomé IV-bis 1995.

From its initial stages as an allegedly apolitical activity, EU-ACP development cooperation became overtly political from the beginning of the 1990s onwards through the introduction of political conditionality. However, the EU was vocal in its efforts to promote a dual approach by emphasising the need to support human rights reform, rather than engage in a policy based exclusively on negative sanctions. Apart from the EDF funding, this shift in policy was also reflected in EU budget spending. Whilst the EU was previously reluctant to undertake an explicit ‘democratisation’ programme,¹⁷⁹⁹ it became clear during this decade that the EU had abandoned this apparent reluctance. Evidence of this shift in approach could be seen in the creation of a new EU budget line known as the European Initiative for Democracy and the Protection of Human Rights (EIDHR).¹⁸⁰⁰ By consolidating the existing human rights budget lines under a single instrument, a move which was largely promoted by the European Parliament, the EU’s human rights activities became more visible. The legal basis for this budget line was provided through two separate Regulations to accommodate developing and non-developing third countries. Its entry into force provided further evidence of the shifting policy objectives of the EU’s activities in developing countries and external relations more generally in the 1990s.

The Cotonou Agreement, which replaced the previous Lomé Conventions in 2000, continued the practice established in Lomé IV-bis. Firstly, it retained the substantive aspects of the human rights clause by including respect for human rights, democratic principles and the rule of law as essential elements of the partnership. Article 9 provided a legal basis for the promotion of civil, political and economic, social and cultural rights as ‘essential elements’. In addition, it elaborated on the definitions of democratic principles and the rule of law.¹⁸⁰¹ Secondly, it maintained the procedural aspects of the non-compliance clause in Article 96, along with an immediate suspension procedure in the event of situations of ‘special urgency’.¹⁸⁰² Article 8 on political dialogue represented

¹⁷⁹⁸ Communication from the Commission to the Council and the European Parliament, ‘The Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries’, COM (1995a) 216 fin., 23rd May 1995.

¹⁷⁹⁹ Alston, P. and Weiler, J.H.H., ‘An ‘Ever Closer Union’ in Need of Human Rights Policy,’ from Alston, *op. cit.*, (1999), p. 693.

¹⁸⁰⁰ EIDHR funding is placed under Chapter 19.04 (previously Chapter B7-70) of the Community budget.

¹⁸⁰¹ Article 9(2) and (3). Martenczuk, *op. cit.*, (2000), p. 470.

¹⁸⁰² The time-limit for the duration of the consultation procedure was extended from thirty days to sixty days.

a notable innovation in the Cotonou Agreement. It was envisaged that this provision would perform a dual role, on the one hand, as a medium for ensuring on-going political dialogue between the Parties and, on the other hand, as a first step to avoiding the use of restrictive measures under Article 96. Furthermore, human rights were consolidated as a constituent and instrumental element of the normative definition of development in the Cotonou Agreement. This can be seen in Article 9(1), which states that “cooperation shall be directed towards sustainable development centred on the human person, who is the main protagonist and beneficiary of development; this entails respect for and promotion of all human rights.”

An innovative feature of the Cotonou Agreement related to the introduction of good governance as a ‘fundamental element’ of cooperation. Article 97 provides for ‘appropriate measures’, which may be taken in light of serious cases of corruption. It also provides for a consultation mechanism and suspension as a last resort. Good governance was included in Lomé IV as a ‘particular aim’ of cooperation, however, in response to the phenomenon of aid fatigue, the issue of good governance became a key concern in renegotiation of the EU-ACP accords by the middle of Lomé IV-bis.¹⁸⁰³ Due to strong resistance from the ACP group, it was not included as an essential element of the partnership. As a result of a compromise between the contracting parties, it was instead included as a ‘fundamental element’. Whilst the provisions relating to good governance are relatively vague (in particular, cases in which EU is a significant funding partner), it is clear that the failure to meet good governance requirements involves any case of serious corruption and not simply those involving EU funds.

The trends in EU-ACP relations reveal that the political dimensions of this relationship have been consolidated and strengthened over the past decade, in particular, through enhanced procedures on political dialogue and good governance.¹⁸⁰⁴ At a more general level, it should also be noted that the character of the EU-ACP relationship was substantially altered in other areas through the introduction of the Cotonou Agreement.

¹⁸⁰³ European Commission, ‘Guidelines for the Negotiation of New Cooperation Agreements with the African, Caribbean and Pacific (ACP) Countries,’ COM (1997) 537 fin.

Some of these changes may impact on the political dimensions of EU-ACP co-operation in the future, including the human rights portfolio. Significant changes in the nature of EU-ACP relations were already envisaged in the Green Paper of 1996, which the European Commission stated that: "...future cooperation between the EU and the ACP countries must be seen against a radically changed international backdrop."¹⁸⁰⁵ The most significant change signaled in the Cotonou Agreement relates to the phasing out of non-reciprocal trade preferences with the ACP group by 2008. The preferential trading system of the ex-Lomé Conventions constituted a derogation from the Most-Favoured Nation (MFN) principle under the GATT.¹⁸⁰⁶ A waiver was granted to the ACP countries (Lomé IV) in 1997, however, this expired in February 2000.¹⁸⁰⁷ The Cotonou Agreement provided that current trading system will be replaced by WTO-compatible regional trade agreements known as the European Partnership Agreements (EPAs). There are special procedures for Least Developed Countries (LDCs) that would allow for the continuation of non-reciprocal preferences if these countries do not wish to enter into the EPAs. If a country is unable to join a regional grouping, they can opt for the GSP after 2007. The Cotonou Agreement also provides for the phasing out of the Sysmin and Stabex instruments due to the perceived lack of effectiveness and limited impact in the ACP states.

Another striking feature of the Cotonou Agreement relates to the reform of financial co-operation mechanism, which is now allocated on the basis of needs and performance. The Mid-Term Reviews (MTRs), which are scheduled to take place every five years, allow for the reallocation of funding on the basis of performance and may include an analysis of the good governance situation of the ACP countries and reforms undertaken in this regard.¹⁸⁰⁸ The Cotonou Agreement provides for increased involvement of civil society through decentralised co-operation. Non-state actors may also eligible to apply for EDF

¹⁸⁰⁴ Arts, K., 'Political Dialogue in a 'New' Framework,' p. 163, from Babarinde, O. and Faber, G., (eds.), *The European Union and the Developing Countries. The Cotonou Agreement*, (Leiden, Brill, 2005).

¹⁸⁰⁵ European Commission, 'Green Paper on Relations between the European Union and the ACP countries on the Eve of the 21st Century,' COM (1996) 570 fin., November 1996, p. 35.

¹⁸⁰⁶ The ACP countries were only obliged to treat EU imports on the same basis as products coming under the most favoured industrialised country source.

¹⁸⁰⁷ Babarinde, O., 'The Changing Environment of ACP-EU Relations,' p. 21, from Babarinde and Faber, *op. cit.*, (2005).

¹⁸⁰⁸ Article 2 of the Cotonou Agreement. Article 3(1) of Annex IV of the Cotonou Agreement. The performance-based criteria include progress on institutional reform.

funding, however, this situation does not detract from the highly intergovernmental nature of EU-ACP co-operation.

Since the introduction of the Cotonou Agreement, the increasing relevance of good governance conditionality was also highlighted in this thesis. In this respect, it was shown that the EU has recently sought to move away from project aid to programme aid in order to allow for sector-wide approaches that would encourage national ownership and avoid the overlapping of donor activities. It also seeks to encourage donor coordination on a sector wide basis rather than *ad hoc* projects. Due to the increasing move from project to programme aid, the EU has also begun to provide direct budget support to the ACP governments that fulfil the good governance requirements.¹⁸⁰⁹ There is also some evidence of cross-conditionality, as the EU has also stated that in order to be eligible for budget support, the ACP governments are also required to meet the conditions laid down by the World Bank and the IMF through the poverty reduction strategy papers.¹⁸¹⁰ The EU has stated that its country strategy papers should be drafted in line with the poverty reduction strategies or interim strategies where they exist.¹⁸¹¹ Due to the enhanced recourse to financial instruments such as budget support, it appears that the importance of the ‘fundamental element’ of partnership has become increasingly relevant to ensure the accountable and transparent management of public funds. However, it was also argued that the alignment of EU objectives with those of the World Bank/IMF through the PRSPs may lead to a lack of coherence in its commitment to human rights. This is due to the fact the international financial institutions adopt a narrower version of good governance that equates more with economic and financial management aspects and wider political issues such as human rights have failed to infiltrate their policies in a similar manner.¹⁸¹²

¹⁸⁰⁹ By 2004, one third of EDF resources had been channeled through budget support. European Union, ‘Annual Report 2004 on the European Community’s Development Policy and External Assistance,’ (Luxembourg, 2004), p. 91.

