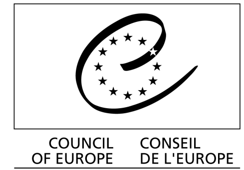

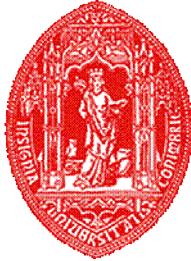

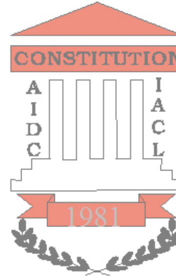

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"THE STATUS OF INTERNATIONAL TREATIES ON HUMAN RIGHTS"

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REPORT
"INTERNATIONAL TREATIES AND AGREEMENTS CONDITIONING FOREIGN TRADE AIDS ON RESPECT FOR HUMAN RIGHTS AND DEMOCRACY"

by
Mr Cesare PINELLI
Professor, University of Macerata, Italy
Member of IACL

1. The question of whether human rights norms are characterized from a special or hierarchical status in international law depends on the criteria guiding our research.

Human rights treaties, it has been noticed, differ already from ordinary treaties, since the reservations-regime of the Vienna Convention on the Law of Treaties is inappropriate with respect to them, and succession into human rights treaties is considered to be automatic. But, according to the same scholar, only *jus cogens* rules as well as *obligations erga omnes* can be considered to be of a constitutional nature, as well as obligations arising out of the UN Charter and general principles[1].

Hierarchical status of human rights norms is here circumscribed to the relationship between human rights treaties and ordinary treaties. But this perspective leaves open the question of the hierarchical status of human rights norms as such, since some human right is provided from *jus cogens* rules, which, given their constitutional nature, should be deemed superior to other human right treaties. Moreover, obligations *erga omnes* affecting non-derogable rights might derive both from customary law and treaty.

Since the status of human rights norms cannot be inferred from sources of law, we must rely here on a content-based notion of hierarchy. This is confirmed from the fact that no international Court will deny that *jus cogens* obligations exist, and that is rather the uncertainty of its contents that forms a barrier for a wider acceptance of the idea of peremptory norms by both states and international courts[2].

The shift we are assisting at from a “value-free attitude”, necessary for a horizontal world where no single state can claim supremacy, towards “a more value-oriented attitude”[3], is decisively driven from the need for the protection of the human person. Once said this, a content-based notion of hierarchy is needed, and, therefore, a definition of basic, or core, human rights. This appears a difficult question, not only because of deep political divisions and different perceptions of human rights values within the international community, but also because of the uncertainties affecting the legal grounds of the definition.

At this respect, I will argue that the definition of core human rights needs to take account of the different circumstances which it ought to be adapted to. I will then refer to one of those circumstances, that is, the evolution affecting human rights clauses of EU cooperation agreements with third countries, with the aim of enhancing the approach to the issue.

2. During the first decades of the twentieth century, it was never denied that protection of human rights was a matter for each individual state and did not concern the international

community, notwithstanding the treatment of Armenians in Turkey and of Jews in Germany[4]. This rule of indifference, as we might call it, not only characterized international law, but

[1] S.Kirchner, *Relative Normativity and the Constitutional Dimension of International Law: A Place for Values in the International Legal System?*, *German Law Journal*, Vol. 5, January 2004, at 5.

[2] S.Kirchner, *Relative Normativity*, at 2.

[3] T.Koji, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, *European Journal of International Law*, 2001, 937.

[4] H.G.Schermers, *Acceptance of International Supervision of Human Rights*, *Leiden Journal of International Law*, 1999, at 821.

corresponded to the acceptance, at the national scale, of a formal notion of constitution, according to which a text may be called a constitution when certain procedural requirements are met, irrespective of its contents, including the nature of the regime, authoritarian or democratic, which it introduces.

