

Europeanization of human rights foreign policy from a small state's perspective

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an opportunity or a constraint?

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Since the end of 1970s there has been a tendency towards Europeanization of human rights foreign policy. However, till the end of the Cold War there was little progress within this field despite numerous initiatives, European Parliament, other European institutions and some of the member states as well and despite pressure of non-governmental organizations and European public. In a changing international climate of the beginning of 1990s the tendency towards Europeanization strengthened which is obvious from the Treaty of Maastricht, especially from the construction of the second pillar of the EU.

Nowadays, being further developed in the Treaties of Amsterdam and of Nice, in secondary community law and in political acts of the EU, human rights foreign policy developed at the EU level should help Europe to deal with sensitive human rights issues worldwide. Yet, is it really effective tool of various human rights protection objectives promoting? Does it extend the capacity of particular member states, especially the small ones, to solve problems connected with human rights breaking or does it limit their more effective individual activities? To answer these questions is the aim of the following paper.

Europeanization of human rights foreign policy – a definition

While exploring particular aspects of human rights foreign policy Europeanization, the phenomenon of Europeanization is understood primarily in the sense of Caporaso, Green-Cowles and Risse's definition as „*the emergence and development at the European level of distinct structures of governance, that is, of political, legal, and social institutions associated with political problem-solving that formalize interactions among the actors, and of policy networks specializing in the creation of*

authoritative rules.” (Caporaso, Green-Cowles and Risse 2001: 3) In accordance to this definition attention is paid to moments when special European structures in the form of formal and informal rules occur, when competitions of existing European institutions in external human rights area increase or when bodies specialized in dealing with external human rights issues are created. Simultaneously the definition formulated by Claudio Radaelli is taken into account, according to which Europeanization involves “processes of (a) construction (b) diffusion and (c) institutionalization of formal and informal rules, procedures, policy paradigms, styles, ‘ways of doing things’ and shared beliefs and norms which are first defined and consolidated in the making of EU decisions and then incorporated in the logic of domestic discourse, identities, political structures and public policies.” (Radaelli 2000: 4)

Europeanization is supposed to emerge in two directions – a bottom-up and a top-down perspective. In the bottom-up perspective the EU member states, like their governments as well as the non-state actors (which seems to be of special importance in the field of human rights protection), transfer various tasks from their domestic environment to European level in order to solve them collectively. At the same time member states’ domestic environment is influenced by common decisions of communitarian institutions and changes with consequent adaptation pressure. Adaptation pressure should force member states to follow common policies, strategies and other common actions, but this is not always the case. It has been shown in a multitude of cases that in practice domestic impacts of European policy making in particular countries differ substantially. In the complicated field of foreign policy and its components such as human rights protection, this sometimes means that transferring various issues at Community level influences the effectiveness of both the EU’s and its member states’ activities negatively. As an example of cases when the ability to act is limited and Europeanization affects as a constraint the EU China policy in the second half of the 1990s and the beginning of the new millennium could be used.¹

¹ For further details see Hasenkamp 2004, Nesshöver 1999 and other.

Human rights foreign policy

Human rights foreign policy is an example of a relatively new phenomenon with ancient roots. Almost during all historical periods there were moments when states protected individuals out of their territory trying to improve their complicated situation. In modern times its development started with particular international regimes creation such as the ones for preventing slavery, for prisoners of war and the victims of armed conflicts protection, for laborers' status improvement or for guaranteeing rights of minorities.

In the aftermath of World War II. many states focused on standard setting. During the period of the three postwar decades International Bill of Rights consisting of Universal Declaration of Human Rights (1948) and two international covenants on human rights² (1966) were formulated. As a part of international public law it became binding for major part of international society. (*Paul 1996: 178 – 180, 210 – 211, 263 – 266, Ishay 2004: 27 – 35, Sudre 1997: 23 – 25*)

In the late 1970s, drawing from International Bill of Rights and several other documents devoted to particular human rights issues some states such as Norway, Netherlands, France or the USA started a new type of human rights foreign policy aimed at influencing situation in other countries, like interrupting and preventing human rights abuses in authoritative and totalitarian regimes. Nowadays, this (second) type of human rights foreign policy forms a standard agenda of many countries and is thought to be of special importance for small states trying to extend their activities in the international arena and to play a more visible role in international society.

The goals of human rights foreign policy aimed at influencing other countries belong either to category of solidarity or of socialization. Solidarity means that states help persons in crises caused by extreme poverty, internal or interstate wars, natural disasters or similar troubles. They do that either on bilateral or on multilateral basis (through an international institution). Concrete help is usually connected with a certain degree of conditionality – it can be suspended, reduced or re-channeled if there is a danger of misuse by human rights violating governments and other authorities.

Within the category of socialization states intend to involve human rights violating governments into international regimes for human rights protection. They try to force them accept and respect human rights in

² International Covenant on Civic and Political Rights and International Covenant on Economic, Social and Cultural Rights, both signed in 1966, entered into force in 1976.

domestic affairs through social learning. However, the process of socialization regardless of its form³ requires much time and is always connected with a high degree of uncertainty. It also runs in difficulties both at human rights violators' and human rights protectors' side. Governments breaking human rights seriously refuse external pressures as unacceptable interference in their sovereignty; criticize international human rights using relativist argumentation or expose protectors for their own domestic problems. States protecting human rights do not often formulate their goals clearly and appropriately. They combine human rights with other principles such as democracy or good governance inadequately. In many cases there is the lack of international coordination, too. (*Risse – Sikkink 2000: 11-35, Kubicek 2003: 4-5*)

Besides these problems foreign policy goals in the field of human rights often run into other foreign policy questions. There may be a tension between humanitarian principles and security needs or economic ends. In these cases governments occur under double pressure. On the one hand they should satisfy demand for human rights protection from mass-media and general public. On the other hand they are asked by army officials and by business sector to secure their interests abroad. In often means that states are forced to choose which of these conflicting goals to develop or follow strategies meeting all needs partially. At the same time tension between human rights principles and other foreign policy interests may be used by countries violating human rights as an important tool when repelling uncomfortable impacts of socialization tendencies in international environment.