¹⁸¹⁰ EU Annual Report 2004, *op. cit.*, (2004), p. 49; European Union, ‘Annual Report on Human Rights 2003’, 10th October 2003, 13449/03, p. 175. Source: http://europa.eu.int/comm/external_relations_human_rights/doc/report03_en.pdf

¹⁸¹¹ *Ibid.*, (2004), p. 50.

¹⁸¹² Brown, W., ‘From Uniqueness to Uniformity? An Assessment of EU Development Aid Policies,’ p. 24, from Arts and Dickson, *op. cit.*, (2004).

Other reforms introduced within the Cotonou Agreement such as the phasing out of trade preferences and the wider trend towards convergence with the WB/IMF poverty reduction strategies have caused some concern over the question of whether the EU's development co-operation policy is moving from 'uniqueness to uniformity' in particular through the increased emphasis on 'reciprocity' in trade relations.¹⁸¹³ Whilst the Lomé relationship was purported to be based on the principles of mutual co-operation and non-reciprocity, the Cotonou Agreement testifies to the concept of performance and non-reciprocal treatment. At a macro level, human rights continue to infiltrate and shape the EU's relations with other developing countries. In addition, human rights have also continued to filter down through general policy documents such as the Development Policy Statement of 2000 and the more recent Development Policy Statement on 'the EU Consensus' in 2005. However, it remains to be seen whether these changes will have an impact on the role of human rights in EU-ACP development co-operation policy at a more micro level. This question will be discussed in more detail below.

5. The Practical Application of Human Rights in EU-ACP Relations: Evidence of Human Rights as Instrumental for Achieving Development Objectives

As shown in the third chapter of this thesis, the Cotonou Agreement recognises that human rights are instrumental for achieving development objectives. The idea that human rights play an instrumental role in development means that both the promotion of human rights and the integration of human rights in the process of development can contribute to the achievement of development objectives. In light of the commitment enshrined in the Cotonou Agreement to actively promote human rights as essential elements of the partnership, the fourth chapter of this thesis examined the practical application of human rights in EU-ACP relations and sought to ascertain whether there was any evidence that

¹⁸¹³ Ibid.

human rights are conceived as instrumental for achieving development objectives. This necessitated a detailed analysis of the practical implementation of human rights in EU-ACP relations, focusing on three areas including negative conditionality, political dialogue and measures to promote human rights.

As mentioned in the introductory chapter of this thesis, most of the key literature on the role of human rights in this domain focuses almost exclusively on the legal aspects of human rights conditionality in the external relations of the European Union.¹⁸¹⁴ However, this thesis makes a distinctive contribution by analysing not only the procedural and substantive aspects of human rights conditionality, but also by examining the positive application of the human rights clause.

5.1. The EU's Legal and Normative Framework for the Promotion of Human Rights in the ACP States

The first part of this chapter analysed the adequacy of the legal and normative framework for the practical application of a *positive approach* to the integration of human rights in EU-ACP relations. Although the issue of whether the EU has an adequate human rights policy in external relations is a contentious issue,¹⁸¹⁵ it was shown in this chapter that there is little ambiguity in relation to developing countries. Firstly, it was shown that the Maastricht Treaty provided an adequate legal basis for the promotion of human rights in EU development policy by virtue of Article 177(2) of the EC Treaty. In addition, the inclusion of a specific human rights clause in the EU-ACP bilateral cooperation agreements provides a legal basis for both the promotion of human rights and the suspension of cooperation in light of human rights violations.

The human rights clause within the EU-ACP Partnership Agreement provides a legal basis for the promotion of human rights. According to Article 9(4) of the Cotonou

¹⁸¹⁴ Bulterman, M., *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?*, (Gronigen, 2001); Hoffmeister, F., *Menschenrechts und Demokratieklausein in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft*, (Berlin, 1998); Fierro, *op. cit.*, (2003); Bartels, L., *Human Rights Conditionality in the EU's International Agreements*, (Oxford, 2005).

Agreement, '[t]he Partnership shall actively support the promotion of human rights, processes of democratisation, consolidation of the rule of law, and good governance. ... These areas will be a focus of support for development strategies.' Article 9 refers to the indivisibility of civil, political, economic, social and cultural rights contained within existing international law conventions. Article 25(1)(g) on social and human development also refers to the objective of 'encouraging the promotion of participatory methods of social dialogue as well as respect for basic social rights.' The revision of Cotonou in 2005 included an additional reference to promoting the fight against 'HIV/AIDS, ensuring the promotion of sexual health and reproductive rights of women.'¹⁸¹⁶

Some of the literature stresses the priority given to civil and political rights in EU human rights policy in developing countries.¹⁸¹⁷ As far back as 1994, the European Parliament recommended the inclusion of a separate 'social clause' to ensure equal respect for the so-called 'second-generation' human rights. According to Riedel and Will, "... if the Commission in the medium term fails to translate the social rights potential of the human rights clause into reality the very idea of the indivisibility of human rights might require the introduction of an explicit social clause."¹⁸¹⁸ However, Riedel and Will also agree that the inclusion of a separate human rights clause would undermine the indivisibility of human rights and would indicate that social rights are not included in the general human rights clause.¹⁸¹⁹ The long-standing debate over whether a separate 'social clause' should be included in the Cotonou Agreement appears to have receded and most commentators have argued that this would threaten the indivisibility of human rights contained in Article 9.¹⁸²⁰ It could also be argued that the inclusion of a separate reference to 'basic social rights' in Article 25 simply confirms the EU's commitment to social rights (at least at a rhetorical level) by indicating that social rights are an integral aspect of social and human development. As stated in the introductory chapter, a concerted effort was made in this thesis to illustrate the interconnected nature of human rights and to move beyond

¹⁸¹⁵ See Alston, P., and Weiler, J.H.H., 'An 'Ever Closer Union' in Need of a Human Rights Policy,' 9 *EJIL* (1998).

¹⁸¹⁶ Article 25(d) of the revised Cotonou Agreement.

¹⁸¹⁷ See Alston and Weiler, *op. cit.*, (1998).

¹⁸¹⁸ Riedel and Will, *op. cit.*, (1999), p. 724.

¹⁸¹⁹ *Ibid.*, pp. 744-745.

¹⁸²⁰ *Ibid*; Alston and Weiler, *op. cit.*, (1998).

traditional assumptions regarding a hierarchies or dichotomies between the so-called first and second generations of human rights.

An analysis of secondary legislation was also carried out in the fourth chapter to determine the adequacy of the EU's normative framework for the promotion of human rights in the ACP countries. A further insight into the EU's human rights policy in developing countries can be gained from the thematic Regulations, which are designed to complement the funding provided through the association and cooperation agreements. Instruments such as Council Regulation 975/1999 are useful to determine the priorities of the EU in this domain. In this regard, Council Regulation 975/1999, which provides a legal basis for the EIDHR, provides further insight into the values and thematic priorities of the European Union. Council Regulation 975/1999 provides a legal basis for the funding of human rights contained in both the ICCPR and the ICESCR.¹⁸²¹ Alston and Weiler argue that there is an inherent bias towards civil and political rights in the normative provisions of the Regulation,¹⁸²² however, whilst it could be argued that the provisions do not elaborate or expand on the issue of socio-economic rights, there is undoubtedly an equal legal basis in Article 2(1). More interestingly, however, the EIDHR also supports funding activities for collective rights, including minority rights and the rights of indigenous peoples.¹⁸²³ Andrew Williams argues that the promotion of collective rights in EU development policy is an example of the bifurcation of EU human rights policies – in other words, a cleft between the EU's internal and external policies.¹⁸²⁴

The scope of the EU's human rights policy in developing countries has been supplemented by various documents such as Council Resolutions, Resolutions of the European Parliament, and soft law documents such as Communications of the European Commission.¹⁸²⁵ For example, a 1998 Communication outlined the Commission's

¹⁸²¹ Article 2(1) of Council Regulations 975/1999 of 29th April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms, [1999] OJ L 120, 8th May 1999.

