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## **The European Union as an Actor in International Relations**

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## 6. THE SCOPE OF THE EU FOREIGN POWER

### *Is the EC Competent to Conclude Agreements with Third States Including Human Rights Clauses?\**

*Enzo Cannizzaro*

#### I. CONCERN FOR HUMAN RIGHTS AND THE ROLE OF THE EC IN INTERNATIONAL RELATIONS

The incorporation of *ad hoc* clauses into the terms of agreements with non-Member States represents one of European Union's most efficient devices with which to promote compliance with human rights.

Human rights clauses have the effect of making the efficacy of commercial and co-operation agreements conditioned upon the observance of fundamental human rights by the parties. They thus give to the EC the power to demand the respect for human rights by third States, to enter into consultation in case of violation of a certain standard agreed upon by the parties and, albeit in exceptional situations, to suspend or terminate the agreement in case of a massive violation of human rights.

The practice of incorporating human rights clauses into the terms of commercial, development and co-operation agreements has progressively increased in the last decade and is now firmly established in the external relations of the EC with third States.<sup>1</sup>

This practice has been, and continues to be, supported by a wide political consensus, by the EC institutions as well as by the Member States and by public opinion.<sup>2</sup> Both because of the political sensitivity of these matters, and because of the existence

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1 See the Commission communication to the Council and the European Parliament "The European Union's Role in Promoting Human Rights and Democratization in Third Countries", COM (2001) 252 def., of 8 May 2001.

2 See the formula adopted by the Conclusion of the Luxembourg European Council of 28 and 29 June 1991, and successively reproduced in other EU documents, according to which, "respect, promotion and safeguard of human rights is an essential part of international relations and one of the cornerstones of European co-operation as well as of relations between the Community and its Member States and other countries".

of a common appreciation of the necessity of linking commercial intercourse with respect for human rights, it has gained a large favour as a potent tool with which to strengthen respect for human rights by third States.

The political impact of this practice is by no means negligible. Human rights clauses have the capacity to strengthen the protection of certain values and principles, which are assuming growing importance in the conscience of the international community. Rather than confining its activities to the promotion of the economic welfare of its own citizens, the EC endorses the observance and promotion of universal values as one of the cornerstones of its international action, to the extent of placing the coercion of its formidable economic power at their service.<sup>3</sup>

The protection of fundamental rights is therefore no longer thought to be an ancillary objective of EC external relations. Quite to the contrary, in fact, the promotion of compliance with human rights is recognized as having a primary role in the system of external relations and can, in certain circumstances, supersede other Treaty objectives.<sup>4</sup>

At the present stage of European integration, the problem arises, however, as to the legal basis for EC action. Not long ago, the Court of Justice held that there was no general EC competence to assume obligations in the field of human rights protection, stating that "no Treaty provision confers on the Community Institutions any general power to enact rules on human rights or to conclude international conventions in this field".<sup>5</sup>

From a legal perspective, human rights clauses also have the subtler, but by no means negligible, effect of altering the scope of EC foreign power. By protecting human rights in the international arena and by assuming this as one of the aims of its external policies, the EC endorses the role of a global political actor. The search for a legal basis for human rights clauses is therefore meaningful in a more general perspective, regarding the scope of EC foreign powers under the special legal system established by the Treaty, as well as under international law. The analysis may indeed contribute to observing closely the evolution of the EC, from an entity put into being for the pursuit of specifically enumerated aims, mainly of economic and commercial character, to an entity endowed with the power to seek compliance with universal values in the international arena, and can shed some light on the interplay between its competence, as defined by the founding treaties, and its capacity as an international legal actor.

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3 This aspect has been considered by many authors; see for example D. McGoldrick, "The European Union after Amsterdam: An Organization with General Human Rights Competence?" in D. O'Keeffe and P. Twomey (eds), *Legal Issues of the Amsterdam Treaty* (Hart Publishing, Oxford, 1999), p. 249.

4 See J.H.H. Weiler and S.C. Fries, "A Human Rights Policy for the European Community and Union: The Question of Competences" in P. Alston (ed.), *The EU and Human Rights* (Oxford University Press, Oxford, 1999), p. 147.

5 Opinion 2/94 *Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759, para. 27. It may be worthwhile to recall that the Court went on to say that there are "no express or implied powers for this purpose" (para. 28).

## II. HUMAN RIGHTS CLAUSES IN INTERNATIONAL AGREEMENTS OF THE EC: AN OVERVIEW

A preliminary inquiry into the nature and effect of human rights clauses is opportune in order to avoid possible generalizations about this new and, to some extent, still mysterious concept.

The tendency of the EC to include human rights clauses in agreements with third States is now so prevalent as to have become an expected component of such agreements. Most commonly such clauses are to be found in co-operation agreements with developing countries, for which Art. 177, par. 2, read in conjunction with Art. 181, provides an adequate legal basis.<sup>6</sup> The competence of the EC has been upheld by the Court of Justice in *Portugal v. Council*.<sup>7</sup>

Beyond Art. 177, par. 2, there are no other provisions of the EC Treaty that bestow on the EC the power to act in international relations for the protection of human rights.<sup>8</sup> Despite the failure of the Treaty to mention human rights as one of the aims of EC foreign activities, human rights clauses are uniformly incorporated in the terms of association,<sup>9</sup> commercial<sup>10</sup> and co-operation<sup>11</sup> agreements. Although many of them have been concluded with developing countries, an attempt to include human rights clauses in agreements to be concluded with developed countries is also discernible.<sup>12</sup>

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6 See the co-operation agreements concluded with Nepal, OJ L 137, 8 June 1996; and Bangladesh, OJ L 118, 27 April 2001. See also the framework agreements on co-operation concluded with the Countries of the Andean Pact OJ L 127, 29 April 1998; and the Interregional framework co-operation agreement concluded with Mercosur and its States, OJ L 69, 19 March 1996.

7 Case C-268/94 [1996] ECR I-6177.

8 This gap is filled to some extent by the new Art. 181 a), inserted by the Treaty of Nice that introduces the new category of co-operation agreements, to be concluded with developing as well as with developed countries. The protection of human rights is mentioned among the objectives of the action to be undertaken by the EC under this provision.

9 See the agreements recently concluded with Morocco, OJ L 233, 15 September 2000; Tunisia, OJ L 97, 30 March 1998; Lithuania, OJ L 51, 20 February 1998; Czech Republic, OJ L 360, 31 December 1994.

10 See the agreements on trade and trade related matters concluded with Estonia, OJ L 373, 31 December 1994; Lithuania, OJ L 375, 31 December 1994; Latvia, OJ L 374, 31 December 1994. A human rights clause is incorporated into the terms of interim agreements on trade and trade-related matters concluded in the framework of previous partnership and co-operation agreements. See the agreements with Kyrgyzstan, OJ L 235, 26 August 1997; Azerbaijan, OJ L 285, 22 October 1998; Georgia, OJ L 129, 21 May 1997; Uzbekistan, OJ L 43, 14 February 1998; Armenia, OJ L 129, 21 May 1997; Former Yugoslav Republic of Macedonia, OJ L 124, 5 May 2001; Russia, OJ L 247, 13 October 1995.