After the Second World War and the Nuremberg trial, the Universal Declaration and other Charters on human rights, the ECHR included, were founded on the value of dignity of the human person. This, again, corresponded to the new conception of constitutionalism contextually emerging in Western Europe's national states. But all these novelties were not expected to function as a Trojan horse in an international system wholly dominated by states[5]. Prohibition of United Nations intervention in domestic jurisdictions, stated in Article 2, para. 7, of the UN Charter, was deemed sufficient to preserve the traditional sovereignty of states.

During the Cold War, interference in domestic jurisdictions for human rights purposes was barred both by the resistance of communist countries, and by the fact that the United States could express its concern over human rights without having to fear that this might be detrimental to its security interests. In other words, considerations of power politics and moral ethical considerations coincided[6]. It is not surprising, then, that the Final Act of the Helsinki Conference on Security and Cooperation in Europe of 1975 put abstention from intervention in domestic jurisdictions (Principle VI) on an equal footing with respect for human rights and fundamental freedoms (Principle VII).

During those decades, the efficacy of the Universal Declaration of Human Rights of 1948 was thus paralyzed, even after its translation into the binding rules adopted with the two Covenants of 1966, respectively, on civil and political rights and on economic, social and cultural rights. Besides, that very distinction reflected longstanding quarrels between the two power blocks about the priority of civil and political over economic, social and cultural rights or *vice versa*[7], which drove many scholars to consider the Universal Declaration as a set of moral precepts without legal binding force[8].

However, in the meanwhile, important legal developments occurred in the field of human rights. In the *Barcelona Traction* case (1970), the International Court of Justice held that obligations *erga omnes* affect "the principles and rules concerning basic rights of the human person including protection from slavery and racial discrimination"[9]. Such "basic rights" were referred to gross violations, roughly corresponding to those protected under the Vienna

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[5] See A.Bianchi, *Globalization of Human Rights: The Role of Non-state Actors*, in G.Teubner (ed.), *Global Law without a State*, Dartmouth, Aldershot, 1997, 183.

[6] P.Baehr, *The Role of Human Rights in Foreign Policy*, II ed., London, Macmillan, 1996, at 85.

[7] Those quarrels stemmed from a contested decision of the UN General Assembly in 1951 based on the underlying assumption that civil and political rights were absolute, immediate and justiciable, whereas economic, social and cultural rights were programmatic and would be costly to implement: see J.Dine, *Human Rights and Company Law*, in M.K.Addo (ed.), *Human Rights Standards and the Responsibility of Transnational Corporations*, Kluwer, The Hague, at 211.

[8] P.Meyer-Bisch, *Le corps des droits de l'homme. L'indivisibilité comme principe d'interprétation et de mise en œuvre des droits de l'homme*, Editions Universitaires Fribourg Suisse, 1992, 65, and N.Bobbio, *L'età dei diritti*, Einaudi, Torino, 1990, 41.

[9] *Barcelona Traction, Light and Power Company, Limited*, arret, CI.J, Recueil, 1970, at 32.

Convention on the Law of Treaties of 1969 with the proclamation of *jus cogens* (prohibition of aggression, genocide, slavery, racial discrimination, and self-determination of peoples).

To the contrary, the above mentioned "basic rights" do not correspond to the human rights recognized from the UN Covenant on Civil and Political Rights and that on Economic, Social and Cultural Rights of 1966, covering a wider spectrum than those provided in strictly humanitarian terms. Moreover, human rights listed in the UN Covenants appear differently connected with the welfare of individuals, since they not only need to be protected from the State, but also to be promoted through an active role of the State. Does this mean that they cannot be deemed "basic human rights"? The answer is yes to the extent that we refer such rights to gross violations, as in the *Barcelona Traction* case or according to the Vienna Convention's list, which presuppose an abstention of the State from interventions violating the dignity of the human person. The answer is no, whenever we refer the basic nature of human rights to the minimum welfare of the individual, rather than to strictly humanitarian considerations. While certain rights, e.g. the right to education or freedom of the press, are unlikely to fall within the latter category, they certainly fall within the former.

Our difficulties in achieving a satisfactory response to the question of which human rights are core or basic could thus be significantly reduced, although of course not eliminated, if we leave aside the ambition of giving a once-for-all response to that question, and, correspondingly, take account of its different dimensions.