Human rights foreign policy European way – the origins of common actions

First considerations that human rights protection should become a part of European Economic Community external policy and hence extend the capacity of particular states occurred hand in hand with the emergence of the second type human rights protection in particular states' foreign activities. It happened despite the fact that human rights protection either in its internal or external form did not belong among the objectives of European integration included in the Treaty of Rome of

³ According to Risse and Sikkink there are three major forms of socialization:

1. adaptation and strategic bargaining,
2. moral consciousness-raising, shaming, argumentation, dialogue, and persuasion,
3. institutionalization and habitualization. (*Risse – Sikkink 2000: 11*)

March 1957⁴, as it omitted political questions and was basically of economic substance⁵.

The need to consider human rights in common activities was given primarily with the interconnection of human rights and economic issues already transferred at community level. In the EEC's internal agenda human rights started to be taken into account thanks to the decisions of the Court of Justice of the European Communities (ECJ) already in the end of 1960s⁶. In its external practice the same happened ten years later, in the late 1970s. However, unlike internal affairs the Member states of the EEC, its institutions, European Political Cooperation and the European Council, who became the most important actors when

⁴ either the Treaty of Paris establishing the European Coal and Steel Community (1951) or the Treaty of Rome establishing the European Atomic Energy Community (1957)

⁵ On the other hand there was probably no need to include human rights into the Treaties, as each of the six founder members belonged to the signatories of the Convention for the Protection of Human Rights and Fundamental Freedoms, a document signed in the Council of Europe in November 1950.

⁶ In practice the lack of human rights provisions in Community law led to clashes with national legal systems embodying human rights both in their constitutional and international (universal and regional) shape. The situation was contested by high national courts such as German Supreme Court or Italian Constitutional Court. Facing the fact that it led to doubts about primacy of the Community law over national law and about its democratic legitimacy, the ECJ responded by incorporating references to fundamental rights (rather than human rights which were mentioned only in connection with general and specialized international legal instruments for human rights protection.) traditionally recognized under national constitutions and the relevant regional and international sources of law into its rulings and hereto extending the shape of the Community beyond the framework of the content of the documents establishing European Communities.

Since then fundamental rights have been treated as an integral part of general principles of Community law reflecting member states traditions and guidelines incorporated in human rights conventions and establishing a sort of European legal order. Moreover, in October 1972 at the Paris Summit the Heads of States and of Governments declared the development of the Community should be based on the principles of democracy, freedom of opinion, the free movement of individuals and ideas and the full participation of the people of Europe through the European Parliament elected by a direct suffrage. One year later in Copenhagen A document mentioning respect to human rights as one of the key European values was adopted. (*Napoli 19 95: 302 – 303, Rosas 2001: 53, 56, Case 29/69, Stauder v. Ulm [1969] ECR 419, Case 11/70, Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide [1970], ECR 1125, Case 4/73 Nold v. Commission (second Nold Case) [1974] ECR 491, Case 36/75 Rutili v. Minister for Interior [1975] ECR 1219*).

In the *Nold vs. Commission* Case of 1974 the Court of Justice of the European Communities referred to the European Convention on Human rights (ECHR) which reflected the fact that all of the then nine member states became parties to the Convention after French ratification that year. In its judgment the Court pointed out that in search for general principles of Community law the Convention presents a document of special significance.

In 1979 the Commission as an executive body with the power of initiative proposed in a Memorandum that legal act of the Community should be scrutinized by the European Commission for Human Rights and European Court for Human Rights as a monitoring mechanism of the ECHR. However, despite the positive attitude of European Parliament and The Economic and Social Committee the proposal was not accepted by the Council of Ministers. In the beginning of the 1990s the issue became current again and after incorporating of explicit reference to the ECHR into the Treaty of Maastricht the debate continued more even till the following decade. However, in Opinion 2/94 rendered by the Court of Justice of European Communities in 1996⁶, it refused the possibility of adhering to ECHR without modification of the EU and the European Communities constituent Treaties as despite the fact all the member states are bound by the ECHR, such a step overreaches the field of the EU (EC) competence. (*Rosas 2001: 53*)

incorporating human rights into external policies of the Community, were not forced to deal with human rights by judicial body. There was a strong pressure for doing so from general public and in addition there were external incentives from the Carter administration and its emphasis on human rights in the US foreign policy which means the issue was Europeanized without prior integration (like transfer of competencies). Since then ensuring that Community external action corresponds with general principles of Community law has been one of the main tasks of the Community human rights foreign policy. (*Napoli 1995: 299-300, Bulterman 2005: 253*)

From the practical point of view European relations to development world played an important role. For the period of 1975-1980 the EEC was bound to numerous African, Caribbean and Pacific⁷ states by the Lomé I Convention. According to its wording it was supposed that the EEC would support these countries without interfering in their internal affairs. However, in some of these states such as Uganda, Liberia, Central African Republic of Equatorial Guinea atrocious violations of human rights occurred. Vis-à-vis these events European public criticized guaranteeing trade preferences and providing technical and financial aid to their regimes. It feared especially that the EEC funds could be misused in such a way that in fact the Community would contribute to human rights violations. Another alarming issue which attracted much attention both of general public and European institution in the same time period was the bloody Pinochet's coup in Chile.

