Leading by Example: A Human Rights Agenda for the European Union for the Year 2000

Agenda of the Comité des Sages and Final Project Report

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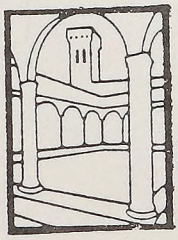

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Table of Contents

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This Agenda has been adopted by a Comité des Sages *consisting of:*

- ***Judge Antonio Cassese,*** *President from 1993 to 1997, and currently Presiding Judge of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia, and former President of the European Committee for the Prevention of Torture;*

- ***Mme. Catherine Lalumière,*** *Member of the European Parliament (and President of its ARE Group), and former Secretary-General of the Council of Europe;*

- ***Professor Peter Leuprecht,*** *Visiting Professor, University of Québec and McGill University, both in Montréal, and former Deputy Secretary-General and Director of Human Rights of the Council of Europe, and*

- ***Mrs. Mary Robinson,*** *United Nations High Commissioner for Human Rights, and former President of Ireland.*

A. Why the European Union Needs to Develop its Human Rights Policy

1. The European Union is committed to human rights. Its achievements to date are considerable, both within the Union and outside. Nevertheless, much remains to be done and the time for action is now.

2. A European Union which fails to protect and promote human rights consistently and effectively will betray Europe's shared values and its long-standing commitment to them. However, the Union's existing policies in this area are no longer adequate. They were made by and for the Europe of yesterday; they are not sufficient for the Europe of tomorrow. The strong rhetoric of the Union is not matched by the reality. There is an urgent need for a human rights policy which is coherent, balanced, substantive and professional.

3. There are many reasons why the European Union cannot remain without a comprehensive and effective internal human rights policy. They include:

- the rapid movement towards an 'ever closer Union' and towards a comprehensive single market;
- the adoption of a single currency for close to 300 million people;
- the increasing incidence of racism, xenophobia and ethnic hatred within Europe;
- the tendency towards a 'fortress Europe' which is hostile to 'outsiders' and discourages refugees and asylum-seekers;
- the growing cooperation in policy and security matters, which is not matched by adequate human rights safeguards;
- the increasingly complex political and administrative system that governs the Union and is supported by a bureaucracy with extensive powers; and
- the aspiration to bring at least five and perhaps as many as thirteen countries within the Union's fold in the years ahead.

4. These developments call for a Union which must be adequately equipped to protect and promote the human rights of all its residents.

5. Similarly, human rights must be a key part of the EU's policies towards the rest of the world. An integrated policy is essential for a European Union that:

- recognizes that respect for human rights among its neighbours and partners has an enormous impact on its own security;
- has been taught by history that respect for human rights is the only enduring foundation for building peace and harmony;
- is forging a common foreign policy, within which human rights must be a core element;
- has cooperation and other agreements with a vast number of other countries;

- plays a key role in many international organizations concerned with human rights; and
- spends well over a billion euros every year on development assistance and humanitarian aid.

6. The EU must conduct an informed, consistent, credible and effective human rights policy. But it cannot do so in the absence of an authentic commitment, one underpinned by appropriate political, financial and administrative support. Instead, the Union's present approach to human rights tends to be splintered in many directions, lacks the necessary leadership and profile, and is marginalized in policy-making.

7. The EU has devoted a great deal of energy and resources to human rights, both in its internal and its external policies. Yet the fragmented and hesitant nature of many of its initiatives has left the Union with a vast number of individual policies and programmes but without a real human rights policy as such.

B. What are Our Principal Objectives?

8. EU human rights policy should be guided by these objectives:

a. *Recognition of legal obligations*. Even the most minute actions on behalf of the Union should be conducted with full respect for human rights. EU Member States should always comply with their international human rights obligations, deriving both from treaties and general norms, as well as the policy commitments they have undertaken in the Vienna Declaration and Programme of Action. They should explore the extent to which their cooperation within the EU context provides opportunities to honour those obligations, both within and outside the Union as well as at the national level.

b. *Universality.* The EU should always uphold the principle that human rights are universal in nature and must be respected by all States and applied to all individuals.

c. *Indivisibility*. Civil and political rights cannot be separated from economic, social and cultural rights. All these rights are both a means of promoting the common good and ends in themselves.

d. *Consistency between internal and external policy.* These two dimensions of human rights must be seen as two sides of the same coin. A Union which is not prepared to embrace a strong human rights policy for itself is highly unlikely to develop a credible external policy, let alone to apply it with energy or consistency. As long as human rights within Europe are considered to be an area in which the Union has only a very limited role, their status in the Union's external policy will remain tenuous.

e. *A sound policy requires a strong information base.* Especially in this field, informed, consistent and transparent policy-making is impossible in the absence of accurate and up-to-date information. Yet the Union currently lacks any systematic approach to the collection of information on human rights, either within or outside Europe.

f. *Mainstreaming*. Human rights must not be put to one side as a separate or specialized concern. They should be an integral part of, and fully permeate, all the activities of the EU.

9. **Leading by example** must become the *leitmotif* of a new European Union human rights policy. If these objectives are respected, the EU will be well placed to provide such leadership.

C. What are Our Main Concerns?

10. There are many concerns which should be prominent on the European Union's human rights agenda. We call attention to some that seem especially pressing, but our list is not intended to be comprehensive.

11. Within the Union, large-scale discrimination persists in various forms. *Racism and xenophobia* are thriving. EU efforts to combat these phenomena should be broadened and reinforced. Important strides have been made in the quest for *gender equality*, but there is considerable scope for broader-based efforts to promote non-discrimination and equality in all of the relevant fields of Community law, including the internal market, the workplace, in access to education and training, in structural funds, and in public procurement. The promotion of gender equality and the fight

against racism and discrimination should also be accorded a higher priority in the EU's development cooperation programmes.

12. EU policy towards *persons with disabilities* should reflect a human rights-based approach which aims to eliminate barriers to full participation and equal opportunities within society. Protection of the *rights of members of minority groups* should also become a more prominent focus of the Union's policies, both internally and externally. *Discrimination based on sexual orientation* continues to be widespread and should be more systematically addressed through a Commission action plan and the development of a draft directive on equal treatment.

13. The need to combat *inhumane conditions of detention* should be an important element in the context of development cooperation. Unfortunately, it is also a growing concern within the EU, where it increasingly has a discriminatory racial and ethnic dimension as well. While prison conditions are not matters of Community competence, there is scope for the Union to encourage its Members to address this issue more systematically.

14. The quality of justice within the EU is inevitably, and rightly, judged in part by our response to the plight of *refugees* fleeing persecution. Yet within Europe we see pressures to shape asylum policy to accommodate nationalism and to weaken accepted international protection standards in the name of greater 'efficiency' or the need to meet 'new' challenges. Both the EU and the European Court of Justice must take seriously the explicit commitment in the Amsterdam Treaty to those standards.

15. There is much scope for improving the treatment of *third country nationals* within the EU. Consistent with appropriate measures to preserve law and order, xenophobia must not be permitted to curtail the enjoyment of the human rights of such individuals.

16. No human rights policy is complete in the absence of measures designed to ensure respect for basic *social rights*. Continuing large-scale unemployment, very high levels of youth unemployment, and growing poverty and social exclusion continue to blight the picture within the EU. The development and adaptation of the European social model, in response to new

trends, must be based on respect for human rights in general, and social rights in particular. In external policy as well, there is a need for far greater attention to social rights than has been the case to date.

17. The revolution being wrought by the emergence of the 'Information Society' must be shaped and regulated in accordance with human rights and the values that inspire them. This will require efforts to enhance democracy through appropriate uses of information technology, using that technology to build a more inclusive society and economy, and using appropriate forms of regulation to prevent abuses of that technology while ensuring freedom of expression. The EU's external policies should also seek to ensure that these new technologies are used to enhance the capacity of human rights defenders in third countries. The Union also needs to devote increased attention to the threats posed to human rights by breakthroughs in bio-technology and related developments.

18. Very valuable human rights initiatives have been promoted within the EU's development cooperation programmes and we welcome the development of the European Master's Course in Human Rights undertaken by a consortium of universities led by the University of Padua. Nevertheless, these initiatives remain limited in scope and human rights has yet to be fully integrated into the development programme as a whole. International aid flows are diminishing rapidly precisely at a time of great instability and widespread suffering and when many of the gains achieved since the early 1990s are at risk in a backlash against policies that have failed to meet expectations. The EU must continue to develop a comprehensive aid policy in which the promotion of human rights is a central element.

D. What Initiatives are Required to Achieve these Objectives?

19. Based on the many studies and analyses which have been prepared for our consideration in the context of this project, we have identified the following initiatives which we believe warrant urgent consideration. While many are institutional in nature, they are designed to provide the foundation stones upon which the human rights policies that we are calling for can be built and applied.

a. The Commission should appoint a Commissioner for Human Rights; he or she should play a central coordinating role to ensure that all Commission activities are consistent with, and contribute as much as possible to the realization of, human rights. By the same token, this approach must coincide with, and not be at the expense of, a systematic effort to mainstream human rights within all the services of the Commission.

b. The Council should establish a specialist Human Rights Office to inform the work of the new High Representative for the Common Foreign and Security Policy ('Monsieur PESC').

c. European Community law should be developed in such a way as to enable individuals and public interest groups alleging serious human rights violations to get more ready access to the European Court of Justice.

d. A European Union Human Rights Monitoring Agency, with a general information-gathering function in relation to all human rights in the field of application of Community Law, is essential. One option for this purpose would be to expand the existing European Monitoring Centre on Racism and Xenophobia in Vienna. Another is to establish a new and separate Agency.

e. Balanced and objective surveys of the human rights situation both within the EU and in the world at large are an indispensable basis for informed analysis and policy-making. The Commission, in consultation with the Council, should develop a global report for this purpose, while the new Monitoring Agency should develop such a report in relation to the EU and its Member States. Action would then be taken at whatever level is appropriate in light of the principle of subsidiarity.

f. The European Parliament should be seen as an important force for promoting respect for human rights by and within the Union. An effort should be made to reinforce the specialist human rights expertise available to the secretariat of the Parliament; better coordination should be sought between the Committee on Civil Liberties and Internal Affairs and the Sub-Committee on Human Rights of the Committee on Foreign Affairs, Security and Defence Policy;

and there should be greater interaction with the human rights committees in national parliaments. Parliament should strive to achieve a more coherent and better focused approach to human rights, with improved cooperation on the part of the Commission and the Council. The two annual reports we propose would provide an ideal basis upon which to build that approach.

g. Despite continuing reluctance, the Community should accede to the European Convention on Human Rights, even if this requires a Treaty amendment, as well as to the European Social Charter.

h. In addition to the work of the Council's Committee on Human Rights (COHOM), there should be greater interaction within the EU among Government Ministers with major human rights responsibilities.

i. The human rights aspects of the Commission's development cooperation programmes should be expanded, the details of those programmes should be made more transparent, and more systematic evaluations should be undertaken. Measures should also be taken to ensure that the Union is obliged to investigate allegations that specific development cooperation projects have had a negative human rights impact.

j. In view of the rapidly growing impact of non-State actors on the enjoyment of human rights, the Commission should evaluate existing voluntary codes of conduct and prepare a study on the ways in which an official EU code of conduct for businesses could be formulated, promoted and monitored.

k. The human rights clauses that are now included in over 50 Community agreements should be a standard feature of all such agreements. However, more detailed criteria, designed to balance consistency and flexibility in the application of those clauses, are required. Clear procedures for the suspension and termination of external agreements are also needed and the powers of the Commission and the European Parliament in this respect should be clarified.

l. The Commission should undertake a study of the procedures to be applied in considering whether to suspend

the rights of a Member State for a serious and persistent breach of human rights under the new provisions in the Amsterdam Treaty.

m. The various institutions of the Union should develop a more effective system of consultation with non-governmental organizations and should consider the possibility of establishing a permanent forum to facilitate more systematic and productive interaction with them.

n. Human Rights education should be given a high priority within the Union as a whole. Building a culture of mutual respect, understanding, and harmony represents a long-term challenge. Since it is a process that may take decades and even generations, the earlier it begins the better.

E. Do the Initiatives Require Changes in the Basic Legal Framework?

20. This Agenda is based upon policies and institutions that are already in place. We do not call for the recognition of new rights and the increase in resources required is not great. Very few of the proposals imply a Treaty amendment and we do not seek to alter either the existing institutional balance within the Union or the constitutional balance between the Community and its Member States.

21. Since legal sophistry is too often used to circumvent the need for an EU human rights policy, this Agenda is based upon a thorough and cautious legal analysis of the existing competences of the Union in this field. We reject the view that is sometimes expressed that the Community has, or should have, full authority with respect to all human rights matters of any significance. This view is out of touch with the legal and constitutional realities of the Union. However, neither do we accept the more commonly held, contrary view that human rights should be matters solely for Member States. The Union is already legally obligated to 'respect fundamental rights', including those guaranteed by the European Convention on Human Rights. And there are already many areas of major and direct human rights relevance in which the competence of the Community is unquestionable. The cross-cutting nature of these issues also justifies a prudent use of the powers inherent in

the Community under Art 308 (formerly Art 235) of the Treaty Establishing the European Community. Moreover, a Community human rights policy is not only consistent with the principle of subsidiarity, but is in some measure a necessity required by it.

22. Finally, there is absolutely no legal or constitutional barrier to the Union's common foreign and security policy taking full account of human rights. Indeed, the European Council has made precisely that commitment.

23. It is clear therefore that the existing legal competences of the Community and the Union are sufficient to support the proposals contained in this Agenda.

An Appeal to the European Council

As the century and the millennium draw to a close, we call upon the European Council to restore human rights to the central role they enjoyed at the dawn of the European construction: that of the cornerstone upon which the fabric of a united Europe must rest.

To renew this fundamental commitment, the European Union can no longer limit itself to grand philosophical statements. It must commit the political, legal, administrative and financial resources needed to fulfill this ideal. Otherwise, the European idea risks losing both its force and its main *raison d'être*.

We therefore call upon the European Council, meeting in Vienna exactly 50 years after the proclamation of the Universal Declaration of Human Rights, to:

1. Adopt a solemn statement confirming the Union's commitments to a human rights policy based on the principles and objectives outlined above.
2. Call for the appointment of a Human Rights Commissioner in the next Commission.
3. Request the Commission to prepare a detailed study, including budgetary implications, on the proposal to establish a fully-fledged European Union Human Rights Monitoring Agency. The study should be transmitted to the European Parliament by December 1999.

4. Call upon the Commission and the Council to study the Agenda of the *Comité des Sages* along with the Final Report of the Project and present their proposals in light of the recommendations made therein.

The European Union and Human Rights: Final Project Report on an Agenda for the Year 2000

Philip Alston and J. H. H. Weiler

This is the Final Report of the Project on the European Union and Human Rights. It is the principal reference document used by the Comité des Sages in the preparation of the Agenda. The authors of the Report are, however, solely responsible for its content.

THE EUROPEAN UNION AND HUMAN RIGHTS: FINAL PROJECT REPORT ON AN AGENDA FOR THE YEAR 2000

Philip Alston and J. H. H. Weiler

Table of Contents

TABLE OF EQUIVALENCES

(showing the numbering of Articles referred to in this *Report* before and after the Amsterdam Treaty)

Treaty establishing the European Community (TEC)		Treaty on European Union (TEU)	
New Article number in the Consolidated Version of the TEC	Previous number in the TEC	New Article number in the Consolidated Version of the TEU	Previous number in the TEU (Maastricht)
3	3	1	A
13	6a*	6	F
63	73k*	7	F.1*
137	118	49	O
141	119		
177	130u		
226	169		
227	170		
230	173		
234	177		
255	191a*		
286	213b*		
288	215		
308	235		

* Indicates that a new Article was introduced by the Treaty of Amsterdam

PREFACE*

A. Background

i. December 10, 1998 marks the 50th anniversary of the adoption of the twentieth century's most important proclamation of human rights, the Universal Declaration of Human Rights. The Universal Declaration of 1948 provided not only the inspiration but also the basis for the drafting of the European Convention on Human Rights, which was adopted less than two years later. Between them, the two instruments enabled the work of building a European community to proceed without a separate human rights foundation.

ii. To mark the beginning of the 50th anniversary year, the European Council, meeting in Luxembourg in December 1997, appealed to all States to step up their efforts in the field of human rights by:

- acceding to international instruments to which they are not yet party ...;
- ensuring more stringent implementation of those instruments;
- strengthening the role of civil society in promoting and protecting human rights;
- promoting activities on the ground and developing technical assistance in the area of human rights;
- strengthening in particular training and education programmes concerning human rights.[1]

iii. Although seemingly directed at other States, it goes without saying that such a programme applies as much, if not more, to the

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* The authors are deeply indebted to the members of a Drafting Group which discussed both the outline and many of the details of this Report. It was composed of two members of the *Comité des Sages* - Madame Catherine Lalumière and Professor Peter Leuprecht - and Professors Gráinne de Búrca, Andrew Clapham and Bruno de Witte, Mr Michael O'Boyle, and two members of the Project Staff, Ms Mara Bustelo and Mr James Heenan. They are not, however, responsible for the content of the *Report*.

1 Conclusions of the European Council meeting of Luxembourg, December 1997, Annex 3 with the Title 'Declaration by the European Council at the Beginning of the Year of the Fiftieth Anniversary of the Universal Declaration of Human Rights', *Bulletin of the European Union 12-1997*, point I.21, para. 6.

European Union and its Member States. In order to underscore that fact, and by way of marking the 50th anniversary, the European Commission funded a major project, of which the present *Report* is one result. The project was based at the European University Institute in Florence, under the direction of Professor Philip Alston. This part of the project consists of an *Agenda* and a *Report*. They are the culmination of a series of consultations with civil society, scholars, experts, Community officials and institutions, members of the European Parliament, non-governmental organizations, and other interested groups and individuals over the course of almost one and a half years. In addition, the other part of the project involved the commissioning of a range of scholarly analyses, the results of which were among the sources taken into account in the preparation of both of the documents contained in this booklet. Those analyses remain, however, an entirely separate part of the project. They are being published in separate volumes in English and French.[2]

B. This Report and the Comité des Sages

iv. This *Report* was one of the principal documents which was taken into account in the drafting of *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (referred to as 'the *Agenda*'). The members of the *Comité des Sages* – Judge Antonio Cassese, Madame Catherine Lalumière, Professor Peter Leuprecht, and Mrs Mary Robinson – are not, however, responsible for the contents of the *Report*.

C. What Distinguishes this *Report* from Previous Calls for Reform?

v. A considerable number of the specific recommendations made in this *Report* have previously been made by others. In particular, the European Parliament has long called, and continues to call, for major reforms, some of which follow lines similar to ours.[3] The European Commission has advocated a great many innovations, starting with its unsuccessful 1979 proposal for Community accession to the European Convention on Human Rights, and

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[2] See Annex IV for full details.

[3] See, in particular, Annual Report on Human Rights Throughout the World in 1995-1996 and the Union's Human Rights Policy, Rapporteur: Mrs Catherine Lalumière, Doc. A4-0400/96 of 28 Nov. 1996.

continuing until today. In a detailed examination of the Union's external human rights policy the Economic and Social Committee concluded that internal and external policies need to be closely linked, and it endorsed an extensive range of recommendations.[4] In addition, a range of expert groups focusing on specialized issues has reached similar conclusions about the need for human rights reforms. These include the 1996 Final Report by a *Comité des Sages*, chaired by Maria de Lourdes Pintassilgo, entitled *For a Europe of Civic and Social Rights*, and the 1997 Report of a High Level Panel on Free Movement of People, chaired by Simone Veil. Finally, reference may be made to an earlier set of proposals emanating from a project which was a predecessor to the present one and whose three directors (Antonio Cassese, Andrew Clapham and Joseph Weiler) have all been involved in this project.[5]

vi. What then is new about the present *Report*?

vii. In the first place, the situation has changed fundamentally in the past year or two. There are many reasons for this, as explained below. A failure to act now will have serious consequences, in a way which was not true even a relatively short time ago. The Union is indeed becoming 'ever closer'. A single market, a single currency, and the imminent prospect of a greatly enlarged Union, all have major human rights implications that can no longer be dealt with in a piecemeal fashion. Second, rather than focusing on either internal or external policies, this *Report* insists that only a unified approach embracing both dimensions of the Union's approach to human rights is viable. Thirdly, the *Report* presents a comprehensive and balanced package of reforms which pays very careful attention to the limits of what might be legally and politically feasible. Accordingly, it spells out in considerable detail the legal and political bases upon which the proposed programme can be implemented.

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[4] Opinion of the Economic and Social Committee on 'The European Union and the External Dimensions of Human Rights Policy', 97/C206/21 of 24 April 1997, OJ C 206/117.

[5] '1992 – What Are Our Rights?: Agenda for a Human Rights Action Plan', in A. Cassese, A. Clapham and J. Weiler (eds), *Human Rights and the European Community*, Vol. II (Baden-Baden, Nomos, 1991).

I. THE PARADOX OF THE EU'S HUMAN RIGHTS POLICIES

1. The human rights policies of the European Union are beset by a paradox. On the one hand, the Union is a staunch defender of human rights in both its internal and external affairs. On the other hand, it lacks a comprehensive or coherent policy at either level and fundamental doubts persist as to whether the institutions of the Union possess adequate legal competence in relation to a wide range of human rights issues arising within the framework of Community policies.

A. The Positive Side of the Balance Sheet

2. On the positive side of the balance sheet, a strong commitment to human rights is one of the principal characteristics of the European Union. The Amsterdam Treaty proclaims that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law'. By the same token, any Member State violating human rights in a 'serious and persistent' way can lose its rights under the Treaty. The European Court of Justice has long required the Community to respect fundamental rights and the European Council has issued several major statements emphasizing the importance of respect for human rights. Similarly, the Community has taken notable initiatives in a wide range of fields from gender equality to racism and xenophobia. It has also supported the development of an innovative and successful European Human Rights Master's Program, based in Venice and led by the University of Padua. Some of these developments are elaborated upon briefly below.