3. I will further concentrate on the minimum welfare individual's dimension of basic human rights. At this respect, the dissolution of the Soviet block was perceived as a unique opportunity for launching a new vision of human rights, grounded on the mutual relationship among the classes of rights which the two UN Covenants had separately recognized. This vision, as we will see, might improve the understanding of the evolution affecting human rights clauses of the EU agreements with third countries.

By enunciating the principle of indivisibility between human rights as recognized in the Universal Declaration, and by considering democracy, development and respect for human rights "as interdependent and mutually reinforcing", the Vienna Declaration and Programme of Action, adopted by consensus by the World Conference on Human Rights on 25 June 1993, appears as a watershed after the deep division which had characterized the international community during the Cold War. Albeit well known to René Cassin[10], the main drafter of the Universal Declaration, the principle of indivisibility contrasted with the propaganda and political behaviour of the two blocks during the Cold War. Hence derives the

importance, on historical grounds, of the explicit reference to that principle in the text of the Vienna Declaration.

But the principle of indivisibility of human rights acquires also a positive meaning, being recognized as a fundamental guideline to achieve the end of both protecting and promoting the "inherent dignity" of human beings enunciated in the Preamble to the Universal Declaration. This implies structural interconnections and mutual reinforcement between such classes, civil and social rights included.

[10] J.-J.Dupuy, *L'universalité des droits de l'homme*, in *Studi on. Sperduti*, Milano, Giuffrè, 1984, 547.

The indivisibility principle corresponds to a conviction that is deeply embedded in the experience of courts and international organizations. The European Court of Human Rights has frequently asserted its competence over controversies concerning social issues, to the extent that they involve civil and political rights, whose protection is at the core of the Court's tasks[11]. And the International Labour Organization has described the freedom of association of workers both as a civil liberty and as a requirement for the social covenant, including *inter alia* the right to collective bargaining and equal access to the labour market[12].

The indivisibility principle should also be connected with a new understanding of human rights. According to recent constitutional thinking, the theoretical distinction between social, or economic, and civil rights does not necessarily lead to the conclusion that they are incompatible. The long-standing assumption that only social rights are costly to implement has been convincingly rejected[13]. Moreover, many scholars believe that human rights concerning material goods differ from basic needs, to the extent that entitlement to them does not correspond to a right to receive passive assistance, but gives each individual the opportunity to become author of his or her own freedom[14]. And that, in turn, the so-called negative rights cannot be conceived only as restrictions against intrusions into the individual's realm: by ensuring freedom of choice, those rights enhance also a mutual relationship, whether conflictual or cooperative, between the holders of these rights, and thus a common learning process.

Indivisibility and interdependence between human rights are also clearly needed with regard to market competition. Historical experience has fully demonstrated that markets risk destroying themselves, unless liberty rights, property rights and social human rights are protected and abuses of power are constitutionally restrained. Market failures affecting human rights should thus be corrected, both at the regional and at the international scale, through labour, social and health legislation, and prohibitions of cartels and environmental pollution, without preventing citizens from engaging in mutually beneficial trade[15].

Indivisibility is strictly connected with human dignity, which is put at the edge of the human rights edifice, as an intrinsic value which is incompatible with a purely utilitarian approach to human rights. On the other hand, by presupposing that the protection and promotion of each human right have crucial consequences on the protection and promotion of every other right, the indivisibility of human rights encourages a consequentialist approach to human rights policies.

It should therefore appear clear that the indivisibility of human rights implies rejection of a hierarchical relationship between the five classes of human rights enshrined in the Universal Declaration. But this does not prevent from searching a category of core human rights. It only prevents from excluding some human right from that category because of its pertinence to one class or to the other.

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[11] See M.Delmas-Marty, *Trois défis pour un droit mondial*, Seuil, Paris, 1998, 51.

[12] See P.Meyer-Bisch, *Le corps des droits de l'homme*, 191 ff.

[13] See S.Holmes and C.R.Sunstein, *The Cost of Rights. Why Liberty Depends on Taxes*, New York, W.W.Norton, 1999.