In response to human rights violations f. e. aid to Uganda was suspended partially or the activity of the EEC office in Santiago de Chile was reduced substantially. The EEC condemned the excesses publicly and threatened with other steps within the framework of its treaty relations, too. Yet, it did not reject its treaty obligations as such as it was not ready to abandon the principle *pacta sunt servanda*. Since then this approach clearly articulated in the so-called Uganda Guidelines from June 1977⁸ was applied generally and reluctantly in small steps the integration of human rights principles into external policy of the EEC started. (*Fierro 2003: 42-44*)

⁷ ACP in the following

⁸ For Uganda Guidelines see Statement of the Council, Bull. EC of 21.06.1977 or its formalized version in Commission „Memorandum on the Linking of Economic Aid and Human Rights“ of 16 February 1978, COM (78) 47.

Introducing aid conditionality? – the first “Lomé” debate

In the end of 1970s, when negotiations on the Lomé II Convention started, the Netherlands and Great Britain and requested embodying human rights references into the text of the treaty. As already stated above, the Netherlands belonged to pioneer countries pursuing human rights in its foreign policy since the end of that decade and formulated the links of its human rights foreign policy already in 1979.⁹ Moreover, in its memorandum Human Rights and Foreign policy Dutch Ministry of Foreign Affairs stated that “*there is an indissoluble connection between human rights and development policy as the aim of the later is to create the basic preconditions for human development in the third world, both materially and spiritually*” (*Human Rights and Foreign Policy 1979: 13, cited according to Baehr 2000: 53*) and that “*in cases where [human rights] abuses derive directly from government policy, one should take care at any rate to ensure that aid does not contribute directly to the perpetuation of repression*” (*ibid. conclusion 35, cited according to Baehr 2000: 54*).

In accordance with its foreign policy statement the Dutch government was convinced that the reference to human rights in the Lomé II Convention should be of some legal effect; like that it should be legally enforceable and could open the possibility to suspend the treaty in case of severe atrocities. Together with this request the Dutch it also expressed its affirmation that human rights clauses should be incorporated in any other external agreement which will be concluded between the Community and the third countries in future.

In contrast, other countries such as Germany, Belgium or France did not show much interest in human rights provisions in the treaties. One possible explanation of their attitude is that they feared ACP countries would criticize human rights violations at their territories what had already been the case of African workers in France or Indian immigrants in the UK. On the other hand, the criticism of human rights violations in the post-colonial world was a sensitive political issue. The less common nominator seemed to be the reference to the most fundamental human rights in the preamble of the treaty accompanied with an EEC’s unilateral declaration permitting the EEC condemnation of atrocities if there were any after the document came into force. (*Fierro 2003: 48-49, Arts 2000: 171*)

However, as showed already in the first debate about inclusion of human rights clause into agreement held at the ACP-EEC Council of Ministers

⁹ Human Rights and Foreign Policy, Memorandum presented to the Lower House of the States General of the Kingdom of the Netherlands, Ministry of Foreign Affairs of the Netherlands, 3 May 1979

meeting in June 1977, the ACP countries were reluctant to agree with any human rights references in the new instrument as they perceived them as incompatible with the spirit of Lomé trade and economic cooperation relationship and as a way Europe interferes in their internal affairs. They preferred human rights to be solved in the domain of the United Nations and stressed that despite the existence of common human rights standard in the form of Universal Declaration on Human rights from 1948 it would be difficult to reach common definitions. As Karin Arts points out, they “although divided on many other negotiation points...showed great unity and strength in their efforts to keep human rights references out of Lomé II.”. (*Arts 2000: 171*)

As a result, despite numerous discussions about the matter, the reluctance of the ACP countries and the disunity within the EEC, the EEC did not succeed in developing real human rights policy at this stage and there was no reference to human rights either in the preamble of the Lomé II Convention or in its body. Yet, at the signing ceremony the European Commissioner for Development Cheyson pointed out that the EEC would apply human rights in the relations with the third countries without exception. In Internal Regulations on EEC aid to the ACP from November 1979 the Council of Ministers confirmed that human rights protection belonged to basic aims of the Convention and in case of severe violations the EEC might consider appropriate measures without specifying what action could be taken in particular cases. Yet, in practice it went on applying the principles expressed in Uganda guidelines which showed especially dramatic events in Surinam in 1982¹⁰. (*Bartels 2003: 10-11*)

Moreover, the complicated case of Surinam showed the disunity of the EEC member states enabled the ACP countries to use the Joint Assembly created on the base of Lomé treaties for criticism of more stringent EEC members which Surinam certainly could not have done at bilateral level (but which could have been done in another international forum such as the UN, of course). After several members of opposition were assassinated in Surinam in the end of 1982 the Netherlands as a main donor with important share on the total amount of development aid delivered to this country suspended the bilateral treaty in order not to support a repressive regime¹¹. Community as a whole refused to follow. In the second half of the 1980s the request for rapid resumption of Dutch aid was discussed repeatedly at the Joint Assembly meeting as the

¹⁰ In 1982 the core of the political opposition almost disappeared as 15 of its main members were assassinated.

¹¹ However, in fact this step meant an introduction of double standard policy from Dutch side as similar action was not taken after similar excesses in form of „mysterious murders“ occurred in Suharto’s Indonesia.

differing attitudes of the Netherlands and the Community made it extremely appropriate for such a debate. (*Arts 2000: 266-267, Baehr 2000: 73-75, Bartels 2005: 13*)

European Parliament – motor of human rights foreign policy Europeanization

In the first half of the 1980s the internal debate on the position of human rights in external relations of the EEC continued as it was still up-to-date for European public. Moreover, since 1978 headings devoted to promoting human rights outside Community became a part of its annual budget¹².