¹⁸²² Alston and Weiler, *op. cit.*, (1998).

¹⁸²³ *Ibid.*

¹⁸²⁴ Williams, *op. cit.*, (2004), pp. 42 and 51.

¹⁸²⁵ See Communication from the Commission to the Council and the European Parliament, 'The European Union's Role in Promoting Human Rights and Democratisation in Third Countries', COM (2001) 252 fin., 8th May 2001; Commission Communication, 'Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States', COM (1998) 146 fin., 12th March 1998; COM (1995) 216 fin.; Commission Communication,

interpretation of key concepts including human rights, democratic principles and the rule of law. Therefore, in light of the strong normative basis for a ‘positive approach’ to the integration of human rights in development cooperation policy, the EU-ACP case study provided an appropriate avenue for examining the cleft between rhetoric and practical implementation.

5.2. Negative Conditionality

As outlined in chapter four, despite the existence of transparent procedures for restrictive measures, most commentators have pointed to the *ad hoc* and often informal nature of human rights conditionality. This has led Holland to remark that “this seemingly variable application of conditionality ... detracts from the EU’s international credibility and influence.”¹⁸²⁶ Whilst the European Parliament has been at the forefront of calling for more transparent conditionality procedures, the European Commission has sought to balance the need for transparency with flexibility in order to promote its ‘positive approach’.

In response to the criticisms of the *ad hoc* nature of human rights conditionality, is there any potential from improvement at the normative or operational level? Firstly, from a normative perspective, it could be argued that the Cotonou Agreement contains adequate provisions for the balancing of transparency and flexibility. In this respect, it lays down clear procedures in Article 96 and 97 for the holding of consultations and emphasises a positive approach through the provisions on political dialogue. According to the EU, Article 96 is regarded as a “state of the art” version of the essential elements clause¹⁸²⁷ and a model for other agreements to follow due to the detailed dialogue and consultation procedures. The revision of Cotonou in 2005 further reinforces the positive approach by stating that all possibilities for dialogue should be exhausted through Article 8 before

¹⁸²⁶ ‘The External Dimension of the EU’s Human Rights Policy: From Rome to Maastricht and Beyond, COM (1995b) 567, 22nd November 1995.

¹⁸²⁶ Holland, M., *The European Union and the Third World*, (Palgrave, 2002), p. 139.

¹⁸²⁷ EU Annual Report on Human Rights 2003, *op. cit.*

initiating consultations.¹⁸²⁸ The time-limits for the consultation period were extended for both Articles 96 and 97, thus, emphasising the EU's willingness to find a solution through dialogue before taking "appropriate measures." Furthermore, detailed guidelines were provided for the holding of political dialogue before, during and after the consultation procedures in Annex VII, which may contribute to enhanced transparency in the dialogue and consultation process. Therefore, from a normative perspective, there is little need to improve the scope of the Cotonou human rights clause. At the same time, however, despite providing detailed guidelines on political dialogue and the consultation procedure in the interests of transparency, the modalities for dialogue still remain vague within Article 8 to ensure that all possibilities for dialogue are exhausted.

Secondly, is it possible to establish clear and verifiable criteria for the use of Article 96 and 97? On the one hand, it could be argued that this is an impossible task as requests for consultations and decisions relating to the suspension or partial suspension of cooperation agreements are inherently political. In practice, a decision to hold consultations is normally made on the basis of a Council Decision following a proposal from the Commission. The impetus for a Commission proposal for consultations may be influenced by a Resolution of the European Parliament, however, the European Parliament does not have a formal role in the decision-making process of the human rights clause. In light of the political nature of human rights conditionality, flexibility is paramount and the outcome of decision-making largely depends on political will within the EU.

Due to the overtly political nature of human rights conditionality, several commentators have highlighted the added-value of an independent agency in monitoring the human rights situation in developing countries and playing an advisory role in the recourse to consultation procedures.¹⁸²⁹ In this respect, it has been contended that the creation of a

¹⁸²⁸ See Annex VII of the Revised Cotonou Agreement. Council Decision 599/2005 of 21st June 2005 concerning the signing, on behalf of the European Community, of the Agreement amending the Partnership Agreement between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23rd June 2000, [2005] OJ L 209, 11th August 2005.

¹⁸²⁹ Reference was made for example in the report of the Comité des Sages, *op. cit.*, (1998); Bulterman, M., 'The Contribution of the Agency to the External Policies of the European Union,' from Alston, P., and de Schutter, O., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, (Oxford, 2005).

Fundamental Rights Agency (FRA), as proposed by the European Commission in 2005, would contribute to greater coherence in the EU's human rights activities in third countries and more specifically, in the ACP countries. The Proposal envisages that the function of the Agency would be to provide independent expertise and assistance on human rights issues and would have a mandate to deal with fundamental rights in the Union and Member States when implementing European Community law. The scope of the FRA would also extend to police and judicial matters in criminal matters in the context of Title VI of the TEU.¹⁸³⁰ According to Article 3(4) of the Proposed Regulation, the Commission may ask the Agency to submit information and analysis on third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements.¹⁸³¹ The creation of an independent Fundamental Rights Agency has been supported by many commentators,¹⁸³² and in particular, it has been welcomed as a means of strengthening the EU's external policy on human rights.¹⁸³³

If and when the proposed Regulation is adopted, the Agency would be permitted to provide information, submit reports and deliver opinions on the human rights situation in non-candidate third countries upon the request of the Commission. This objective appears to highlight a perception that there is a lack of information on the human rights situation in third countries. However, it could be argued that existing sources on the human rights situation in third countries are sufficient (for example, through the reports of human rights NGOs, UN reports, US State department reports and media reports). There is no shortage of information in this respect and the Commission has already argued that this activity would be superfluous as it would overlap with existing sources. For this reason, the Commission rejected the idea that it should produce a worldwide overview of the

¹⁸³⁰ European Commission, 'Commission Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities referred to in Title VI of the Treaty on European Union,' COM (2005) 280, *op. cit.*, p. 5.

¹⁸³¹ *Ibid.*, p. 6.

¹⁸³² Alston, P., and de Schutter, O., *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, (Oxford, 2005).

¹⁸³³ Bulterman, M., 'The Contribution of the Agency to the External Policies of the European Union,' from Alston and de Schutter, *ibid.*, p. 264.

human rights situation in each country.¹⁸³⁴ Furthermore, if the FRA is envisaged to be a ‘lightweight structure’, there may be reason to be skeptical about its potential contribution to the monitoring of human rights and requesting information in third countries.

It has been argued that the FRA could assist in the examination of the human rights situation in ACP countries for the purposes of human rights conditionality. Although this possibility was not explicitly foreseen in the Proposed Regulation, the requirements to provide information and technical expertise in Article 3(4) could be used for the purposes of consultations under Article 96 of the Cotonou Agreement. In addition, although it is not explicitly mentioned in the Proposal, the Agency could play a role in making recommendations for the application of the human rights clause in the event of alleged human rights violations. In this regard, the debate on the establishment of the FRA appears to signal some gaps or weaknesses within the EU institutional architecture for monitoring compliance with the ‘essential elements’ of the Partnership. As an independent agency, the recommendations of the FRA may be viewed as impartial, thus, assisting in the depoliticisation of human rights conditionality and improving transparency in the application of restrictive measures. The current procedures for examining compliance are undoubtedly political. Within the European Commission, the Delegations send regular briefings to the desk offices and any political changes within the ACP countries are monitored on a systematic basis. These briefings are then fed into Council meetings¹⁸³⁵ and form the basis of Commission proposals for Council Decisions on the consultations under Article 96. At the same time, it is questionable whether the creation of a new agency (whose independence would not necessarily be beyond doubt) would contribute to depoliticising decision-making regarding compliance with the ‘essential elements,’ a decision which depends primarily on political will. Furthermore, it could be argued that this proposal simply provides another technical response to a political issue (i.e. creating a new body to respond to the politicisation of human rights conditionality).

¹⁸³⁴ COM (2001) 252, *op. cit.*, p. 20.