3. Thus, in diverse ways, the European Union has acknowledged that it has an important role to play in promoting respect for the human rights of its citizens and of all others resident within the Union and of ensuring that those rights are fully respected. This is so despite the fact that the Member States are, and will remain, the principal guardians of human rights within their own territories.

4. Equally, the Union is a powerful and uniquely representative actor on the international scene. It has the responsibility, reinforced by the capacity and financial resources, to influence significantly the human rights policies of other States as well as those of international organizations. In recognition of this

responsibility it has insisted that States seeking admission to the Union must satisfy strict human rights requirements Other governments wishing to enter into cooperation agreements with the Union, or to receive aid or benefit from trade preferences, must give an undertaking to respect human rights. If that undertaking is breached, serious consequences can ensue. It has adopted a number of declarations underlining the importance of human rights in its external relations and it has given substance to this approach by funding a wide range of development cooperation initiatives with major human rights components. It has sought to strengthen the capacity of civil society in many countries to protect human rights, has funded election monitoring and human rights monitoring, and has played an active role in support of human rights in multilateral contexts.

B. The Other Side of the Balance Sheet

5. Nevertheless, despite the frequency of statements underlining the importance of human rights and the existence of a variety of significant individual policy initiatives, the European Union lacks a fully-fledged human rights policy. This is true both in relation to its internal policies and, albeit to a lesser extent, its external policies. Some of these shortcomings are noted below. To date, in relation to its internal human rights situation, the institutions of the Community have succeeded in cobbling together a makeshift policy which has been barely adequate, but by no means sufficient. In the future, this approach will be unsustainable, increasingly ineffective and ultimately self-defeating. In relation to its external policies, the irony is that the Union has, by virtue of its emphasis upon human rights in its relations with other States and its ringing endorsements of the universality and indivisibility of human rights, highlighted the incongruity and indefensibility of combining an active external policy stance with what in some areas comes close to an abdication of internal responsibility. At the end of the day, the Union can only achieve the leadership role to which it aspires through the example it sets to its partners and other States. Leading by example should become the *leitmotif* of a new European Union human rights policy.

6. The paradoxical nature of the Union's human rights policies may be illustrated by reference to two events of recent months. The first is the final statement adopted by the European Council at

Cardiff in June 1998. Its content reveals the ease with which human rights can be rendered almost invisible in major declarations of EU policy. The phrase 'human rights' is used once in the space of 97 paragraphs, spread over 16 pages. In that reference, the Council 'calls on Indonesia to respect human rights' in relation to East Timor (para. 93). Even the word 'rights' appears only twice in the entire document. The first time it is used to laud President Nelson Mandela 'as an example to champions of civil rights'. The second reference is to the 'single market rights and opportunities' of 'citizens and business'. It is true that the virtual absence of references to human rights stands in contrast to the Council's Declaration at Luxembourg in December 1997 when it marked the beginning of the year of the 50th anniversary of the Universal Declaration of Human Rights with a 12 paragraph Annex. The latter, however, focused almost exclusively on the external relations dimensions of the issue. In any case, human rights should be a consistent and prominent theme in all such declarations.

7. The second event was a ruling by the European Court of Justice on 12 May 1998 [6] which threw into doubt the legal basis for much of the funding provided by the Commission for human rights and democracy-related activities. Among the results of the Judgment are the freezing of a very considerable number of projects, the urgent need to consider draft Regulations concerning the EU's external human rights policies, and increased awareness of the entirely unsatisfactory legal basis for many of the activities needed to monitor and promote respect for human rights within the Union.

8. The time has come, therefore, for the Union to meet its responsibilities and to develop a comprehensive, coherent, balanced and forward-looking human rights policy. This *Report* amplifies the considerations which such a policy should take into account.

C. Internal and External Policies as Two Sides of One Coin

9. Human rights are all too often assumed to be primarily matters arising in a country's external relations rather than its internal affairs. The project from which this *Report* has resulted began

[6] Judgment C-106/96, *United Kingdom v. Commission*.

with a strong focus on the role of human rights within the external relations of the European Union. It quickly became apparent, however, that the internal and external dimensions of human rights policy can never be satisfactorily kept in separate compartments. They are, in fact, two sides of the same coin.

10. In the case of the Union, there are several additional reasons why a concern with external policy also necessitates a careful consideration of the internal policy dimensions. Firstly, the development and implementation of an effective external human rights policy can only be undertaken in the context of appropriate internal institutional arrangements. Secondly, in an era when universality and indivisibility are the touchstones of human rights, an external policy which is not underpinned by a comparably comprehensive and authentic internal policy can have no hope of being taken seriously. Thirdly, as the next millennium approaches, a credible human rights policy must assiduously avoid unilateralism and double standards and that can only be done by ensuring reciprocity and consistency. Finally, the reality is that a Union which is not prepared to embrace a strong human rights policy for itself is highly unlikely to develop a fully-fledged external policy and apply it with energy or consistency. As long as human rights remain a suspect pre-occupation within, their status without will remain tenuous.

11. Our analysis thus makes no fundamental distinction between the internal and external dimensions of the Union's human rights policy. To use a metaphor, it is clear that both must be cut from a single cloth. By the same token, it is perhaps prudent to acknowledge from the outset that this approach will not easily gain acceptance. There is an unfortunate, although perhaps inevitable, element of schizophrenia that afflicts the Union between its internal and external policies, or to put it differently between its First, Second and Third Pillars. The result is that very few officials concerned with the EU will be interested in this report as a whole. Instead, those concerned with external relations will focus solely on its implications in that domain, while their internal counterparts will adopt an equally narrow approach. Meaningful action will thus require that the Governments of Member States see beyond the narrow and compartmentalized concerns of different bureaucratic and political actors and embrace a vision

which recognizes the true place that human rights must come to occupy in the new Europe.

II. THE CURRENT SITUATION

A. How Adequate is the EU's Existing Approach to Human Rights

12. The Treaty of Amsterdam marked a significant step forward when it affirmed that the Union '... shall respect fundamental rights, as guaranteed by the European Convention [on Human Rights] ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. But it still remains for these solemn words to be matched by the same institutional, legislative and administrative follow-up which characterizes other areas. The failure to take adequate measures is particularly striking since the very same Treaty Article provides that '[t]he Union shall provide itself with the means necessary to attain its objectives and carry through its policies'.

13. Before examining what needs to be done, it is essential to understand the broader historical context within which these commitments were made in Amsterdam. Until the Treaty of European Union, signed at Maastricht in 1992, neither fundamental rights nor the concept of European citizenship had been recognized in the various Community treaties. Nevertheless, even before Maastricht, the Union did not come to the field of human rights with a blank sheet.

14. Despite the absence of any reference in the original constituent Treaties to the protection of fundamental human rights, the European Court of Justice began in the late 1960s to affirm that respect for such rights was part of the legal heritage of the Community. Measures incompatible with fundamental human rights were deemed to be unacceptable and judicial protection of those rights took root in the Community legal order.

B. Negative and Positive Approaches to the Integration of Human Rights

15. In essence this initial step was an example of negative integration. Whereas positive integration requires that affirmative

steps be taken to expedite the achievement of specified goals, negative integration confines itself to a prohibition of violations of the principle in question. But in this respect, the starting point was no different to that which was used in relation to foundational developments in other fields of Community life. It is instructive to take as an example the centrepiece of the Community, the creation of a Single Market through the establishment of the four fundamental economic freedoms: free movement of goods, services, capital and labour. There, too, the first step was the creation of an obligation of non-violation; a ban on measures which would compromise the key principles. And again the Court of Justice played an important role in interpreting these interdictions as legally enforceable duties. It is this approach which scholars have characterized as negative integration.

16. In these other fields it was not long before it became widely accepted that negative integration was insufficient to attain the agreed goals. It needed to be matched and complemented by positive integration. The result was the adoption of specific policies in the various economic fields designed to ensure that the common market place would become more than a series of legal prohibitions. It seemed self-evident that courts alone could not ensure the full attainment of the four fundamental economic freedoms. The political institutions had to play their role too. A wide range of major political initiatives followed.

17. In stark contrast, the move from negative to positive integration in the field of human rights has been far more problematic. Already in 1977 the political institutions of the Community jointly affirmed their support for the basic legal principle of non-violation contained in the jurisprudence of the Court of Justice. But in retrospect, it is now clear that what should have been no more than an initial political step has become a powerful presumption that Community political activity in the field of human rights should be largely confined to negative prohibitions rather than positive initiatives. Thus on the one hand, starting with the Single European Act of 1986, the commitment to respect for fundamental human rights has found an increasingly important place, with ever more ringing rhetoric, in the Treaties. On the other hand, however, attempts in the field of human rights to match the legal prohibition on violation with positive measures and a pro-active human rights policy have met with varying

degrees of success and in some occasions with resistance and hostility, principally from various Member States.

18. A few examples are sufficient to illustrate this inconsistency. In 1978 the Commission proposed to begin a process which would lead to the European Community's accession to the European Convention on Human Rights. The proposal was important not only for its symbolism, but also for a series of practical reasons. In particular, it would have sent the message that Community measures were subject to the obligations contained in the Convention and that if Community institutions, including the Court of Justice, were not vigilant, there would be a prospect of being found to be in violation by the Court in Strasbourg. The relevant provisions of the European Convention (especially the requirement 'to secure' the relevant rights, as Article 1 puts it) have long been interpreted as imposing both negative and positive obligations. But the proposal to accede was not taken up by the Council and the Member States. Attempts to revive the initiative two decades later also failed. The result is that the Treaty rhetoric affirms the normative commitment to the European Convention on Human Rights, but this commitment is not matched by political practice.

19. There are nevertheless, some important instances within Community law in which the need for human rights measures to go beyond the principle of non-violation has been understood. An inventory of Community activity in the field of human rights would not be negligible. In some cases such activity derives from specific legal bases to be found in the Treaty, where human rights and the objectives of creating a common or single market happen to coincide, at least in part. Such has been the case, for example, in the area of gender discrimination, where Community policies, though far from perfect, have made important contributions and have afforded a degree of protection going well beyond that which was available at the time within the Member States. But, as important as such examples are, they also serve to highlight the fact that in other areas of social policy there has been far less affirmative human rights policy, and in some cases almost none.

20. In the external relations field, on the other hand, an early emphasis upon linking human rights to sanctions, such as the suspension of aid or trade preferences, has been definitively replaced by a more pro-active emphasis on promoting the

development of democratic institutions, strengthening the rule of law, working through civil society, and both encouraging and funding specific human rights initiatives.

C. Institutional Arrangements

21. The institutional arrangements made by the Community in order to give effect to human rights policies have generally been inadequate, both in relation to internal and external matters. In the great majority of instances, the task has been left to entities with a very vague human rights mandate, reinforced by little expertise and even less interest. In a few isolated instances, however, and especially in relation to external policies, the Commission has established units with a specific mandate. They include Unit 2 of Directorate A of Directorate-General 1A, responsible for human rights and democratization; and Unit 4 of Directorate-General VIII responsible for the coordination of issues relating to the rule of law, fundamental freedoms, democratization and institutional support. These isolated units have achieved an enormous amount through the promotion of human rights activities in a wide range of areas.

22. But the complexity and fragmentation of the current arrangements are well illustrated by the composition of the 'Standing Inter-Departmental Human Rights Co-ordination Group' which sets the general guidelines for funding from the main external relations human rights budget (under chapter B7-70). The group is convened by DG I A and includes representatives from the Secretariat General, Forward Studies Unit, Legal Service, and from Directorates-General I, I A, I B, II, V, VIII, X, XI, XII, XIII, XV, XIX, XXII, XXIV, XXIII, and ECHO.[7] Even with respect to external relations alone, the regional breakdown of responsibilities among Commissioners means that five different Commissioners and their respective bureaucracies have central roles to play.

23. This dispersal serves to highlight the extremely unsatisfactory state of affairs in relation to responsibility for human rights matters within a very large institutional apparatus which boasts all too little specialist human rights expertise in this field. It is

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[7] European Parliament, *Report on setting up a single co-ordinating structure within the European Commission responsible for human rights and democratization (Lenz Report)*, A4-393/97, p.14.

important that the key human rights-related Units exist within Directorates-General IA and VIII. It is disturbing, however, that institutionally there is little more than that in any concerted sense. The result is that the Community landscape of human rights policies is not without some important positive features, but it is clearly fragmented, deficient in overall coherence and lacking in institutional leadership.

24. The recent decision of the European Court of Justice, in which it undercut the legal basis of the financial support given by the Community to a myriad of human rights agencies and activities, is emblematic.[8] It was a perfect display of the consequences of human rights activity without a coherent policy, of *ad hoc* action rather than the achievement of programmatic goals, of almost intentional constitutional ambiguity towards human rights, of the wilful lack of clarity as regards Community competences and jurisdiction, and the embarrassing realization that in this field the Community has had to act by stealth and questionable constitutional means. In a perverse way the decision has had a positive impact in so far as it has drawn both public and official attention to the fact that the existing approach is in crisis and in need of major reform.

25. That decision also underscores that the European Court of Justice, no matter how carefully it may be attuned to the need to ensure full respect of fundamental rights within the Community legal order, cannot make up for the absence of the necessary legal and policy commitments on the part of the other institutions.

D. Excessive Reliance upon Judicial Remedies

26. Overall, human rights policy within the Community continues to rely far too heavily on the premise that equipping individuals to pursue existing Community legal remedies (both at the national level and through the possibility of references to the European Court of Justice) is, for the most part, not merely sufficient but is even an effective mechanism to guarantee that rights will not be violated within the Community legal space. We challenge this implicit understanding. Judicial protection at the instance of individuals is an important, even foundational, dimension of an

[8] See note 6 above.

effective human rights regime. But while it is necessary, it is not sufficient. Effective access to justice requires a variety of policies that would empower individuals to vindicate the judicially enforceable rights given to them.[9] Ignorance, lack of resources, ineffective representation, inadequate legal standing and deficient remedies all have the capacity to render judicially enforceable rights illusory.

27. In our view, therefore, too much faith is placed by the Community in the power of legal prohibitions and judicial enforcement. The gap between the political rhetoric of commitment to human rights and the unwillingness to provide the Union with the means to make that rhetoric a living reality have only served to underscore the inadequacy of the excessively judicially-focused strategy of negative integration in relation to human rights. To pretend at the end of this century that human rights and dignity can be guaranteed to all those, especially the weakest in our society, who need them by simply affirming the principle of respect or even by rendering Community and Union measures which are incompatible with human rights putatively illegal if challenged before Community Courts, is a position which, at best, is overly complacent.

E. An Inadequate Information Base

28. The inadequacy of the Union's approach to human rights is made possible in part by a knowledge and monitoring gap. The United Nations bodies responsible for supervising States' compliance with their international human rights obligations have consistently emphasized that effective monitoring systems are an indispensable foundation upon which domestic human rights policies must be constructed. While there is a great deal of unsystematic information which suggests lacunae and gaps in the vindication of human rights in the field of application of Community law, no observer can have a comprehensive picture in this regard because there is no agency which is empowered to provide or collect such information in a regular, ongoing and systematic fashion. As a result, the Community lacks the necessary information base upon which it should make decisions as to the identification of legislative and policy priorities and the

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[9] These are addressed in paras. 147 and 175-184 below.

allocation of administrative and budgetary resources in the field of human rights.

29. A similar vacuum exists in relation to external relations. The absence of any systematic approach to monitoring and reporting has frequently been remarked upon, whether by the Parliament, the Economic and Social Committee, non-governmental organizations involved in EU matters or outside experts. The consequence is that the various policy-making and review exercises undertaken by the different institutions within the Union are based upon inadequate, uneven and above all unreviewable data and analysis. The resulting situation is unsatisfactory from the point of view of the institutions themselves, of third countries who should know the basis upon which an EU evaluation of their performance has been based, and of civil society whose informed capacity to scrutinize is an indispensable element in a consistent, coherent, transparent and well-supported human rights policy. If human rights are to be given their due in the context of the Second and Third Pillars, transparent reporting, based on objective and systematic monitoring, is essential. The availability of such reports would also have the capacity to increase considerably the effectiveness of the role played by the Parliament.

30. What is needed are not isolated initiatives – a data-base here, a new report there – nor even greater transparency; rather, a fundamental rethinking of the entire Union posture in this area is required.

III. WHY DOES THE EU NEED A NEW HUMAN RIGHTS POLICY?

31. The call for a new human rights policy derives both from an assessment of the current internal situation and from the particular historical context in which the Union finds itself. It must be emphasized, however, that the need for such a policy is far greater now than it was, even in the recent past. We discuss elsewhere in this report[10] the judgment of the European Court of Justice of 12 May 1998, which has highlighted the disarray of important aspects of existing policies. Other current developments within the Union, in Europe as a whole, and in the world at large,

[10] See paras. 7 and 113.

also make it imperative for action to be taken now. This is demonstrated by a variety of factors, including those noted below.

A. The Internal Human Rights Situation

32. Neither the conclusions drawn in this *Report* nor the recommendations made are driven primarily by a sense that there are systematic violations of human rights occurring within the Union which remain entirely unaddressed. But, by the same token, there clearly are many human rights challenges which persist and to which greater attention must be given. This is clear from a wide range of sources, including various reports by the European Parliament, by the European Commission, and by non-governmental groups such as Amnesty International and Human Rights Watch. It is not the intention of the present *Report* to replicate that information or to dwell on the details of the violations that persist. Suffice it to note that they include a resurgence in racist and xenophobic behaviour, a failure to fully live up to equality norms or to eliminate various types of discrimination, major shortcomings in the enjoyment of economic, social and cultural rights of disadvantaged and vulnerable groups, unsatisfactory treatment of refugees and asylum seekers, inhumane and degrading treatment of detainees, and so on.

33. Although it is not for the institutions of the Union to take it upon themselves to seek to resolve these problems, it can equally well not stand passively by and chant the mantra of exclusive individual Member State competence while taking no steps to contribute to an improvement of the situation. In short, the Union must have a human rights policy, albeit one that takes appropriate account of the various principles upon which it has been established.

B. The EU's Role in the World

34. The European Union is a key player in world affairs. It has close to 7 per cent of the world's population and almost as many people as the USA and Japan combined. It accounts for 27 per cent of the world's Gross Domestic Product, almost one-fifth of its trade flows and well over half of the total official development assistance flows to developing countries. While it is true that these figures are only the aggregate of 15 different sets of

national statistics, the Union's determination to be more than the sum of its parts is reflected in a wide range of treaty commitments, policies and programmes. Along with the power and influence that these statistics represent comes responsibility. The Union cannot be a credible defender of human rights in multilateral fora and in other countries (as it has long sought to be) while insisting that it has no general competence of its own in relation to those same human rights.

35. Thus, for example, the EU strongly supports UN measures to persuade governments to establish national human rights institutions, but it does not have such an institution itself and nor has it encouraged its own Member States to establish them. To take another current example, the Union adopted, in May 1998, a 'Common Position on Human Rights, Democratic Principles. the Rule of Law and Good Governance in Africa', which proclaimed its objective of working 'in partnership with African countries to promote respect for human rights' and the other stated objectives. There is, however, no equivalent policy which commits the EU to work actively within Europe in relation to human rights. The need to end this double standard can perhaps best be expressed in biblical language by noting that, if it is to be consistent and have credibility, the EU must do unto itself as it would have others do unto themselves.

36. In short, as Europe finds itself increasingly playing a major role in world politics, the commitment to human rights, democracy and the rule of law will acquire not simply a greater urgency but will require a much more coherent and consistent policy towards other countries.

C. Monetary Union

37. The Union is poised to realize Economic and Monetary Union. Hesitatingly, but steadily, the matching of Europe's external political presence with its internal economic might is occurring. Already from 1 January 1999 EMU will bring a single currency to some 290 million people. Its economic and political significance to the entire Union cannot be overestimated. But it is no secret that, even among the enthusiasts, expectations have been mingled with anxiety and even fear. In part this is fear of the unknown and anxiety over the need to re-imagine oneself as part of a new

economic polity. Inevitably the increased economic freedoms of an economic and monetary union make each individual feel smaller and fear the impact on his or her daily activities, especially since EMU is associated with a monetary discipline which poses a particular challenge to the tradition of human solidarity that has characterized the European approach to social and economic policy. It would be appropriate, precisely at this moment of EMU-propelled monetary rigour, to find equally visible and tangible ways to affirm the European humanist tradition.

38. There is something terribly wrong with a polity which acts vigorously to realize its economic ambitions, as it clearly should, but which, at the same time, conspicuously neglects its parallel ethical and legal obligations to ensure that those policies result in the fullest possible enjoyment of human rights.

D. Enlargement

39. Eventual enlargement towards Eastern Europe will create the world's largest trading bloc and zone of economic liberty. At present, five new members look very likely and in the longer term the number may be as high as thirteen countries. To many, enlargement is a moral imperative. And rightly so. But it will not come without costs – and our concern is not simply or primarily with economic costs. Enlargement inevitably means a further diminution in the sense of importance felt by each individual within the polity. As the Union widens and the machinery of governance grows more complex, the sense of individual alienation, of despair at being able both to influence decision-making and understand its rationale, will correspondingly deepen. 'European citizenship' must not become a beautiful phrase devoid of meaningful tools for individual empowerment. Moreover, the challenges posed by enlargement are not only structural or size-related. With enlargement, the Union will be importing a new set of unresolved minority issues as well as additional human rights challenges, whose solutions will test the strength of many Community policies.

40. In some respects the Union has looked ahead to this prospect. Articles 6(1) and 49 TEU together provide that only a European State which respects the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law

may apply to become a member of the Union. A procedure has also been introduced for the suspension of the rights of Member States in case of a 'serious and persistent breach' of these principles (Article 7 TEU). But such policies and procedures look very strange alongside the Union's continuing insistence that it cannot itself have an overall policy to promote human rights within the Union. Now is the time to act to remedy this deficiency. The motivation of action taken only after the enlargement process has borne fruit will be suspect and a strong policy will be much more difficult to achieve at that late stage.