11 See the agreements on trade, commercial and economic co-operation concluded, on the basis of Art. 133 (former 113) and 308 (former 235) with Lithuania, OJ L 403, 31 December 1992; Albania, OJ L 343, 25 November 1992; Estonia, OJ L 403, 31 December 1992; Slovenia, OJ L 287, 22 November 1993.

12 See, by way of example, the well-known case of the draft trade and co-operation agreement between the EC and Australia, whose conclusion failed following the refusal of Australia to incorporate therein a binding provision concerning human rights; Bull. EU 6-1997, 1.4.103. It is submitted that the need for consistency and coherence in EC human rights policy requires the incorporation of uniform human rights clauses in agreements with developing as well as with developed States. See A. Ward, "Frameworks for Cooperation between the European Union and Third States: A Viable Matrix for Uniform Human Rights Standards?" (1998) 3 EFA Rev. 505.

While most agreements bearing a human rights clause have been concluded in mixed form, some have been concluded solely by the EC.<sup>13</sup> The EC is thus certainly the addressee, together with the third State, of all the rights and obligations deriving therefrom.

The content and nature of human rights clauses have evolved over the years. Though seeming simply to express an EC insistence upon making economic and trade concessions dependent upon the attitude of third States to human rights, the clauses are formally bilateral, imposing reciprocal obligations upon all the parties to the agreement, the EC as well as the third States. Although one can speculate about the existence of a substantial interest on the part of third States in EC respect for human rights, the bilateral character of the clauses is basically insisted upon in order to maintain a formal symmetry between rights and obligations deriving from the agreement. The bilateral character of human rights clauses, while practically of little or no importance, has an important legal effect, since it raises the question of the competence of the EC not only to impose an obligation to respect human rights on third States, but also to assume the same obligation.

The link between human rights and trade concessions has been progressively strengthened through gradual refinement of the clause.<sup>14</sup> The most sophisticated versions affirm expressly that the obligation relating to human rights assumes essential character in the context of the agreement. As a consequence, each party is entitled unilaterally to suspend or terminate the agreement, subject eventually to the exhaustion of preliminary procedures, if the respect for human rights falls below a certain standard mutually agreed upon. However, in certain agreements it is spelled out that suspension or termination represents a measure of last resort, to be taken only after the failure of other means of reaction available to the parties.<sup>15</sup> Recently, following the

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13 See the trade and trade-related matters agreement, n. 10 above.

14 See B. Brandtner and A. Rosas, "Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice" (1998) 9 EJIL 468; E. Riedel and M. Will, "Human Rights Clauses in External Agreements of the EC" in P. Alston (ed.), *The EU and Human Rights*, n. 4 above, p. 723; J. Rideau, "Le rôle de l'Union européenne en matière de protection de droits de l'homme" (1999) 99 Rec. des Cours 359; Flauss, "Droit de l'homme et relations extérieures de l'Union européenne" in S. Leclerc, J. K. Akandji-Kombé and M. J. Rendtorf (eds), *L'Union européenne et les droits fondamentaux* (Bruylant, Bruxelles, 1999), p. 137; F. Hoffmeister, *Menschenrechts- und Demokratiekláuseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaften* (Springer Verlag, Berlin, 1998); J. Verhoeven, "La Communauté européenne et la sanction internationale de la démocratie et des droits de l'homme" in E. Yakpo and T. Boumedra (eds), *Liber amicorum Judge Mohammed Bedjaoui* (Kluwer Law International, The Hague-Boston-London, 1999), p. 771.

15 See the wording of the so-called Bulgarian clause, that reads: "in the selection of measures, priority must be given to those which least disturb the functioning of the Agreement". See moreover Art. 96 of the Cotonou agreement concluded by the EC and its Member States with the ACP Countries, that lists the procedural conditions precedent to the suspension of the Agreement.

failure of consultation proceedings, the EC issued measures substantially amounting to a partial suspension of the Cotonou agreement<sup>16</sup> with respect to Haiti.<sup>17</sup>

The essential character of the obligation to respect human rights undoubtedly renders more crucial the demand to identify an autonomous legal basis. There is a certain paradox to the conclusion that a fundamental rights clause might occupy an ancillary position amongst the objectives of an agreement, so that a specific human rights' legal basis needs not be identified for its conclusion, while at the same time insisting that breach of the clause is of such fundamental importance as to entitle the other party thereto to suspend or terminate the agreement.

Human rights clauses do not normally mention individual rights with which compliance is sought. Such rights are somewhat vaguely identified through reference to "commonly accepted standards". Agreements concluded with European States generally include a reference to the Helsinki Final Act and to the Charter of Paris, while most of the agreements concluded with non-European States mention the Universal Declaration of Human Rights and the UN Covenants of 1966. The Cotonou Agreement of 23 June 2000, containing the most elaborate version of the clause, incorporates a generic reference to political, economic, social and cultural rights, to the rule of law and to democratic principles. Such reference is nevertheless expressly meant to refer only to international obligations already in force between the parties.

This wording makes it reasonably clear that human rights clauses are not meant to expand the protection for human rights beyond that already existing. The wording aims rather at conveying the idea that the clause simply strengthens commitments already incumbent upon the parties.

This assumption raises an interesting problem concerning the nature of the individual rights entitled to protection. Most of the documents referred to by human rights clauses have the nature of soft-law and are deprived, as such, of binding force. Even when reference is made to treaties, such as the UN Covenants of 1966, they are not in force between the parties.

It seems reasonable to assume then that these documents are referred to as evidence of principles and customary rules of international law. Far from imposing new obligations, human rights clauses reveal the commitment of the parties to the protection of such fundamental individual rights as are binding for all subjects of international law. The first and, in many respects, most important, effect of this practice is to contribute to a process of transformation of the legal nature of these rules, from soft-law into hard law, and from treaty-based rules into general international law. By so doing, human rights clauses contribute to significantly expanding the body of individual rights entitled to protection under general international law.

<sup>16</sup> Applied on a provisional basis.

<sup>17</sup> See the Council Decision of 29 January 2001 concluding the consultation procedure with Haiti under Article 96 of the ACP-EC Partnership Agreement (2001/131/EC).

In other words, human rights clauses do not statically reflect the present stage of evolution of international law; rather they aim at advancing the evolutionary process and expanding the protection of human rights well beyond that stage. The EC thus assumes a propulsive role as a qualified interpreter of the legal sensitivity of the international community.

Even conceding that the clauses refer to principles and rules already binding under international law, their incorporation into internationally binding agreements is not without legal effect. By transforming the nature of the obligations and by bestowing on them a conventional character, these clauses also entail a process of transformation of their structural elements and confer on each of the parties the right to react to a breach thereto through means of response available under the law of treaties. In particular, violation of human rights standards can justify, depending on the circumstances, the suspension or termination of the agreements, even in cases where such remedies would not be available under the law of State responsibility.<sup>18</sup>

The conclusion can be drawn that human rights clauses do not simply reaffirm protection for human rights under general international law. They have a twofold effect. First, they expand that protection, bringing certain principles and rules within the realm of general international law, though they may not formerly have had this status. Second, and perhaps more importantly, human rights clauses expand instrumental protection, by rendering available to the parties means of reaction to human rights breaches that might not otherwise be available under general international law.