In addition, the European Parliamentary Sub-Committee on Human Rights also makes regular assessments of the human rights situation in third countries and passes resolutions on human rights-related matters. Whether the resolutions of the European Parliament are taken seriously and followed up is another issue and would not be addressed through the creation of a new agency. It would perhaps be more useful, therefore, to address the current weaknesses and strengthen existing mechanisms. The proposal of the European Parliament in 2004 for the establishment of sub-committees on human rights within the framework of Association Agreements, which would serve as a basis for dialogue on human rights issues between the EU and association countries and as a means of monitoring compliance with human rights, is one example of proposed institutional reform in this domain.¹⁸³⁶ More recently, it has been recommended that the human rights sub-committee could be upgraded to a full committee¹⁸³⁷ and that stronger linkages should be forged with Development and Foreign Affairs Committee.¹⁸³⁸

5.3. Good Governance

The inclusion of provisions relating to good governance is perhaps indicative of the inequality of bargaining power between the EU on the one hand and the ACP states on the other. A further example of this inequality is illustrated by certain ‘strong states’ that have succeeded in avoiding the inclusion of a human rights clause in agreements with the EC (such as the Australia and New Zealand) and the absence of a human rights clause in sectoral trade agreements with developed countries. However, the European Parliament recently stated that it would be unwilling to assent to agreements which did not contain a human rights clause.¹⁸³⁹

¹⁸³⁵ For example at the PSC and Africa Working Group meetings which are then fed into the GAERC.

¹⁸³⁶ European Parliament, ‘Report on the Annual Report on Human Rights in the World and the EU’s Policy on the Matter 2004,’ A6-0086/2005, 5th April 2005, para. 215.

¹⁸³⁷ Youngs, R., *et al.*, ‘No Lasting Peace and Prosperity without Democracy and Human Rights. Harnessing Debates on the EU’s Future Financial Instruments’, Report Commissioned by the European Parliament and carried out under the auspices of the Netherlands Institute for Multiparty Democracy’, July 2005, p. 29.

¹⁸³⁸ *Ibid.*

¹⁸³⁹ European Parliament Press Release, ‘MEPs threaten to reject international accords containing no human rights clause,’ 25th November 2005.

Although good governance and human rights are interrelated concerns, there is little consensus on the definition from a legal perspective. According to Arts and Dickson, caution should be exercised in this regard as good governance lacks a legal basis in international law and doubts have been raised as to whether it constitutes an international legal principle.¹⁸⁴⁰ Although the human rights and good governance agenda may be interlinked to some degree, the absence of an international convention in this area raises some fundamental questions. During the negotiations for the Cotonou Agreement, the proposal to include good governance as an essential element was met with great reluctance on behalf of the ACP states, however, a compromise was eventually found by including it as a ‘fundamental element’. Whilst recognising the rationale behind the introduction of good governance into the Cotonou Agreement, the ambiguity in its interpretation has led Fierro to remark that: “[a] different question is whether the appropriate place for this element, which is not supported by any convention in international law, is the human rights clause.”¹⁸⁴¹

More controversially, however, there have been some doubts expressed over whether the inclusion of ‘good governance’ as a fundamental element complies with international law. Article 97 provides that consultations may be initiated in cases of serious corruption and that this may lead to the suspension of cooperation in exceptional circumstances. The EU has indicated its willingness to use this provision, for example, in the recent case of Liberia. Furthermore, the EU has called for “appropriate measures” to be taken on other occasions in light of the failure to respect good governance in Guinea-Bissau and the Central African Republic, however, reference was only made to Article 96 and not to Article 97. This is a contentious issue, particularly, in light of the controversial nature of good governance conditionality in international law. In the interests of transparency and accountability, it is recommended that Article 96 should not be used as a vehicle to undertake good governance conditionality due to the existence of separate clauses for restrictive measures for the ‘essential elements’ in Article 96 and ‘fundamental element’ in Article 97.

¹⁸⁴⁰ Arts and Dickson, *op. cit.*, (2004), p. 10; Arts, *op. cit.* (2000), pp. 40-41 and 50; Hilpold, P., ‘European Development Co-operation at a Cross-roads: The Cotonou Agreement of 23 June 2000 and the Promotion of Good Governance,’ 7 *EFAR* 1 (2002b), p. 69.

¹⁸⁴¹ Fierro, E., *The EU’s Approach to Human Rights Conditionality in Practice*, (The Hague, 2003);

Firstly, in light of the controversial nature of this subject, steps should be taken to outline the scope of ‘serious cases of corruption’ in order to ensure greater transparency in the future application of Article 97. There is a wealth of literature on the use of indicators for the promotion of good governance in donor and policies. These include governance indicators,¹⁸⁴² guidelines for the development of programme methodology,¹⁸⁴³ and international and regional indexes and performance benchmarks for measuring good governance performance.¹⁸⁴⁴ The wide-ranging sources also include the recent draft handbook of the European Commission on the promotion of good governance.¹⁸⁴⁵ Nevertheless, whilst an extensive range of indicators may exist for the promotion of good governance, there appears to be a lack of transparency on the scope and content of situations giving rise to good governance conditionality. Article 97 conditionality may be invoked in ‘serious cases of corruption’, however, the scope of this term is rather ambiguous. Consequently, in the interests of transparency and accountability, the EU and ACP countries should develop joint guidelines for assessing failure to comply with the good governance provisions of Cotonou.

Secondly, it is argued that the EU should avoid using Article 96 as a means of indirectly tackling Article 97 issues. Article 96 should not be invoked indirectly as a means of carrying out good governance conditionality. This has occurred in three cases to date, namely, Guinea-Bissau, the Central African Republic, and the Republic of Guinea. Article 96 and Article 97 are inter-related to some extent as they both deal with restrictive measures. Article 96 can only be invoked in situations involving the breach of the ‘essential elements’ of the partnership, whilst recourse to Article 97 should only be made for situations concerning the breach of the ‘fundamental elements’ of EU-ACP co-operation.

¹⁸⁴² See for example: Sudders, M., and Nahem, J., ‘Governance Indicators: A Users’ Guide,’ UNDP, 2004.

¹⁸⁴³ World Bank Operations Evaluation Department, ‘Monitoring and Evaluation: Some Tools, Methods and Approaches,’ The World Bank, Washington D.C., 2002; Court, J., Hyden, G., and Mease, K., ‘Assessing Governance: Methodological Challenges,’ Governance Discussion Paper 2, United Nations University, Tokyo, Japan, 2002; Landman, T., and Häusermann, J., ‘Map Making and Analysis of the Main International Development Indicators on Democracy and Good Governance,’ University of Essex, Human Rights Centre, Report for the Statistical Office of the Commission of the European Communities, (EUROSTAT, 2003).

¹⁸⁴⁴ Transparency International, Corruption Perceptions Index at <http://www.transparency.org>; See also NEPAD Peer Review Mechanism as described in other papers in this series.

¹⁸⁴⁵ Europeaid, ‘(Draft) Handbook on Promoting Good Governance in EC Development Co-operation’. (2004) Source: http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/themes-gg-handbook_en.pdf

Thirdly, the European Commission should focus on on-going dialogue on good governance issues which would complement and build upon its commitment to promote good governance reform. The proposal to create a ‘Governance Initiative’ as stated in the *EU Strategy for Africa* of 2005 represents further evidence of the EU’s willingness to engage in broader pan-African governance initiatives. It is envisaged that the Governance Initiative would encourage participation in NEPAD’s peer review mechanism and provide support for African governments that are undertaking reforms triggered by the African Peer Review Mechanism (APRM).¹⁸⁴⁶ A concerted effort to take governance into full consideration during Article 8 political dialogue should also be made.

5.4. Political Dialogue

In EU-ACP cooperation, the provisions relating to political dialogue are contained within Article 8 of the Cotonou Agreement. Article 8 has two functions. Firstly, it provides a means of promoting dialogue on the essential elements (including human rights) and other issues of mutual concern between the Parties. Secondly, Article 8 is inextricably linked to the consultation process under Article 96 and 97.¹⁸⁴⁷ Article 8 is a clear manifestation of the EU’s rhetoric on a positive approach to conditionality, which sets it apart from other donors. In the revision of Cotonou in 2005, efforts were made to strengthen the ‘positive’ ethos by aiming to exhaust all possibilities for dialogue before taking restrictive measures. This was achieved through the introduction of new provisions relating to more formal and systematic dialogue procedures.¹⁸⁴⁸ The new provisions are helpful as they clarify the relationship between Article 8 and Article 96 by stating that dialogue must be held before the consultation procedure can be launched.¹⁸⁴⁹ Nevertheless, political dialogue would continue to be bypassed in cases of ‘special

¹⁸⁴⁶ Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the ‘EU Strategy for Africa: Towards a Euro-African Pact to Accelerate Africa’s Development,’ COM (2005) 489 fin., 12th October 2005, p. 4.