[14] F.Meyer-Bisch, *Le corps des droits de l'homme*, cit., 329.

[15] E-U.Petersmann, *Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, *European Journal of International Law*, 2002, at 640.

It is worth adding that, according to Paragraph 31 of the Vienna Declaration, states should abstain from unilateral measures putting obstacles to international trade and barring the achievement of adequate standards of living for people with regard to food, health, housing and social services. This presupposes a positive vision of market competition, aimed at ensuring such standards. Since development, democracy and respect for human rights are deemed mutually reinforcing and since, particularly, fair market competitions are no longer perceived as incompatible with social development, recent declarations and programmes on human rights reject a dogmatic approach to the tensions between universalism and market competition. These tensions may not become intractable, provided that a balanced approach is followed in introducing competition and social rules, and in enhancing true respect for human rights and democracy.

Such an approach reflects also the fact that the former insistence on a complete separation of trade and human rights has been overtaken by the developments of the 1990s. It appears therefore pertinent to consider how the link between trade and human rights has been established according to the human rights clauses of the EU cooperation agreements with third countries[16], and whether the evolution affecting these clauses is connected with the principle of indivisibility.

4. The European Union has had a pivotal role in promoting human rights and democracy at the international level, and this both in terms of procedures and means aimed at that end[17]. This role applies also in terms of financial resources, given that in 1998 the budget for the UN High Commissioner for Human Rights expenses amounted to less than one quarter of that of the “European initiative for democracy and human rights protection”, which was only one of the main EU initiatives[18].

Such special engagement in human rights issues can be connected with a tradition which goes back to the adhesion by EU Member States to the European Convention on Human

Rights and Fundamental Freedoms (ECHR) of 1950, testifying the first efforts at the international level to overriding national borders for human rights protection’s sake. It is worth recalling, in this regard, that Article 6 of the EU Treaty refers to the ECHR as one of the bases of respect for fundamental rights by the EU.

Nevertheless, the EC practice of conditioning development aid, cooperative agreements and bilateral trade on respect for human rights and democracy, has long been affected by legal uncertainty. Leaving aside the question concerning the legal basis which under European law are needed for exercising EC and EU competences in the field of human rights, reference will be made to the compatibility of the conditionality practice with Article 60 of the Vienna Convention on the Law of Treaties. Since this provision forbids a state from suspending or terminating an agreement unless an “essential clause” of such agreement has been violated, the right of the Community to suspend or terminate an agreement for reasons connected with

[16] B.Brandter and A.Rosas, *Trade Preferences and Human Rights*, in P.Alston (ed.), *The EU and Human Rights*, Oxford University Press, 1999, at 700.

[17] A.Tizzano, *L'azione dell'Unione europea per la promozione e la protezione dei diritti umani*, *Il Diritto dell'Unione Europea*, 1999, at 163.

[18] For these data see P.Alston, *Diritti umani e globalizzazione. Il ruolo dell’Europa*, EGA, Torino, 1999, at 109.

the disregard of human rights by the third country concerned is subordinated to the insertion of a "human rights clause" in the text of the agreement as an "essential element" of that agreement.

The EC agreements previous to 1992 did not provide that insertion, thus rendering doubtful their own legal basis. But, after that year, all the agreements have been accompanied by the "essential element" clause, which, according to ECJ rulings, spells out the condition as provided by Article 60, Vienna Convention[19].

In the meanwhile, a complementary clause was inserted within the single cooperation agreements, defining the procedures aimed at ascertaining the violation of the human rights clause and the related sanctions. While the so called "Baltic clause", inserted in the cooperation agreement with Estonia of 1992, provided the immediate suspension of the agreement in case of alleged violation of the human rights clause, the "Bulgarian clause" of 1993 and all the following clauses required a consultation procedure among the parties prior to the suspension of the agreement, conceived rather as a measure of last resort.

In 1995, the human rights clause was inserted within Article 5 of the IV Lomè's Convention, regulating cooperation agreements of the EC with ACP (the "African, Caribbean and Pacific Group of States"), and procedures inspired to the "Bulgarian clause" model were herein provided with respect to the disputes concerning an alleged breach of the human rights clause.