### III. THE SEARCH FOR A LEGAL BASIS. HUMAN RIGHTS PROTECTION AS AN OBJECTIVE OF EC ACTION

From the perspective of EC law, the incorporation of human rights clauses into agreements with third States raises the interesting question of the relevance of political motivation in the context of EC external relations.

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18 The difference between the legal regime of the response to a breach under, respectively, the general rules of State responsibility and the special rules established by the presence in the terms of a certain agreement of a human rights clause hardly needs to be highlighted. Two notable differences can be mentioned. First, the presence of a human rights clause entitles the parties not only to suspend the performance of the agreement, but also to terminate it. Yet, termination of an agreement is a measure qualitatively different from a reprisal, insofar as it affects the legal efficacy of the agreement. Second, the presence of a human rights clause pre-determines the proportionality of the response, by making clear that the suspension of part or of the whole agreement in case of failure by one of the parties to observe fundamental rights represents the appropriate response to the breach.

Certainly there is a strong case for allowing political considerations to come into play in implementing external policies of the EC.<sup>19</sup> A strict interpretation of EC external competence which precludes political awareness on the part of the EC would have the consequence that the EC is politically blind in the exercise of its powers. Recourse to the instruments of international trade as a means of sanctioning wrongful conduct would be precluded in many cases, potentially opening the door to the possibility of third States having commercial links with the EC fearlessly engaging in massive violations of human rights.

The case of the co-operation agreement concluded in 1980 with the then still existing Socialist Republic of Yugoslavia provides a clear example of this difficulty. The agreement did not contain a clause making its performance conditional upon respect for human rights by the parties. After the outbreak of civil war on Yugoslav territory, the EC considered itself nonetheless entitled to initially suspend and, ultimately, terminate the agreement under the customary rule on fundamental change of circumstances. Although this conclusion was substantially upheld by the Court of Justice in *Racke*,<sup>20</sup> there is some space to argue that the measures taken by the EC institutions fell outside the scope of the *rebus sic stantibus* rule, and rather expressed the willingness of the EC to sanction the other party to the agreement for its conduct in breach of international obligations. It remains open to question if the EC could not have been entitled to suspend the performance of its obligations under the agreement – notwithstanding the absence of a human rights clause – as a countermeasure at least against the breach of customary international rules and principles on human rights, which are addressed to the EC not less than to any other member of the international community.

Such political considerations as do come into play in EC external relations must be legally based upon a provision of the Treaty. From a legal perspective, however, it is difficult to see how human rights clauses can be accommodated into one of the competences transferred to the EC by the Member States. It is common knowledge that Art. 5 places a heavy restriction on the scope of EC action, requiring it to act “within the powers conferred upon it by the Treaty and of the objectives assigned to it therein”.<sup>21</sup> In

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19 In the Commission communication “The External Dimension of the EU’s Human Rights Policy: from Rome to Maastricht and Beyond”, COM (95) 567 of 22 November 1995, is written: ‘These provisions (on human rights) constitute a decisive advance in the development of an essentially economic Community into a political body’.

20 Case C-162/96 [1998] ECR I-3655.

21 This principle, which constitutes one of the cornerstones of European integration, can be derogated from only by EC measures adopted in order to implement a CFSP measure, according to the procedure laid down by Art. 301 of the EC Treaty. The Court of Justice did not disregard this principle in Case C-70/94 *Werner* [1995] ECR I-3189, by asserting that “a measure ... whose effect is to prevent or restrict the export of certain products cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives” (see also Case C-124/95 *Centro-Com* [1997] ECR I-81, para. 24). This finding is aimed only at preventing Member States from adopting measures, having an intrinsically commercial character, in the pursuit of political aims. It would be unwarranted to invert the line of reasoning followed by the Court and conclude that the objectives pursued by a certain measure do not come into account in determining if the EC has the power to adopt it.

order to determine whether the EC has competence to include a clause in agreements with third States, enabling each of the parties to the agreement to suspend or to terminate it following a failure by the other to observe human rights, we must preliminarily establish if the protection of human rights constitutes one of the objectives of the EC.

The only provision of the Treaty that expressly mentions human rights among the objectives of the EC is Art. 177, par. 2, concerning development co-operation. In *Portugal v. Council*<sup>22</sup> the Court of Justice adopted a broad interpretation of the scope of this provision. The decision reads: "in order to qualify as a development co-operation agreement for the purposes of Article (181) of the Treaty, an agreement must pursue the objectives referred to in Article (177). Article (177, para. 1) in particular makes it clear that those are broad objectives in the sense that it must be possible for the measures required for their pursuit to concern a variety of specific matters. That is so in particular in the case of an agreement establishing the framework of such co-operation".<sup>23</sup>

This finding has the effect of enlarging the range of measures by which the EC can pursue its development co-operation policy. The scope of human rights clauses is correspondingly enlarged, in the sense that a failure to observe human rights from one party entitles the others to suspend the performance of parts of the agreement only indirectly related with development.

Though broadly interpreted, however, Art. 177, para. 2, does not constitute a sufficient legal basis for action aimed at protecting human rights outside the scope of development policy.

True, the objectives assigned in the Treaty to the diverse policies cannot be considered in isolation. Rather, they concur to set the teleological system for which the EC has been established. Consequently, the powers conferred on the EC must be assessed against the whole set of aims established by the Treaty, comprehensively considered, and balanced against each other.

This perspective would permit considering the protection of human rights not only in the framework of development policy but, more generally, as one of the aims of EC external action. The conclusion can be drawn that the objective of human rights protection, although expressly formulated only in the context of development policy, has a pervasive effect and influences the carrying out of other EC policies. It would be unwarranted, however, to draw from this assumption the conclusion that the protection of human rights is an objective enjoying absolute priority in the context of the other objectives of the Treaty, even overarching those specifically laid down in the Treaty. Such would be the case, for example, if a commercial measure would disregard the objective of the common commercial policy for human rights purposes.<sup>24</sup>

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22 Case C-268/94 [1996] ECR I-6177.

23 Para. 37.

24 In *Portugal v. Council*, n. 22 above, the Court of Justice approved the priority given to human rights concern only in the context of development policy. See para. 26 of the decision.

By freely connecting the aims and the means of its action and by making some objectives subordinate to others, the EC would otherwise enjoy a broad discretion and virtually an unbounded freedom of action.

#### IV. EC HUMAN RIGHTS POLICY IN THE LEGAL FRAMEWORK OF THE EU

The gap resulting from the absence in the EC Treaty of a clear and well established legal basis for human rights clauses is not filled by referring to those provisions of the EU Treaty which regard the protection of human rights both as a limit to the internal as well as an objective of the international action of the Union.

One ought to consider, though, whether EC action seeks to achieve objectives laid down in the EU Treaty<sup>25</sup> and, more precisely, in the provisions establishing the CFSP. In this regard, EC measures can be considered as instrumental tools for achieving EU aims. EC measures aimed at promoting and enforcing respect for human rights could be framed instrumentally in the wider context of the EU legal system.<sup>26</sup>

The existence of a link between the two systems, having the effect of empowering the EC to adopt instrumental measures for implementing the objectives of the EU Treaty is broadly shared by the Commission. On various occasions the Commission has mentioned provisions of the EU Treaty as forming the legal basis for its action on human rights, such as Articles 6, 7 and 11.<sup>27</sup> In its above-mentioned Communication to the Council and the European Parliament "The European Union's Role in Promoting Human Rights and Democratization in Third Countries", of 8 May 2001, it asserted that "Community activities cannot be viewed in isolation from other European Union Actions", thus giving the impression that the powers and policies of the EC could be employed as a means for implementing EU foreign policy.