¹⁸⁴⁷ This issue is discussed in further detail below.

¹⁸⁴⁸ This was achieved through the inclusion of Annex VII of the Revised Cotonou Agreement.

¹⁸⁴⁹ Article 1(1), *ibid.*

urgency' or if there is a persistent lack of compliance with previous commitments made or a failure to engage in dialogue in good faith.¹⁸⁵⁰

However, whilst the revision of Cotonou furthers the agenda of a 'positive approach' by providing for a more systematic and formalised dialogue in a new annex, the modalities for holding dialogue continue to be extremely vague. It could be argued that the precise modalities for political dialogue are kept deliberately vague in order to ensure that all possibilities for dialogue are exhausted and to facilitate a negotiated solution through formal or informal dialogue rather than resorting to conditionality procedures. Therefore, whilst provisions are made for enhanced and more structured dialogue in theory, it is unlikely that the modalities of political dialogue will become overly rigid to ensure that all channels for communication are kept open between the EU institutions and ACP countries.

In this thesis, some recommendations were made with regard to how Article 8 could be improved. Rather than being viewed simply as an instrument that can be used in situations of alleged human rights violations, it was argued that Article 8 should primarily be used in a flexible and effective manner that is independent from the consultation procedure under Article 96. More importantly, it is recommended that any future dialogue in this area should not only take human rights issues of mutual concern for EU and ACP groups, but also give priority to intra-ACP human rights concerns. It is anticipated that dialogue will be intensified between the EU and pan-African structures, including the African Union (AU) and NEPAD. This dialogue is envisaged as a means of complementing the existing dialogue that takes place by virtue of the agreements with third countries, including the ACP countries and the Mediterranean countries.¹⁸⁵¹ Finally, it was also noted that the revision of Cotonou in 2005 provides for the participation of the ACP group and the ACP-EU Joint Parliamentary Assembly (JPA) in dialogue procedures. This development is welcome as the ACP group may play a valuable role in the negotiation process as a peer group and its recommendations may hold more weight

¹⁸⁵⁰ Article 2(4), *ibid.*

¹⁸⁵¹ European Commission, Communication from the Commission to the Council on 'The EU-Africa Dialogue,' COM (2003) 316 fin., 23rd June 2003.

during the consultation procedures. However, some questions may be raised about the future of the ACP group as a bloc in light of the new regional trading groups that will be created with the introduction of the European Partnership Agreements in 2008.¹⁸⁵²

5.5. Measures to Support Human Rights

The EU also promotes human rights through technical and financial assistance known as ‘positive measures’. This activity can be distinguished from the conditionality procedures described above as funding in this area is granted without prior compliance with specific requirements. An examination of the EU’s funding activities in developing countries is insightful as it provides a concrete means of assessing the gap between rhetoric and practice regarding a ‘positive approach’ at a quantitative level through the proportion of funding allocated and the range of countries covered and the type of thematic priorities. At a more qualitative level, it enables an assessment of the extent to which the EU’s human rights policy documents are used in practice, the role of human rights in the design, implementation and evaluation of activities and the way in which the EU’s commitment to ‘mainstreaming’ human rights is carried out in practical terms.

5.5.1. EDF Funding

Support for human rights is channeled through a top-down approach to direct funding from the EDF. This may be complemented by direct funding to non-governmental organisations and non-state actors for the promotion of human rights activities at the grassroots level. These activities are normally jointly agreed with the partner country and included within the country strategy papers and the funding commitment is noted in the national indicative programme (NIP). On occasion, funding is also directed through non-state actors, although the introduction of provisions relating to non-state actors was met

¹⁸⁵² See section 4 above.

with some reluctance on behalf of the ACP governments.¹⁸⁵³ Human rights are also promoted indirectly through measures such the mainstreaming of human rights in country strategy papers, the promotion of cross-cutting themes such as gender equality and the analysis of the political situation in country strategy papers.

What conclusions can be drawn on the direct and indirect measures funded by the EDF in the area of human rights? Firstly, in relation to direct funding, it was noted that human rights funding from the EDF is normally channeled through support for institution building and democratic governance. Whilst this practice renders it more difficult to quantify the EU's human rights activities, the decision to mainstream human rights in broad-based governance programmes reflects a conception of the interrelated nature of human rights, democracy and good governance reform in donor development policy. In addition, the findings indicate that only an average of 1% of EDF funding is allocated from the national indicative programmes (NIPs) for human rights and democratisation activities for the individual ACP countries. Although this only reflects a very crude and quantitative analysis of EDF funding, it undoubtedly highlights a gap between rhetoric and practice of its 'positive approach'. Furthermore, in the context of the Cotonou Agreement, it was shown that human rights funding is not an automatic entitlement of the indicative programmes of the country support strategies, but instead depends upon the availability of resources. Furthermore, the introduction of performance-based lending in 2000 leaves open the question of whether adequate indicators exist to judge performance and progress in the area of human rights and democratisation. The views of Crawford are instructive in this regard, who argues that the methodology of the current programme and project evaluation indicators of EuropeAid (log-frame analysis) are inadequate for this purpose as they only measure linear transformations and measurable or quantifiable progress.

Secondly, in relation to indirect measures, it was noted that the EU has taken steps in recent years to improve the qualitative aspects of its development assistance. An example

¹⁸⁵³ Article 4 of the Cotonou Agreement, non-state actors may be provided with financial aid in relevant areas, however, these actors are only eligible if they have been identified in the country strategy paper. According to Article 58(3) of Annex IV of the Revised Cotonou Agreement, contracts non-state actors may benefit directly from grant from the Commission.

of this is the policy of mainstreaming, which is defined as the process of systematically integrating a particular theme or value into the country and regional strategy papers and programmes and promoting this specific objective at all levels of cooperation. These themes or values are often promoted directly for their own sake (i.e. to promote specific values such as gender equality) or they may be regarded as instrumental for achieving other objectives such as poverty reduction. As mentioned above, a recent internal document on mainstreaming in country strategy papers identified the mainstreaming priorities for country strategy papers.¹⁸⁵⁴ The creation of the Inter-service Quality Support Group (IQSG), which is situated within DG Development and also reports to DG Relex¹⁸⁵⁵ has undoubtedly improved the level of overall ‘quality control’ by vetting all project and programmes, ensuring that the design of country strategy papers and programmes conforms to the new framework strategy and verifying that the core values of EU development policy are mainstreamed at all levels.

Furthermore, it is clear that efforts are being made to improve programming guidelines, for example, it was shown that EuropeAid has produced a Draft Handbook on Good Governance in 2003, which is expected to improve the mainstreaming and inclusion of governance-related concerns in projects and programmes, and has been developed in line with programme cycle management techniques. As noted above, the definition of human rights is expansive, encompassing rights contained within the major international conventions.

In relation to human rights funding in EU development policy, Williams has stated that “... it is clear that the procedure now adopted for assessing human rights conditions and instituting programmes are rigorous.”¹⁸⁵⁶ ... “The Community has therefore instituted a process of positive action that has attained a sophisticated structure.”¹⁸⁵⁷ Whilst there have been some positive developments in recent years, there is still cause for some

¹⁸⁵⁴ ‘Programming Guide for Country Strategy Papers’, Internal Document. Five themes are integrated in all country strategy papers: i) respect for human rights and democracy; ii) children’s rights; iii) gender equality; iv) environment; v) culture. A further three cross-cutting themes will be integrated if relevant: vi) migration; vii) conflict prevention; viii) indigenous peoples’ rights.

¹⁸⁵⁵ Dearden, S., ‘The Future Role of the European Union in Europe’s Development Assistance,’ 16 *Cambridge Review of International Affairs* 1 (2003), p. 109.

¹⁸⁵⁶ Williams, *op. cit.*, (2004), p. 47.

¹⁸⁵⁷ *Ibid.*, p. 48.

skepticism. The findings of this chapter are less optimistic and point to a more modest contribution of the recent reforms to EU's human rights policy in developing countries. In relation to indirect measures, it was found that the EU's policy of integrating human rights in development cooperation suffers from a number of limitations. For example, it was argued that the human rights analysis in CSPs is relatively scant and depends to a large degree upon the initiative of the Delegations. Furthermore, there was little evidence of the systematic mainstreaming of human rights in development programmes and policies as a whole.