In substituting the IV Lomè's Convention, the 2000 Cotonou's Convention affords a broader framework of mutual engagements between the EC and the ACP Group, including "joint institutions" (the Council of Ministers, the Committee of Ambassadors and the Joint Parliamentary Assembly) aimed at *inter alia* conducting the political dialogue, adopting the policy guidelines necessary for the implementation of the agreement and resolve any issue liable to impede its functioning (Title I, Part. II).

According to Article 9, para. 2, "Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and

international policies of the Parties and constitute the essential elements of this Agreement". Article 96, para. 2, states that

"If, despite the political dialogue conducted regularly between the Parties, a Party considers that the other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9, it shall, except in cases of special urgency, supply the other Party and the Council of Ministers with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties. To this end, it shall invite the other Party to hold consultations that focus on the measures taken or to be taken by the party concerned to remedy the situation".

If the consultations, it is added, "do not lead to a solution acceptable to both Parties, if consultation is refused, or in cases of special urgency, appropriate measures may be taken". The term "cases of special urgency" is referred "to exceptional cases of particularly serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9,

[19] Case C-268/94, *Portugal v. Council* (1996), ECR I.6177 (para.27). See E.Reidel and M.Will, *Human Rights Clause in External Agreements of the EC*, in P.Alston (ed.), *The EU and Human Rights*, at 729.

that require an immediate reaction". The term "appropriate measures" is referred to "measures taken in accordance with international law, and proportional to the violation. In the selection of these measures, priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be a measure of last resort".

5. From the "Baltic clause" to the Cotonou's Convention, a significant evolution has affected both the procedures and sanctions connected with the claimed violation of the human rights clause.
By relying only on the immediate and automatic suspension of the agreement, the "Baltic clause" was a rather primitive attempt to regulate the issue. Such suspension was provided irrespective of its collateral damages even on the ground of human rights protection in the country concerned, thus resembling to the UN economic sanctions, such as trade restrictions, investment restrictions and embargoes, which have become a preferred policy instrument of foreign policy-makers after the end of the Cold War. In defining and enforcing sanctions regimes, the Security Council has demonstrated an almost complete disrespect for international law standards, particularly the criteria of proportionality and discrimination, and a scarce consideration of the effectiveness of these measures[20].

The further EU-ACP cooperative agreements and Conventions have progressively enlarged the array of measures, as particularly demonstrated from the express reference to the criterion of proportionality in the Cotonou's Convention. Consultation procedures have also been introduced and progressively enhanced, together with an institutionalisation of the "political dialogue" among the parties.

While deserving due attention to international law standards, these developments presuppose that an alleged violation of the human rights clause needs to be ascertained in light of many elements. As reported earlier, that clause consists in "respect for human rights, democratic principles and the rule of law". Moreover, the very insistence on "political dialogue" among the parties of the cooperation agreements presupposes *inter alia* that the human rights

concerned require not only protection from undue State's interference into the realm of the individual, but also active public policies and interventions.

The evolution affecting the measures aimed at the observance of the human rights clause mirrors not only the dimension of human rights as individual's welfare, but, more specifically, the indivisibility of human rights as affirmed from the 1993 Vienna Declaration, and a consequentialist approach to human rights policies.

Searching for a satisfactory definition of basic human rights might here seem an intractable burden, not only because human rights do not stem from obligations *erga omnes*, but also because their own definition could not be established a priori. On the other hand, it should be reminded that conditionality is a fairly recent practice, whose improvements are strictly related to the emergence of minimum standards of human rights protection and promotion. The question of whether this might lead to a progressively refined definition of basic human rights remains of course open. At any rate, an inquiry into the practice of conditionality might appear a fruitful enterprise in this perspective.

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[20] W.M.Riesman and D.L.Stevick, *The Applicability of International Law Standards to United Ecnomic Sanctions Programmes*, *European Journal of International Law*, 1998, at 126.