Unavoidably, there are points of intersection between EC and EU actions. However, with the salient exception of the co-ordination provided for in Art. 301, to which we

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25 This possibility is expressly taken into account, and rejected, by E. Riedel and M. Will, "Human Rights Clauses in External Agreements of the EC", n. 13 above, at p. 734. See B. Brandtner and A. Rosas, "Human Rights and the External Relations of the European Community", n. 13 above, at p. 471, who do not exclude that international action of the EC can be based on general principles of EU law relating to human rights.

26 The question of the legal relations between the three pillars of the European Union has attracted the attention of many authors. Among those that look with favour at a certain integration of the respective legal systems, see B. de Witte, "The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?" in T. Heukels, N.M. Blokker and M.M.T.A. Bruns (eds), *The European Union after Amsterdam: A Legal Analysis*, (Kluwer Law International, The Hague-London-Boston, 1998) p. 51; A. von Bogdandy, "The Legal Case for Unity: the European Union as a Single Organization with a Single Legal System" (1999) 36 CML Rev. 887; D. Curtin and I. Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise" in P. Craig and G. de Búrca (eds), *The Evolution of EU Law* (Oxford University Press, Oxford, 1999), p. 83.

will return below, these points of intersection presently exist within a legal vacuum. Thus, it is no surprise that the relationship between CFSP and EC acts is a difficult one. Occasionally a CFSP measure has enlarged the scope of EC action by giving to the EC the power to act in situations in which there would otherwise be no competence. In other cases, a different pattern can be registered. Member States preferred to act under CFSP procedures, imposing the unanimity rule and thereby safeguarding their predominant position, even in cases in which the Community could have acted on its own, according to procedures laid down in the EC Treaty.<sup>28</sup>

It is certainly not easy to determine the legal conditions under which CFSP and EC acts may combine. Nor is the issue to be dealt with comprehensively in this study. It can, however, be observed that the merger in a unitary legal framework of the intergovernmental model, such as the CFSP, and the supranational model, such as the EC, is not free from shortcomings. The idea that the EC can freely carry out its action within the framework of the aims of CFSP is not acceptable to the Member States, who would lose much of their control over foreign policy. The converse, that through CFSP actions, Member States could intrude upon the sphere of activities and aims set forth in the EC Treaty appears unacceptable to the EC, insofar as that would subject EC activities to the direction and control of the Member States. The latter situation would present the additional difficulty of draining all meaning from Art. 301, which would become superfluous if the EU could in any case, and not only in the case expressly put forward by that provision, utilize EC action under its direction and in the pursuit of its aims.

The present situation, symbolically (if simplistically) depicted by the three-pillar structure, reflects the asymmetry of the various stages of development of European integration and the need to protect the supranational system from the pervasive intrusions of Member States.

Summing up, the conclusion that EC action can pursue EU aims, as a corollary of the existence of a unitary organizational framework, appears unconvincing. It does not reflect the current practice and it does not solve the theoretical and practical problems deriving from the merger of the two organizational models; rather it produces new problems that are not easily resolved.

If neither the EC nor the EU treaty, separately considered, provides a clear legal basis for human rights clauses, the question arises if this basis can derive from a joint consideration of the two systems. The idea must be considered that the existence of a multiplicity of provisions concerning human rights protection, in the EU as well as in the EC treaty, could have the effect of creating a human-rights friendly legal environment in which EC action could be globally framed. This opinion emerges, albeit not very clearly, from certain Commission working documents, and is largely shared in

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28 See R. Baratta, "CFSP and EC Measures: Overlaps between EC Competence and EU Foreign Policy Activity", Part I, Sec. 3, above. On the risk of erosion of the powers of the EC by acts of the CFSP, see C.W.A. Timmermans, "The Uneasy Relationship between the Communities and the Second Union Pillar: Back to the Plan Fouchet?" [1996] 23 LIEI 61.

legal literature.<sup>29</sup> According to this view, Art. 177, para. 2, would simply reveal the emergence of a general principle, permeating all the actions and policies carried out in the context of the EU, according to which human rights protection is to be accorded priority over every other objective of European integration.

Though attractive, this interpretative method presents some difficulties which make it preferable to look elsewhere for a legal basis for human rights clauses. Arguably, human rights protection in the EU legal system has constitutional underpinnings. However, it seems neither easy nor safe to draw from this premise the conclusion that actions inspired by the protection of human rights do not need to rest on a more precise legal basis. At its present stage of development, the need for a clear and well-established legal basis for action aimed at implementing the objectives of the EC Treaty remains at the core of European integration and constitutes an essential requirement for the exercise of powers conferred on it by its Member States.

The construction at hand also seems technically objectionable. It rests on an interpretative approach that considers jointly provisions of the EU as well as of the EC Treaty. Yet, the possibility of invoking EU provisions as potential legal bases for EC action remains doubtful.<sup>30</sup> The provisions of the two legal systems have different purposes and scope. There is a notable difference between political actions, undertaken in the framework of the second pillar, for securing and protecting human rights in the international sphere, and measures affecting the efficacy of agreements regularly concluded in order to implement objectives laid down in the EC Treaty.

The main reason for viewing this interpretative method with some misgivings lies in the consideration of the consequences that would flow from its acceptance. If general principles and values of European integration could establish a legal basis for EC acts, then the EC institutions could rely on a potentially open catalogue for determining the objectives of their international actions. That would be tantamount to saying that the scope of EC foreign powers is potentially unlimited. Apparently, the same logical argument could equally justify the use of EC foreign power for any other political purpose that could, even indirectly, fall within the objectives for which the CFSP has been set up.

In conclusion, the joint consideration of provisions of the EC and the EU Treaties relies on an interpretative method whose effects go well beyond the limited context that we are now exploring and calls into question the principle of enumerated powers. Consequently, it must be looked at with great caution, and not be unnecessarily resorted to, unless other attempts to find a legal basis for human rights clauses under the EC Treaty have failed. Not unexpectedly, it has never been relied upon by the Court of Justice.

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29 This idea is echoed in the Commission communication "On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third States", COM (95) 216 of 23 May 1995, and in the Commission communication to the Council and the European Parliament "The European Union's Role in Promoting Human Rights and Democratization in Third Countries", COM (2001) 252 def. of 8 May 2001.

30 See E. Riedel and M. Will, n. 14 above, at 734.

V. INTERNAL COMPETENCE AS A COROLLARY OF THE INTERNATIONAL  
CAPACITY OF THE EC. INTRODUCTORY REMARKS

Hitherto we have followed a classical approach to methodology. We have examined the competence of the EC to incorporate human rights clauses in international agreements, on the assumption that, if the EC has such competence, it also has the international capacity to act accordingly. This method, however, has been proved unfit for solving our problem.

We will now propose to invert this methodological approach and examine the issue from a different perspective. We will examine the international capacity of the EC to act in the field of human rights, with a view of discerning on this basis the possible existence of a competence to do so.