5.5.2. Unilateral Regulations and Human Rights

The analysis of the practical implementation of human rights in EU-ACP cooperation also required a micro analysis of the human rights funding provided from the additional EU budget lines.¹⁸⁵⁸ There are several thematic budget lines with direct relevance to the issue of human rights, including gender equality,¹⁸⁵⁹ reproductive and sexual health rights and democracy, the rule of law, and human rights.¹⁸⁶⁰ Unlike EDF funding which is agreed jointly between the EU and the ACP countries on the basis of country and regional strategies, the EU budget lines are based on unilateral regulations, therefore, the funding is granted (or withdrawn) at the discretion of the European Commission, which is responsible for the implementation of the regulations and prior approval of the ACP countries is not required. The funding is usually allocated to NGOs, regional organisations and international organisations for programmes (multi-annual frameworks) or projects (for a specific time period and objective.)

The human rights budget line, the European Initiative for Democratisation and Human Rights (EIDHR), is the most well-known and Regulations 975 and 976/1999 have been subject to sustained discussion in the literature since their creation in 1999 as a means of amalgamating all of the EU budget lines relating to human rights and democratisation

¹⁸⁵⁸ The EIDHR amounted to 3.3% of the total external relations expenditure in the 2005 EU budget. Bartels, *op. cit.*, (2005), p. 62, fn. 81.

¹⁸⁵⁹ Budget line 21.02.06. Gender equality in development cooperation (Regulation No. 806/2004).

into a single budget line. Its high profile is also due to the strong visibility given to the EIDHR by the European Parliament and by the Council in its annual reports on human rights. The fourth chapter focused on the budget line relating to developing countries under Regulation 975/1999. Since 2004, the funding for the EIDHR has been included in Chapter 19.04 (human rights and democratisation) of the EU budget.

The EIDHR is undoubtedly a clear manifestation of the positive approach to the integration of human rights in EU development policy. The added-value of this thematic budget line lies in the fact that funding can be granted without the consent of the host government, thereby facilitating the human rights and democratisation efforts in areas where other Community instruments may have been suspended. The activities are considered to be complementary to EDF funding and are targeted primarily towards civil society stakeholders and to international and regional organisations, albeit to a lesser extent. This budget line allows the EU to undertake highly specific human rights, democratisation and conflict prevention issues that are not covered by other operations.

Although the normative framework for the EIDHR provides a comprehensive legal basis for an expansive range of human rights activities, the actual practice reveals that funding is directed towards a narrower set of priorities. The introduction of priority themes came as a response to recommendations from the Commission in 2001 as a means of improving the effectiveness and efficiency of the budget line.¹⁸⁶⁰ The priority themes for the current period 2005 and 2006 are focused on four main areas. The first theme focuses broadly on democracy, good governance and the rule of law. The other priority areas are more specific including: efforts to promote the abolition of the death penalty; support for the victims of torture and impunity and support for international criminal tribunals and the international criminal court; and finally, the fight against racism and xenophobia, discrimination against minorities and indigenous peoples.

¹⁸⁶⁰ Budget line 21.02.07.03. Reproductive and sexual health rights in developing countries (Regulation No. 1567/2003 and 1484/97 on population policies and programmes in developing countries).

¹⁸⁶¹ COM (2001) 252, *op cit*.

A few remarks can be made about these thematic priorities. Firstly, as mentioned in this chapter, support for the abolition of the death penalty is a controversial issue as it is not protected by an international treaty but is instead referred to in Article 2 of the EU Charter on Fundamental Rights. It was also noted that programmes providing for support for training on the 2nd Optional Protocol of the ICCPR and the 6th Protocol to the European Convention on Human Rights (ECHR) are also included as a specific area of focus.¹⁸⁶² Furthermore, in the third priority area, the position adopted in the EU Guidelines on torture and the prevention of torture as laid down in the EU Charter will be promoted. The promotion of rights contained within the EU Charter on Fundamental Rights in third countries is undoubtedly a controversial issue.

Research carried out on EIDHR ‘positive measures’ has also claimed that priority is given to civil and political rights, in an almost exclusive manner.¹⁸⁶³ However, in the opinion of this author, it is not possible to draw such a clear-cut distinction, as most of the activities funded by the EIDHR budget line (particularly under priority (1)) address human rights reform in a general manner, for example, through support for civil society and human rights advocacy. Furthermore, rather than pointing to a dichotomy between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand, it was argued in this chapter that the EIDHR prioritises high profile and highly visible themes.

Secondly, it was shown that the introduction of priority themes was also accompanied by the emphasis on ‘focus countries’ which would be eligible for funding. In 2003, this consisted of thirty-one focus countries and although the ACP countries were eligible for the lion’s share of this funding, this only amounted to fourteen out of the 79 ACP countries. In 2005, the same ACP countries were eligible for funding.¹⁸⁶⁴ This policy is justified on the basis that it allows the EU to focus on ‘difficult partnerships’, however, it could be argued that the introduction of focus countries serves to stigmatise support for human rights, which continues to be linked to the question of human rights violations,

¹⁸⁶² The 2nd Optional Protocol to the ICCPR and Protocol No. 6 of the ECHR relate to the abolition of the death penalty.

¹⁸⁶³ Alston and Weiler, *op. cit.*, (1999).

rather than support for human rights as an objective in itself. Furthermore, the limited geographical scope challenges (at least at a quantitative level) the high profile given to EIDHR in the annual reports of the EU Council and the European Parliament.

It was also shown that several evaluations of the EIDHR have been extremely critical of the management and implementation of this budget line, particularly due to delays in disbursement and the inadequacy of the calls for proposals system. Criticism of the overall management of this budget line and delays in disbursing funds has led to several reforms including the deconcentration of the responsibility for approving EIDHR applications and project cycle management. This change of policy was introduced in response to the poor disbursement record of the budget line, which had been identified in several evaluations, and to ensure the effectiveness of these activities in the host country. Consequently, the majority of EIDHR activities (with the exception of global and regional projects) have been managed by the Commission Delegations in third countries since 2004.

Finally, the fragmented and *ad hoc* nature of the EIDHR's programmes was also highlighted in the fourth chapter. For example, apart from the targeted projects (carried out by international and regional organisations), the type of projects funded largely depends upon the initiative of civil society groups. Furthermore, due to the limited geographical scope of the EIDHR, there is little evidence of synergy between the human rights budget line and EDF funding. However, the observations relating to the fragmented and *ad hoc* nature of EIDHR should not necessarily be regarded as a criticism. Firstly, there may be a gap between expectations and capabilities due to the high profile given to this budget line by the European Parliament, among others. It should not be forgotten that the EIDHR is simply a thematic budget line with a limited geographical scope. In addition, it could be argued that the expectations placed on the EIDHR are unrealistic, bearing in mind that other thematic regulations have not been subject to such extensive scrutiny in the literature. Secondly, the human rights regulations do not purport to provide a comprehensive approach to human rights in third countries. Furthermore, the

¹⁸⁶⁴ EIDHR Programming for 2005 and 2006, 6th December 2004, Annex 1 'Eligible Countries and Regions per EIDHR Campaign

ad hoc and fragmented nature of human rights funding may reflect a deliberate policy, rather than a representing a confusing sum of disconnected forces. The EIDHR is designed to fund standalone projects on a one-off basis, rather than engage in a long-term strategy. Similarly, the decision to fund priority themes and countries is indicative of the EU's commitment to support civil society groups working in 'difficult partnerships,' for example, in countries where the relationship between the EU and the host country has deteriorated. In this light, the *ad hoc* and fragmented nature of the EIDHR may represent a clear policy objective, rather than evidence of a gap between rhetoric and practice.

5.5.3. The Future Orientation of EIDHR: Mainstreaming or Standalone?

The discussion on mainstreaming and standalone human rights operations has become relevant in the on-going debate on the future orientation of Regulations 975 and 976/1999 after their expiration in 2006. The negotiations for the new Financial Perspective for 2007-2013 may bring some changes to the overall structure of the thematic budget lines. As mentioned in the third chapter of this thesis, the European Commission has proposed that the EU budget lines for external relations should be restructured into three thematic and three geographical budget lines.¹⁸⁶⁵ In addition, the proposal to restructure the instruments for external relations has provided an opportunity to re-evaluate the current structure of the thematic Regulations. The European Commission has also put forward a proposal for integrating the thematic budget lines into new budget lines for external relations.¹⁸⁶⁶ This would mean that the EIDHR would no longer have a separate legal basis.¹⁸⁶⁷ The Commission argues that this would ensure greater efficiency and flexibility by mainstreaming funding for human rights and democratisation within two of the geographical instruments and two of the thematic instruments.¹⁸⁶⁸ However, the European Parliament is strongly opposed to this suggestion and has called for a separate Regulation

2005)'.