The voice of general public was represented by European Parliament newly elected in a direct election since 1979 and hence with increased democratic legitimacy and moral authority. Having paid attention to human rights already in the 1970s in its resolutions, at meetings with Latin American and ASEAN Parliaments and through initiating a "Joint Declaration on Human Rights of the European Parliament, Council and the Commission" of the 5th April 1977 (*OJ [1977]C 103/1*), the EP lacking real political power took the role of the guardian of democratic values within Communities. Thanks to activities such as reports, resolutions, recommendations and written and oral questions to the Council and Commission it changed into an important forum for human rights defense and promotion, encouraged debates among institutions and the EEC policy makers and stimulated incorporating human rights aspects into Communitarian activities. (*King 1997: 57, Rack – Lausegger 1999: 805, 810*)

Receiving even more information on human rights violations the EP started to publish its own annual overview relating to human rights in the world in 1983. In the first report it explained its competence to deal with human rights both from political and legal point of view. Furthermore, it called for gradual establishment of human rights policy in external relations of the EEC covered by European Commission and for using political and economic means in the EEC disposal which may be helpful when improving situation concerning respect for human rights in the third countries. It understood external ties of the EEC to be more than commercial ones – a factor of peace and stability with respect for human rights as an important element. Therefore it demanded the

¹² In 1978 money to be spent on human rights amounted to 200.000 ECU. (*Napoli 1995: 305*)

inclusion of references to human rights to the whole range of agreements the EEC concluded with the third countries. (*Rack – Lausegger 1999: 807*)

Another initiative of the EP beginning around 1983 was adopting increasing number of resolutions on human rights and referring to human rights in declarations with the third parties such as countries of Latin America. In resolutions and declarations the attention was paid primarily to political and civic rights, especially to the right to life, the right to respect for the physical and moral integrity of the person and the right to a fair trial, considered to be a prerequisite to respecting economic, social and cultural rights. (*Fierro 2003: 61*)

As an institution looking for its place in the Community organizational framework the EP advocated for human rights more urgently than usually national parliaments do as there was no political allegiance to the executive organs of the Community as is usual at national level. Therefore it became a suitable domain for drawing attention to various human rights problems worldwide but according to its character of a directly elected body representing European public more suitable for use by non-state actors than for member states including the small ones.

Introducing aid conditionality? – the second “Lomé” debate

On the background of the above characterized internal developments a new debate about human rights in context of the EEC-ACP relations got under way. It was the result of the fact that human still attracted much interest of European public in the first half of the 1980s and therefore the issue of including human rights provisions into the treaty rose again when negotiating the Lomé III Convention.

Similarly to the former case the debate took place almost on the platform of the ACP–EEC Council of Ministers and the ACP-EEC Consultative Assemblies. However, despite the fact that the attitude of ACP countries to human rights changed after adopting the Banjul Charter of Human and Peoples’ rights in 1981, and they were more ready to discuss human rights and search for common standpoints with the EEC, the EEC did not succeed in including effective human rights provisions again. It was weakened with its policy vis-à-vis racist regime in South Africa, which it had condemned formally, without curtailing mutual trade. (*Bartels 2005: 13-14*)

The only progress achieved was the inclusion of several references to human rights such as the faith in fundamental human rights and the

dignity and worth of human person in the first paragraph of the preamble or well-being of ACP countries population, recognition of the role of the women, the enhancement of people's the respect of human dignity as an objective of cooperation with ACP countries in article 4¹³. Yet, the Lomé Convention established a precedent and human rights clauses began to be included into the preambles of agreements with third countries, such as with the Cartagena ones in 1986, which was an important step for the future¹⁴. (*Lomé III Convention, preamble, article 4, Annex I, Annex IX*)

Human rights foreign policy in the Single European Act

In 1986 there was a breakthrough in the internal sphere of the EEC concerning human rights protection as human rights were mentioned in the primary legislative for the first time thanks to the preamble of the Single European Act. Next to a reference on human rights in the internal policy¹⁵ the Preamble included also a reference to the external dimension: "*... to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interest and independence, in particular to display the principles of democracy and compliance with the law and to human rights to which they are attached, so that together they may make their own contribution to the preservation of the international peace and security in accordance with the undertaken entered by them within the framework of the United Nations Charter.*" (*Single European Act, OJ L 169/2, preamble, recital 5*). According to the European Parliament, the EEC now had a part of political responsibility for the situation in the world including respect to human rights, although without any legal consequences.

In the same year as the Dutch Presidency found a new way how to strengthen human rights protection in external relations of the Community when it pursued a Memorandum "on the action taken in the

¹³ Further elaborated in Annex I to the Convention.

¹⁴ Since that time a new instrument labeled as references to human rights in contractual relations with third countries has been a part of European human rights foreign policy next to financial assistance, diplomatic bargaining and sanctions and relations with the United Nations, the Organization for Security and Cooperation in Europe and the Council of Europe.