Thus, instead of questioning if the EC Treaty establishes a legal basis for EC foreign action, we may ask if the competence of the EC in the field of the international protection of human rights cannot be deduced from its capacity as an actor in international relations and, more precisely, from its status as the addressee of the international general rules on human rights. In order to verify this hypothesis we must preliminarily ascertain if these rules confer rights and obligations upon the EC, and, thereafter, analyze the impact of this finding on the system of EC competence.

The question, at its core, consists of an inquiry into the relationship between the internal competence and the international capacity of supranational organizations. In light of this consideration, it is appropriate to clarify briefly the theoretical framework within which the analysis will be carried out.

Over the decades, the problem of the personality of international organizations has proved to be a stimulating challenge for legal research. Yet, no firmly-established theory about it can be deemed to exist. There is a wide consensus that it is more restricted than that of States, which are full subjects of international relations.<sup>31</sup> However, the question as to whether the transfer of powers by Member States to an international

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31 See the advisory opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, in (1949) ICJ Rep. 174, at 179: "The Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State. Still less it is the same thing as saying that it is a "super-State", whatever that expression may mean. It does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law and capable of possessing international rights and duties and that it has capacity to maintain its rights by bringing international claims ... Whereas a State possesses the totality of international rights and duties recognized by international law, the rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice". See I. Brownlie, *Principles of Public International Law* (5th edn, Clarendon Press, Oxford, 1998), p. 680; H.G. Schermers and N.M. Blokker, *International Institutional Law* (Kluwer Law International, The Hague, London, Boston, 1995), p. 976.

organization establishes such personality or whether, instead, such personality derives from principles autonomously developed by international law remains controversial.<sup>32</sup>

The prevailing view tends to consider the personality of international organizations as deriving from their founding treaties. Though this idea represents vividly the need to link the personality of the new entity with the limited powers of which the entity is endowed, it appears unable to explain the objective nature of legal capacity – a legal capacity vis-à-vis members as well as non-members of the organization. According to this view, competence generates capacity, with the unwarranted consequence that an act adopted outside the sphere of its competence would be automatically invalid under international law. This consequence, in its absoluteness, has never been recognized in international practice.<sup>33</sup> Although it seems reasonable to maintain a certain link between the powers bestowed on it by its Member States, the idea of a strict coincidence between competence and capacity is not altogether acceptable.

On a different view, the idea has been maintained that legal personality must be assessed in relation to standards autonomously established by international law. This theory has the advantage of recognizing that the process of attribution of international personality is one that must be accomplished objectively, according to standards that take into account the degree of independence of the organization and its ability to operate autonomously as an actor in international relations. If, however, we examine the standards suggested in legal theory and practice for assessing the personality of international organizations, it soon becomes apparent that the concept is dependent upon the powers of action expressly or implicitly conferred upon it by its Member States.<sup>34</sup> A conception of legal personality that leaves aside the consideration of the scope of the powers given to each organization would be divorced from reality.

Having examined, albeit in passing, some features of legal personality of international organizations, we can see how difficult it might be to use it as the foundation for a persuasive and constructive theory. A legal theory on the personality of interna-

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32 The terms of a perennial doctrinal dispute are well summarized by J. Klabbers, "Presumptive Personality: the European Union in International Law" in M. Koskenniemi (ed.), *International Law Aspects of the European Union* (Martinus Nijhoff, The Hague, 1998), p. 231.

33 *Reparation for Injuries* case, note 31 above, at 179. Some provisions of the Vienna Convention on the law of treaties between States and international organizations or between international organizations of 1986 seem to imply that the capacity of an international organization under the law of treaties goes beyond the express terms of its constituent instruments; see particularly Articles 2 (1) (j), 6 and 46. On these provisions, see G. Gaja, "A 'New' Vienna Convention on Treaties Between States and International Organizations or Between International Organizations: A Critical Commentary" (1987) 58 BYIL 253. Apparently, a different reasoning has been followed by the Court of Justice of the European Communities in Case C-327/91 *France v. Commission* [1994] ECR I-3641, in which the Court denied the power of the Commission to conclude international agreements on the ground that "a mere practice cannot override the provisions of the Treaty". This conclusion, however, was expressly meant to apply only within the internal legal order of the EC.

34 See H.G. Schermers and N.M. Blokker, n. 31 above, p. 979.

tional organizations must simultaneously take into account exigencies which are not easily reconcilable. On the one hand, there is the need to maintain a link with the powers attributed to the organization by the founding treaty. On the other hand, there is the need not to hamper excessively the external relations power of that entity, and to allow it to exercise, on the international plane, prerogatives connected to the exercise of the powers of which it disposes.

Beyond the theoretical complexities, what really matters is to establish a methodological process aimed not so much at determining the legal personality of a certain entity in the abstract, but rather to determine concretely its capacity to take international legal positions.<sup>35</sup> The analysis must therefore aim at determining which rights are conferred, and which duties are imposed, upon a certain organization. By its nature, this task must be fulfilled case-by-case, in relation to the powers of action put concretely at the disposal of the organization. In other words, attention should be directed not so much at the question of legal personality – conceived as the abstract quality of a certain entity to be a subject of international law – but rather at its capacity to possess and to exert certain international rights and duties.<sup>36</sup> For entities not possessing the plenitude of powers, capacity, and not personality, represents the standard according to which its status as actor in international relations acquires legal meaning.

There are good reasons for assuming that, although in principle the capacity of international organizations depends on the competence transferred to it by its Member States, the former does not merely constitute the projection onto the international sphere of the latter.

This finding derives from the basic consideration that international legal positions and internal competence are structurally different. We can hardly expect international legal positions to be distributed between Member States and international organizations in proportion to their respective shares of competence. Although strictly interrelated, these two concepts, competence and capacity, overlap without completely coinciding. Even if the international personality of a certain entity is established in relation to the powers of action of which it disposes, its capacity can go beyond expressly transferred competence. Although capacity must primarily be established in relation to the powers transferred by its Member States, certain prerogatives pass to it by virtue simply of its existence as a subject of international law. That holds true in particular for what con-

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35 It seems preferable to speak of "legal positions" instead of simply referring to "rights and duties" possessed by a certain international subject. The formula "legal positions" is more comprehensive and extends to the full panoply of interests protected by the law, such as powers, faculties, and so on.

36 The adoption of a functional standard is now widely accepted in legal literature. See recently P. Sands and P. Klein (eds), *Bowett's Law of International Institutions* (Sweet and Maxwell, London, 2001), p. 473: "The precise scope of those rights and duties will vary according to what may reasonably be seen as necessary, in view of the purpose and functions of the organization in question, to enable the latter to fulfil its tasks. Therefore the test is a functional one; reference to the functions and powers of the organization exercised on the international plane, and not to the abstract notion of personality, will alone give guidance on what powers may properly be implied".

cerns instrumental powers, conferred by international law as adjuncts to the possession of international rights and duties, such as the power to suspend an agreement in response to a conduct of other parties, to bring international claims, to seek compensation for injury on the international plane, to settle international disputes, and so on. Although perhaps not expressly conferred by the founding treaty, absent a provision to the contrary these powers can be considered to have been automatically given within the international legal order, as a corollary of the capacity of an entity to act autonomously in the sphere of international relations.