E. Globalization

41. The globalization of the world economy, coinciding with the acceleration of measures to consolidate the European advanced market place, gives rise to a variety of additional human rights-related challenges. Some of these are linked to the diminishing capacity of individual governments to deal adequately with certain problems, either because of the increasingly transnational character of the problem or because of the pressures on governments themselves to 'downsize'. Other challenges arise in relation to the new information technologies which are the engine for much of the thrust towards globalization. Issues of privacy and equal access are the most visible of what a new generation of rights must address.

42. Likewise, the breakdown of traditional distinctions between trade in goods and services, between information and entertainment, between the commercial and material and the cultural and spiritual, highlight the need to rethink the compartmentalized ad hoc approach to rights which hitherto has characterized the Union's approach. These developments call for new and innovative thinking and approaches, which in turn will inevitably require a significant component of EU-level implementation. In addition, globalization has been accompanied by significant growth in the importance of non-governmental groups and coalitions whose activities and influence transcends the borders of even strong regional groupings of States.

F. The Third Pillar

43. As the Community assumes far greater administrative and legislative responsibility in relation to Justice and Home Affairs, the need to assure, at the Community level, the rights of those affected by this new jurisdiction becomes more pressing. As long as responsibility in these areas was kept almost entirely outside the competence of the Community, the absence of a strong human rights policy in relation to those matters was defensible. As cooperation develops and the Community moves towards assuming considerably expanded powers, a parallel human rights policy must be seen as an indispensable counterpart.

G. The Amsterdam Treaty

44. The Treaty of Amsterdam of 1997 introduced a number of elements which require the development of a new human rights policy:

- The Treaty now provides for the first time that the EU is founded on the principles of liberty, democracy, human rights and the rule of law. It would be odd if this innovation were to have no significant policy implications and were instead to be treated as a mere rhetorical flourish.

- The Treaty requires the Court of Justice, in so far as it has jurisdiction, to apply human rights standards to acts of Community institutions. The fact that these institutions are now subject to judicial scrutiny in a more structured way than was possible before should surely prompt careful reflection as to what steps could be taken to ensure not only compliance but the active promotion of respect for human rights.

- Amsterdam significantly expands the Community's powers to take appropriate action to combat a wide range of forms of discrimination. Given the problems that remain to be overcome in this area it is inconceivable that new policies will not be needed. The broader human rights context of any such policies should be clearly recognized.

- The Third Pillar reforms dealing with police and judicial co-operation in criminal matters require significant accompanying initiatives in the human rights field.

- As also noted above, the Treaty introduces the possibility of suspending the rights of a Member State for human rights breaches. That provision cannot be permitted to remain a dead letter. Consideration must be given now to the procedures which will be followed in such an event.

45. In summary, although there is just cause for satisfaction with a Europe which is taking formidable steps to realize its aspirations, two hard and discomforting truths must also be faced. First, current policies such as monetary union, enlargement, and ever greater engagement with the global economy pose new threats, and create new challenges, to the European commitment towards the safeguarding of fundamental human rights. Second, public opinion is deeply ambivalent towards some of the principal developments within the Union. A cleavage between the increasingly generous verbal affirmation of commitment to human rights without matching the rhetoric with visible, systematic and comprehensive action will eventually undermine the legitimacy of the European construct. In the pursuit of this grand design that is the European Union it is essential to keep constantly in mind the centrality of the individual – the men and women of whom and for whom ultimately Europe is made.

IV. OBJECTIVES OF THE PROPOSED NEW HUMAN RIGHTS POLICY

46. The preceding parts of this *Report* have briefly assessed the EU's existing approach to human rights and examined some of the factors that underscore the need for a new human rights policy. Before developing specific policy proposals it is instructive to begin by clarifying the objectives that such a policy should be designed to meet.

47. Without going into the specific details, which are developed later in this analysis, the following should be the principal characteristics of a new policy:

i Acceptance of the fact that there is a need for a comprehensive and coherent EU human rights policy based on a clarification of the constitutional ambiguity which

currently bedevils any discussion of Community action in this field;

ii The development of more consistent linkages between internal and external policies and the promotion of greater interaction and complementarity between the two levels;

iii The establishment of detailed, systematic and reliable information bases upon which the various actors (including Member States, the Commission, the Council, the European Parliament and civil society) can construct integrated, calibrated, transparent and effective policies;

iv The development of a pool of knowledgeable and experienced personnel with the necessary technical and policy-making expertise in human rights, thereby overcoming the current dispersion of human and financial resources, especially within the Commission;

v The promotion of more effective coordination among the many Community actions, programmes and initiatives already being undertaken in the field of human rights by different Commission services so as to achieve a more coherent whole and so as to prevent duplication in this field;

vi Changing the human rights culture of the Community legislative and administrative apparatus – in the way that has to some extent now been achieved in the field of environmental protection and, more recently, in relation to subsidiarity;

vii The elaboration of policy approaches which bring the human rights dimensions of action under each of the three Pillars into closer alignment, while respecting the key differences in terms of Community competence, financing, and decision-making processes;

viii Enabling the European Parliament to play a more effective role in shaping human rights policy through giving it greater and more assured access to reliable information and enhanced opportunities to interact constructively with the Council and Commission;

ix Increasing the accessibility of existing avenues for judicial vindication of human rights both through national courts and through the European Court of Justice, as well as through the development of the new judicial opportunities provided for in the Amsterdam treaty;

x The identification of new policy options designed to ensure that the culture and methodology of human rights are able to adapt and respond to the needs of a rapidly changing political and economic environment;

xi Creating opportunities for more sustained consultation with non-governmental organizations, as well as civil society in its broadest sense, in all aspects of EU policy-making and, where feasible, in the implementation of those policies;

xii Strengthening the coherence and unity of external human rights policies through the development of more principled, predictable and transparent procedures and criteria in relation to aid and its suspension;

xiii Ensuring a more effective EU role in influencing, shaping and acting as a catalyst to achieve, where appropriate, greater respect for human rights among some of the Union's interlocutors and partners, including within multilateral fora;

xiv Facilitating a more principled and consistent European policy in response to serious violations of human rights among interlocutors and partners. Such a policy would also relate to third countries which are not covered by the two new proposed Community Regulations.

xv Being in the vanguard of efforts to provide effective and more assured flows of humanitarian assistance, combined with an appropriate emphasis upon human rights;

xvi Supporting the work of other international institutions, particularly that of the United Nations High Commissioner for Human Rights, the United Nations High Commissioner for Refugees, the Council of Europe and the OSCE.

V. TOWARDS A NEW APPROACH

A. Rethinking the Tasks and Institutions

48. There is no shortage of criticism that has been directed at the existing approach. It has been variously described by its critics as piecemeal, ad hoc, inconsistent, incoherent, half-hearted, uncommitted, ambiguous, hypocritical, and so on. Indeed, we use some of these terms ourselves elsewhere in this *Report* in relation to specific policies.

49. Nevertheless, it must be emphasized that the existing policies, in their totality, are *not* misconceived, misguided or wholly inadequate. In fact, it is *not* necessary for there to be a radical departure from the policies that are currently in place. On the contrary, in many respects existing arrangements provide an appropriate basis upon which to construct the new, much-needed policy.

50. Stated differently, most of the important pieces of the jigsaw puzzle that are required to make up an EU human rights policy already exist in a recognizable form. What now needs to be done is to put them in their correct places and to provide the glue that is indispensable for holding them together as part of a single picture.

B. What the Proposed New Policy is *Not* About

51. As a prelude to identifying the principal elements for a new policy, it is appropriate first of all to emphasize what the policy is *not* about. Thus, the proposed new policy:

- is not premised on the need to recognize new rights;
- does not depend upon future amendments to the Treaty;
- will not significantly alter the existing institutional balance within the Union;
- does not imply any major realignment in the relationship between the Community and the Member States; and
- is not dependent upon a major increase in available resources.

52. While some changes of this nature might be desirable at some stage in the future, none of them is essential for the implementation of the principal parts of the package that is proposed below.

C. Moving towards New Institutional Roles

53. The institutional dimension of the proposed human rights policy is based on the assumption that, if it is to be credible,

consistent and effective, such a policy must engage all Community and Union institutions to the extent of their legislative and executive constitutional roles. By the same token, it is in the exercise of those very roles that human rights deficiencies may often occur. There would be an in-built conflict of interest if both supervisory and executory functions were assigned to the EU institutions. They are designed to be the guarantors of human rights, but they are also potential violators. This is a tension that has to be resolved.

54. The classic model of assigning exclusive supervisory functions to the European Court of Justice is inadequate in itself. Such a court can be an effective guarantor of human rights once cases are brought before it. But, as mentioned, the underlying theme of this analysis is the need to go beyond the model of reliance upon self-help by affected individuals who must invoke judicial protection. Thus, the supervisory function requires pro-active monitoring designed to detect areas of human rights concerns.

55. What is needed therefore is an institutional model which rests on the development of three already existing foundations. This model should consist, in essence, of:

i the establishment of a clear set of executive functions to be exercised by the Commission through the creation or designation of a Directorate-General with responsibility for human rights, to be headed by a separate Member of the Commission;

ii the development of a monitoring function to be achieved through the creation of a new agency or through a substantial expansion in the scope and power of the existing European Monitoring Centre on Racism and Xenophobia in Vienna; the latter should be transformed into a veritable Monitoring Agency, with monitoring jurisdiction over all human rights in the field of application of Community Law; and

iii the development of a specialist human rights unit within the functions already envisaged to be performed by the new High Representative for the Common Foreign and Security Policy.

56. In addition, as part of such a changed institutional framework, all other institutions of the European Union should be called upon

to enhance their human rights functions and sensibilities. In subsequent parts of the *Report* we amplify on this basic institutional set up.

57. It must be emphasized, however, that to a very large extent these proposals are part of a single coherent and integrated package of measures designed to reflect a new human rights policy. The adoption of one or two elements, accompanied by neglect of the others, will not achieve the desired overall result. There is a synergy within the various institutional proposals which is especially important. To take but one example, the Parliament needs to have a Commissioner and a specialized Directorate-General as interlocutors and to benefit from a more elaborate and sophisticated common foreign and security policy (CFSP) human rights framework if it is to be able to develop its own role to the extent that we, and the Parliament itself, deem desirable.

VI. LEGAL AND CONSTITUTIONAL ASPECTS OF A NEW POLICY

58. The first essential element in building a new EU human rights policy is to establish that such a policy lies within the constitutional competence of the Community and that it would not violate important principles such as that of subsidiarity.

A. Competences

59. The need for a comprehensive human rights policy seems so compelling that it will be very difficult for an outside observer to understand why such a policy has not already been adopted. There are many reasons. Principal among them is the issue of competences. Yet the proposal for a significantly expanded human rights policy would be either naive or fraudulent if the Community and Union lacked the legal competences to enact it.

60. The Treaty did not, and still does not, even after the measures introduced in Amsterdam, list human rights among its objectives. Opposition to a human rights policy, to accession to the European Convention on Human Rights, to the drafting of a Community 'Bill of Rights', and to a range of other policy proposals which have failed to gain acceptance over the years can all be explained in large measure by a concern that the Community lacks any

significant constitutional competence to deal with all but a very circumscribed range of human rights matters. Underlying this concern is a fear that allowing the Community to move beyond a policy of not violating human rights would lead it to encroach on areas which are outside its jurisdiction and should be reserved to the Member States. Those who hold this view would argue that the potential reach of human rights policies is almost unlimited. And it is true that human rights do directly affect all activities of public authorities and, depending on their definition, also touch upon many areas of social activities of individuals. The fear is that empowering the Community in the field of human rights would be an invitation to a wholesale destruction of the jurisdictional boundaries between the Community and its Member States. It would be ironic if a proposed new policy, whilst motivated by the desire to vindicate fully the values represented by human rights, trampled over the equally important democratic and constitutional principles of limited governance and attributed powers.

61. The issue of competences is of particular importance in this context, not only because of the extent to which it has underpinned the resistance to an EU human rights policy on the part of some States but perhaps more importantly because it has been the preferred excuse invoked by those who do not want such a policy for very different reasons. Those reasons range from a simplistic belief that the Union can and should confine itself to a narrow range of economic aspects of integration to a more general sense that human rights just get in the road of efforts to build a strong and wealthy new Europe. Whatever the motivation, it seems to us to be essential to put the issue of competences into perspective so that the debate over the real issues can move ahead.

i. Rejecting Extreme Positions

62. Earlier debates about a human rights policy for the Community seemed to oscillate between two, equally untenable, poles. There were those, including in some contexts the Commission, who seemed to believe that the commitment to ensure respect for human rights gave the Community a plenary jurisdiction in this area. Certainly, many suggestions by non-governmental groups have tended to reflect such an assumption and to dismiss arguments to the contrary as being driven by anachronistic

concerns to protect State sovereignty. The opposite extreme would suggest that human rights are matters which are almost by definition reserved exclusively for action by the Member States. In this vein, the Council, whilst acknowledging a certain competence in the field of international co-operation and development, has consistently held that a general Community human rights policy, especially one impinging on action by and in the Member States, was outside the legislative jurisdiction of the Community.

63. In fact, both of these extreme positions are wrong. Neither the Community nor the Union have a plenary human rights jurisdiction in the way that Member States have. However, it is clear that, within carefully delineated boundaries, the Community and the Union do enjoy the necessary jurisdiction to enact a comprehensive and meaningful policy.

ii. Human Rights as Cross-cutting Concerns

64. It is instructive, by way of analogy, to consider some of the areas in which the Community has assumed exclusive competences, such as major aspects of the Common Commercial Policy, of the Common Agricultural Policy (which often implicate rights to property) or of the Single Market concerning the free movement of labour. It seems self-evident that in those areas it is only the Community which could reasonably be considered to be the custodian of human rights – in the same way that the Member States are custodians of human rights in the vast areas of State jurisdiction, like criminal law, which are largely outside Community jurisdiction.

65. It is true that Europe has evolved what is probably the most sophisticated system of judicial protection of human rights involving both the domestic constitutional orders of the Member States and the European Convention system. Each of these has its unique characteristics that must be preserved and allowed to play its rightful role. But there are also aspects of European Community activity which are not subject to effective human rights control at these levels. Given the consistent expansion of Community responsibilities, it becomes all the more imperative that they be accompanied by necessary measures, at the Community level, to ensure the protection of human rights.

66. But human rights principles, which impinge upon such a wide and vitally important array of policies at all levels, cannot simplistically and definitively be slotted in a single pigeon hole. Instead, they must be considered to cut across all levels of national and transnational governance and regulation and each level must be enabled to play its appropriate part. This includes, on the one hand, the United Nations and the Council of Europe with their array of human rights treaties and other instruments and, on the other hand, NGOs, other groups and individuals, and of course everything that comes in between.

67. A useful analogy in the context of Community Law is the issue of privacy and data protection. This is a classic cross-cutting issue with multiple dimensions which do not fall easily within either the exclusive competence of the Community or that of the Member States. That ambiguity, however, did not prevent the Amsterdam Treaty from providing that all Community institutions would be bound by the relevant privacy principles; nor did it stop it from setting up 'an independent supervisory body' to monitor compliance.[11]

68. The Community should aim to create what might be termed a 'Common Human Rights Area' in which interlocking and overlapping levels of protection interact synergistically with each other.

B. The Legal Bases for a Human Rights Policy

69. It sometimes seems to be thought that the reasoning used by the European Court of Justice in its Opinion 2/94 on Community accession to the European Convention on Human Rights not only prevents such accession in the absence of a specific Treaty amendment, but also makes it virtually impossible to develop a general human rights policy unless it too were specifically authorized by a Treaty amendment. In our view, however, a Treaty amendment is not required in order to provide a legal basis, or legal bases, for the human rights policy we envisage. Such a policy would be perfectly consistent with the jurisprudence of the Court, including its Opinion 2/94. At no point in that Opinion did the Court suggest that the protection of human rights was not an

[11] Article 286 TEC.

objective of the Community, nor did it say that the Community lacked competence to legislate in the field of human rights. Because of the centrality of this issue, it seems necessary to devote particular and detailed attention to it.

i. Complying with the Interpretations of the European Court of Justice

70. In its jurisprudence, the Court has articulated three critical constitutional principles which inform this field. The first affirms that '... respect for human rights is a condition of the lawfulness of Community acts'. The second affirms that it is the positive duty of the institutions '... to ensure the observance of fundamental rights'. In other words, they are obligated not simply to refrain from violating them, but to ensure that they are observed within the respective constitutional roles played by each institution. Finally, the human rights jurisdiction of the Community extends only '...in the field of Community law'.

71. A Community Human Rights Policy must, therefore, not extend beyond the field of Community law. That boundary, like many other legal boundaries, is not always razor sharp. There are likely to be some hard cases. But that does mean that the vast areas of Member State action which fall outside the reach of Community law will be beyond the writ of a Community human rights policy. By contrast, all those areas which are regulated by the Community or come within the reach of Community law, can and should also be subject to its human rights policy.

72. Especially since the entry into force of the Single European Act, the question of the legal basis for Community legislation has become critical given the different political consequences of varying legal bases in terms of voting procedures and the role accorded to the European Parliament. What legal basis, then, could and should be used by the political institutions when exercising their duty to ensure the observance of fundamental rights in the field of Community law?

ii. The Specific Treaty Provisions

73. There are several potential legal bases, although attention is given below to only the the most salient.

74. The first is that governing action in a specific field. For example, the Community 'legislative branch' (the Commission, the Council and the Parliament) could, and in our view should, attach to any legislation it passes a 'human rights clause' dealing with matters such as transparency, the availability of information to interested parties, the possibilities open to those affected to launch an appeal, the availability of legal aid and the like. This would be consistent with the commitment in Article 1 of the EU Treaty to take decisions 'as openly as possible' and of new Article 255 of the EC Treaty providing for enhanced public access to Community documents. There are few areas of Community activity which cannot, negatively and positively, affect the fundamental rights of individuals and groups. In this way, the Community would consistently and routinely be affirming that it considers its legislative action to conform with its human rights undertakings and would make it possible for those who believe otherwise to take appropriate action.

75. In some fields, unchallenged Community competences which underpin legislation also coincide with a classic fundamental right – such as the right to freedom of movement, access to employment and Article 141 TEC establishing the principle that men and women have the right to receive equal pay for equal work and for work of equal value. In other fields, the importance of fundamental rights is specifically mentioned – such as in relation to the provisions dealing with Cooperation and Development (Article 177 TEC). Similarly, under Article 13 TEC as introduced by the Amsterdam Treaty, 'the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation'. Indeed, such measures were taken even prior to the enactment of that Article, on the basis of existing non-discrimination provisions, such as in the case of the Broadcasting Directive. Article 13 is especially significant since the right to non-discrimination and the duties that flow from that right are at the core of a great number of other human rights and thus provide a broad foundation upon which to build a human rights policy.

76. An appropriately broad human rights policy cannot, however, be constructed entirely on the basis of individual provisions of this

type. As is the case in a great many areas of Community activity, certain measures would have to cut across several fields, in the sense that they have implications for a broad range of horizontal and institutional matters. In relation to these, a prudent usage of Article 308 would be permissible.

77. Because this provision was a central focus of Opinion 2/94 of the European Court of Justice it is necessary in this context to explore whether our conclusion is compatible with the view expressed by the Court. In its Opinion the Court noted that:

> No Treaty provision confers on the Community institutions any general power to enact rules on human rights ....

78. This then led the Court to ask whether, in the absence of such express or implied powers, Article 308 could provide the necessary legal basis. It defined the function of the Article thus:

> Article 235 [new Article 308] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

79. In considering whether that Article could then be used as a basis upon which to proceed with Community accession to the European Convention on Human Rights, the Court concluded in the following terms:

> That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 [new Article 308] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.

80. What then are the implications of this reasoning for the proposal that the Community should adopt a human rights policy which relies, by no means exclusively but at least in part, on Article 308? In our view it is clear that such a policy would be in conformity with the Court's reasoning provided that it:

- does not entail the entry of the Community into a distinct international institutional system;
- does not modify the material content of human rights within the Community legal order; and
- does not have fundamental institutional implications.

81. In other words, a Community human rights policy which respects the current institutional balance and which scrupulously remains within the field of Community law could be based, in part, on Article 308 TEC. The approach suggested in this *Report* meets these criteria.

C. Subsidiarity

82. Finally, a word about the important principle of subsidiarity, which requires that decisions should always be taken at the level closest to the citizen at which they can be taken effectively, thus creating a presumption in favour of action at the level of the Member States except where exclusive Community competence has already been granted.

83. It seems sometimes to be assumed that the application of this principle requires that responsibility for matters dealing with human rights should remain at the national level. But this is a false assumption which actually undermines the objectives of the principle. Subsidiarity is not a one-way street. Consistent with the principle, Community-level action is warranted if the objective in question cannot be adequately achieved by Member State action alone and if the scale or effects of the proposed measures favour Community action. Clearly where the measures in question are taken by the Community within the field of Community law it makes no sense to argue that individual Member States are best placed to ensure not only that those measures do not violate human rights but that they do whatever they can to promote respect for them. Moreover, the guidelines contained in the

Protocol on subsidiarity attached to the Amsterdam Treaty correctly emphasize that Community action might be necessitated by various factors including the transnational dimensions of an issue and the existence of treaty obligations.

84. Thus a Community human rights policy is not only consistent with the principle of subsidiarity, but is in some measure a necessity required by that principle.

