

'DO AS I SAY NOT AS I DO': EUTOPIA, THE CEECS AND THE CREDIBILITY OF THE EU HUMAN RIGHTS REGIME

Ingi Iusmen*

Abstract. *This article examines EU's involvement in human rights from the perspective of a promoter of human rights norms. It is argued that a human rights EUtopia has emerged, i.e. that there is a gap between the real and normative EU -when it comes to human rights - which affects the credibility of the EU's human rights regime. The EU lacks a solid legal entrenchment of human rights and there are different degrees of human rights protection in the Member States which amount to different hierarchical concepts of human rights. There are legal shortcomings regarding EU's human rights promotion to third countries, while the Copenhagen human rights conditionality attached to EU accession was vaguely stated and was not underpinned by EU internal human rights templates. Furthermore, the screening process of the candidates- by the use of double standards - entailed EU's involvement in matters falling outside its own internal remit. Hence the credibility of the EU human rights regime is jeopardised by its attempt to export human rights externally- hence the normative and utopian claims - without having a real, substantial legal entrenchment of human rights internally.*

Keywords: *EU human rights, human rights protection, conditionality*

Introduction

This article scrutinizes the emerging EU human rights regime and asks whether the EU is credible as a human rights promoting actor on the international arena. Section one asks: what kind of actor - i.e. "what is the nature of the beast" (Puchala, 1972) - is the EU if viewed as a human rights champion? Is there a dualistic relationship between the ideal EU and the real EU, i.e. is there a real EU human rights model that is being promoted on the international arena or is it just an utopian makeshift to be exported to non-EU countries? Ultimately, is there a credible EU involvement with human rights both at internal and external levels?

In short, to what extent is an EUtopia emerging in the developing of a EU human rights regime?

Section two looks at the reasons for the EU's lack of solid legal entrenchment of human rights at an internal level, while section three examines the different degrees of human rights protection in the Member States. Section four examines the controversies underpinning the legality of EU's human rights credentials, while in section five it is argued that the vagueness of the Copenhagen human rights conditionality impacted on EU's credibility. In the final section it is contended that the screening process of the Central and East European countries (CEECs) with regard to human rights

* Ingi Iusmen is a PhD student (3rd year) at the University of Strathclyde (Glasgow). BA in Political Science (University of Bucharest), MA in Political Philosophy (University of York) and MSc in Political Research (University of Strathclyde). E-mail: ingi.iusmen@strath.ac.uk

amounts to a double standards approach on the part of the Union – it is claimed that this has significant implications for the credibility of the EU as a “normative power” in the area of human rights protection.

I. A human rights EUtopia?

First of all, what kind of power is the EU? The European Community (EC) has been presented as a “civilian power” (Duchene, 1972) in international relations, although some authors totally reject the idea that the EC/EU can be deemed to be an “actor” at all in world politics (Bull, 1982). Perhaps most usefully in the context of this article, Manners (2002) has described the EU as a *normative power* arguing that the EU institutions and policy-making process rest on a normative basis, i.e. a set of fundamental norms, which make the EU a *sui generis* international actor. Furthermore, the normative Europe is congruous with the normative and ideational impact of the EU on world politics via its role of setting *world standards* in normative terms (Rosecrance, 1998:22). Simply put, the EU is first and foremost about norms¹ – either core norms, such as liberty, democracy or human rights, or minor norms, for instance social solidarity (Manners, 2002: 242) - and these norms are being projected in EU’s external relations. Hence, the EU is envisaged as a normative actor or a promoter of norms

on the international political arena and this is consistent with the perception of the EU as a human rights promoter.

The question thus arises: how are these norms promoted? According to some authors (Manners and Whitman, 1998, Manners, 2002) various modes of norm diffusion exist: (i) *contagion* – results from unintentional diffusion from the EU – (ii) *informational* diffusion results from strategic communication by EU actors, or (iii) *procedural* diffusion, which involves “the institutionalisation of a relationship between the EU and a third party, such as an inter-regional cooperation agreement” (Manners, 2002) and which was, for example, applied to candidate countries. Yet, it should be noted that all these modes of norm diffusion are underpinned by EU’s *narratives of projection*², i.e. how the EU describes itself via the norms that are being projected by it.

Narratives of projection rest on the presumption of superiority and they “always assert some form of control over the rest of the world: *normative power* is the ultimate form of soft power” (Nicolaidis and Howse, 2002: 770). Thus, the EU projects its normative framework – in this case: its human rights model – in its external relations in an attempt to justify the “creation of ‘others’ in its own image”. This mirrors the case of CEECs’ relation to the EU: the end of Cold War constituted a significant opportunity for the EC/EU to project its European model to the former communist countries³.

¹ I employ the broad meaning of norms as “standards of behaviour defined in terms of rights and obligations” (Krasner, 1983: 2) accepted by the world community.

² The phrase coined by Nicolaidis and Howse (2002) refers to the EU’s exportability of its own institutions and norms resting on presumptions of antecedence or simultaneity, differences or similarity, superiority or equality (Nicolaidis and Howse, 2002: 770).