¹⁵ „Determined to work together to promote democracy on the basis of the fundamentals rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice“ (*Single European Act, Preamble, recital 3*)

field of human rights within the framework of the European Political Co-operation" was published, evaluating human rights activities within the frame of European Political Co-operation (EPC) since the last Dutch presidency in 1981. In addition, the first resolution of the Council of Ministers on human rights occurred also belonging to the EPC area, with the first elements of the strategy to promote human rights worldwide.¹⁶ (*Napoli 1995: 304*)

Shortly after these events the EP asked the Commission to prepare a proposal for a Community act which would make the legal base for the external human rights policy. However, the Commission refused to do so, as it found the act not to correspond with communitarian treaties. It was convinced that EEC might take human rights into account while exercising its external powers in accordance with the aims of Community and the competencies it was given by the Treaty of Rome and the Single European Act. But it was not allowed to develop an independent human rights policy as such a policy belonged neither among the aims nor the competencies of the EEC. (*Fierro 2003: 66*)

Unable to pursue an independent human rights policy as a part of the external relations of the EEC the EP tried to use its newly increased competencies. After the Single European Act entered into force, it took an active part as for relations with third countries as its assent by an absolute majority was now necessary before concluding an agreement. It was ready to give its assent only to agreements containing human rights clauses and soon refused to do so in case of financial protocols with Syria¹⁷ and Turkey¹⁸ and until certain reforms in those countries were realized. (*Rack – Lausegger 1999: 820*)

The end of the Cold War and Lomé IV negotiations

In a changing international climate influenced by the end of the Cold War certain restrictive measures were accepted after the coup in Panama and the massacre on the Tiananmen square in China during

¹⁶ In the end of 1991, before the conclusion of Maastricht negotiations, a new resolution was adopted at a meeting of the Council and the Member States highlighting the links between development co-operation, human rights and democracy promotion inclusive priorities, guidelines, procedure and practical action. Besides approaching human rights as a whole actions focused on specific issues were undertaken, too. F. e. a joint declaration of the Council, Parliament, the Commission and the representatives of member states condemning racism and xenophobia was issued. (*Napoli 1995: 304-305*)

¹⁷ Resolution on the financial protocols with Syria, Morocco, Algeria, Egypt, Tunisia, Jordan, Lebanon and Israel and these countries' respect for human rights and international agreements [1992] OJ C39/50.

¹⁸ Resolution on the draft agreement on the conclusion of a customs union between the EU and Turkey [1995] OJ C 56/99.

1989. The position of human rights in foreign policy and international relations as such strengthened importantly with the decline of bipolarity as there was more room for human rights protection in the agenda of the UN and other international organizations and groupings including the European Communities.

Furthermore, there was a new trend towards binding human rights and economic and development cooperation since 1986 when the efforts up to then strengthened thanks to the Organization of the United Nations and its "Declaration on the Right to Development". The declaration provided that states "*have a duty to co-operate with each other in ensuring development*" and "*should fulfill their duties in such a manner as to promote a new international economic order based in sovereign equality, interdependence, mutual interest and co-operation among the states as well as to encourage the observance and realization of human rights.*" Moreover, it defined the right to development as an "*inalienable human right*" enabling to every person "*to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized*". (UN Declaration on the Right to Development, UN General Assembly, Resolution 41/128 of 4 December 1986, Art. 1 and 3(3)) As it meant the states were obliged to co-operate with each other in order to ensure development and respect to human rights since then, it legitimized the approach of the EEC which was pursued by the EP.

In accordance with this new practice and also on the base of the changing attitude of ACP countries, after the above mentioned UN "Declaration on the Right to Development" and the "African Charter on Human and Peoples' Rights" had been adopted, a human rights clause was incorporated into the body of the Lomé IV Convention. (*Article 5*) However, this new step towards stronger human rights protection in the external relations of the EEC highlighted a weakened bargaining position of the ACP states much more dependent on European aid while facing increased economic problems than during previous rounds of Lomé negotiations. Therefore already in 1987 the EEC and the ACP states were able to adopt a joint ministerial declaration called Kingston declaration which referred to principles of equality and human dignity and included an action program against apartheid. (*Bartels 2005: 15*)

In fact there were two new paragraphs concerning human rights in the preamble of Lomé IV (one mentioning international covenants on human rights and the other referring to regional European and African instruments) and an article in the body of the treaty called "Objectives

and Principles of Co-operation"¹⁹. Despite its extent (substantially influenced by the demands of ACP countries which EEC was trying to meet in order to achieve the incorporation of a human rights clause into the body of the treaty) the meaning of the clause was rather rhetorical and did not enable to suspend the treaty if serious human rights breaches occurred. (*Fierro 2003: 69*)

The limits to the human rights clause of Lomé IV application showed already in 1991, after a coup had taken place in Haiti, when Community decided to interrupt financial aid and technical co-operation. Due to the lack of legal base the measures could not be extended with a trade embargo (although the Committee of Ambassadors of ACP States called for such step) until it was authorized by a UN Security Council resolution which meant in practice more than a year delay. (*Bartels 2005: 19*)

The China Challenge

Next to Haiti, former Yugoslavia and China belonged to cases where either insufficiency of legal basis for suspending co-operation agreements (if there already were any) or Community disability to impose effective measures against human rights abuses became apparent. In the former case circumstances under which the Community is allowed to terminate a co-operation treaty had to be examined by the ECJ²⁰. In the later one a conflict of values and economic interests typical for foreign policies of member occurred and transferred at the European level.

Bloody suppression of students' demonstrations on the Tiananmen square in Beijing at night from the 3rd to 4th June 1989 was broadcasted by numerous western TV channels and emerged on front pages of distinguished periodicals. Therefore it quickly attracted interest of general public and had to be taken into account by European politicians. As a reaction Community imposed several sanctions on China. Yet, with the exception of official contacts at the highest level interruption, which was a step of a clear political meaning, the measures taken at the economic level did not lead to any substantial decrease of mutual trade. The armament embargo and the suspended military cooperation together with economic co-operation limiting and new development programs freezing slowed down the supplementation of

¹⁹ In 2000 human rights became a part of Cotonou Agreement, too.