VII. THE CONTEXT OF EUROPEAN UNION HUMAN RIGHTS POLICY

A. The Relationship of EU Policy to the Broader Human Rights Setting

85. An EU human rights policy can neither be conceived nor executed without full account being taken of the broader human rights context in which the Community finds itself. This includes the normative foundations upon which the international and European human rights systems have been constructed as well as the institutional framework which European States have played a key role in establishing in order to ensure that effect is given to the obligations that they and other States have assumed. But while the European Council, as noted earlier, has long appealed to all States to accede to the principal international instruments to which they are not yet party and to ensure 'more stringent implementation of those instruments', the fact remains that not all EU Member States have ratified even the six core United Nations instruments.[12] Two (Belgium and Ireland) have yet to ratify the Convention against Torture; another (Ireland) is not a party to the Convention on the Elimination of All Forms of Racial Discrimination; three (Belgium, France and the United Kingdom) have not ratified the Second Optional Protocol (aiming at the abolition of the death penalty) to the International Covenant on Civil and Political Rights (ICCPR); and one (the United Kingdom) has not yet accepted the individual complaints procedure under the (first) Optional Protocol to the ICCPR. The Council's call for 'stringent implementation' also raises the issue of reporting and the desirability of EU States leading by example. Yet one EU State

[12] The full EU ratification record is contained in Annex V of this *Report*.

(Greece) has yet to submit its initial report under one of the UN Covenants which it ratified more than 13 years ago.

86. Similarly, although the 15 Member States of the EU have all been long-term participants in, and very active proponents of, the human rights system established by the Council of Europe, there remain significant and unfortunate gaps in the ratification record of EU States. Thus, for example:

- Protocol No. 4 of 1963, which prohibits imprisonment for breach of contract, guarantees freedom of movement and residence and bans collective expulsions, has not been ratified by Spain or the United Kingdom;
- Protocol No. 6 of 1983, abolishing the death penalty, has not been ratified by Belgium, Denmark or the United Kingdom;
- Protocol No. 7 of 1984, dealing with rights of lawfully resident aliens, and rights arising in criminal proceedings, has yet to be ratified by Belgium, Germany, Ireland, the Netherlands, Portugal, Spain or the United Kingdom.

87. While the European Social Charter of 1961 has been ratified by all EU Member States, the various attempts to update it both substantively and procedurally have garnered a lukewarm reception. In particular:

- the Additional Protocol extending the rights recognized has yet to be ratified by Austria, Belgium, France, Germany, Ireland, Luxembourg, Portugal, Spain and the United Kingdom;
- the Protocol aimed at improving the supervisory machinery has not been ratified by Belgium, Denmark, Germany, Luxembourg, Spain or the United Kingdom.
- the Additional Protocol providing for a complaints mechanism has been ratified by only five (Finland, Greece, Italy, Portugal and Sweden) of the 15 EU States.

88. The two minority rights treaties adopted by the Council of Europe have also attracted relatively little commitment from within the EU:

- the European Charter for Regional or Minority Languages has been ratified by only two EU States (Finland and the Netherlands);
- the Framework Convention for the Protection of National Minorities has yet to be ratified by eight EU States (only Austria, Denmark, Finland, Germany, Italy, Spain and the United Kingdom have ratified).

89. This incomplete record of the EU States sits rather uncomfortably beside the fact that the record of ratification of these treaties by those States which aspire to EU membership has been the subject of careful scrutiny in the context of discussions over the basis for potential membership. It would seem difficult for the Union, either as a matter of fairness or logical consistency, to be imposing requirements on applicant States to meet a level of Community *acquis* which has yet to be fully met by existing Member States.

90. It might be argued in response to this analysis that the existing level of diversity in relation to the acceptance of international and regional standards is unproblematic and simply honours the principle of subsidiarity by permitting each Member State to decide such matters for itself. But while comprehensive uniformity cannot, and should not, be required in relation to every single international human rights standard, there are powerful reasons for concluding that there must be a common core of shared standards. These should include, as a minimum, the six basic UN treaties and each of the principal Council of Europe treaties, along with their respective protocols. To the extent that this minimum level of uniformity is not achieved, the EU maintains uneven internal levels of human rights commitments and protections, jeopardizes the principles of universality and indivisibility to which it has long paid lip-service, and weakens its own credibility as a human rights proponent especially in relation to its external relations. As noted above, EU leadership is best achieved by example, rather than by urging other States to do what the EU itself has not been willing to achieve.

91. Indeed, it is curious to be paying homage to the 50th anniversary of the Universal Declaration of Human Rights and to be urging other States to mark the occasion by acceding to the principal international instruments, without at the same time embarking upon a major effort to bring the EU's own record up to an optimal level.

92. Two human rights treaties are specifically referred to in the various EU and EC treaties. They are the European Convention on Human Rights and the European Social Charter. They constitute an important part of the overall context to which we now turn.

B. The EU and the European Convention on Human Rights

93. The relationship between the Community and the European Convention on Human Rights calls for special comment in the present context. As noted above, the Treaty of Amsterdam commits the Union to 'respect fundamental rights, as guaranteed by the European Convention ...'. The Convention has also acquired particular significance because of the extent to which it has been cited in the case-law of the Court of Justice. The latter has also tended to interpret its provisions in line with the approach adopted by the European Court of Human Rights. The result is that the Convention has played a fundamental role not simply in providing a mechanism for protection but also in underscoring the European commitment to human rights and in emphasizing that such commitment, if taken seriously, involves important concessions which States must make to classical notions of national sovereignty. The European Convention system has become more than a legal safety net. It is now a part of the cultural self-definition of European civilization.

94. It is for this reason that we return to the long-standing issue of Community accession to the Convention. The reasoning of the European Court of Justice which concluded that the Treaty would have to be amended to allow Community accession is unpersuasive. For example, acceptance of the jurisdiction of the European Court of Human Rights, to which the European Court of Justice implicitly seemed to object, cannot reasonably be considered to be of such great constitutional significance as to require a Treaty amendment when the Court was prepared to endorse without demur the Community's acceptance of the

dispute resolution mechanisms of the World Trade Organization. It is true, however, that the Court's Opinion has rendered these matters temporarily moot and that this is no longer a battle that can be fought on these terms.

95. Equally disappointing was the reluctance of Member States to take action to include the required amendment called for by the Court as part of the new Treaty of Amsterdam. It appears to be highly anomalous, indeed unacceptable, that whilst membership of the Convention system is, appropriately, a prerequisite of accession to the Union, the Union itself – or at least the Community – remains outside that system. The negative symbolism is self-evident. From a pragmatic point of view, the most troubling aspect is not the persistent, even if less than acute, lacunae in the judicial protection of human rights within the Community legal order. After all, the European Court of Justice does look to the substantive obligations of the European Convention and, as already noted, has more recently begun to pay considerable attention to the jurisprudence of the Strasbourg organs.

96. As the Council of Europe grows, as the European Convention on Human Rights adapts and absorbs new Member States and new legal traditions and understandings, it is regrettable that there will be no explicit Community voice within the European Convention on Human Rights. Such a voice would have enabled the sensibilities and experiences of the Community to form an integral part of the evolving jurisprudence and extra-juridical activity of the European Convention system. This, almost as much as any other reason, requires that accession to the European Convention on Human Rights remain a live objective. For that reason, the issue should be revisited at the next intergovernmental conference to amend the Treaty.

97. The setback as regards the European Convention on Human Rights should not prevent other similar activity. The Community could accede, without amending the Treaties, to the European Social Charter, to the Convention of the Council of Europe on Data Protection and to the Vienna Convention on Human Rights and Application of Biology and Medicine, to give but three examples.

98. By the same token, taking account of the spirit of subsidiarity, the Community as such does not need to be a member of all human rights treaty regimes. It could, nevertheless, still play an important role in encouraging its Member States to adhere to the various instruments noted above as well as, for example, the Council of Europe's Framework Convention for the Protection of National Minorities and to the core human rights conventions of the International Labour Organisation.

C. The Role of Economic and Social Rights in EU Policies

99. The principle of the indivisibility of human rights is a keystone of EU policy. This means that economic, social and cultural rights should be accorded as much importance as civil and political rights. This principle not only reflects the doctrine embodied in both the Universal Declaration of Human Rights and the Council of Europe's human rights regime but also the consensus on the importance of the European social model. However, the Union's rhetorical commitment has hardly been matched by its practice. This is true in both the internal and external dimensions of EU policy.

i. Social Rights within the Community

100. In terms of the Community itself, the revisions to the social rights provisions of the Amsterdam Treaty fell considerably short of the proposals made by a range of expert groups, as well as in the report of the *Comité des Sages*, chaired by Maria de Lourdes Pintassilgo.[13] In addition, there is a strong tendency in the great majority of Community documents to focus on 'social policy', designed to promote 'social protection' or overcome 'social exclusion', rather than to focus on 'social rights'.[14] A recent Commission proposal to 'individualize' social rights could assist in this regard, although the human rights dimension should remain central in any such approach.[15]

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[13] See para. v. above.

[14] E.g. 'Social Action Programme 1998-2000, Commission Communication', Doc. Com (98) 259 of 29 April 1998.

[15] 'The individualisation of rights would aim to halt the practice of taking account of personal links when ensuring social protection of an individual. It would contribute to bringing social protection in line with legislation governing employment contracts, which considers workers as individuals. More generally, individualisation is in line with the general trend towards a greater

101. The Treaty of Amsterdam refers in non-restrictive terms to 'respect for human rights and fundamental freedoms', and the preamble to the Single European Act refers to 'the fundamental rights recognized in ... the European Social Charter'. On this basis, and because the Court of Justice has long referred to 'the constitutional traditions common to the Member States' in identifying applicable human rights standards, one would expect to find a range of references to economic and social rights. In fact, there have been remarkably few such references.

102. In relation to the Community's internal social policy, note should be taken of the importance of:

- recognizing the right to organize;
- promoting accession by the Community to the European Social Charter;
- encouraging more consistent reference in the judgments of the European Court of Justice to the jurisprudence of the Council of Europe's Committee of Independent Experts on the European Social Charter;
- encouraging all Member States to ratify ILO Convention No. 111; and
- improving the standing rules of the European Court, as suggested below, in relation to social rights issues.[16]

103. A Group of Experts on Fundamental Social Rights is expected to report by the end of 1998 as a follow-up on the Pintassilgo Report. Very careful attention should be given to their recommendations with a view to strengthening social rights within Europe.

ii. Social Rights in External Relations

104. In terms of the role of social rights in the Union's external relations, two examples of the inadequate attention accorded to

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autonomy of the individual'. See 'Modernising and Improving Social Protection in the European Union, Communication from the Commission' (1998), http://europa.eu.int/comm/dg05/jobs/forum98/en/texts/socprot.html, sec. 2.4.

[16] See paras. 175-184 below.

them must suffice. The first concerns the criteria for future accession to the Union. In Agenda 2000 the Commission made reference to the compliance of applicant States with the European Social Charter and the UN Covenant on Economic, Social and Cultural Rights, although minimal attention was actually devoted to the relevant rights.

105. The second, and perhaps more surprising example, concerns the EU's extensive development cooperation activities. In their landmark resolution of 28 November 1991 on human rights, democracy and development, the European Council listed a range of positive measures to be taken, but only one was potentially of direct relevance to social rights: 'ensuring equal opportunities for all'. This is an imprecise and flexible concept, but it is often considered to be compatible with policies which accord a very low priority to social rights. Even if interpreted in a more positive sense, it seems to fall far short of a commitment to promoting realization of the inherent social rights of all human beings as a full component of a broader human rights policy.

106. A similar concern applies to the Commission's 1998 policy statement in the context of the Lomé Convention, which from a social rights perspective speaks only of the goal of 'promoting pluralist civil society in a context of sustainable social and human development'.[17] This broad language is not followed up by reference to any specific social rights-related policies. This is consistent with the fact that the chapter B7-70 budget line is largely confined to activities relating to civil and political rights, despite the fact that economic and social rights are of vital importance to the well-being of many of the stated priority target groups, including women, children, minorities and indigenous peoples. Funding for projects relating to economic and social rights must be sought under other budget lines.

107. There are two problems with this approach. One is that investment in social development has been accorded a low priority

[17] Communication from the Commission to the Council and the European Parliament entitled 'Democratization, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States', Doc. COM(1998) 146 final, 12.03.1998, para. 2.

in most EU aid,[18] even though increased attention is now being given to health and education. The other is that there remains a very significant difference between general social sector funding and support for economic and social rights as human rights. The time has come for the Union to end its neglect of these rights and to develop and fund a specific programme for the promotion of economic, social and cultural rights. The funding of initiatives in this field is particularly important. At present these rights are trapped in a vicious circle which leads some governments to argue that neither their conceptual foundations nor the practical measures for their implementation are as yet sufficiently developed as to warrant the adoption of specific measures. This approach only reinforces their continuing neglect and overlooks the extent to which the deeper understanding achieved in relation to civil and political rights has in part been possible precisely because of such funding.

108. Consistent with this approach, it is time for the Union to move beyond the old 'social clause' debate by exploring new approaches. That debate sought to link respect for certain human rights with participation in trade agreements and preference schemes.[19] The Commission has indicated that it will present a Communication in 1998 on the development of the external dimension of European social policy. The adoption by the ILO in June 1998 of the Declaration on Fundamental Principles and Rights at Work provides an important opportunity for concerted EU support to its development co-operation partners designed to promote the relevant rights (freedom of association and collective bargaining, elimination of forced labour, abolition of child labour, and elimination of discrimination in respect of employment and occupation). These standards have not received sufficient priority in EU cooperation activities. Moreover, three EU States have yet

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[18] Allocations to the social sector accounted for only 10.5 % of project aid between 1990-1995. ADE final report, *Evaluation of EU Aid to ACP Countries managed by the Commission, Phase I*, (July 1997) 20.

[19] For example, in a 1996 Resolution the Parliament called on 'the Commission to ensure, as part of the activities that it carries out as the European Union's representative at the World Trade Organization, that minimum humanitarian clauses are defined to determine the legality of trade transactions, particularly with regard to work imposed on children, prisoners or other disadvantaged sections of the population.' Resolution on human rights throughout the world in 1995-1996 and the Union's human rights policy, 12 Dec. 1996, OJ C20, 20.01.97, p. 94, para. 68.

to ratify the core ILO human rights Convention No. 111 dealing with the latter issue. In general, the proposed Communication should also seek to elaborate a more sustained emphasis on economic and social rights than has so far been the case.

109. The existing human rights clauses in EU agreements provide an ideal basis upon which to pursue a more systematic approach to economic and social rights and to promote the rights which have been the prime focus of the 'social clause' debate and are now reflected in the new ILO Declaration.

110. This Communication, along with other Community projects and policies dealing with social rights in external relations, should:

- reflect consistent use of the terminology of human rights;
- rely as far as possible upon the internationally recognized standards for social rights, including those of the United Nations, the ILO and the Council of Europe;
- target specific rights-based objectives as priorities; and
- promote the acceptance of the human rights principles of monitoring and accountability.

VIII. THE COMMISSION

A. The Commission's Role, especially in the Field of External Relations

111. In relation to a very large number of countries, the Commission has played a vital, constructive and often innovative role in supporting human rights and democracy initiatives, providing funds for election support and observation, and ensuring humanitarian assistance. Its budget is one indicator of its particular significance in terms of human rights and democracy. The 'European initiative for democracy and the protection of human rights' (Chapter B7-70 of the Community budget) began in 1994 with a budget of 59.1 million euros. It has since almost doubled and some 97.4 million euros were available for grants in 1998. Salaries for EU officials are not included in this amount. By way of comparison, the regular UN budget funding for the Office of the UN High Commissioner for Human Rights, much of which is

devoted to salaries, is currently less than one-quarter of this amount (at around US$22 million).

112. The role, impact and effectiveness of the Commission's activities would be considerably enhanced if measures were taken to address the three major problems which we believe impede the work of the Commission in the human rights area. They are: its legal basis; its internal fragmentation; and its lack of staff, expertise and bureaucratic 'clout'.

113. *The legal basis:* Chapter B7-70, the principal human rights budget line, was one of those most heavily affected by the ruling of the Court of Justice of 12 May 1998 and the subsequent large-scale freeze on many disbursements and new initiatives. The inadequacy of acknowledged Community competences in this area had already been highlighted by the debates around a draft Regulation proposed by the Commission in December 1997, well before the Court's judgment. Those debates have since gathered speed and urgency and have focused on two draft Regulations presented by the Council in July 1998. As one report to the Parliament put it, the uncertainty illustrates the fact that the TEU 'does not provide a clear legal basis for comprehensive action by the Union in the promotion of democracy, the rule of law and human rights other than the one upon which the CFSP is based', and that Second Pillar basis is inappropriate in a number of respects for this purpose.[20] We deal below with what we consider to be the principal shortcomings in the proposed Council response.

114. *Internal fragmentation:* As noted earlier,[21] the problem of administrative fragmentation is illustrated by the fact that the 'Standing Inter-Departmental Human Rights Co-ordination Group' consists of 19 different entities from within the Commission. In the view of the Parliament, the Commission's strategy for using its funds is lacking and the responsibility unduly divided. It considers the Co-ordination Group to be 'a mirror image of the fragmentation of responsibilities'.[22] There is no doubt that outsiders wishing to

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20 'Working Document on the proposal for a Council regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms', Rapporteur: Mr Galeote Quecedo, COM(97)0357 of 12 Feb. 1998.

21 See para. 22 above.

22 Resolution on setting up a single co-ordinating structure within the European

understand where and how Commission policy is being developed and implemented will be utterly defeated by existing arrangements. Even more troubling, however, is that insiders themselves, including the representatives of Member States, Members of Parliament and EU officials, are not much better off. The lack of coordination is thus associated with inefficiency, fragmented policy responses, unclear lines of responsibility, an inability to develop necessary expertise, the marginalization of Parliament, and a general lack of transparency.

115. *Lack of staff, expertise and bureaucratic 'clout'*: The fragmentation of responsibility means that none of the bureaucratic entities responsible for human rights policy is large enough to develop the range of staff and the level of expertise required to contribute to the development of the 'consistent, transparent, efficient, credible and conspicuous' human rights policy to which the Union aspires. This is compounded by the lack of clear responsibility within the Commission. In formal terms the position is that the President of the Commission is responsible for the overall promotion of a human rights policy, while another Commissioner (currently Mr Van den Broek) is responsible for the horizontal and thematic issues relating to human rights. In practice, however, a range of Commissioners deal with human rights issues. These issues not only cut across thematic portfolios, such as development, social issues, humanitarian affairs, migration, foreign policy and commercial policy, but also arise in relation to particular regions for which different Commissioners have responsibility. The result is that no individual Commissioner and no senior EU bureaucrat can be identified as the visible face of human rights either within the Commission or viewed from outside. While perfect consistency and coordination will never be attainable, the existing scope for letting many different human rights policies bloom within the Commission is greatly excessive. As one informed observer has accurately concluded, 'the current system ... simply does not work'.[23]

Commission responsible for human rights and democratization, pream. paras. R and S, 19 Dec. 1997, Doc. A4-0393/97, OJ C14/403, 19.01.98.

[23] Gijs M. de Vries, 'Human Rights and the Foreign Policy of the European Union', unpublished paper, April 1998.

B. Development Cooperation, Trade and Related Policies

116. The EU, especially since around 1990, has done much to ensure the inclusion of human rights provisions in a wide range of its external relations activities affecting aid, trade and other forms of cooperation. They include: the development cooperation arrangements under the Lomé IV Convention; a variety of other cooperation programmes relating to third countries, including TACIS, PHARE, MEDA and the Bosnia and Herzegovina Regulations; trade agreements with third countries and in relation to the operation of the EC's Generalized System of Preferences (GSP); and humanitarian assistance policies.

117. It is appropriate that these policies should place an emphasis upon the principles of universality, indivisibility and interdependence, reliance upon international standards, a recognition of the need to work with and through multilateral organizations, an insistence upon the centrality of human rights in international relations, a commitment to dialogue with partners, and a preparedness to balance pro-active policies designed to encourage respect for human rights with reactive policies designed to respond to human rights violations, including through sanctions as a last resort.

118. In recent years there has been a very strong emphasis upon concerns closely related to human rights, such as democratization, the rule of law and good governance.[24] While it is essential that human rights issues be addressed within their broader context, it is also important that the distinctive and authentic human rights component of such policies be ensured. In the Commission's overall external relations policies, specific human rights standards and initiatives would seem to have enjoyed an excessively low profile to date in the general context of efforts to promote democracy and the rule of law. While programmes such as PHARE and TACIS have some human rights components to which attention can be drawn in order to deflect criticism, these

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[24] See, for example, the Communication from the Commission to the Council and the European Parliament entitled 'Democratization, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States', Doc. COM(1998) 146 final, 12.03.1998.

elements are far smaller than they should be and often seem to be little more than incidental.

119. In fact, a recent evaluation study undertaken for the Commission recommended that the PHARE and TACIS labels be dropped in favour of a renamed 'EU Democracy Programme'.[25] In some respects, this recommendation highlights a much larger problem. The EU's insistence upon separate programmes for different areas reflects several entirely legitimate considerations, including the distinct legal bases invoked, the specific historical origins of the various initiatives, and the different bureaucratic and political considerations which are at work in support of specific programmes. At a deeper level, however, the preference for maintaining an alphabet soup of diverse and odd-sounding programmes may well be due to a deep-seated reluctance to accept that a democracy programme in its fullness should be undertaken by the EU. In this respect, it might be seen as another manifestation of the reluctance to embrace human rights and related issues as an authentic dimension of the Union.

120. There are four issues that should be given more prominence in the future development of the Union's policies in these areas.

i. Economic and Social Rights

121. The first concerns the negligible role accorded to economic and social rights. As noted earlier, despite a strong commitment in principle to these rights, EU cooperation policies have generally tended to neglect them.[26] In the present context two aspects warrant attention. The first is that the financial and related crises dominating the situation in many Eastern European, Asian and Latin American States make it all the more imperative that a greater emphasis be placed upon these rights, both for their own sake and because of their vital role in reinforcing efforts towards democracy and respect for civil and political rights. The second is that many of the policies already pursued by the Commission could be adapted relatively easily in order to reflect a better balance. To give but one example, the Commission could earmark specific funds for countries wanting to develop the role of national

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[25] See 'Evaluation of the Phare and Tacis Democracy Programme – 1992-1997', Section 6.1, http://europa.eu.int/comm/dg1a/evaluation/ptdp.