Theoretically, this finding derives from the ability of certain international organizations to exercise their powers, although in limited fields, independently and not as a common agency of their Member States. Once capacity has been recognized, the entity should logically possess, to a proportionately limited extent, the same instrumental means of actions as those of which sovereign entities dispose, to a full extent, for the protection of their legal rights and interests.<sup>37</sup>

## VI. INTERNATIONAL CAPACITY AND IMPLIED POWERS

The enlargement of powers deriving from the international capacity can have effect in the internal legal order of the organization. Powers of action that are not expressly transferred can be considered to be inherent in order to enable the organization to occupy effectively its international legal positions.

This effect can be legally explained by recourse to the doctrine of the implied powers, by virtue of which the organization is reputed to possess, besides the powers expressly transferred to it, other powers, necessary to carry out its tasks efficiently. If we consider that Member States have bestowed on a certain organization international legal personality, that is, the capacity to possess and to occupy autonomously international legal positions, it seems reasonable to infer that this entity has been endowed with those powers and prerogatives which are necessary or even useful for the implementation of its legal positions.

The impact on the internal sphere of competence of the establishment of international capacity can be twofold. First, powers not expressly transferred by Member States, but whose exercise is necessarily connected with the international legal positions occupied by it, may be deemed to have been established inherently. Second, a

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37 The idea that a centralized entity possesses some powers inherent in sovereignty and not expressly transferred to it by its Member States has been advocated in general terms by Justice Sutherland in its opinion for the Supreme Court of the United States in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). The opinion of Justice Sutherland is framed in an historical analysis that however does not necessarily constitute its logical premise. For a thorough discussion of the merits and limits of Sutherland's constitutional theory see L. Henkin, *Foreign Affairs and the US Constitution* (2<sup>nd</sup> edn, Clarendon Press, Oxford, 1996), p. 16.

subtler, but no less significant, effect is the expansion of the set of aims in pursuit of which the organization can legitimately act. The organization is empowered to exercise the powers of which it is endowed for protecting its international legal positions, thus permitting the use of the powers conferred on the organization for aims not explicitly stated in the founding treaty. The expansion of the field of competence of the organization can thus take place vertically, through the attribution to the organization of new powers of action, as well as horizontally, through the acknowledgement of new aims for which the organization can lawfully act.

The first effect is traditionally embodied in the classical understanding of the doctrine of implied powers, which recognizes the existence of powers not expressly attributed to the organization, but necessary for the accomplishment of its tasks. The second concerns the scope of foreign action. It implies that the organization is empowered to act, even beyond the aims explicitly assigned to it, in order to occupy properly and effectively its international legal positions. The first case concerns the exercise of non-Treaty powers for the pursuit of Treaty aims. The second concerns rather the exercise of Treaty powers for non-Treaty aims.

Summing up, and applying the results of our inquiry to the case of the EC, it seems logical to assume, unless a clear indication appears to the contrary, that Member States did not intend to hamper the international capacity of the EC by preventing it from using its external competence in order to secure its international legal positions. Having put into being an entity endowed with international personality, Member States have implicitly consented that the EC uses powers transferred to it across the whole field of international legal positions occupied by it.

The international capacity of the EC is already curtailed by the sharing of competence. The founding treaty can certainly place an inner limit on the use of EC competence for international law purposes. However, insofar as this limitation would impinge upon the international prerogatives of the EC, it cannot be presumed, but must expressly result from the treaty, or clearly emerge from the practice of the institutions.

In the absence of an explicit limitation, one can reasonably infer that the international capacity of, respectively, the Member States and the EC is partial only in relation to the limited competence with which each entity is endowed, but not in relation to the scope of their action. The scope of the international powers of the EC extends to the exercise of all the legal positions occupied by it.

This line of reasoning leads to the conclusion that the EC can exercise its competence to protect its international legal positions. In other words, the possession of international rights and duties has, on this view, the effect of expanding the set of aims for which the powers conferred to the EC under the Treaty can be legitimately exercised.

The methodological approach followed hitherto is apparently contradictory. We started by deducing international capacity from the internal competence attributed to a certain entity, and concluded that the competence possessed by that entity is significantly influenced by its international capacity. The logical process of deducing competence from capacity, and vice-versa, may appear to be characterized by a certain circularity. On closer analysis, however, this impression appears to be unfounded. This

line of reasoning reflects the interplay between these two symbiotic concepts, which influence mutually each other. The competence of an entity determines its international capacity, in so far as international law imposes upon it only duties that it has the ability to observe. On the other hand, once it is established that an entity can be the addressee of international rights and duties, its competence is correspondingly enlarged. Is it not unreasonable to think that Member States conferred on the EC sovereign powers, definitively depriving themselves of important means of action in the sphere of international relations, while, at the same time, placing limitations on those powers which are so strict as to prevent the implementation of international legal positions?

In the following paragraph we will observe more closely this process of symbiosis in the context of the foreign powers of the EC.

## VII. THE INTERNATIONAL CAPACITY OF THE EC: A REAPPRAISAL

Moving from the theoretical plane to a more practical one, the methodological approach adopted ought now to be applied in order to determine if human rights clauses fall inside the scope of EC foreign power.

It can preliminarily be observed how in depth the legal experience of the European integration can contribute to enlightening the uneasy profile of the relationship between competence and capacity. Both because of the quantity and because of the quality of the competence transferred to the EC, the exercise of foreign power by that entity is incomparable with the prerogatives of other existing international organizations. Dealing with the distribution of powers between the EC and its Member States in the field of external relations calls for a certain mental readiness to update traditional concepts of subjectivity and sovereignty. We are dealing with a system composed of a plurality of actors, each of them possessing some powers of action, none of them possessing the plenitude of powers traditionally referred to under the concept of sovereignty. Moreover, the line dividing the capacity of the Community from that of Member States is not a clear-cut one. Intersections and overlaps exist, that highlight the uniqueness of the legal experience of European integration.

The EC undoubtedly occupies the international legal positions resulting from agreements concluded by it. But what of the legal positions resulting from general international law?<sup>38</sup>

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38 On the question of the legal personality of the EC, see J. P. Puissechot, "L'affirmation de la personnalité internationale des Communautés européennes" in *L'Europe et le droit. Mélanges en hommage à Jean Boulouis* (Dalloz, Paris, 1991), p. 435; Ch. Tomuschat, "Artikel 210" in H. von der Groeben, J. Thiesing and C.-D. Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* (Nomos, Baden-Baden, 1997); B. Simma and C. Vedder, "Artikel 281" in E. Grabitz and M. Hilf (eds), *Das Recht der Europäischen Union* (Beck, München, 1999).

It is reasonable to think that the only rules which address the EC are those which affect its sphere of competence. However, there are many ways in which international law rules can affect the EC competence. The precise determination of those ways falls outside the scope of this work. We may be content to state that any rule prescribing a certain conduct that implies an exercise of EC competence addresses the EC.

This conclusion stems from the principle that legal norms generally impose duties only upon subjects possessing a legal capacity, directly or indirectly, to keep conduct in compliance with them.