²⁰ Case C-162/96, Racke vs. Hauptzollamt Mainz [1998] ECR I-3655

technologies and scientific knowledge but did not harm China seriously.
(Kristof – WuDunn: 74 – 85, 295, Donnely 1998: 119, Wan: 68-71)

Although European approach towards China could be labeled as the line of the so called containment or policy of sanctions and conditionality, it is also necessary to add that it was one of its very mild forms. Furthermore, the relatively strict measures adhered to only for several months. In the end of 1991 major economic sanctions were removed, others in trade and diplomatic spheres ended in 1993. Finally, only the armament embargo and the annual practice of submitting resolution, denouncing human rights violations in China, during regular session of the UN Commission for human rights continued. The later one was interrupted in 1997 showing similarly as the first human rights clause Lomé negotiations that the common European action is often endangered by the member states disunity and that the activities of small states favorably inclined to human rights may be foiled hence.

(Kristof – WuDunn: 74 – 85, 295, Donnely 1998: 119, Wan: 68-71)

To explain, according to a long term strategy from 1994, the EU had to support dealing with Chinese human rights abuses in broader international arenas such as the former UN Human Rights Commission. Thanks to a common action of the EU member states together with other partners realized, despite the fact that China tried to prevent it by influencing the EU's foreign policy Troika, a resolution condemning China was introduced during the Commission's session in 1995.

Two years later attitudes of particular members differed substantially, which made common action regarding resolution impossible. During its presidency the resolution was promoted by Netherlands. Its efforts were supported by Scandinavian countries. France, whose head of state was about to held an official visit to China and wanted to secure sale of Airbus aircrafts and other lucrative contracts, refused to join her European partners. The same position was adopted also by Italy, Spain and Greece. Germany tried to bring both groups closer together in the beginning, but later she went over to French position. In the end resolution was not sponsored by the whole 15, but only by 10 member states.

Disagreement concerning resolution showed that Chinese government was able to misuse disunity among member states and to influence more strict members by a more open attitude to entrepreneurs from moderate ones. After considerable improvement in relations between Beijing, Paris and Roma the camp of states cosponsoring resolution emptied. A year later, only few states continued in their efforts. After Chinese diplomatic offensive, concentrating especially on Netherlands holding EU presidency

and Denmark²¹ with major initiative by submitting the resolution, the EU member states agreed not to continue annual practice of sponsoring resolution supposed China is ready to start a human rights dialogue. (*Hasenkamp 2004: 444, Youngs 2001: 170, Case study land Sanctions and Terrorism, Case 89 – 2 S.I.: 11, Wan 2001: 72*)

Central and Eastern Europe

The shift in the general international climate in the beginning of 1990s and transformation of the international political architecture influenced political priorities of the EEC importantly. Whereas during the Cold War major assistance was provided to ACP countries, after the Eastern enlargement in 1986 countries of Latin America gained importance under pressure of Spain and Portugal and much attention was paid to democratization processes in this area during that period.

However, the consolidation of post-communist Central and Eastern Europe became of major priority both from political, security and economic grounds. The interest on stabilization of this large part of European continent was shared perhaps by all Community members. In the course of more than fifteen years it is possible to observe that fulfilling the important task of helping Central and East European countries while building new democratic political system and recovering their economies belongs to cases of exceptional success. Simultaneously, in accordance with conclusions of the European Council meeting in Madrid, which decided to encourage reforms and changes in Central and East European countries actively, it is a successful case of using conditionality not only in the field of human rights but also in other areas crowned with achieving the full EU membership in several cases.

Yet, according to specific conditions in which transformation processes were realized and according to specific combination of sticks and carrots with the enlargement perspective on its top it must be understood as a unique experience which could be hardly transferred or repeated in relation to other regions. The importance for future developments of human rights foreign policy of the EC (more precisely EU since 1993) must be seen rather therein that the Central and East European experience helped the EC to recognize its part of responsibility for the state of human rights protection world-wide (as had been already

²¹ In both cases China threatened to restrict bilateral economic relations. In Dutch case a visit of its economic minister to China was canceled as well as the visit of Chinese Vice premier Zhu Rongji to Netherlands (and for the same grounds to Austria, Ireland and Luxembourg, too).

suggested by European Parliament before) and that external (association and Europe agreements including human rights clause together with financial aid in form of long-term co-operation programs together with pre-accession strategies proved to be suitable tools to fulfill this purpose.

Human rights violations as a matter of international concern

With the end of the Cold war internal violations of human rights in particular states stopped to be understood primarily as their domestic issue and become international affair which was reflected also in some subsidiary sources of international law (but not in its basic legally binding principles). In European (preciously Euro-Asian) context this was confirmed in a political document agreed at the OSCE Conference of Human Dimension in Moscow in 1991. Corresponding with this trend the EC revised its approach, too. It refused its previous belief that actions against human rights violations constitute a non-acceptable interference in internal affairs. Moreover, in 1989 the Twelve made a joint intervention in the UN Commission of Human Rights and labeled human rights protection to be based on the values on which the EC is founded. And soon other steps towards developing a real external human rights agenda followed. In the internal sphere a "Declaration on Fundamental Rights and Liberties" was issued by the European parliament with the aim to strengthen European identity and to improve protection of political, civil, economic and social rights of community nationals and a "Charter of Social Rights" was agreed at the European Council meeting in Strasbourg. (*Fierro 2003: 75-79*)

In 1991 the Commission of the EEC produced a communication "on human rights, democracy and development co-operation policy"²² which affirmed the needs to assist democracy and democratization all over the world and to consider human rights in development cooperation. The priority was given to political and civic rights again, however, social, economic and cultural rights were mentioned also as an important matter. As a tool of the new approach positive (especially financial) support and political dialogue had to be used primarily. According to communication human rights clauses were to be included in all agreements which Communities concluded with third countries which

²² SEC (91) 61

was confirmed in a Council and its Member states resolution "on human rights, democracy and development"²³ several months later.