[26] See paras. 104-110 above.

human rights institutions in promoting respect for these rights through more effective monitoring at the domestic level.

ii. Transparency and Accountability

122. The second issue is the achievement of a greater degree of transparency and accountability. Given the amounts of money involved, the considerable potential impact of the projects and the hopes that they represent from a human rights viewpoint, it is essential that the Commission's human rights activities be reasonably transparent. At present, official policy statements and formal reports are readily available, as are some evaluation and financial reports. Overall, however, the situation is unsatisfactory and makes a careful external evaluation of the effectiveness of the policies virtually impossible. For example, access to country strategy papers and to the National Indicative Programmes is highly restricted, despite their importance in ensuring that human rights are taken adequately into account in policy-making.

123. Similarly, very few evaluations have been performed in relation to human rights projects and those that are undertaken do not have any significant human rights dimension.[27] Moreover, the information available on the relevant Commission websites provides few insights into these issues beyond official statements of policy. Similar concerns have been expressed by the Parliament.[28] The Commission should address this issue specifically in the context of a detailed statement designed to improve the transparency of the cooperation process. In addition, it should prepare and publish an annual report providing an overview of the main human rights initiatives reflected in its cooperation activities and an evaluation of their effectiveness.

124. It is especially important in the context of cooperation programmes aiming to promote human rights that adequate

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[27] Since it began operations in January 1997, the Evaluation Unit within DC1A has undertaken or begun some 40 evaluations. Of these only one was available on-line by mid-September 1998 and it contains no significant treatment of human rights issues per se. See 'Evaluation of the Phare and Tacis Democracy Programme – 1992-1997', http://europa.eu.int/comm/dg1a/evaluation/ptdp.

[28] Resolution on setting up a single co-ordinating structure within the European Commission responsible for human rights and democratization, para. 19, 19 Dec. 1997, Doc. A4-0393/97, OJ C14/403, 19.01.98.

possibilities exist to ensure the Union's accountability in cases in which it is alleged that EU development policies have had a significantly adverse impact or have failed to respect human rights. In theory, various avenues of redress already exist. In principle, the Parliament's Development and Co-operation Committee is able to express concerns and to question Commission officials, but in practice it is ill-equipped to pursue most such concerns effectively. Similarly, EU citizens and others resident or based in a Member State may petition the Parliament, but this is a time-consuming procedure, one which is not available to residents of third States. Another avenue is the Ombudsman who can receive complaints of maladministration, but that Office deals only with EU citizens and is not empowered to redress situations. The Court of Auditors is not well placed to pursue individual cases, and for the most part does not. Finally, while a complaint for breach of contractual liability can be brought before the Court of Justice under Article 288 TEC, such a remedy is never going to be very accessible in practice to those complaining of the impact of EU development policies. It has therefore been suggested that the Union should establish an Inspection Panel along the lines of that which has existed for some years within the World Bank. The Commission should consult broadly to assess the most appropriate form which such an initiative within the EU should take.

iii. Human Rights Clauses

125. The third issue concerns the various types of human rights clauses that are now included in over 50 Community agreements. It is entirely appropriate for such clauses to become a standard feature of all such agreements. The Union should resist measures, whether by developed or developing countries, to exclude such provisions in future agreements. The principal value of these clauses is to ensure that the human rights dimensions of an issue are taken into account whenever relevant. No particular importance should thus be attached to the fact that no such clause has yet been formally invoked as the basis for suspending or otherwise not carrying out trade preference or aid arrangements. This has not prevented a range of other measures from being undertaken in order to enhance respect for human rights with various countries covered by such agreements.

126. Several innovations are needed, however, in order to improve the operation of these clauses:

- the system of annual country reports, recommended below,[29] should be put in place. These would facilitate a more consistent, coherent and transparent application of the clauses;
- criteria to be used in applying the clauses should be drawn up. They should go beyond those already identified by the Commission,[30] and should reflect an appropriate balance between the concern for consistency and the need for flexibility; and
- the Community should establish procedural rules to be followed for the suspension and termination of external agreements, and the powers of the Commission in this respect should be clarified.

iv. Human Rights Training

127. If EU officials are to do everything possible not only to make EU cooperation policies consistent with respect for human rights but also to actively promote their realization, they need to have a full understanding of the relevant standards and procedures and of their potential implications in the context of a wide range of development policy situations. Given the complex and increasingly technical nature of these standards and the need to avoid arbitrary or subjective interpretations, systematic training is an essential component of an effective EU policy in this area. Such training is not currently provided on any systematic basis; the Commission should initiate an appropriate programme of this type.

C. The Commission after Amsterdam

128. Quite apart from the shortcomings that characterize the existing role of the Commission, the entry into force of the Amsterdam Treaty will bring a variety of new demands which would be sufficient in themselves to require a thorough rethinking of the Commission's human rights activity. Apart from the

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[29] See para. 167 below.

[30] Doc. COM(1998) 146 final, 12.03.1998, Part III, para. 14.

expanded general Community mandate in relation to human rights, discrimination and related issues, to which the Commission will have to respond, there are three other significant aspects.

129. The first is that the new arrangements in relation to the common foreign and security policy, which are dealt with below in relation to the Council,[31] will provide not only the opportunity, but also a clear need, for the Commission to work more closely with the Council, through the Troika as well as more generally. The Commission will also need to develop a more systematic input to the work of Council Committees such as COHOM (the Committee on Human Rights).

130. The second is the Treaty's provision for the suspension of Member States rights in response to a 'serious and persistent breach' of the 'principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'. The Commission is empowered to propose that the Council meet to make such a determination. In order to do so it will need to have developed a methodology and guidelines for dealing with such cases, and it will need to be in a position to provide the Council with a detailed analysis of its reasons for concern. This will require the development of the necessary capacity as soon as possible, rather than leaving the provision as a virtual dead-letter to be resuscitated only after a crisis has erupted. For this purpose, the Commission, in consultation with the Council and Parliament, should undertake a study of the procedures to be applied in considering whether to suspend the rights of a Member State for a serious and persistent breach of human rights.

131. Thirdly, the Amsterdam Treaty formalizes the fact that the acts of the Council, Commission and Parliament are reviewable by the European Court of Justice in cases in which violations of human rights are alleged. In order to minimize the uses of this procedure in relation to its own work the Commission will need to scrutinize draft legislation and a wide range of other proposed measures to ensure its conformity with the applicable human rights standards as defined in Article 6(2) TEU.

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[31] See para. 163 below.

D. Proposed Reforms: A Commissioner and a Directorate-General

132. For all of these reasons, both practical and symbolic, it is essential that human rights become the subject of a central and separate portfolio within the Commission. This raises the question as to whether the Commissioner for Human Rights should have other responsibilities. On the one hand, the adding of other portfolios may make organizational sense, given that important aspects of human rights policy overlap with responsibilities in fields such as social policy, immigration and asylum, citizens' rights, humanitarian assistance and the like. Moreover, status and authority within the Commission sometimes seem to be linked to the number of staff and the size of the budget of a portfolio. On the other hand, there would seem to be a significant risk that combining human rights with one or more other portfolios would make the former a subsidiary concern and create possible or actual conflicts of interest on the part of the Commissioner. This would be especially the case if the Commission moves to bring external relations under the responsibility of a Vice-President, as suggested in a Declaration agreed by Member States at Amsterdam, and if that new post were also expected to take the lead on human rights.

133. It is therefore proposed that a separate Commissioner for Human Rights be appointed within the Commission. It would be best if no major additional portfolio responsibilities were linked thereto; if that is considered to be impossible for general administrative reasons, the only linkage that would seem to be compatible would be with humanitarian affairs and the European Community Humanitarian Office (ECHO). In order to facilitate a strong role in policy coordination and the mainstreaming of human rights, consideration should also be given to according the status of Vice-President to that Commissioner.

134. Some observers will inevitably seek to reject this proposal on the grounds that there are already too many Commissioners, and perhaps even more problematically, too many Directorates-General. As a result, there are strong pressures towards reducing the existing 26 Directorates-General down to some 10 to 15. But the need for administrative streamlining is a poor justification for dismissing the need to remedy a major shortcoming in the Commission's makeup.

135. The Directorate-General which would be responsible to the Commissioner would have three principal functions and responsibilities:

i In its 'mainstreaming' function it will bear the principal horizontal coordinating responsibility within the Commission to ensure that in all their legislative and administrative activities the various Commission services give the necessary attention to human rights concerns. This is a *coordinating* responsibility since we do not envisage the Directorate-General for human rights having an exclusive internal monopoly in this field. On the contrary, we are concerned to enhance human rights sensibility throughout the Commission. This will happen only through regular, streamlined interaction between the various specialized services and the one service (the Directorate-General) which has specialist expertise in human rights.

ii The Directorate-General will also be the principal interlocutor and recipient of the reports or surveys presented by the Vienna Monitoring Agency. These reports will be the basis for Commission action designed to deal with specific problems highlighted by the Monitoring Agency, in so far as Community-level action is appropriate. Similarly, the Directorate-General could undertake or coordinate an evaluation function in relation to the human rights components of the development cooperation and other external relations activities of the Commission.

iii Finally, and possibly most importantly, the Directorate for Human Rights will be responsible for developing policies and initiatives designed to make the protection of existing human rights more effective in the long run. This will be done through: contacts and coordination with Member States; support for, and consultation with, non-governmental organizations in the field of human rights; legislation attentive to the changing demands required to ensure respect for human rights, contacts and cooperation with similarly situated bodies at the international and national levels; and, critically, cooperation and consultation within the other parts of the Commission and its specific services.

136. All three functions will operate synergistically. What we envisage here is a period of strategic thinking and planning in each and every one of the myriad operational services of the Commission, throughout the Secretariat and all its Directorates-General. Each Directorate and/or Division should prepare, in consultation with the Directorate-General for Human Rights, an analysis of those areas of responsibility which are 'human rights' sensitive – either in the sense that the Commission or the Community itself may, unwittingly, be accomplices to abuse or that within the relevant sphere of responsibility the Commission or Community could enhance the respect for fundamental human rights. Following such a period of internal assessment, each service would draw up a plan, setting out the steps and means required to further the objective of enhanced respect for human rights. Once again, this would be done in cooperation with the accumulated expertise of the Directorate for Human Rights. Eventually, a new matrix of action will emerge across the area of activity of the Community. In some cases, action will be required across the board; in others, it will be tailored to the functional and operational specificities of each service.

137. The means of action will range from educational programmes, measures promoted through citizen and resident information and advice bureaux, and the proposing of strategic legislation and enforcement measures where merited through the support and funding of public and semi-public groups and NGOs operating wholly or partly within the sphere of application of Community law.

138. The Directorate-General for Human Rights will have special responsibility in the field of European Citizenship, some of the details of which are dealt with below.[32]

IX. THE EUROPEAN PARLIAMENT

139. Since at least the late 1970s, the European Parliament has played a very important role in promoting human rights as an integral component of EU policies in both the internal and external domains. It has done so in a variety of ways, including through annual reports on different issues, debates and resolutions,

[32] See paras. 201-204.

withholding of its assent to external agreements in cases where serious human rights problems persist, insistence upon increased funding for human rights and democratization programmes, sending of election monitors and parliamentary delegations, and regular calls upon the Commission and the Council to adopt more human rights-friendly policies.

140. In considering the ways in which Parliament's contribution might be further enhanced in the future, three issues stand out. The first concerns the internal institutional allocation of responsibilities for dealing with human rights-related matters. At present, there are two separate forums which have all too little interaction. They are the Committee on Civil Liberties and Internal Affairs Committee and the Sub-Committee on Human Rights of the Committee on Foreign Affairs, Security and Defence Policy. The Parliament itself has acknowledged the need for its own 'bodies dealing with human rights and democracy issues to be more effectively co-ordinated'.[33] The existing arrangement, born of various internal accommodations, reflects and even reinforces the split between the internal and external dimensions of human rights policy which this Report argues is counter-productive and ultimately incompatible with the quest for a coherent EU policy.

141. The second issue concerns standards. The Parliament continues to entertain a debate over the normative content of human rights which, on some occasions, has led to a virtual stalemate, especially in relation to the scope and status of social rights. This is essentially an anachronistic debate which, in almost all other contexts, has long since been settled. All EU Member States are parties to the European Social Charter and the International Covenant on Economic, Social and Cultural Rights. Moreover, a significant range of social rights find explicit recognition in the EU and EC Treaties.

142. The third and most important issue concerns the relationship between the Parliament on the one hand and the Council and the Commission on the other. Neither have proved to be consistent or reliable interlocutors on human rights matters. In the case of the Council, Parliament has long been highly critical of the Council's

[33] Resolution on setting up a single co-ordinating structure within the European Commission responsible for human rights and democratization, para. 15, 19 Dec. 1997, Doc. A4-0393/97, OJ C14/403, 19.01.98.

Annual Memorandum describing the human rights activities of the Council and the Member States in the framework of CSFP on the grounds that it is lacking in detail and is submitted on an irregular and unpredictable schedule. Similarly, reports that are drawn up within the CFSP framework and deal with the human rights situation in third countries are not routinely made available to Parliament. In the case of the Commission, the relationship is also based on inadequate information flows and a degree of uncertainty as to the type of information which Parliament is entitled to seek from the Commission. For several years now the Parliament has sought to spell out the structure that Commission reports should follow and the types of information it would like to receive. Much of this relates to analysis as well as raw data. The response has been limited.

143. This situation has helped to create and perpetuate something of a vicious circle. The Council and Commission seem unwilling to involve the Parliament in various aspects of human rights policy-making, although the latter has been able to use its budgetary and other limited forms of authority to good effect in certain areas. The Parliament, for its part, is perceived by many observers to have acted too often in ways that might reflect an expectation that it will not be taken very seriously. It is thus sometimes unable to resist the temptation to endorse positions which are lacking in nuance, are not necessarily consistent over time or from one case to another, and in the case of external policy issues are not readily reconcilable with the EU's own internal policies. Its frequent use of 'urgency procedures' in relation to specific situations has also drawn considerable criticism, including from within its own ranks.[34] These shortcomings are, in turn, taken by the Council and the Commission as a confirmation of the appropriateness of their own relatively unforthcoming attitudes.

144. It is time for this vicious circle to be broken. Although the Parliament was disappointed in terms of many of the reforms that it had hoped to achieve in the Amsterdam Treaty, its powers have nevertheless been steadily augmented. Amsterdam contains a number of innovations which will enhance the role of the Parliament in human rights matters. They include: the change from cooperation to co-decision as the basis for decision-making in

[34] De Vries, note 23 above, p. 14.

relation to a number of important issues (such as discrimination on grounds of nationality, the right of establishment for foreign nationals, equal opportunities and equal treatment, consumer protection and data protection); the requirement of consultation in relation to issues of discrimination on all of the prohibited grounds, except for nationality;[35] the role of the Parliament in any procedure under Article 7 of the TEU to suspend the rights of a Member State for a 'serious and persistent breach' of human rights; and the inclusion within the Community budget of operational expenditure under the Third Pillar, which has been classified as non-compulsory expenditure, thus increasing Parliament's role. Parliament itself can make effective use of these opportunities in order to shape a stronger human rights policy.

145. In addition, many of the proposals contained in the present report would, if adopted, make a very big difference to the capacity of Parliament to exercise a sustained, informed and responsible role both in exercising oversight and in acting as a catalyst in this area. The member of the Commission responsible for human rights would, in the normal course of affairs, appear before the Parliamentary hearings. In its enhanced constitutional role in relation to the appointment of the President and Members of the Commission, Parliament has an important role in ensuring that human rights are given significant weight. Parliament could attach importance to both the competence and the human rights commitment of the designated Commissioner.

146. Parliament will also play an important supervisory role in overseeing the Commission and the Monitoring Agency, as well as in terms of development of policy, budget and execution. To the extent that the new human rights policy involves legislation, Parliament will play its role as provided in the Treaties. The monitoring proposals reflected in this report would transform the Parliament's capacity to analyse, to formulate precise and focused recommendations, and to evaluate action taken in response to its own opinions. This applies in particular to the proposed Annual Report on Human Rights in the World, the annual report on human rights within the EU to be produced by the Human Rights Monitoring Agency, and the more detailed, regular and analytical reports to be submitted by the Commission and the Council in

[35] Article 13 TEC.

relation to their respective areas of responsibility. All of these reports would enable the Parliament to overcome the information gap from which its deliberations currently suffer, would help it to structure its work in a more systematic fashion, would make it easier to identify genuine priorities and to accord less prominence to the hobby-horses sometimes championed by individual MEPs.

147. Similarly, the access to justice sensibility that informs much of this *Report* must also extend to parliamentary activities, such as the Petitions Committee, and to the Ombudsman. The function of both extends beyond human rights but also overlaps in some considerable measure.. It is our impression that neither is especially well known beyond narrow circles and their visibility could and should be enhanced. We are also concerned that the Ombudsman, at present, will not hear complaints about the administration of Community monies in third countries – a particularly sensitive issue in the field of human rights. This policy should be revisited.

148. Several other recommendations also emerge from this analysis:

i Parliament should consider moving towards a single integrated Committee structure for dealing with both the internal and external dimensions of human rights policy.

ii The indivisibility of the two sets of human rights should be acknowledged by the Parliament in a way which puts an end to the sterile debates over what is in fact a non-issue.

iii An effort should be made to reinforce the specialist human rights expertise available to the secretariat of the Parliament.

iv There should be greater interaction between the European Parliament and the human rights committees which exist in many of the national parliaments, both within the Community and outside. A more effective relationship with the former would reinforce the impact of Parliament's own work and provide it with a better sense of national policies and concerns.

v Parliament should develop more systematic, open and transparent means by which the knowledge and views of

non-governmental groups can be taken into account in its work.

vi Parliament should encourage the Commission to undertake a study of the procedures that could be used in considering whether to suspend the rights of a Member State for a serious and persistent breach of the principles contained in Article 6(1) TEU, which include human rights.

vii Parliament should develop a more systematic means of monitoring the implementation of its various policy recommendations by the bodies to which they are directed, and seek to reduce the repetitiveness of the content of its resolutions.

X. THE ROLE OF THE COUNCIL, ESPECIALLY IN THE FIELD OF EXTERNAL RELATIONS

149. The Council has always had a central role in relation to human rights issues, particularly because of the limited competences of the Community, the sensitivity of human rights for both the foreign and domestic policies of Member States, and the cross-cutting nature of the issues. The Council's role is, however, of particular importance at the present time for two reasons. The first is because of the implications for human rights of certain provisions in the Amsterdam Treaty designed to strengthen the framework for the Common Foreign and Security Policy (Pillar Two). The second reason is that the Court of Justice ruling of 12 May 1998 on competences has compelled a re-examination of the grounds upon which the Union operates in relation to the different areas of human rights.

150. In addition, the Council is uniquely placed to contribute to the coordination of human rights concerns among the three Pillars which, in the view of most observers, has been clearly inadequate to date. Equally, if the call for a better matching of internal and external human rights policies is to be answered, it will be the Council, both at the level of the European Council and in the specialist settings, that will need to play a leading role. To date, however, the Council has been seen rather as the principal stumbling block in the quest to develop a better integrated and more consistent EU human rights policy.

151. As in all areas of EU policy-making, the Council performs a variety of tasks in the human rights field. It has a coordinating role in relation to some aspects of Member State policies, it assists in the formulation of EU policy, and it has a central coordinating and representational role in many external relations settings and especially within the context of multilateral organizations. The objectives which it might thus be expected to pursue in relation to human rights can perhaps best be gauged by reference to the formulation included in the two Draft Regulations sent to the European Parliament in August 1998. They are designed to establish the legal bases which permit the financing and administering of Community action to enhance human rights, democracy and the rule of law.

152. Because of the importance of the proposed approach, it is necessary to quote *in extenso* from the relevant text. Thus, in part, each of the draft Regulations provides that:

> ... consistent with the European Union's foreign policy as a whole, the European Community shall provide technical and financial aid for operations aimed at:
>
> 1. promoting and defending the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and the other international instruments concerning the development and consolidation of democracy and the rule of law, in particular:
>
> (a) the promotion and protection of civil and political rights;
>
> (b) the promotion and protection of economic, social and cultural rights;
>
> (c) the promotion and protection of the human rights of those discriminated against, or suffering from poverty or disadvantage, which will contribute to reduction of poverty and social exclusion;
>
> (d) support for minorities, ethnic groups and indigenous peoples;
>
> (e) supporting local, national, regional or international institutions, including NGOs,

involved in the protection or defence of human rights;

(f) support for rehabilitation centres for torture victims and for organizations 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;

(g) support for education, training and consciousness-raising in the area of human rights;

(h) supporting action to monitor human rights, including the training of observers;

the promotion of equality of opportunity and non-discriminatory practices, including measures to combat racism and xenophobia;

(j) promoting and protecting the fundamental freedoms mentioned in the International Covenant on Civil and Political Rights, in particular the freedom of opinion, expression and conscience, and the right to use one's own language;

2. supporting the processes of democratization, in particular:

(a) promoting and strengthening the rule of law, in particular upholding the independence of the judiciary and strengthening it, and support for a humane prison system; support for constitutional and legislative reform;

(b) promoting the separation of powers, particularly the independence of the judiciary and the legislature from the executive, and support for institutional reforms;

(c) promotion of pluralism both at political level and at the level of civil society by strengthening the institutions needed to maintain the pluralist nature of that society, including non-governmental organizations

(NGOs), and by promoting independent and responsible media and supporting a free press and respect for the rights of freedom of association and assembly;

(d) promoting good governance, particularly by supporting administrative accountability and the prevention and combating of corruption;

(e) promoting the participation of the people in the decision-making process at national, regional and local level, in particular by promoting the equal participation of men and women in civil society, in economic life and in politics;

(f) support for electoral processes, in particular by supporting independent electoral commissions, granting material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process, and by training observers;

(g) supporting national efforts to separate civilian and military functions, training civilian and military personnel and raising their awareness of human rights;

3. support for measures to promote the respect for human rights and democratization by preventing conflict and dealing with its consequences, in close collaboration with the relevant competent bodies, in particular:

(a) supporting capacity-building, including the establishment of local early warning systems;

(b) supporting measures aimed at balancing opportunities and at bridging existing dividing lines among different identity groups;

(c) supporting measures facilitating the peaceful conciliation of group interests, including support to confidence-building measures relating to human rights and democratization,

in order to prevent conflict and to restore civil peace;

(d) promoting international humanitarian law and its observance by all parties to a conflict;

(e) supporting international, regional or local organizations, including the NGOs, involved in preventing, resolving and dealing with the consequences of conflict, including support for establishing ad hoc international criminal tribunals and setting up a permanent international criminal court, together with measures to rehabilitate and re-integrate the victims of human rights violations.[36]

153. This list seems, at first glance, to be appropriately detailed and comprehensive. Upon closer scrutiny, however, several of its features are rather striking. The first is the remarkable lack of balance reflected in a policy which is so wide-ranging in relation to two sets of third states (those with development cooperation agreements with the EU and those, mainly in Central and Eastern Europe, subject to other specific EU programmes) but which is then not matched by an appropriately comprehensive human rights policy in the field of external relations more generally. The fact that many countries in the world do not fit within the framework of the proposed Regulations does not mean that the Union should not address relevant human right issues in those countries.