Selecting, from the vast range of rules of general international law, those that actually address the EC, however, is not an easy task, and can at best be accomplished empirically. As described above, some norms address the EC only. Some others address both the EC and its Member States, in so far as they affect the competence of both entities.<sup>39</sup> Some rules, which impose obligations on the EC and Member States, reserve the exercise of the rights deriving from them to the latter.<sup>40</sup>

By way of example, we might recall here that the EC considered itself to be the addressee of the rule on extraterritorial jurisdiction, which affects the way in which both Member States and the EC exercise their respective powers,<sup>41</sup> of the rules on the law of treaties,<sup>42</sup> of the rules on State succession in regard to treaties<sup>43</sup> of some rules

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39 On the interplay between EC and Member States action in the field of customary international law, see V. Lowe, "Can The European Community Bind Member States on Questions of Customary International Law?" in M. Koskeniemi (ed.), *International Law Aspects of the European Union*, n. 32 above, at 149.

40 An example of this curious sharing of international legal positions as between the EC and its Member States emerges from the international rules on nationalization and expropriation of aliens. The EC is certainly addressed by these rules, since the exercise of EC powers can involve expropriation of third countries' nationals. However, the EC does not possess the right to make a claim in respect of these rules against a third States, since the pre-condition for the exercise of this right is the link of nationality between the individual and its State.

41 See the reaction to the adoption of the Helms-Burton Act by the United States. The EC considered itself to have been injured by the conduct of the U.S., and adopted countermeasures aimed at impairing the extraterritorial effect of the Act: Regulation 2271/96 of 22 November 1996 Protecting against the Effects of the Extraterritorial Application of Legislation Adopted by a Third Country and Actions Based Thereon or Resulting Therefrom, OJ L 309 of 29 November 1996, p. 1. The regulation was complemented by a Joint Action adopted by the Council on the same date, OJ L 309 of 29 November 1996, p. 7, concerning the measures to be taken by the Member States. See more recently the decision of the Court of first instance of 25 March 1999 in the Case T-102/96 *Gencor v. Commission* [1999] ECR II-759.

42 See P. J. Kuijper, "The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969" (1998) 25 LIEI 1.

43 See P. J. Kuijper, "The Community and State Succession in Respect of Treaties" in D. Curtin and T. Heukels (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers* (Martinus Nijhoff, Dordrecht - Boston - London, 1994), II, p. 619.

of law of the sea<sup>44</sup> and environmental law.<sup>45</sup> The status of the EC as the addressee of these rules under international law was considered, in the internal legal order of the EC, sufficient to establish *de facto* competence to exercise the powers and prerogatives descending from them.<sup>46</sup>

While a comprehensive consideration of the rules of general international law addressing the EC falls outside the scope of this work, attention ought now to be turned to the question of the EC as addressee of general international rules on human rights. Although the question will be addressed with a view to solving the problem of human rights' competence only, encroachment upon the more general question of the EC as the addressee of *erga omnes* rules is inevitable.

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44 See T. Treves, "The European Union and the Law of the Sea: Recent Developments", in Sec. 5 above.

45 See the regulations 2092 and 2093 of the Council of 28 September 2000, in OJ L 249 of 4 October 2000, suspending the importation of Atlantic swordfish originating from Belize and Honduras, and Atlantic blue-fin tuna originating from these countries and from Equatorial Guinea. The measures were meant to implement a recommendation of the International Commission for the Conservation of Atlantic Tuna (ICCAT), to which, however, the targeted States are not parties. The regulations refrain from qualifying the measures as sanctions, and rather insist on their lawfulness under international law, implicitly referring to the general exception clause of Art. XX (g) of GATT. However, this reference appears particularly controversial under the case-law of the GATT. The qualification of such measures as sanctions appears more plausible, if we accept the idea that the recommendation of the ICCAT constitutes an instrument declaratory of international environmental law relating to the protection of marine environment. See thereon A. Rosas and E. Paasivirta, "Sanctions, Countermeasures and Related Actions in the External Relations of the European Union: Search for Legal Frameworks", Sec. 3 above.

46 The conclusion that the EC is empowered, under the Treaty, to use its powers for implementing its international legal positions does not touch upon the different question concerning the use of EC competence for implementing legal positions possessed by its Member States. A positive answer to the latter question can descend from a joint consideration of EC and Member States' international powers. It is not reasonable to think that, while transferring some powers to the EC, Member States lost their capacity to use certain means of action for implementing their international rights without this capacity being correspondingly acquired by the EC. The question arises particularly in relation to the use of commercial measures, which fall within the exclusive competence of the EC, for securing international legal positions of Member States. It may be reasonable to suppose that, while passing instrumental means of action to the EC, the Member States implicitly consented to the acquisition of the capacity of the EC to use them for maintaining rights and interests possessed by them or by some of them. This conclusion, however, would imply that, correspondingly, the EC acquired the power, under international law, to act for securing international legal positions of its Member States. The conditions under which the EC can use, under international law and EC law, their competence instrumentally as a means for securing compliance with international legal positions of Member States are not to be dealt with in the present contribution.

# VIII. THE EC AS THE ADDRESSEE OF ERGA OMNES OBLIGATIONS

The question now arises as to whether the status of the EC as an entity possessing rights and duties deriving from general international law rules on human rights is established by reason of the *erga omnes* character of those rules.

This question has been widely debated in the past, particularly with reference to the problem of the EC's power to impose international sanctions on third States for violation of *erga omnes* obligations.<sup>47</sup> The question was temporarily settled, although not definitively solved, by the incorporation of the new Art. 301 into the EC Treaty, introducing a two-step process for the imposition of sanctions by the EC, on the basis of a CFSP measure. While this process avoids doctrinal disputes concerning the power of the EC to respond to violations of *erga omnes* obligations, it does not entirely solve our problem. The ambiguous wording of Art. 301 does not clarify the respective roles of CFSP and EC measures. If it applies to cases in which international legal positions of the EC are at stake, Art. 301 would have the effect of narrowing the scope of EC foreign power, since it interposes an additional precondition to action which the EC would otherwise have the power to take on its own. On the other hand, if it applies to cases in which international legal positions of Member States are at stake, the provision would have the effect of enlarging the scope of EC foreign powers, since it would allow it to pursue aims for which no competence could possibly exist. Practice to date has not clarified the matter.<sup>48</sup>

The conceptual confusion surrounding the adoption of sanctions by the EC seems to be a consequence of the way in which the problem is framed. The characterization of the EC's competence to impose sanctions for breaches of *erga omnes* obligations as the central problem is misplaced. While it is reasonable to think that the EC is entitled, under international law, to use its competence as a means of protecting its international legal positions, it is open to debate whether, and under which procedures, it can

47 The terms of a learned debate can not be easily summarized. See, among numerous contributions, A. Davì, *Comunità europee e sanzioni economiche internazionali* (Jovane, Napoli, 1993); J. Verhoeven, "Communautés européennes et sanctions internationales" (1984-85) 18 R.B.D.I. 79; C. D. Ehlermann, "Communautés européennes et sanctions internationales. Une réponse à J. Verhoeven" (1984-85) 18 R.B.D.I. 96.

48 Significantly, the second paragraph of Art. 301, introduced by the Treaty of Amsterdam makes clear that the EC possesses the power to suspend the application of an agreement irrespective of a previous CFSP decision. The provision seems to imply that the EC can act on its own when the sanctions measure falls within its sphere of competence, and it is taken in order to implement international legal positions possessed by it. From this reading of Art. 301 the consequence seems to follow that a previous CFSP is needed when the measure to be taken by the EC, although materially falling within the powers assigned to the EC, is adopted for securing international legal positions of its Member States or is, more generally, taken for purposes falling beyond the objectives for which the EC can legitimately act.

do so with regard to legal positions possessed by its Member States. The preliminary question to be solved therefore concerns not so much the competence of the EC to adopt sanctions, but rather that of determining the international legal positions of which the EC is the addressee.