¹⁸⁶⁵ See chapter three of this thesis.

¹⁸⁶⁶ European Commission, Communication from the Commission to the Council and the European Parliament, 'External Actions through Thematic Programmes under the Future Financial Perspectives 2007-2013,' COM (2005) 324, 3rd August 2005.

¹⁸⁶⁷ Youngs, *op. cit.*, (2005), p. 8. [It should also be noted that they go further than simply strengthening existing mechanisms. In relation to the EIDHR, they also suggest the creation of a Parliamentary Human Rights and Democracy Centre within EP, EU Forum for Partnership in Democracy and Human Rights and High Level Democracy and Human Rights Advisory Committee.]

¹⁸⁶⁸ *Ibid.*, p. 8.

for human rights and democratisation to remain in place.¹⁸⁶⁹ In this regard, it could be argued that there is a potential tension between the perceived benefits of visibility through a separate Regulation, on the one hand (as advocated by the European Parliament) and the quest for effectiveness and efficiency through the mainstreaming approach, on the other hand (as put forward by the European Commission).¹⁸⁷⁰

The restructuring of the thematic budget lines will undoubtedly affect the future of the EIDHR. On the one hand, it could be argued that restructuring is inevitable in light of the fact that the mandate of Regulation 975 and 976/1999 only lasts until the end of 2006, which coincides with the new Financial Perspective 2007-2013 (if adopted) that includes the Commission's proposals for the creation of new instruments for external assistance as described in chapter three of this thesis. However, it could also be argued that the restructuring of the EIDHR is an example of procedure triumphing over substance. The Commission's proposal to integrate the EIDHR into the geographical instruments might be largely motivated by the desire to improve internal efficiency and to rationalise the budget lines, rather than on the basis of any judgement on the overall substance or quality of EIDHR activities. The "procedure-driven ethos" of the Commission has also been noted by Santiso in relation to its overall external relations assistance programmes.¹⁸⁷¹ Moreover, the Commission has often been preoccupied with questions of form, rather than substance. For example, as Weiler and Fries have noted, following the controversial *UK v. Commission* case, the EU simply provided a legal basis to legitimise what they were already doing under the human rights budget line,¹⁸⁷² without undertaking any analysis of the type of work that was being carried out. Furthermore, it could also be argued that the European Parliament's proposals to maintain a separate thematic regulation for human rights and democratisation is motivated by its concern for high profile and highly visible human rights activities, rather than a decision motivated by the effectiveness of the EIDHR.

¹⁸⁶⁹ Ibid., p. 9.

¹⁸⁷⁰ Meeting with René Vandermosten, DG Budget, 11th October 2005.

¹⁸⁷¹ Santiso, *op. cit.*, (2002b), p. 3.

¹⁸⁷² Weiler, J.H.H. and Fries, S., 'A Human Rights Policy for the European Community and Union: The Question of Competences,' Jean Monnet Working Papers, (1999), part 1. Source: <http://www.jeanmonnetprogram.org/papers/99/990401.html>

5.6. Insights from the Experience of Kenya

Within the context of EU-ACP relations, a case study of EU development cooperation relations with Kenya was undertaken. This case study has contributed to the literature in this field by providing original insight into the practical application of the human rights clause and assessing the consistency between EU rhetoric and practice. An attempt was made to transcend the objectives of this thesis by analysing the imprint of human rights on the changing trends in EU development policy in Kenya and assessing the implementation of the EU's human rights policy at the individual ACP country level. Furthermore, an in-depth case study provided a further insight into the way in which the wide range of instruments available to the EU for the promotion of human rights are utilised in practice. As stated from the onset, the scope of this case study was strictly limited to an analysis of the human rights aspects of EU development cooperation policy and did not extend to a broader analysis of EU-Kenya relations in other areas.

From the case study of EU-Kenya cooperation, it was shown that human rights have shaped the development agenda in this country from the early 1990s onwards. Prior to the end of the Cold War, Kenya was perceived to have considerable geostrategic importance as an ally of the West. Official development aid to Kenya was largely based on the objective of promoting technical and economic reform. However, in 1991, the authoritarian regime of Daniel Arap Moi, the leader of the Kenyan African National Union (KANU) party, and the absence of multi-party democracy came under severe criticism from donors. This led to the repeal of section 2a of the Constitution of Kenya which provided for multi-party democracy. During this period, European Community aid was also suspended to the region, despite the absence of a legal basis for non-compliance in the fourth Lomé Convention. This indicates the often *de facto* nature of suspension prior to the introduction of a legal basis in Lomé IV-bis.

The informal nature of negative conditionality was also noted in this case study. For example, it was also shown that the EU has recently exercised *de facto* good governance conditionality as it had delayed direct budget support of over €125 million due to the

failure to enact a new Public Procurement Act and to undertake significant anti-graft measures.¹⁸⁷³ As it was noted above, good governance conditionality is a controversial area, however, the EU has clearly shown its willingness to ensure compliance. It should be noted, however, that recourse was not made to the consultation procedure in Article 97 in the case of Kenya.

The convergence of human rights and development has had an impact on Kenya not only in the area of negative conditionality, but it has also shaped the character of the development agenda. The first three Lomé Conventions focused almost exclusively on promoting economic growth, particularly through the cereals sector and support for structural adjustment. However, from Lomé IV onwards, it was recognised that political dimensions (including human rights) are necessary to create an appropriate environment for development. This commitment was further solidified in the Cotonou Agreement of 2000, however, is this commitment actually followed through practice? Firstly, with regard to direct funding measures, human rights funding is channeled through the broad framework of 'governance reform' and it was shown that approximately 1% of the previous 8th EDF was allocated to this broad title.¹⁸⁷⁴ Furthermore, it was noted that there is no funding earmarked from the 9th EDF for governance-related activities.¹⁸⁷⁵

Within the EU-Kenya Country Strategy Paper (2003-2007), human rights are viewed as a cross-cutting issue rather than a priority focus. In relation to direct funding measures, human rights are mainstreamed within the framework of a broad governance and legal reform programme.¹⁸⁷⁶ The most prominent example is the cooperation of the European Commission in the Governance, Justice, Law and Order (GJLOS) programme, which consists of a tripartite agreement between the Government of Kenya, donors, and civil society. It aims to provide technical and financial assistance to the government institutions to improve the capacity of the functioning of the legal system and reform of

¹⁸⁷³ Interview with Vanessa Nagel-Dick, EU Delegation Kenya, Nairobi, 5th October 2004. Kathuri, B., 'EU Delays Sh12bn Budget Support,' *The East African Standard*, 12th April 2005.

¹⁸⁷⁴ Interview with Vanessa Nagel-Dick, EU Delegation Kenya, Nairobi, 5th October 2004. The governance funding (approx. €1 million) has been carried over from the 8th EDF due to delays in disbursement.

¹⁸⁷⁵ As it was shown in chapter five, there is €2 million earmarked for non-state actors in the 9th EDF, however, this is not necessarily reserved for activities in the area of governance, human rights, the rule of law or democratic principles. Interview with Vanessa Nagel-Dick, EU Delegation Kenya, Nairobi, 5th October 2004.

¹⁸⁷⁶ This following activities have been funded from the 8th EDF.

the judiciary. The European Commission Delegation has contributed to the preparation of GJLOS and short term programme, however, it has not taken a leading role in this process. The GJLOS programme is heralded as an innovation in Kenya as it provides a forum for government, donors, and civil society cooperation. It is also designed as a sector-wide programme in order to create a more holistic approach, rather than simply responding to *ad hoc* requests for funding. However, some NGOs have been critical of the use of the Financial Management Agent (KPMG-Kenya) to manage the basket funding system created by the donors as it is believed that it would have been more cost-effective and beneficial to channel these funds through another organisation. There has also been some criticism of the actual extent of CSO participation and indeed some concern that previous allocations to non-governmental organisations will now be redirected for the GJLOS programme with handpicked NGOs.¹⁸⁷⁷ The EU also provides support for civil society through the DGSP (Democratic Governance Strengthening Programme).