154. The second feature, as underlined earlier, is the absence of an equivalent set of Community policies and programmes as an internal counterpart to such an impressive external set of goals and commitments. In other words, whilst the two proposals demonstrate the Union's enthusiasm for supporting human rights and democracy in third countries, there is surprisingly little

[36] See the '[Draft] Council Regulation (EC) laying down the requirements for the implementation of development co-operation 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'; and its companion '[Draft] Council Regulation (EC) Laying down the requirements for the implementation of community operations, other than those of development co-operation which, within the framework of community co-operation policy, 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 in third countries', both of 1 July 1998.

sensibility to these very issues as regards the Community activity itself. The third feature is the extent to which a variety of very specific civil and political rights policy objectives are identified, whereas economic and social rights objectives are stated in a notably vague and general fashion.

155. Nevertheless, these objectives provide an excellent illustration of the type of goals which should be considered to be every bit as relevant to Second Pillar or CFSP activities, as to First Pillar cooperation arrangements. Naturally, the constitutional bases for various actions would be different as would the respective roles played by Member States, Union and Community. But, as far as possible, the policies pursued at each level could seek to reinforce those at the other levels.

A. The Relationship between the Council and the Commission and Parliament

156. The two draft Regulations referred to above have important implications in terms of this relationship. Without needing to challenge the objectives, the means, or the balance of institutional responsibilities reflected therein, there are several aspects of the proposals which warrant attention.

157. First, when the Commission carries out the tasks entrusted to it under the draft Regulations, it will be necessary for the lead role to be taken by the Directorate-General for Human Rights and the new Human Rights Commissioner, albeit of course in cooperation with the various Commission services responsible for development cooperation and for other relations with third countries in the framework of Community cooperation policy. It makes no sense to further entrench the fragmentation of overall human rights responsibility among different Commission services, nor does it make sense to promote an unnecessary gap between the internal and external dimensions.

158. Second, the democratic accountability of the Community's proposed action is weak. The European Parliament will, effectively, only be able to exercise control through the budgetary procedure but is excluded from substantive scrutiny and dialogue. In contrast, the 'Human Rights and Democracy Committee', proposed to be set up under Article 12, will perform a powerful

oversight role. Yet it will be composed of Member State representatives, even if it is to be chaired by the Commission. The role of the European Parliament must be strengthened and made commensurate to that of the Member States or, in effect, the Council. As envisaged in the present draft, the Committee lacks precisely the democratic accountability which it will be supposed to promote in third countries.

159. Third, the programmes to be undertaken under the proposed Regulations involve the distribution of large sums of money (estimated by the Council at 400 million euros over five years) which will be administered either directly by, or on behalf of the Community, by a variety of public, semi-public or private agencies. Neither under the proposed Regulations, nor under the standing procedures for the Ombudsman, are there provisions for individual complaint and/or investigation of the manner in which these funds are spent, or policies are administered, by or on behalf of the Community. It is an area which is susceptible to abuse and misuse. In accordance with the general rule-of-law principle established within the Community, appropriate safeguards should be implemented. The Ombudsman, or a surrogate for the Ombudsman (such as the Inspection Panel suggested above)[37] should be established to receive and investigate such complaints and, where necessary, to take further necessary action.

B. Proposed Reforms in Relation to the Council's Human Rights Role

160. It will, of course, be for the European Council to take the lead in adopting the initiative for a fully-fledged human rights policy for the Union. And, to the extent that the internal dimension of the human rights policy involves legislation, the Council will play its normal constitutional role in the legislative process, both at primary level and through Comitology. The critical role of the Council will, however, be in the external dimension of the human rights policy.

161. The Union has a key role to play in enhancing human rights in all aspects of its common foreign and security policy and not only in relation to democratization, the rule of law and good

[37] See para. 124 above.

governance in narrowly defined areas of the world. There is, after all, no material, geographical or political limitation on the reach of the Union under the second Pillar. Thus, human rights should become an important, regular and systematic dimension of the Union's foreign posture under Pillar Two.

162. Until now, little attention seems to have been given to developing the Council's capacity to make human rights a significant part of its activities. The secretariat of the Council is not currently well-equipped to perform human rights functions. While the Council's Committee on Human Rights (COHOM) plays an important role, it deserves a more focused and better coordinated secretariat interlocutor with which to work.

163. The Amsterdam Treaty creates the new post of CFSP (Common Foreign and Security Policy) High Representative (to be filled by the Council Secretary General). This post has already been popularly dubbed 'Mr or Monsieur Pesc', based on the French acronym for CFSP which is PESC. There will also be a new form of CFSP 'troika' consisting of the Council President, the CFSP High Representative and the Commission. We believe that within the framework of the 'Mr PESC' function under Pillar Two, a special Human Rights Office should be established. This Office should work in close coordination with the Commission's new Human Rights Directorate-General, while preserving the constitutional demarcations between Pillar One and Pillar Two. An appropriately modified version of the more robust Community policies should guide CFSP.

164. Two objections to this proposal can be anticipated. They are that the Council Office will duplicate some of the work that the new Commission structure is supposed to perform and that its creation will only exacerbate the policy disagreements that characterize so much of the Commission-Council relationship. The effect will be to paralyse, or at least further complicate, overall EU human rights policy. These are valid concerns but they underestimate the extent to which the Commission and the Council do, and should, perform rather separate functions under their respective Pillar One and Pillar Two responsibilities. The proposal is also predicated upon the hope that greater expertise and more systematic information, on both sides, will help to align the different policy perspectives.

165. As already noted, there is no constitutional bar for the Union's foreign policy to pursue policies which would have as their objective and would be aimed at promoting and defending the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and the other international instruments concerning human rights, the development and consolidation of democracy and the rule of law in third countries, even outside specific Community policies. The existing Community model should provide guidance to the type of activities to be pursued under Pillar Two. It warrants emphasizing the fact that this Pillar does not contain any constitutional limitations to consensual action in this area.

166. The specific polices proposed in relation to the Council revolve around monitoring, cooperation, responding to violations and general policy promotion.

167. *Monitoring*. Under the auspices of the Commission, which would draw upon its 129 'delegations' in third countries, and in cooperation with 'Mr PESC', an Annual Report should be prepared giving an overview and details of the state of human rights in the world from a European Union perspective. Part of this Report would cover those States coming within the EU's cooperation framework – and the main raw material would be generated by the Commission and its delegations. Reports for other countries would draw primarily upon information generated by the Office of Human Rights of CFSP using all resources available to it. It is acknowledged, however, that the precise modalities for drawing up the Annual Report would clearly need to be the subject of considerable discussion and negotiation among the institutions concerned. It would thus be foolhardy to seek to prescribe them in any detail in this context.

168. It is sometimes suggested that such reporting, long called for by others, should focus only on countries with which the EU has a specific relationship. But this would make little sense in terms of the resulting coverage and would require many invidious decisions as to which countries to cover and which to overlook. The resulting patchwork would be seen as discriminatory and incomplete.

169. The very publication of this report – the idea of which, it can safely be anticipated, will be contested by many in the national foreign policy establishments – should be a constant and stable feature of the Union's foreign policy posture. Third countries will simply know that their human rights record will be one element in their relationship with the Union and that it will not be an *ad hoc*, subjective or avoidable dimension of the relationship.

170. As noted above,[38] the Parliament has consistently criticized the Annual Memorandum presented to it by the Council on the grounds that it is both inadequate and greatly delayed. The new report for which we are calling would be sent annually to the European Parliament and would provide it with an ideal basis upon which to play a constructive and informed role in relation to its long-standing human rights concerns.

171. *Cooperation*. Over time, the CFSP should adopt and put in place the same type of pro-active programmes which are already a feature of the Community's cooperation and development cooperation frameworks. These would involve support for public and private organizations involved in the enhancement of respect for human rights. Such initiatives could be characterized as Common Action and be subject to all Pillar Two management, budgetary and decisional procedures. They would be designed to give the CFSP the necessary flexibility to provide positive forms of assistance to reinforce its other policy orientations. Perhaps the best example is the possibility for the Council to offer funding and expertise to assist governments in third states to establish national human rights commissions. This is a high priority objective of the UN human rights programme and has been strongly supported by the EU in that context. Again, however, it is somewhat anomalous that national commissions have not been set up within most EU countries.

172. *Responding to violations*. The Union cannot remain indifferent to large-scale violations of human rights. While acknowledging the particular difficulties faced by the EU in relation to especially complex and controversial cases, we believe it is essential for the EU to continue to strive to ensure an appropriate balance between the positive and negative dimensions of its

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[38] See para. 142 above.

policies. Whilst we do not agree with those who advocate the automatic application of economic or other forms of sanctions in certain circumstances, and while we consider that the impact of any proposed sanctions upon human rights must always be taken fully into account, it is clear that sanctions should not be excluded from the range of policy options available to the Union. Their appropriate form and duration will inevitably differ from case to case, but there will be instances in which there is no other reasonable response.

173. There are two developments which could assist greatly in enabling a tailored and more effective EU response to violations. The first is the better integration of human rights considerations into defence and security policy as well as economic and commercial policies. The second is the development of the expertise and routine consideration of human rights which would result from the creation of the proposed Human Rights Office.

174. *General policy promotion and representational policies*. The EU has a particularly important representational role, especially *vis-à-vis* other international organizations, in the context of which greater attention should be paid to human rights. These issues are increasingly prominent on the agenda of the UN Security Council and should be made so in relation to those of the World Bank and the International Monetary Fund, to name but two important forums. The EU should take a more pro-active role, both through its individual Member States and collectively, to promote the incorporation of human rights concerns into the mainstream activities undertaken within such settings.

XI. THE EUROPEAN COURT OF JUSTICE AND ACCESS TO JUDICIAL REMEDIES

175. The European Court of Justice deserves immense credit for pioneering the protection of fundamental human rights within the legal order of the Community when the Treaties themselves were silent on this matter. It has been the Court that has put in place the fundamental principles of respect for human rights which underlie all subsequent developments. It is worth noting that, in the context of individual rights, the Court, historically, developed a special 'user friendly' approach to access. This contrasted with

the approach taken in other areas in which individual reliance on Community measures to vindicate rights – whether *vis-à-vis* Community institutions or Member States – is linked to the doctrine of direct effect which requires clear, precise and unconditional measures.

176. In the field of human rights, however, the Court has always permitted individual challenges to the legality of measures on the grounds of an alleged violation of human rights, even though these, by definition, could not always be considered clear and precise in the absence of a written Community 'bill of rights' or formal accession to the European Convention. The value and importance of this approach should be underlined. The Court has not only made the material provisions of the European Convention *de facto* binding on the Community, but has also commenced in recent time to rely more extensively on the jurisprudence of the Strasbourg Organs. This development is to be strongly welcomed.

177. There is, however, one area where the judicial protection of individuals within the legal order of the Community and as concerns rights within the field of application of Community law is unsatisfactory, and the remedy to this inadequacy lies in the hands of the Court.

178. Individual and group standing to challenge Community measures directly before the Court(s) through the means of Article 230 TEC is, and has been, extremely restrictive. The conditions created by the Court of Justice to satisfy the Treaty requirements of being 'individually and directly concerned' are such that individual plaintiffs or groups representing individuals are for the most part shut out from direct challenges before the European Court. This situation is particularly grave when the challenges in question concern alleged violations of human rights by Community institutions or by Member States operating on behalf of the Community.

179. The Court has indicated in its jurisprudence (such as in the *Greenpeace Case*) that individuals may always seek a remedy before national courts which may, or in prescribed circumstances must, make a reference to the European Court of Justice under Article 234. But the expansion and complexity of Community governance has demonstrated that the complementarity of Articles

230 and 234 is no longer assured. The rules of standing before national courts may defeat meritorious plaintiffs without the case ever reaching the European Court of Justice. Likewise, there is no guarantee that national courts will always make a preliminary reference.

180. As a result, the issue of access to justice in the field of human rights requires review both by the Court itself and by the Community legislator.

181. Specifically, consideration should be given to the following measures:

i The Court should revisit its jurisprudence on Article 230 with a view to facilitating the standing of individuals and public interest groups alleging the violation of fundamental human rights. Articles 6 and 13 of the European Convention on Human Rights should guide such jurisprudence. Specifically, access to the ECJ should always be available where no other guaranteed judicial route is available before national courts or where national courts have refused to make a reference.

ii The Court should also revisit its jurisprudence and, if necessary, request a revision of its Statute, in order to facilitate intervention by recognized public interest groups. The current automatic right of intervention of Member States must be balanced by a right of intervention by other public groups which may better inform the Court of sensitive societal concerns in the field of human rights

iii Within the sphere of application of Community law, rules of standing before national courts should be amended to allow recognized non-governmental organizations to initiate cases. The Community has already pioneered such a scheme in the field of consumer protection and the same principle should be extended to human rights more generally.

iv Access to justice is often defeated by lack of the resources required to bring meritorious cases or test cases even where procedurally such action would be possible. The Directorate-General for Human Rights should be authorized to oversee an adequate legal aid scheme to facilitate the funding of meritorious cases in the field of human rights. Since such cases might be directed at the Commission itself,

independent intermediaries must also be found to oversee the allocation of such funding without, however, having their hands tied by conflict of interest.

182. There is reason to be concerned by the dangers caused by refusal of national courts to make references in the field of human rights on the basis of Article 234, especially when the issue concerns an alleged violation by a Member State within the sphere of application of Community law. At present, the only remedy available to the individual is to lodge a complaint with the Commission in the hope that it will take the matter up through negotiation, and eventually by commencing proceedings under Article 226. This is an unsatisfactory situation, both practically and symbolically. In meritorious cases individuals should have access to courts without the sanction of those they may be complaining about.

183. In effect, there should be recognition in the procedural field of the same principle which animated the Court substantively in its *Francovich* jurisprudence. In relation to matters which concern a Community violation, it has already been proposed that the European Court of Justice should revisit its jurisprudence relating to Article 230. But this would not help *vis-à-vis* Member States.

184. What is needed is a Treaty amendment to Article 227 which would allow in such cases for recognized public interest groups to bring an action before the European Court of Justice – although only after the Commission itself declines to do so. The merit of this proposal lies not only in enhancing the judicial protection of human rights within the Community legal order, but also in preventing Member States having to defend before the European Court of Human Rights measures adopted on behalf of the Community without the latter having the right to defend itself.

XII. THE EUROPEAN HUMAN RIGHTS MONITORING AGENCY

185. Monitoring is an indispensable element in any human rights strategy. Systematic, reliable and focused information is the starting point for a clear understanding of the nature, extent and location of the problems which exist and for the identification of possible solutions. It is also a necessary element in any strategy to

garner the support of civil society and the community at large for measures to promote and protect the human rights of vulnerable groups. The transnational dimension of many human rights challenges, combined with the need to facilitate coordinated responses within the Union, demand that a general monitoring function be performed by the Community. The principal need is to produce an Annual Survey of Human Rights within the EU which would be factual, objective and designed to facilitate informed policy-making. But it must be emphasized that Community-level monitoring is separate from policy-making, policy implementation and enforcement. Those functions would not be entrusted to the Agency.

186. Indeed there is no assumption that any form of Community-level action need necessarily follow from the results of the monitoring process. In egregious cases and where a matter is within Community competence, the Community would be expected and even required to react to the reports provided to it by the Monitoring Agency. But it will often be the case that the specific measures to be taken will either fall outside the fields of competence of the Community, or would, in any event, be more effectively taken at the national level. Thus, in various ways, we consider that the principle of subsidiarity is again fully compatible with the proposed policy initiative.

187. It is proposed either that a separate Monitoring Agency be created or that the jurisdiction of the Vienna Monitoring Centre on Racism and Xenophobia should be enhanced so as to make it into a fully-fledged agency with monitoring responsibility over all human rights in the field of Community law. The latter proposal is put forward because it seems likely to be more politically palatable and less administratively challenging than the creation of an entirely new agency. That option should, however, be pursued if it is more acceptable to Member States. The remainder of this analysis focuses on the Vienna option.

188. The same logic which justified the establishment of the Vienna Centre, the same legal basis which underpins that initiative, and the same manner of functioning all apply equally to the proposed expanded agency. For those reasons it is highly instructive to review some of the principal elements cited in the Preamble to the Regulation setting up the current Centre.

> (1) Whereas the Community must respect fundamental rights in formulating and applying its policies and the legal acts which it adopts; whereas, in particular, compliance with human rights constitutes a condition of the legality of Community acts;

189. This first paragraph restates, in an admirably succinct manner, much of the approach that is called for earlier in this *Report*.

> (2) Whereas the collection and analysis of objective, reliable and comparable information on the phenomena of racism, xenophobia and anti-Semitism are therefore necessary at Community level to provide full information to the Community on those phenomena so as to enable the Community to meet its obligation to respect fundamental rights and to enable it to take account of them in formulating and applying whatever policies and acts it adopts in its sphere of competence;

190. The importance of monitoring is thus acknowledged, although it is not apparent that the phenomena mentioned are fundamentally different in nature from many of the broader human rights concerns with which our present *Report* is also concerned.

> (14) Whereas in order to carry out this task of collecting and analysing information on racism, xenophobia and anti-Semitism as well and as independently as possible and in order to maintain close links with the Council of Europe, it is necessary to establish an autonomous body, the European Centre on Racism and Xenophobia (Centre), at Community level with its own legal personality;
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> ...
>
> (20) Whereas, in order to enhance Co-operation and avoid overlap or duplication of work, the tasks assigned to the Centre pre-suppose close links with the Council of Europe, which has considerable experience in this field, as well as Co-operation with other organizations in the Member States and international organizations which are competent in the fields related to the phenomena of racism and xenophobia;

...

(23) Whereas the Centre must enjoy maximum autonomy in the performance of its tasks;

191. These three paragraphs underscore the importance of independence which is a necessary element in any effective and authentic human rights institution, while at the same time noting the need for close collaboration with other relevant human rights bodies – especially, in this instance, the Council of Europe.

(15) Whereas the phenomena of racism, xenophobia and anti-Semitism involve many complex, closely interwoven aspects which are difficult to separate; whereas, as a result, the Centre must be given the overall task of collecting and analysing information concerning several of the Community's spheres of activity; whereas the Centre's task will concentrate on areas in which sound knowledge of those problems is particularly necessary for the Community in its activities;

192. The analysis reflected in this paragraph is particularly apposite to the broader human rights focus since it highlights the impossibility of artificially separating those issues which fall directly within the Community's competence and those which do not. But rather than drawing the conclusion that the Community should thus have no role, it draws the far more logical and acceptable conclusion that, while all relevant information must be collected, particular emphasis must be given to matters which are of relevance to the Community.

(16) Whereas racism and xenophobia are phenomena which manifest themselves at all levels within the Community: local, regional, national and Community, and therefore the information which is collected and analysed at Community level can also be useful to the Member States' authorities in formulating and applying measures at local, regional and national level in their own spheres of competence;

...

(17) Whereas therefore the Centre will make the results of its work available to both the Community and the Member States;

193. These paragraphs reinforce the earlier one by noting that there is no question of excluding any particular levels within society from the remit of the Centre and emphasising, as we also do, that action at the level of the Community itself will often be unnecessary. This, in turn, in no way limits the role of the Community in making the relevant information available to other levels of government to facilitate their policy-making endeavours.

> (18) Whereas, in the Member States, there are numerous outstanding organizations which study racism and xenophobia;
> (19) Whereas the co-ordination of research and the creation of a network of organizations will enhance the usefulness and effectiveness of such work;

194. These paragraphs recognize the essential role of non-governmental organizations in this field and foreshadow a strong cooperative and networking approach between them and the Centre.

195. The rationale offered by these preambular paragraphs for establishing a European Monitoring Centre on Racism and Xenophobia is entirely compelling. What is not compelling, from a broader perspective, is to limit the focus of such a centre exclusively to racism and xenophobia. Both constitutionally and pragmatically the same rationale that has been developed in relation to those issues can and should be extended to the entire area of human rights coming within the field of application of Community law. The same complexity, the same need for multi-level action, and the same need for autonomy and independent legal personality all apply equally to the broader focus on human rights with which this *Report* is concerned. This is reinforced by the new commitments in the Treaty of Amsterdam to respect human rights and to combat all forms of discrimination. In terms of the legal basis for such an initiative, there would appear to be no doubt that it is sufficient.[39]

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[39] As Professor Gaja noted in his expert paper (see Annex IV below), 'Opinion 2/94 does not appear to imply that the Treaty [would need to] be amended in order to establish within the European Community a monitoring system concerning the respect of human rights by Community institutions and by Member States within the scope of Community law.'