In that context, the *erga omnes* nature of the rule does not necessarily matter. Whereas some *erga omnes* obligations concern States as well as international organizations, some do have a more restricted field of addressees. According to the method suggested above, in the wider context of *erga omnes* obligations, as in all other contexts, some rules must be singled out which, by virtue of their content, and consequently of their link with the sphere of the EC competence, address the EC and not, or not only, its Member States.

It is reasonable to suppose, by way of example, that the rule prohibiting the use of international force does not address the EC, which has no competence in that regard. Whether and under what conditions the EC can use its competence to react to the violation of rules on behalf of its Member States is quite a different question, not to be dealt with in the present essay.

On the other hand, the body of general international law on human rights surely affects the way in which EC competence must be exercised.

The EC can, of course, infringe these rules, above all if we accept the idea that general international law on human rights extends to rights embodied in documents referred to in the human rights clauses, such as the Universal Declaration on Human Rights, or the UN Covenants of 1966.

In other words, if we accept the idea that some rules, formerly considered not to be binding, such as those contained in the Universal Declaration, or as having conventional character, as those contained in the UN Covenants, have assumed, or are going to assume, the nature of rules of general international law, the conclusion must necessarily be reached that the EC is among their addressees, since it must exercise its competence in a manner consistent with those rules. Some of these rules, indeed, can be infringed by EC's normative activity in the exercise of its competence. Furthermore, it is not unreasonable to think that the EC, eventually in conjunction with its MS, is internationally responsible for breaches by national organs acting on behalf of the EC, when the implementation of EC rules necessarily entails a violation of basic human rights.

The field of human rights constitutes an excellent example of the asymmetry which exists between the competence transferred to the EC and its international capacity. Even if we accept the conclusion of the Court of Justice in Opinion 2/94, and assume

that the EC has no competence to enact rules aimed at protecting human rights,<sup>49</sup> it can hardly be denied that it is among the addressees of the rules of general international law. Insofar as the EC is an entity endowed with certain competence, it is under the obligation to exercise it in compliance with such rules. The status of the EC as the addressee of human rights rules implies that it also possesses, under international law, the right to react to breaches thereto, or promote observance thereof.

Within its internal legal order, the competence of the EC to incorporate human rights clauses in international agreements with third States can logically be deduced from its status as the addressee of these international human rights rules. If we admit that the EC is under an obligation to respect basic human rights, the incorporation of human rights clauses does not have the effect of enlarging the body of international obligations incumbent upon the EC, in the sense ruled out by the Court of Justice in Opinion 2/94. They simply reaffirm an obligation already incumbent upon the EC and strengthen the protection which the EC is entitled to demand internationally. As seen above, human rights clauses have the effect of transferring the protection of fundamental human rights from the customary to the conventional plane. The EC is certainly empowered to do so, since it is addressed by international law rules on human rights and, at the same time, has the international capacity to conclude the agreements in which the clauses are incorporated. In other words, human rights clauses operate in the interstices between the EC's capacity to conclude treaties in certain matters and its capacity to claim respect for fundamental human rights under general international law. We can conclude that, from an international law perspective, the incorporation of human rights clauses into the terms of co-operation or commercial agreements concluded by the EC falls within the scope of the foreign power of the organization.

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49 It may be opportune to observe, in passing, that this conclusion is not completely immune from criticism. A by-product of the lack of competence of the EC in the field of human rights protection would be the acknowledgement that the competence of the Member States is exclusive. So they could assume obligations affecting both their own as well as the EC's spheres of competence. That would create quite a curious situation, in which the EC would be required to act consistently with international engagements of its Member States, in order to avoid that they may incur in international responsibility. That would give to the Member States a permanent power to alter the scope of the competences assigned to the EC beyond the extent determined by the founding Treaty. Yet, human rights obligations have mostly an instrumental character. They are not the object of a specific competence, but rather concern the way in which all the competences assigned to the EC and to the Member States are to be exerted. From this premise the consequence can be reasonably drawn, that there is not an entity possessing a specific, and exclusive, competence on human rights. Rather, each entity endowed with normative powers, the Member States as well as the EC, possesses inherently also the power to assume obligation on human rights for the whole range of its sphere of competence. After all, such obligations have the effect of simply curtailing the discretion conferred to the EC by the Treaty in the exercise of its competence. Within the respective spheres of competence, such power is exclusive altogether. Arguably, this conclusion constitutes a plausible reading of the ERTA doctrine and its aftermath, applied to the particular situation of human rights obligations.

The competence to incorporate human rights clauses into the terms of international agreements with third States can thus be considered to be an inherent power of the EC. As noted above, the doctrine of implied powers can be used to attribute new powers to the organization, necessary for accomplishing its tasks, as well as to justify the use of its powers to further aims not expressly contemplated in the founding treaty.

Human rights clauses provide a vivid illustration of this latter case.

The powers expressly attributed to the EC are used for aims not expressly contemplated, but inherent in the establishment of an entity endowed with international capacity. This conclusion allows the significant enlargement of the set of aims for the attainment of which the EC can legitimately act, without however postulating the existence of an open-ended system of competence, which would be legally and politically untenable at the present stage of European integration. Both the Member States and the EC are, in principle, under an obligation to comply, in the exercise of their competence, with the body of customary international rules on human rights, and each has the capacity to demand compliance from third parties.

We are therefore led to the conclusion that the international status of the EC as an actor in international relations significantly influences the internal system of the EC's aims. The EC is empowered to use its competence not only to attain the objectives expressly assigned to it by the Treaty, but also to attain objectives relating to the implementation of its international legal positions. This conclusion palliates the otherwise excessive rigidity of the system of Treaty aims and allows the competence assigned to the EC to be flexibly used for international law purposes.

However, the conclusion equally rests on the assumption that fundamental human rights constitute, under general international law, a conceptually unitary body of rules which addresses in full the EC as well as its Member States.<sup>50</sup> In other words, a global approach to human rights is the essential pre-requisite of EC action aimed at protecting and developing human rights in the international arena. Should, in an analytical perspective, a distinction be drawn between human rights obligations incumbent solely on Member States, and others that are equally incumbent upon the EC by virtue of the competence transferred to it, it would follow that measures of suspension or termination of agreements containing human rights clauses could be adopted by the EC in respect of breaches of the latter category of obligations. The conditions under which such measures could be adopted by the EC in response to a breach of human rights obligations incumbent solely upon the Member States falls outside the scope of this study.

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50 In the Luxembourg European Council Conclusion of 28 and 29 June 1991 we read: "The European Council recalls the indivisible character of human rights". Analogously, in the above mentioned Commission communication "The External Dimension of the EU's Human Rights Policy: from Rome to Maastricht and Beyond", COM (95) 567 of 22 November 1995 emphasis is put again on the indivisible character of human rights, in order to preclude a discrimination between civil and political rights, and economic, social and cultural rights. It is open to question if this character, that concerns human rights in international law, also precludes to distinguish the international legal positions in their regard between the EC and its Member States.