At the European Council meeting in Luxembourg this practice was confirmed in a far reaching "Joint declaration concerning human rights"²⁴ with the main message that human rights are considered to be one of the cornerstones of EEC relations with third countries. The declaration reflected inter alia the trend of introducing human rights conditionality in foreign policy of member states such as Germany or France. Moreover, it involved general guidelines and priorities in the field of human rights and, despite not intended as an introduction of conditionality, it foresaw also the possibility of appropriate response to human rights violations and to serious interruptions of democratic processes. (*Bartels 2005: 17-22, Napoli 1995: 306*)

At the request of European Parliament the Commission created several budget lines devoted to human rights promotion in the beginning of 1990s. The amount of money spent on this issue increased regularly. In 1992 it started to publish annual reports "on the application of the Council resolution on human rights, democracy and development of November 1991" resuming actions and project realized on behalf of human rights. In response to an EP's request financial instruments used for promotion of democratic principles and civic and political rights into a single chapter "European Initiatives in support of Democracy and the protection of Human Rights" (EIDHR) – chapter B7-70, whereas economic and social rights remained under different budget headings. (*Rack – Lausegger 1999: 809*)

Having been already included into the Lomé VI agreement human rights clause occurred in framework agreements which the EEC concluded with Paraguay, Uruguay and Chile and in agreement on trade and economic cooperation with Macao and Mongolia concluded during 1991-1993. Simultaneously, as already stated above, human rights clauses were supposed to be embodied into agreements with Central and Eastern European countries. However, according to a Council conclusions of May 1995, unlike previous instruments in this cases suspension mechanism had to be added.

During the first half of 1990s three different wordings of the human rights clause were formulated. The first one stipulates that the agreement is based on "respect for democratic principles and human rights"²⁵. The second pointed out that the respect for democratic principles and human

²³ Bull EC 11-1991

²⁴ Bull EC 6-1991

²⁵ Used in agreements with Argentina, Chile, Paraguay, Uruguay, Macao, Mongolia

rights is an essential element of the agreement.²⁶ The third one was a complementary formula to the second allowing either immediate whole or partial suspension of particular agreement²⁷ or appropriate measures²⁸ if the contractual partner brakes human rights as one of the key principles the agreement which the agreement is based on. (*Fierro 2003: 82-83, Napoli 1995: 307-308*)

Human rights foreign policy in the Treaty on European Union

The shift towards human rights protection in external relations contrasted with reluctant approach inside the Community following from the lack of competencies of Community institutions in this domain. The ambivalence was reflected also in the Treaty of Maastricht. In the preamble of the Treaty on European Union member states confirmed their "*attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and the rule of law*" (TEU, preamble, third recital). Further, the Title 1 of the Treaty provided that the Union "*shall respect fundamental human rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States as general principles of Community law.*" (Article F(2) TEU) However, there was not any strong base for Community actions. The article does not refer to Community but to Union which means, that it does not fall inside the jurisdiction of the Court of Justice of European Communities.

External authority of the Community was given much clearer in the Second Pillar – the Common Foreign and Security Policy. Respect for human rights was mentioned as one of the objectives of the Union together with developing and consolidating democracy and the rule of law. (Article J.1(2) TEU, fifth indent) Within this field the European Union was allowed to issue additional legislature – common strategies and common positions, legally binding for particular member states, which define the approach of the EU to various matters of thematic or geographic nature²⁹. For the Union member countries including smaller

²⁶ Co-operation agreements with Brazil, Central American countries, Andean Pact, India

²⁷ Baltic states, Albania, Slovenia

²⁸ Romania, Bulgaria, Czech Republic, Slovakia, Russia (with a declaration explaining cases of special urgency which could cause the non-execution of the treaties in the later three cases)

²⁹ Simultaneously, as confirmed later by the ECJ, article 130(u) of the Treaty on the European Union provided legal basis for human rights clauses in the external agreements when it stated that Community in its development

ones it opened a new possibility to draw attention to several human rights problems outside Union's frontiers especially as they were allowed to propose decisions what is in the fields of common activities is a sole domain of European Commission. Yet, to formulate a common position unanimity vote was required by the provisions of the Treaty (until the Treaty of Amsterdam enabled the abstention of less than one third of member states) which meant that pursuing of particular decision became difficult if there was remarkable difference of attitudes among union members. Otherwise, once a strategy was already formulated, a majority vote sufficed to enforce a common action and therefore opened to smaller EU members more room for bargaining and for coalitions building. (*articles J.2.-J.3 TEU*)

Call for reforms and improvement initiatives around the year 2000

Despite the fact there had been the EIDHR budget chapter since 1994 Union's priorities were not clearly defined and it was difficult to form strategies to fulfill general goal. In 1997 the Commission tried to solve this problem with a regulation proposal "on the development and consolidation of democracy and the rule of law and respect of human rights", but it was not accepted by the Council. The standpoint of the Council supported also the European Court of Justice in its ruling C-106/96 United Kingdom v. Commission (1998) where it found in accordance with the application of the United Kingdom that many human rights projects financed from the EIDHR do not have satisfactory legal basis in primary and secondary Community legislative. The ruling together with the Opinion 2/94 "on accession to the European Convention of Human Rights" became a base of the debate about the EC competences in the field of human rights protection and an inter-institutional dispute going on for more than two years.