196. The European Council should thus make a Statement confirming its overall commitment to ensuring effective action to promote respect for human rights by recognizing that a monitoring mechanism is not only a desirable, but also an essential, Community contribution. Accordingly, the objectives of the existing Centre should be expanded and adapted to enable it to perform the necessary tasks.

197. The new Vienna Human Rights Monitoring Agency should be given a set of objectives which would closely follow those that apply in the case of the existing Centre. In order to give a clear sense of what is involved, the following model is proposed.

1. The prime objective of the Vienna Agency shall be to provide the Community and its Member States reliable and comparable data at European level on respect for human rights in the Community in order to help them when they take measures or formulate courses of action within their respective spheres of competence.

2. The Agency will study the various aspects of human rights and their abuses and examine examples of good practice in dealing with such abuses. To these ends, in order to accomplish its tasks, the Agency shall:

   a. collect, record and analyse information and data, including data resulting from scientific research communicated to it by research centres, Member States, Community institutions, international organizations and non-governmental organizations;

   b. build up cooperation among the suppliers of information and develop a policy for concerted use of their databases in order to foster, where appropriate at the request of the European Parliament, the Council or the Commission, wide distribution of their information;

   c. carry out scientific research and surveys, preparatory studies and feasibility studies, where appropriate, at the request of the European Parliament, the Council or the Commission. In doing so, the Centre shall take account of already existing studies and other activities (conferences, seminars, ongoing research, publications) in order to avoid duplication and guarantee the best possible use of resources. It shall also organize meetings

of experts and, whenever necessary, set up ad hoc working parties;

d. set up documentation resources open to the public, encourage the promotion of information activities and stimulate scientific research;

e. formulate conclusions and opinions for the Community and its Member States;

f. develop methods to improve the comparability, objectivity and reliability of data at Community level by establishing indicators and criteria that will improve the consistency of information;

g. publish an annual report on the situation of human rights within the sphere of application of Community Law, highlighting examples of good practice, as well as on the Centre's own activities;

h. establish and coordinate a European Human Rights Information Network consisting of the Centre's own units, which shall cooperate with national university research centres, non-governmental organizations and specialist centres set up by organizations in the Member States or international organizations;

i. facilitate and encourage the organization of regular round table discussions or meetings of other existing standing advisory bodies within the Member States, with the participation of the social partners, research centres and representatives of competent public authorities and other persons or bodies involved in dealing with human rights.

198. In a similar manner, the organizational arrangements, management structure and budgetary accountability of the new Agency could also be adapted from those of the existing Centre. The most important function of the Monitoring Agency would be the preparation of an Annual Survey of Human Rights within the EU. This Survey would be forwarded to the Commission and the Parliament for consideration, as well as to the Member States for information.

199. Finally, it should again be made clear what is not envisaged in calling for the establishment of such a Monitoring Agency. It

will not be a policy-making body. It will not be responsible for implementing any human rights policies. It will have no enforcement powers. And it will not address itself solely to the institutions of the Community. Indeed its keys partners will be Member States and the broader network of social partners, research centres, public authorities, and groups with expertise in the human rights field.

XIII. SELECTED ISSUES

200. Most of this *Report* has been devoted to consideration of the procedural and institutional reforms or innovations which would be required in order to sustain and drive a more coherent, comprehensive and effective human rights policy on the part of the EU. The principal exception concerns certain aspects of external policy which have been considered in greater depth. In the section that follows, brief consideration is given to some of the key concerns that have arisen in the course of the broader examination of EU policy in relation to a few selected issues of concern. It must be emphasized, however, that this listing is highly selective and does not necessarily reflect the overall importance of the issues selected or the lesser importance of issues not dealt with here, such as racism and xenophobia, which are clearly of particular importance in the current climate. In relation to those and many other issues, the reader is advised to consult the specialist studies that have been drawn up and are published elsewhere.[40] Moreover, even those studies are by no means comprehensive and many areas of importance remain to be dealt with in other contexts.

A. European Citizenship

201. Currently, the limited number of rights mentioned in the Citizenship chapter (Part Two of the TEC) are not sufficient to meet the gravity of the concept of European Citizenship. We focus here on just two dimensions of that issue – freedom of movement and transparency.

[40] See Annex IV below.

i. Free Movement

202. Free movement is among the most visible privileges which are attached to European citizenship. The implementation of this right is still far from complete. In order to promote awareness of existing rights, the current piecemeal legislation on free movement and accompanying rights should be replaced by a common framework on the 'legal status of European citizens and their families', in which differentiation between 'privileged' (economically active) and 'non-privileged' European citizens should be kept to a minimum. Further, the institutions of the Union should complete the measures proposed by the Commission on 1 July 1998 in response to the March 1997 'Report of the High Level Panel on Free Movement of People', chaired by Simone Veil, and continue to examine other measures in response to the more than 80 recommendations made by the Panel.

ii. Transparency

203. Transparency affects the quality of citizens as political beings. Without effective transparency, political responsibility, political control and the true exercise of political rights and duties are all inhibited or impaired. In order to achieve the necessary degree of transparency, the Community's enhanced freedom of information policy, reflected in Article 255 TEC, is not sufficient in itself. This aspect is developed further below.[41]

B. Equality and Non-discrimination

204. The Community's commitment to the principle of non-discrimination and the promotion of equality is long-standing and increasingly deep-rooted. The principle of equality is a fundamental principle of Community law, which binds not only the Community in all of its activities but also the Member States in relation to all of their activities which fall within the scope of Community law. The inclusion of Article 13 in the TEC following Amsterdam, which provides for measures 'to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation', provides the occasion for sustained reflection on the most effective means by which to achieve its objectives. In the longer term, consideration should be given to the reinforcement of

[41] See paras 221-223 below.

this provision through the addition of a general equal treatment provision in Article 3 of the TEC which would go beyond gender to cover all of the prohibited grounds of discrimination.

205. In the medium-term, consideration should be given to the adoption of a Directive covering non-discrimination and equal treatment in relation to all of the grounds mentioned in Article 13. Such a Directive could be based on Articles 13 and 137 (working conditions) and, if necessary, Article 308 TEC. The aim would be to mirror the provisions of the existing Directive 76/207 on gender, but with additional provisions designed to ban harassment in the workplace along with the provision of an accompanying right to an effective remedy, and to require employers to monitor the composition of the workforce in terms of gender, race and disability to establish a workplace equal opportunities policy.

206. In seeking to mainstream these policies, the Commission Directorate-General with responsibility for human rights could either supplement or replace the existing inter-service groups dealing with issues such as disability and race.

207. In relation to *sex equality*, consideration should also be given to adoption by the Community of the Council of Europe's notion of 'parity democracy' in relation to the fair representation of women in the workplace and to the adoption of provisions to make the equal pay principle effective, especially after the Amsterdam Treaty's amendment to Article 141.

208. *Discrimination based on sexual orientation* continues to be widespread and should be more systematically addressed through a Commission action plan and the development of a draft directive on equal treatment.

209. Protection of the *rights of members of minority groups* should also become a more prominent focus of the Union's policies, both internally and externally.

210. EU policy towards *persons with disabilities* should reflect a human rights-based approach which aims to eliminate barriers to full participation and equal opportunities within society. In this respect, the move away from an approach which aims to eliminate discrimination towards an active approach which promotes

measures to support participation and equal opportunities is especially important. This is also one of the areas in which appropriate policies must be pursued within mainstream policy-making across a very wide range of issues and not simply confined to those areas of direct and obvious concern to persons with disabilities.

C. Immigration and Asylum

i. Asylum-seekers

211. The treatment of asylum-seekers is a key component of human rights policy. Yet it has been a matter of particular political controversy within the Member States of the Union and an issue in relation to which accepted international human rights standards, which are clearly binding on the EU, appear to be most at risk. Recent reports have concluded that EU countries: apply widely differing interpretations in implementing common asylum measures, have adopted very different approaches to third country cases, provide inadequate safeguards to protect the obligation to ensure non-refoulement, have applied different interpretations of who constitutes a refugee, and have not always complied with common EU rules.[42] Counter measures such as that to establish 'cities of refuge' for persecuted writers are important, but much more needs to be done.[43]

212. Efforts to coordinate national asylum policies within the EU have been under way since 1990 and the entry into force of the Dublin Convention on determining the Member State of the European Union responsible for determining an asylum application entered into force in September 1997. Once the Amsterdam Treaty comes into effect, Article 63 TEC gives the Community five years within which to adopt a detailed set of measures on asylum. In implementing this mandate it is essential that full account be taken of the human rights provisions of the Treaty and that the exercise is not governed solely by considerations of migration

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[42] For example, S. Peers, *Mind the Gap!: Ineffective Member State Implementation of European Union Asylum Measures*, (London, Immigration Law Practitioners' Association and Refugee Council, May 1998).

[43] See *La Charte des villes refuges: Un réseau contre l'intolérance, pour la protection des écrivains menacés et persécutés* (Strasbourg, Council of Europe, 1997)

management. In order to give effect to its obligations to provide protection, rather than yield to short-sighted pressures to promote exclusion, the EU should seek to ensure that the following key elements inform a communitarized asylum policy which should be implemented in national systems.

213. There should be a coherent and comprehensive policy, encompassing all key elements of the asylum system, to be implemented by the Member States. It should include fair procedures, based on common standards which are in full conformity with the provisions of the 1951 Geneva Convention relating to the Status of Refugees and its 1967 Protocol, including in relation to the granting of asylum in situations of persecution by non-state agents. The next step should be to seek to adopt common regimes designed to provide temporary protection in situations involving large-scale influxes. In addition, a burden-sharing system should be developed in response to the imbalance in numbers of asylum-seekers hosted by different Member States, and similar policies in relation to reception facilities and other matters should be promoted.

214. In implementing the provisions of the Dublin Convention, procedures are needed which respect the interest of the asylum-seeker, including border/admissibility procedures which allow the asylum-seeker to have his or her claim individually assessed on its merits by competent bodies (if necessary in third states). Policies should also be developed to deal with the many persons who cannot immediately be sent back to their country of origin and whose situation therefore needs to be regularized, at least temporarily. Finally, more attention needs to be given to measures to integrate refugees within the EU so that they are able to enjoy the full range of human rights accorded to others resident within the Union.

215. The general commitment to respect for human rights of Article 6 TEU is completed, here, by a specific reference to the Geneva Convention of 1951 and the Protocol of 1967 in Article 63(1) TEC. The institutions of the EU (and the European Court of Justice under its new powers in this field) should be encouraged to give the utmost importance to this reference. In future 'minimum standards' to be adopted under Article 63(1), the Member States should be expressly instructed to respect the

standards of the Refugee Convention and of the European Convention on Human Rights (including the relevant case-law of the Strasbourg Court on Articles 6 and 8 of the European Convention on Human Rights in the context of immigration).

ii. Third Country Nationals

216. Once admitted to the territory of the EU, third country nationals constitute an especially sensitive category of concern in human rights terms because of their particular vulnerability. Two specific measures already proposed by the Commission should be adopted. The first is the proposal for a Convention – or possibly a Directive under Article 63 TEC as revised by the Amsterdam Treaty – on rules for the admission of third country nationals. This deals not only with admission but also includes a right to seek employment in other Member States. The second is a Commission proposal for amending the Social Security Regulation 1408/71 so as to extend the benefit of its rules to third country nationals. In any event, such an extension may well be unavoidable as a result of the European Court of Human Rights judgment in the *Gaygusuz* case of 16 September 1996.

217. More generally, beyond those two initiatives, progress should be made towards equal treatment of third country nationals and European citizens – building on the jurisprudence of the European Court of Justice as regards third country nationals covered by a Community Agreement. The fragmented nature of those rights may be an argument to extend them (a) to fields other than just conditions of employment and social security; and (b) to nationals of countries beyond those covered by specific agreements.

D. Children

218. Issues relating to the well-being of children remain quintessentially within the competence of the Member States. Nevertheless, the increasing importance attached to the concept of children's rights and the major role attributed by the international community to the Convention on the Rights of the Child of 1989 (ratified not only by every EU Member State but by every country in the world except for Somalia and the United States), serve to underline the desirability of a greater EU sensibility in this area. Two dimensions warrant particular

consideration. The first is to explore the potential to develop pilot projects and other initiatives designed to promote children's rights within the context of EU development cooperation activities. The second is for the Commission to ensure that all legislation it drafts is fully compatible with the requirements of the Convention.

E. Transnational Corporations and Other Non-State Entities

219. The impact of private actors on the enjoyment of human rights is growing rapidly in a global economy. Privatization, deregulation, and the diminishing regulatory capacities of national governments have all contributed to enhancing the importance of corporations and other private entities in terms of human rights. However, existing arrangements for monitoring compliance with human rights standards are ill-equipped to respond to these developments. In response to growing corporate awareness and increasing consumer pressure, there has been a significant expansion in the number of voluntary codes of conduct and the like which have been adopted within different business sectors. In principle, these developments are to be welcomed, but they are insufficient. They are not necessarily based squarely on international standards, their monitoring is uneven, they are mostly overseen by the corporations themselves, and they remain entirely optional.

220. The EU needs to take the lead in exploring what further options exist in this regard. In 1977 the Council adopted a Code of Conduct for businesses operating in South Africa and in May 1998 it adopted an EU Code of Conduct on Arms Exports. While there are significant differences in the scope and approach of these Codes, it is difficult to accept as the last word a recent statement by the Commission to the effect that existing Community law makes it impossible to develop a code of conduct to oblige EU-based companies operating in third countries to observe human rights norms.[44] The Commission should evaluate existing voluntary codes of conduct and prepare a study on the ways in which an official EU code of conduct for corporations could be formulated, promoted and monitored. To the extent that changes in Community law will be required, these should be clearly identified.

[44] Letter of 14 November 1997 to the Chairman of the European Parliament's Committee on Foreign Affairs, Security and Defence Policy.

F. New Information and Communications Technologies

221. As noted above in relation to citizenship, citizens need to be effectively informed, directly and through the media and other appropriate sources of information. Otherwise, the average citizen is unlikely to have a very clear idea of the types of information to which they might be entitled to seek access by invoking the freedom of information principle. The need for better information to raise people's awareness of their rights was highlighted in the recommendations made in the Veil Report. The permanent Dialogue with Citizens and Business, launched by the Commission, is relevant in this regard, as is the Euro-Jus system for providing informal legal advice at the national level in relation to the application of Community law. But more sustained measures are needed.

222. The High-Level Expert Group established by the Commission to analyse the social aspects of the information society recognized this fact in its 1997 final policy report. It called upon the EU to implement a democracy project designed to 'step up the interaction between politicians and citizens and increase the latter's participation in the political debate and decision-making' and to 'improve our understanding and the transparency of the democratic process in both national and EU institutions'.[45] Such recommendations are all too easily misread as calling for technological fixes when in fact the principal context in which they should be pursued is one based clearly on respect for human rights.

223. The Directorate-General responsible for human rights could thus play a central role in developing and implementing an active horizontal policy of transparency and general democracy enhancement in the information society. This should include the creation for each Directorate-General and for the Commission as a whole of a standard of transparency to be effectuated through creative use of the Internet and of all other media forms.

224. Three other issues are important in this respect.[46] One is the need to tackle and effectively regulate the misuse of the new

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[45] *Building the European Information Society For Us All: Final Policy Report of the High-Level Expert Group* (1997), p. 61.

[46] This analysis draws in particular on: Peter Brophy and Edward F. Halpin,

information technologies, while maintaining a balance which adequately protects the right to freedom of expression and freedom to impart and receive information. This applies especially in relation to the debate over encryption. In this respect, the standards recognized 50 years ago in the Universal Declaration of Human Rights remain entirely valid, but the policies through which they can be upheld need to be constantly updated. As a key player in the field, the EU has a particular responsibility to ensure that sight is never lost of the human rights dimension of this issue. The second is the importance of seeking to make the benefits of the new technologies more accessible to individuals and human rights groups in developing countries. Existing disparities in access are dramatic and should be explicitly addressed in EU development cooperation policies. The third is the need to assist efforts to make human rights information more accessible, better structured and better managed so as to reduce problems of information overload and to seek to maximize the beneficial use which human rights groups can make of these technologies. Again, the EU, and especially the Commission, have the resources, competence and responsibility to fund and facilitate efforts in this regard.

G. The Third Pillar

225. Under the Amsterdam Treaty, the Third Pillar has been significantly restructured. Freedom of movement, immigration and related issues have been moved to the First Pillar and what remains is a focus on 'police and judicial co-operation in criminal matters'. The addition of trafficking in persons, offences against children and illicit arms trafficking to existing concerns such as drugs, terrorism and organized crime gives an indication of the principal areas of concern. While the objective stated in Title VI is to 'provide citizens with a high level of safety within an area of freedom, security and justice', no specific mention is made of achieving these objectives within a framework which fully respects the human rights of all, including non-citizens. Proposals to subject activities taken within this framework, including the activities of an expanded Europol (European Police Office), to review by the European Court of Justice were not accepted by Member States at Amsterdam.

'Information Technology and Human Rights: A Briefing Paper', July 1998; and Eric Sottas and Ben Schonveld, 'The Beguiling Song of Technology: A European Vision on Technology and Human Rights', June 1998.

226. This development leaves a wide area of expanding EU cooperation within which human rights guarantees are, to say the least, neither strong nor visible. The Union must as a matter of urgency explore the means by which the operation of Europol and similar semi-independent agencies (such as the Committee set up under the Customs Information Convention) can be effectively monitored with respect to their human rights performance. Access to the Court should also be assured in relation to any future schemes of police and judicial cooperation.

XIV. SUMMARY OF RECOMMENDATIONS

227. Rather than repeating the various recommendations contained in this *Report*, it is sufficient to provide a brief inventory of suggested measures:

- ratification of human rights treaties by EU Member States: 85-88, 102
- accession to the ECHR and ESC by the Community: 96-98, 102
- social rights within the EU: 102-103
- external funding for social rights: 110, 121, 154
- a new approach to the issue of a social clause: 108-109
- more regard to ILO standards: 102, 110
- clarification of the legal basis for Commission action: 113
- better coordination within the Commission: 114
- increased expertise within the Commission: 115
- a stronger human rights component in Commission projects dealing with democratization etc.: 118-119
- improved transparency and accountability in development cooperation: 122-124
- improved arrangements for human rights clauses in EU agreements: 126
- human rights training for EU officials: 127
- study of procedures for suspending rights of Member States: 130, 148
- improved Commission scrutiny of draft legislation: 131
- appointment of a Commissioner for Human Rights: 132-134

- a Directorate-General dealing exclusively, or mainly, with human rights: 135
- human rights sensitizing throughout the Commission: 136
- creation of a single Parliamentary human rights committee: 140
- clarification of the meaning of human rights in Parliament's work: 141
- effective use of new powers by Parliament: 143-145
- enhanced Parliamentary debates: 146
- increased publicity for Ombudsman and Petitions Committee: 147
- strengthened secretariat expertise within Parliament: 148
- greater interaction between the different EP and other Parliamentary committees: 148
- improved consultation by Parliament with NGOs: 148
- Parliamentary follow-up of recommendations: 148
- a stronger EP role in the proposed Human Rights and Democracy Committee: 158
- improved responsiveness to complaints of abuse, etc.: 159
- better Council support for the Committee on Human Rights: 162
- creation of a Human Rights Office in the Council for Pillar Two: 163
- preparation of an Annual Report on human rights in the world: 167
- more detailed Council reporting to Parliament: 142, 170
- Council cooperation activities under Pillar Two, including support for national commissions: 171
- improved response by Council to violations: 172-173
- stronger emphasis on human rights in Council's representational activities: 174
- improved standing to bring human rights cases before the ECJ: 181
- improved standing before national courts in relation to Community human rights law: 181
- a legal aid scheme for meritorious human rights cases: 181

- establishment of an EU Human Rights Monitoring Agency: 187
- preparation of an Annual Survey of Human Rights within the EU: 185, 198
- measures to enhance freedom of movement: 202
- improved transparency as an element of citizenship: 203
- detailed measures to give full effect to Article 13 TEC on non-discrimination: 204-206
- measures to improve sex equality: 204-207
- measures to eliminate sexual orientation-based discrimination: 208
- greater emphasis on minority rights: 209
- a human rights-driven policy for people with disabilities: 210
- measures to improve the situation of asylum-seekers: 211-215
- measures relating to third country nationals: 216-217
- children's rights: 218
- development of an EU Code of Conduct for corporations: 219-220
- better use of new information technologies: 221-223
- protection of human rights in the information society: 224
- making human rights technologies more accessible to human rights groups: 224
- protecting human rights under the Third Pillar: 225-226

XV. AFTERWORD: RESPONDING TO ANTICIPATED CRITICISMS

228. There is one criticism that can justifiably be levelled at the emphasis reflected in this *Report* as well as in the *Agenda* that has drawn upon it. It is that there is an excessive pre-occupation with institutional matters. The reader might even conclude that the *Report*'s authors not only have a naïve and undiluted faith in the powers of bureaucracy, but are relatively unconcerned with the substance of the grand challenges that emerge from any close examination of the EU's human rights policy. There are, however, several reasons which seem to warrant the approach which has been adopted.

229. The first, as noted earlier, is that the potential scope of a report such as this is vast. It would be pretentious as well as unrealistic to purport to provide a comprehensive, let alone a minutely well-informed critique, of every aspect of EU policy in all of the many fields touching upon human rights within the confines of a relatively brief report. To some extent, the focused reports which were commissioned in connection with the project as a whole are designed to provide a more detailed analysis of key sectors, but even they do not aspire to be comprehensive.

230. Second, the EU is a political and bureaucratic entity in which the starting points for major policy reform or innovation are: (i) a reasonably clear-cut acceptance of the proposed policy orientation on the part of policy-makers at each of the key levels; and (ii) the shaping of policy-making, administrative and judicial structures which are adequately equipped to pursue the more specialized dimensions of human rights policy in relationship to the different sectoral areas.