Most donors, including the European Commission, indirectly supported the Constitutional Review process in Kenya through the provision of funding for technical legal experts to assist in the drafting phase. It was expected by most donors that the proposed Constitution of Kenya would contribute to the enhancement of individual human rights.¹⁸⁷⁸ However, the draft Constitution (the 'Wako Draft') was rejected when it was presented to the citizens of Kenya in a referendum on 21st November 2005.¹⁸⁷⁹

With regard to the horizontal measures such as human rights mainstreaming, it was found that there was little evidence of the incorporation of human rights into the programming, planning, and evaluation of activities. This can be viewed in contrast with SIDA's

¹⁸⁷⁷ M'Inoti, K., 'Widening the Knowledge Base of the Governance Justice Law and Order Sector (GJLOS) Reforms and Its Short Term Priorities Programme', Discussion Notes for the Consultative Forum for Civil Society and Private Sector Participation', Kenya College of Communication and Technology (KCCT), Mbagathi, 27th-29th September 2004, pp. 8-9; Interview with Mr. Kathurima M'Inoti, Chairman, Kenya Law Reform Commission, Nairobi, 19th October 2004.

¹⁸⁷⁸ Chapter six of the Proposed Constitution of Kenya (2005). On the previous human rights situation in Kenya, see Ghai, Y., 'The Kenyan Bill of Rights: Theory and Practice,' from Alston, P., *Promoting Human Rights through Bills of Rights*, (Oxford, 1999).

¹⁸⁷⁹ Nevertheless, the proposed Constitution was rejected by the people of Kenya in a referendum held in November 2005. Kinuthia, Njoroge, 'Kenyans reject proposed Constitution', *Daily Nation*, Tuesday 22nd November 2005. The Constitution presented to the Kenyan people on 21st November 2005 retained key authoritarian features of the political system such as the strong centralised office of the President, and it was ultimately rejected by 57 per cent of the voters. 'Kenya: Smashing the Fruit Bowl,' 46 *Africa Confidential* 24 (December 2005), p. 1. On the internal political crisis which followed the rejection of the Constitution see 'Kenya. Going down

approach which follows a three-fold strategy, encompassing: the mainstreaming of human rights in its own sectoral programmes (the MANIAC project); direct support to governance-related issues including the GJLOS programme and enhanced dialogue with the Government of Kenya since 2002.¹⁸⁸⁰

Political dialogue in the area of human rights is perceived to be closely linked to the consultation procedures, therefore, it would only be invoked in cases of violations, rather than on-going support for human rights initiatives.¹⁸⁸¹ Furthermore, the association of support for human rights with violations can also be seen from the fact that Kenya has not been eligible for funding from the human rights budget line, the EIDHR, since 2001 as it is not perceived to have difficulties with regard to the fulfillment of its obligations under international law. Kenya has only been allocated EIDHR funding on two occasions. In 2001, a grant was made to fund a women's governance and national leadership programme through the non-governmental Federation of Women Lawyers (FIDA) and in 2002, support was given to the Independent Medico Legal Unit in Kenya to support victims of torture, rehabilitation centres and anti-torture awareness raising campaigns.¹⁸⁸² Furthermore, the European Commission Delegation was informed that Kenya was not eligible for EIDHR funding in the 2005-2006 programming document as it does not fall under the EIDHR country or thematic focus.¹⁸⁸³

As mentioned above, good governance conditionality has become an increasing priority for the European Union. According to Article 97, appropriate measures may be taken in serious cases of corruption. It was noted that due to the types of financial instruments which the EU has increasingly opted for in the delivery of programme funding and direct budget support, it is not surprising that good governance conditionality has emerged as a recent priority. In the case of Kenya, the EU has exercised its power in this regard by delaying the disbursement of budget support in July 2004. This was due to the failure to implement public procurement legislation, to take adequate anti-corruption measures and

with the Ship', 47 *Africa Confidential* 3 (February 2006); 'Kenya: Smashing the Fruit Bowl', 46 *Africa Confidential* 24 (December 2005).

¹⁸⁸⁰ Piron, L-H., *op. cit.*, (2005b), p. 12, Box. 3.1. See also Annexes, p. 43.

¹⁸⁸¹ Interview with Ms. Vanessa Nagel-Dick, EU Commission Delegation in Kenya, Tuesday, 5th October 2004.

¹⁸⁸² *Ibid*

¹⁸⁸³ *Ibid*.

to ensure that appropriate funds for poverty reduction.¹⁸⁸⁴ This situation was recently resolved with the enactment of the Public Procurement Bill in 2005, following an ultimatum issued by the Head of the European Commission Delegation, Mr. Eric Van der Linden. However, the approval of budget support by the European Commission coincided with one of the worst political crisis of the NARC government due to the sacking of the entire cabinet following the rejection of the proposed constitution.¹⁸⁸⁵ This action by the EU reflects a lack of coherence among the international community as other donors and institutions were calling for conditionality measures at this time.¹⁸⁸⁶

The move towards performance and incentive-based conditionality in the area of good governance fits with the broader trends in the political dimensions of development cooperation as described in the first chapter of this thesis. In this regard, it was shown that these trends have the potential to significantly alter the spectrum of donor conditionality by emphasising policy-oriented or process conditionality and may give rise to increased funding for other areas of political reform such as good governance. It also signals the EU's willingness to utilise the performance-based criteria that were introduced in the Cotonou Agreement. The issue of performance was brought to the fore in this Agreement, which allows for the reassessment of funding entitlements in light of human rights and political reform in the ACP countries following mid-term reviews and evaluations. It also indicates a move towards greater use of incentive-based positive conditionality as described in chapter three.

6. Conclusion on the Legacy of Human Rights in Development and the Experience of EU-ACP Development Cooperation

The position of human rights as a constituent and instrumental element of cooperation was consolidated in the Cotonou Agreement of 2000. The practical manifestation of

¹⁸⁸⁴ Ibid.

¹⁸⁸⁵ 'Voter's Voices,' 47 *Africa Confidential* 1 (January 2006), p. 10.

¹⁸⁸⁶ For example, the German Ambassador in Kenya, Mr. Bernd Braun, called for fresh elections before the end of the NARC government's mandate in December 2007. 'Envoy Calls for Snap Elections', *Daily Nation*, Monday, 12th December 2005. Source: 2006] The IMF suggested withholding budget support until the situation had normalised. 'Approval of Sh5.5bn IMF Aid Delayed,' *Daily Nation*, Friday, 16th December 2005.

human rights in development cooperation policy is visible at various levels through human rights conditionality, political dialogue and measures to promote human rights in the EU-ACP development. Whilst respect for human rights is not a precondition for accession to the Cotonou Agreement, the EU-ACP relationship is predicated on respect for human rights, which becomes the subject of regular political dialogue between the parties. Furthermore, a range of avenues is available to promote respect for human rights directly through technical and financial measures. The interrelationship between human rights and the wider political reform agenda can be seen through the practice of integrating human rights funding within the general institution building and good governance programmes. The broad-based support for governance reform is purported to be supplemented by ‘bottom-up’ funding to civil society both from EU-ACP financing and also from additional EU budget lines. Furthermore, human rights are promoted indirectly as cross-cutting themes in development strategies and also through the practice of mainstreaming human rights in ACP country strategies.

The shortcomings in the practical application of the EU-ACP’s commitment to promoting human rights as an objective of the partnership were exposed, particularly due to the low level of expenditure in this area and the failure to specifically earmark financial resources for human rights and related objectives. Furthermore, there was little evidence of synergy or complementarity between the broad-based support for human rights from the European Development Fund and the EU human rights budget line. This was largely due to the low level of funding available for EIDHR and the limited geographical scope of the thematic budget line. Whilst respect for human rights continues to provide the ‘rules of engagement’ for EU-ACP relations at a rhetorical level, the practical implementation of the EU’s commitment to promote human rights as a general objective of cooperation is less than rigorous.

The acknowledgement of the gap between rhetoric and practice is not a clarion cry for additional human rights funding or structural change within the EU with respect to the integration of human rights and development. Instead, these findings reflect the more

partial convergence of human rights and development at a global level as outlined in this thesis. Furthermore, the findings on the shortcomings of the active promotion of human rights should not overlook the fact that human rights continue to shape the character of EU development cooperation and relations between the EU and ACP states - albeit in a limited fashion and increasingly as part of a wider governance agenda.

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