Another proposal of 1997 aimed at improving European human rights foreign policy making was a parliamentary report "on Setting up a Single Co-ordinating Structure within the European Commission Responsible for Human Rights and Democratization". According to its title the report discovered the need to create a single co-ordinating structure within the Commission instead of large number of departments concerned with particular human rights and democratization issues, pertinently its regional aspects, as it hold the unclear organizational structure to be one

co-operation shall "contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms."

of the main obstacles to increasing its effectiveness. Simultaneously, it called for further concentration of financial means under B7-70 chapter of budget. (*Fierro 2003: 86, Rack – Lausegger 1999: 809*)

Last but not least the report of the so-called Comité des Sages “Leading by example: A Human Rights Agenda for the European Union for the Year 2000” observed several problems in human rights foreign policy of the EU including discrepancy between the rhetoric and practice. However, only few of its reform proposals such as establishment a specialized Human Rights Office for supporting the CFSP High Representative have been realized yet. (*Bulterman 2005: 364*)

In 1999 the dispute concerning awarding of financial means for the promotion of human rights and democracy in third countries was solved in accordance with the new wording of the TEU as amended in Amsterdam (*article 308 and 179*) by two Council regulations – the regulation no. 976/1999 “laying down the requirements for the implementation of Community operations other than those of development co-operation policy”³⁰ and the regulation no. 975/1999 “laying down the requirements for the implementation of development co-operation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms”³¹.

In accordance with these regulations a Committee called Human Rights and Democracy Committee consisting of representatives of the EU member states and chaired by Commission started its work in July 1999. The Committee was obliged to assist Commission when allocating financial means. The procedure for allocating the finance changed as well, as particular project started to be delivered on the basis of a call for proposals on a recommendation of the Court of Auditors in order to achieve more transparency. However, according to a special report of the Court of Auditors “on the management by the Commission of European Union support for development of human rights in third countries” there still remained problems when allocating the aid as Commission was not able to develop strategies specifically tailored to the requirements of the countries and focused primarily on the short-term goals corresponding with annual financing with little accent on long-term aspects. (*Fierro 2003: 86*)

In reaction to Court of Auditors criticism, the Commission published a communication “on European Union’s role in promoting human rights

³⁰ OJ L 120/8 of 8.5.1999

³¹ OJ L 120/1 of 8.5.1999

and democratization in third countries” in 2001³² contenting reform proposals for the EIDHR. The communication signaled a shift to long-term approach with clearly defined thematic priorities and country focus reflecting notions of many actors – member states, community institutions and non-governmental organizations. However, it draws attention almost only to civic and political rights with explanation that economic, social and cultural rights are pursued through development co-operation. It is a paradox as it simultaneously recognizes human rights to be indivisible and economic, social and cultural rights to form an integral part of them. (*Bulterman 2005: 264*)

Amsterdam and Nice – a new legal base for human rights foreign policy issues?

Next to the reforms initiated by particular European institutions, there was an important shift in the primary legislation of the EU in the end of the second millennium. The Treaty of Amsterdam strengthened the position of the EU in regard of the internal protection of human rights as a new provision concerning human rights which pointed out that the Union is founded on the principles of liberty, democracy, respect of human rights and fundamental freedoms and the rule of law, common to all Member States. (*Article 6(1) TEU as amended by the Treaty of Amsterdam*). Moreover, provisions concerning human rights were subsumed under jurisdiction of the European Court of Justice with regard to the actions of European institutions (*article 46(d), ibid.*) and one of the treaty provisions provided that only a European state which respect human rights may apply for membership in the EU (*article 49 of the final provisions, ibid.*) and it allowed to suspend membership rights in case of human rights breaches.

Whereas the fact that human rights foreign policy constitutes a part of the Common Foreign and Security Policy follows from the provisions of the Treaty of Maastricht and the Treaty of Amsterdam (article 6(2) TEU together with article J.2) rather explicitly, article 6(2) makes the observance of human rights binding for Community institutions in all their activities). The same principle is embedded in article 51 of the “EU charter of fundamental rights” adopted together with the Treaty of Nice in the end of the year 2000 in a provisional form of declaration (although the document is concerned primarily with rights of European citizens).

³² COM(2001)252 Final

Furthermore it was supposed that it would be further strengthened after adoption a Constitution of Europe.

In situation when the proposal of the Constitution failed and a new Treaty has not been signed yet, the way of further improvements lies especially of particular bodies' initiatives again for the time being. Among these activities introduction of "country strategy papers" setting out the EU approach to particular third countries on the basis of an assessment of its political and economic situation or transforming the European Monitoring Centre on Racism and Xenophobia into a Fundamental Rights Agency are of special importance.

However, despite even increasing patience given to human rights foreign policy within the EU, the major shortcomings identified in critical reports as low degree of coherence and consistency, transparency and prioritization remain and they continue to complicate member states capacity to use the EU as a tool to achieve their own foreign policy objectives effectively. (*Commission communication on "the European Union's role in promoting human rights and democratization in third countries, Bulterman 2005: 271-274)*

Conclusions

Trying to answer the question whether the EC or the EU may contribute to its small members to promote human rights worldwide, asked in the beginning of the paper, one must express a certain degree of skepticism. In their former and the current form the institutions of the EU offer a base for presenting issues and drawing attention to serious human rights atrocities. Especially the European Parliament sessions, Council of Ministers of foreign affairs meetings and the terms of presidency are of special importance in this regard. They offer an opportunity to make foreign policy of small states based on values more visible and more remarkable in international context.

To find solutions to serious cases of human rights violations persisting in many parts of the world, the European way may be suitable provided that no serious clash of interests among member states occurs. Cases of substantial priority differences make effective actions difficult or almost impossible (although room for generally formulated positions and strategies still remains). Moreover they often increase vulnerability of particular EU members as shows Surinam or China experience.

For more effectiveness human rights foreign policy pursued by the EU will have to change further. Strengthening of its legal base, clearing of institutional framework and competencies of particular bodies or improving decision making procedures are of special importance. However, due to sensitivity of human rights issues both in external environment and in domestic reality of 27 member states it cannot be expected that this task will be fulfilled easily. On the contrary it is a long-term run with uncertain results.

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