231. Third, and closely related, is the fact that there is little point in going into the finer details of policy until the central issue of principle, that of the Union's competences in relation to many aspects of human rights, is resolved. There is no shortage of compelling and highly detailed analyses, whether prepared by specialists, interest groups, scholars or activists, which seek to spell out what the Community should do in one area or another of internal policy and which simply take for granted that the necessary legal and constitutional competence exists. For the most part they do so with scant regard to the resistance which that proposition continues to encounter from many quarters. In order to avoid the futility which follows from the neglect of the sometimes tedious and arcane, but nonetheless indispensable, legal dimension, this *Report* attaches particular importance to establishing a clear and appropriate foundation for the specific measures proposed.

232. Fourth, the promotion and protection of human rights is not a one-time undertaking and neither Governments nor bureaucracies can be counted upon to remain consistently, let alone insistently, vigilant. There will always be occasions and issues in relation to which it will seem preferable to sweep human rights under the carpet ('temporarily', of course, and only in the interests of a more

profound objective which is itself assumed to be human rights friendly). Thus, one of the principal themes running through all aspects of this *Report* and the *Agenda* is that the relevant structures and institutions must be made more open and responsive to pressures from civil society and other watchdogs to respect human rights. The *Report* seeks to translate this theme into practice by concentrating upon the need for more systematic and reliable information, the need to be able to identify who is institutionally responsible for upholding human rights, the need to be able to hold those in power accountable, the need for a system of checks and balances, and the need for more openness and transparency.

233. A final criticism that may be anticipated in relation to both the *Report* and the *Agenda* is that the various recommendations contain little that is startling, wholly original, or highly innovative. For the most part this is true. But the explanation is simple and, we believe, compelling. The principal shortcoming of the EU's human rights policy is not a lack of novelty or grand gestures. It is a consistent reluctance to come to grips with some basic home truths about the indivisibility of internal and external human rights policy, the need for a clear and unambiguous commitment at all levels, and the need for effective political and bureaucratic structures to give effect to those commitments. The various components of the recipe for achieving these objectives have been evident for a number of years. Until these indispensable building blocks are put into place by the Member States and the institutions of the Union there will be little point in creating grand new designs for their own sake.

ANNEX I: BIOGRAPHICAL NOTES ON THE MEMBERS OF THE *COMITE DES SAGES* AND THE PROJECT DIRECTOR

COMITE DES SAGES

- **Judge Antonio Cassese** has been a Member of the United Nations International Criminal Tribunal for the former Yugoslavia since 1993. He was elected President in 1993 and re-elected in 1995. Since November 1997 he has been Presiding Judge, Trial Chamber II of the Tribunal. He was also Presiding Judge of the Appeals Chamber of the UN International Criminal Tribunal for Rwanda from1994 to1997. He was previously: President of the Council of Europe Committee for the Prevention of Torture from 1989 to 1993; a Member of the Council of Europe Steering Committee for Human Rights from1984 to 1988 and its Chairman from 1987 to 1988; and a Member of the Italian delegations to the UN Conference on Human Rights (1968), UN Commission on Human Rights (1972-1975), UN General Assembly, (1974, 1975, 1978), Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977), and UN World Conference on Racial Discrimination (1978). He has been a Professor of International Law at Florence University since 1975, and was a Professor at the European University Institute, Florence from 1987 to 1993. He is a Member of the Board of Editors of the *European Journal of International Law* and in 1995 was elected *associé* of the *Institut de Droit International*.

- **Mme. Catherine Lalumière** has been a member of the European Parliament and President of the ERA (European Radical Alliance) Group since 1994. Before that she was Secretary General of the Council of Europe and a member of the Council's Parliamentary Assembly. She has been Vice-President of both the French National Assembly's Committee of Foreign Affairs and the delegation to the European Communities. She has held senior positions within the French Government, including Minister of Consumer Affairs, Secretary of State in charge of the Public Service and Secretary of State responsible for European Affairs at the Ministry of Foreign Affairs. A Doctor in Public Law with

degrees in political science and the history of law, Mme. Lalumière has held academic positions at the Université de Bordeaux 1, the Institut d'Etudes politiques de Bordeaux and the Université de Paris 1, Panthéon-Sorbonne.

- **Professor Peter Leuprecht**, is currently a Visiting Professor at the Département des Sciences Juridiques of the Université du Québec à Montréal and at the Faculty of Law of McGill University. He also acts as an adviser to the Canadian Department of Justice. He was previously an official in the Secretariat General of the Council of Europe (Strasbourg, France) from 1961 to 1997, serving as Secretary of the Committee of Ministers from 1976 to 1980 and Director of Human Rights from 1980 to 1993. In 1993 he was elected Deputy Secretary General, a post which he left in 1997. He holds a Doctor of Law from the University of Innsbruck (Austria). From 1958 to1961 he was an assistant lecturer at the Faculty of Law at Innsbruck University and was called to the Bar. He has also taught at the Universities of Strasbourg and Nancy (France) and at the Academy of European Law in Florence (Italy). He has written extensively in the field of international law and human rights.

- **Mrs. Mary Robinson** has been United Nations High Commissioner for Human Rights since 12 September 1997. She was President of Ireland from 1990 to 1997. She became a member of the English Bar (Middle Temple) in 1973 and served as a member of the International Commission of Jurists (1987-1990) and of the Advisory Commission of Inter-Rights (1984-1990). Her particular field of expertise before becoming President was in constitutional and European human rights law. In 1993 she served as Special Rapporteur to the Interregional Meeting organized by the Council of Europe in preparation for the 1993 Vienna World Conference on Human Rights and she also delivered the keynote address at the Council of Europe's preparatory meeting for the Beijing Fourth World Conference on Women. Mrs. Robinson was the first Head of State to visit: Rwanda in the aftermath of the genocide; the International Criminal Tribunal for the Former Yugoslavia; and Somalia following the crisis there in 1992. She received the Special CARE Humanitarian Award in recognition of her efforts for Somalia.

PROJECT DIRECTOR

Professor Philip Alston is Head of the Department of Law and Professor of International Law at the European University Institute. From 1991 to 1998 he was Chairperson of the United Nations Committee on Economic, Social and Cultural Rights. He is also currently Editor of the *European Journal of International Law,* co-Director of the Academy of European Law, and Visiting Global Law Professor at New York University Law School. He has previously taught at the Australian National University, the Fletcher School of Law and Diplomacy, and Harvard Law School. At various times he has been an adviser to the Office of the UN High Commissioner for Human Rights, the International Labour Office, UNESCO, UNICEF, the Council of Europe, the Human Development Report Office of the United Nations Development Programme, and various other international and non-governmental organizations.

ANNEX II: PROJECT STAFF, MEMBERS OF THE DRAFTING COMMITTEE AND THE PROCESS OF PREPARING THE AGENDA AND THE REPORT

The Project and its Funding

1. The project was undertaken by the Academy of European Law at the European University Institute and was funded by a grant from Directorate-General 1A of the European Commission. The agreed terms of reference of the project are contained in Annex III to this *Report*.

2. The shape of the project emerged from discussions about the ways in which the European Union might best contribute to activities designed to commemorate the 50th anniversary of the Universal Declaration of Human Rights. The *Comité des Sages*, Project Director and the staff of the project wish to record their deep appreciation of the central role played by Mrs Daniela Napoli of DG 1A of the European Commission in initiating the discussions which led to this project and in bringing it to fruition. Mr Denis Petit also assisted in relation to the processing of the grant applications to the Commission. From the outset, Ambassador Christian Strohal, of the Austrian Ministry of Foreign Affairs also made a very important contribution to the discussions surrounding the project. Ms Ingrid Kircher helped in very many ways, especially in the lead up to the Vienna conference. In addition the President of the European Parliament kindly agreed to host a conference in Brussels in the context of the project. The organizers are especially grateful to Mr Barry Waters, Mr Dietmar Nickel and Ms Ursula Bausch for their generous advice and assistance in this regard.

3. Special thanks are also due to Professor Joseph Weiler who made a large and invaluable contribution to the intellectual design of the project as well as providing advice and assistance at many critical points along the way.

4. It goes without saying that none of these individuals, nor any other official of the Commission or the Parliament, is responsible for the content of the *Agenda*, the *Report* or the scholarly papers which have resulted from the project.

Staff

5. The project was directed by Professor Philip Alston.

6. The project was coordinated by Ms Mara Bustelo whose expertise, knowledge, efficiency and tireless efforts were truly indispensable in all aspects of the project. Following her departure to take up a position at the United Nations, Mr James Heenan proved to be a worthy successor as Project Coordinator. Both Ms Bustelo and Mr Heenan also assisted in the editing of the volume of essays that resulted from the project.

7. At various times important contributions to the project were also made by Mr Macalastair Darrow, Ms Susan Garvin, Mr Salvatore Zappalá and Mr Simon Bagshaw, all from the European University Institute. Particular thanks are due to Ms Anny Bremner for her meticulous editing of the Final Report and to Dr Fabián Pereyra, for his invaluable administrative contributions.

The Drafting Group

8. An invaluable role in the preparation of the *Report*, and thus indirectly of the *Agenda*, was played by a Drafting Group which met in Florence in July 1998 and whose members contributed extensively to the overall process. In addition to two of the *Sages* (Madame Catherine Lalumière and Professor Peter Leuprecht) and Philip Alston, Mara Bustelo and James Heenan of the Project Staff, the other members of the Group were:

- *Joseph Weiler*, Manley Hudson Professor of Law and Jean Monnet Chair at Harvard University, Co-Director of the Harvard European Law Research Center and of the Academy of European Law at the EUI and Professor at the College of Europe in Bruges;
- *Gráinne de Búrca,* Professor of European Union Law, European University Institute;
- *Andrew Clapham*, Associate Professor of Public International Law, Graduate Institute of International Studies, Geneva;
- *Michael O'Boyle*, Senior Legal Officer at the European Court of Human Rights in Strasbourg; and

- *Bruno de Witte,* Professor of European Law, University of Maastricht.

Principal Steps in the Project

9. The project consisted of two parts. The first involved the preparation of a large number of scholarly analyses and their publication in both English and French. The second involved the preparation of the *Report* and then the drafting of the *Agenda*. Although clearly linked, the two parts of the project are entirely distinct. The *Sages* have taken account in their work of both the scholarly analyses and the *Report*, but they do not necessarily endorse everything contained in those sources. Similarly, no responsibility for anything in the *Agenda* or the *Report* should be attributed to the authors of the original papers.

The Papers

10. The first part of the project consisted of a major Europe-wide cooperative research programme to analyse and evaluate EU policies in key areas and to make recommendations for future policies and activities. This involved the preparation of reports by leading scholars from every Member State of the Union on a wide range of human rights issues (for full details, see Annex IV). An initial planning meeting was held in Florence in October 1997. This involved the great majority of the paper writers, several *Sages*, and other invited experts, and provided an opportunity to discuss the orientation of the Project as a whole as well as the approach to be adopted in relation to each of the topics identified.

11. A major conference was hosted in Brussels by the European Parliament in May 1998 in order to review the drafts that had been prepared. The first part of the conference consisted of small working groups, designed to provide the opportunity for in-depth discussions on the contents of the initial drafts, to provide suggestions to be taken into account in the preparation of the final reports, and to generate additional suggestions to be considered by the *Sages* in their work. Members of Parliament as well as officials from the principal Community institutions were also invited to participate in these sessions. In addition, two public sessions were held in Brussels at the Parliament. They were

presided over by two of the *Sages* – Madame Lalumière and Professor Leuprecht – and attracted high-level participation from the European Parliament, a wide range of representatives of NGO and other key organizations in the field and members of the public.

The *Agenda* and the *Report*

12. In the preparation of the *Agenda* and the *Report* a particular effort was made to consult with those with an interest or expertise in the issues under consideration. Letters inviting submissions were sent to a wide range of non-governmental organizations, and other groups and individuals. Through the consultations held in Brussels, contributions were sought more generally from civil society, scholars, Community officials, members of the European Parliament, and others. As a result, information, materials and suggestions were gratefully received from a wide range of sources.

13. In addition, specific written submissions were received from the following: Professor Carol Harlow, London School of Economics; Dr Gerard Quinn, University College, Galway; Ms Karijn de Jong, European Centre for Development Policy Management, Maastricht; Ms Lotte Leicht, Director of the Brussels Office of Human Rights Watch; Ms Brigitte Ernst, Director, Amnesty International European Office, Brussels; Ms Anita Wuyts, Quaker Council for European Affairs, Brussels Office; Dr Karin Arts, Institute for Social Studies, The Hague; Professor Peter Brophy and Dr Edward F. Halpin, Centre for Research in Library and Information Management, The Manchester Metropolitan University; Mr Eric Sottas and Mr Ben Schonveld, World Organization against Torture; European Regional Section of the International Lesbian and Gay Association; Dr Lisa Waddington, Institute for Transnational Legal Research, University of Maastricht; Ms Tricia Feeney, Senior Policy Adviser, Oxfam Great Britain; Save the Children, European Union Office, Brussels; and Madame Louise Cadoux.

14. Initial discussions as to the content of the *Agenda* and the *Report* took place within a Drafting Group which met in Florence in July 1998 for this purpose (see above). The final draft of the *Agenda* was then examined and adopted by the *Comité des Sages* at a meeting in Geneva in September 1998. The *Agenda* was

launched at a conference in Vienna on 9-10 October 1998 in cooperation with the Austrian Ministry of Foreign Affairs and presided over by the Vice-Chancellor and Minister for Foreign Affairs of Austria, Dr Wolfgang Schüssel.

ANNEX III: THE TERMS OF REFERENCE FOR THE PROJECT

Both the present *Report* and the accompanying *Agenda* are among the results of a two-phase project funded by the European Commission through Unit 2 of Directorate A of Directorate-General 1A, responsible for human rights and democratization. In accordance with the terms of the project grant made to the Academy of European Law of the European University Institute in Florence, the general objective of the project is 'to make a European contribution to international efforts to mark the fiftieth anniversary of the Universal Declaration of Human Rights'.

The more specific objectives identified were to:

- improve public knowledge of the commitments and activities of the EU in human rights matters;
- examine the current status of human rights both within and outside the EU borders, and, more specifically, analyse the evolution of EU human rights commitments and activities after the adoption of the Maastricht Treaty; and
- promote analysis and public debate of a variety of topics chosen for their crucial importance to the future evolution of EU action to protect and promote democracy and human rights.

The expected results and impact of the project were stated to be to:

1. initiate a process of reflection on current achievements and future challenges faced by the European Union in the field of human rights. Its value will lie in producing thematic reports of a high quality, as well as in the consultative dimension of the drafting process which will blend contributions from different cultural and academic backgrounds and ensure the participation of civil society;
2. produce a significant amount of research describing and analysing the current state of human rights and EU commitment and activities. It will identify trends and priorities and new themes and approaches, leading to the formulation of proposals intended to enhance the renewed commitment of the EU to the principles and aspirations

embodied in the Universal Declaration of Human Rights 50 years after its adoption by the United Nations; and

3. increase awareness and raise the visibility of human rights issues throughout the European Union and among its partners and lead to a renewed effort to examine the achievements and shortcomings of past and current efforts.

ANNEX IV: PAPERS PUBLISHED AS A RESULT OF THE PROJECT

Many of the scholarly analyses commissioned for the purposes of this project have been brought together in a single volume. The English-language version will be published in both paperback and hardback editions by Oxford University Press in early 1999. The French-language edition will be published in a paperback edition by Bruylant.

The European Union and Human Rights, edited by Philip Alston, with the assistance of Mara Bustelo and James Heenan

The provisional Table of Contents of each volume is as follows.

A. Introduction

1. Towards an Authentic and Coherent Human Rights Policy for the EU
   Philip Alston and Joseph H. H. Weiler

B. Some Philosophical Dimensions of Human Rights Policies within Europe

2. Is There a European Approach to Human Rights
   Charles Leben
3. The Effect of Rights on Political Culture
   Martti Koskenniemi
4. The Legacies of Injustice and Fear: A European Approach to Human Rights and their Effects on Political Culture
   Klaus Günther

C. The Human Rights Context within which the European Union Functions

5. The Competences of the EU in Human Rights
   Joseph H. H. Weiler and S. Fries
6. Human Rights in the Context of the Third Pillar
   Steve Peers
7. Access to Justice as a Human Right: The European Convention and the EU
   Carol Harlow

8. Gender Equality in the EU: A Balance Sheet
Catherine Barnard

9. The Human Rights of People with Disabilities under EU Law
Gerard Quinn

10. The Internal and External 'Other' in the Union Legal Order: Racism, Religious Intolerance and Xenophobia in Europe
Conor A. Gearty

11. Non-Communitarians: Refugees and Asylum Policies
Gregor Noll and Jens Vedsted-Hansen

12. The Unity and Universality of Human Rights in Light of the Disjointed Nature of EU Law
Blanca Vila Costa

D. Social Rights: European Union Perspectives

13. We Still Have not Found what We Have Been Looking For: The Balance Between Economic Freedom and Social Rights in the EU
Miguel Poiares Maduro

14. From Strasbourg to Amsterdam: Prospects for the Convergence of European Social Rights Policy
Silvana Sciarra

E. Additional Challenges for the Future

15. Human Rights and European Identity: The Debate about European Citizenship
Ulf Bernitz and *Hedvig Lokrantz Bernitz*

16. The Future of Environmental Rights in the EU
Pavlos Z. Eleftheriadis

F. Human Rights in External Relations

17. Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the European Community
Menno Kamminga

18. Human Rights Considerations in the Development Co-operation Activities of the EC

ANNEX V: PRINCIPAL UNITED NATIONS AND COUNCIL OF EUROPE HUMAN RIGHTS INSTRUMENTS TO WHICH EU MEMBER STATES ARE *NOT* PARTIES

	A	B	DK	SF	F	D	GR	IRL	I	L	NL	P	E	S	GB
United Nations [a]															
1															
2															
3															
4															
5		X						X							
6								X							
7															X
8		X			X										X
Council of Europe [b]															
9															
10															
11													X		X
12		X	X												X
13		X				X		X			X	X	X		X
14					X		X						X		X
15					X		X						X		
16															
17							X								
18	X	X		X	X	X	X	X		X		X	X	X	X
19															
20									X						
21									X			X			
22															
23	X	X			X	X		X		X		X	X		X
24		X	X			X				X			X		X
25	X	X	X		X	X		X		X	X		X		X
26	X	X	X	X	X	X	X	X	X	X	X	X	X		X
27	X	X	X		X	X	X	X	X	X		X	X	X	X
28		X			X		X	X		X	X	X		X	

Legend:

United Nations

1. The International Covenant on Economic, Social and Cultural Rights.

2. The International Covenant on Civil and Political Rights (ICCPR).
3. The Convention on the Elimination of All Forms of Discrimination against Women.
4. The Convention on the Rights of the Child.
5. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
6. The Convention on the Elimination of All Forms of Racial Discrimination.
7. The Optional Protocol to the ICCPR.
8. The Second Optional Protocol to the ICCPR.

Council of Europe

9. The Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) as completed by Protocol No. 2 (ETS No. 44) of 6 May 1963 and amended by Protocol No. 3 (ETS No. 45) of 6 May 1963, Protocol No. 5 (ETS No. 55) of 20 January 1966 and Protocol No. 8 (ETS No. 118) of 19 March 1985 (the ECHR).
10. The Protocol to the ECHR (ETS No. 9, dealing *inter alia* with the right to peaceful enjoyment of possessions, the right to education, freedom of expression and opinion through free elections, the application of the ECHR to Member State territories*).
11. Protocol No. 4 to the ECHR, securing certain rights and freedoms other than those already included in the Convention and the first Protocol thereto (ETS No. 46).
12. Protocol No. 6 to the ECHR concerning the Abolition of the Death Penalty (ETS No. 114).
13. Protocol No. 7 to the ECHR (ETS No. 117, dealing *inter alia* with rights of lawfully resident aliens, and rights arising in criminal proceedings*).
14. Protocol No. 9 to the ECHR (ETS No. 140, on matters concerning the jurisdiction of the European Court of Human Rights*).
15. Protocol No. 10 to the ECHR (ETS No. 146, amending Article 32 of the ECHR with a view to reducing the two-thirds majority mentioned therein*).
16. Protocol No. 11 to the ECHR (ETS No. 155, restructuring the control machinery established thereby*).
17. The European Agreement relating to persons participating in Proceedings of the European Commission and Court of Human

Rights (ETS No. 67, concerning certain immunities and facilities for persons participating in legal proceedings*).

18. European Agreement relating to persons participating in proceedings of the European Court of Human Rights (ETS No. 161, concerning certain immunities and facilities for persons participating in proceedings in the European Court of Human Rights, having regard to Protocol 11*).
19. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT, ETS No. 126).
20. Protocol No. 1 to the ECPT (ETS No. 151, concerning accession of non-member states of the Council of Europe*).
21. Protocol No. 2 to the ECPT (ETS No. 152, on matters concerning renewal of membership of members of the European Committee for the Prevention of Torture*).
22. The European Social Charter (ESC, ETS No. 35).
23. The Additional Protocol to the ESC (ETS No. 128, concerning the extension of social and economic rights provided in the ESC*).
24. The Protocol amending the ESC (ETS No. 142, containing measures designed to improve the supervisory machinery*).
25. Additional Protocol to the ESC Providing for a System of Collective Complaints (ETS No. 158).
26. European Social Charter (Revised) (EST No. 163).
27. European Charter for Regional or Minority Languages (ETS No. 148).
28. Framework Convention for the Protection of National Minorities (ETS No. 157).

Notes:

a. The information concerning UN instruments (1-8 above) was derived from the treaty body database of the Office of the UN High Commissioner for Human Rights, on 9 September 1998.

b. The information concerning Council of Europe instruments (9-28 above) was taken from the Council of Europe's website on the same date.

* Not part of any official description of the convention or agreement in question.

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