³ The end of the Cold War and the break-up of the Soviet Union opened up new horizons of international cooperation, and propelled the Union into a key role of promoting change and stability across Europe” (Agenda 2000 “For a Stronger and Wider Union” E.C. Bull Supp 5/1997).

However, a problematic situation arises if what is being projected – such as human rights norms - via narratives of projection does not correspond to reality: in other words, there is a significant gap between the real EU and the projected EU, i.e. a *normative EUtopia*⁴. Transposed to human rights norms, if there is a radical rift between the real EU involvement with human rights and its external projection, i.e. if there is a human rights EUtopia, what is the impact of this on EU's credibility as a supporter of human rights?

Credibility rests on the consistency between what is being projected externally and what is being practiced at the internal level when it comes to human rights, which is consistent with the theological urge that the EU should “do unto others as it does unto itself”. Credibility amounts to consistency and coherence: the EU human rights policies – externally and internally – should be cut from a single cloth (Weiler, 1999) Yet, if there is an ideal rather than a real EU human rights model that is being projected – in its external relations – then the issue of credibility comes to the fore. Hence, a paradoxical situation emerges (Alston and Weiler in Alston, 1999:9) or the so-called policy of bifurcation - between the EU's internal and external approaches to human rights - arises (Williams, 2000, 2004). One of the main arguments of this article is the projection of a human rights model via the politics of enlargement to CEECs. Thus, it is contended that the EU seized the opportunity to promote a human rights EUtopia via the human rights conditionality - contained in the Copenhagen accession criteria – with the Commission playing the role of a human

rights promoting actor.

II. Lack of an internal solid legal entrenchment of human rights

There are several reasons for which it can be claimed that the EU lacks a firm human rights legal basis. First, the founding Treaties did not state that the protection of human rights was one of the objectives of European integration mainly because the whole European project was perceived as being intrinsically economic, whereas human rights issues related more to the political, hence sensitive, aspects of the European integration. However, a vague reference was made in the Preamble of the Treaty of Rome to the constant improvement of the living and working conditions of the people of the Member States.

Secondly, although European integration was implicitly driven by the universal principles of liberty and democracy, respect for the rule of law, human rights and fundamental freedoms ever since the Treaty of Rome, it was not until 1993 that some of these principles were formally and explicitly included in the Treaty with the entry into force of the Treaty on European Union.

Article F (2) of the Treaty on European Union mentions for the first time the respect for fundamental rights as general principles of Community law:

The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in

Rome on 4 November 1950 and as they result from the constitutional

⁴ The term “EUtopia” was originally coined by Nicolaidis and Howse (2002).

traditions

common to the Member States, as general principles of Community law.

Article 6 (1) in Treaty of Amsterdam – which came into force in 1999 - is the key provision as far as human rights are concerned. This article provides that:

The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which are common to the Member States.

Hence, Article 6(1) states unequivocally that respect for human rights constitutes one of the founding principles of the Union. Yet, it should be noted here that according to the provisions in the European Constitution – and of the newly negotiated Treaty of Lisbon - human rights are one of the EU's values and not principles⁵.

Thirdly, there is ambiguity regarding the definition and meaning of human rights in Article 6 of the Treaty of Amsterdam. Hence, what is the meaning of the term "human rights and fundamental freedoms" in Article 6 (1)? As a minimum, it includes all rights and freedoms guaranteed by the European Convention on Human Rights (ECHR), which is explicitly referred to in Article 6(2) to which all Member States of the Union are parties - although some of them have not ratified some of its protocols - and the ratification of which is today a precondition to membership of the Council of Europe. Nevertheless, are economic, social and cultural rights included in the term "human rights and fundamental freedoms" as this second generation of human rights is

not inserted into the Member States' constitutions, it is difficult to assert that the respect for these rights "results from the constitutional traditions common to the Member States" (Nowak in Alston, 1999). Another ambiguity related to this Article is whether collective rights of the so-called third generation fall within the definition of Article 6(1).

However, the general feeling is that "human rights and fundamental freedoms" must include all human rights presently recognised by the Member States in the context of the United Nations, the OSCE and the Council of Europe. This fact is consistent with the Vienna Declaration and Programme of Action of 1993 - adopted by the UN - in which Member States confirmed the indivisibility and interdependence of all human rights.

Fourthly, in international human rights law there is the traditional distinction between three types of human rights obligations (Bartels, 2005: 145): the obligation to *respect* human rights, the obligation to *protect* human rights – which includes the prevention of violations by private actors – and the obligation to *fulfil* human rights, which involves concerted positive action on the part of the state. Hence, in the light of this differentiation, it was argued that an obligation merely to respect human rights would not imply either any obligation to ensure the prevention of private violations, or any obligation to take positive action to ensure that human rights are respected (Bartels, 2005: 146). The conundrum is between "respect for" and "protection of" human rights.

⁵ Although the status of the Treaty of Lisbon is not clear at the time of writing, it is worth mentioning that Article 1a of the Treaty of Lisbon provides that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities".

Fifthly, the European Court of Justice (ECJ) had a significant role in the development of the principles governing Community law, such as supremacy and direct effect, and in the protection of human rights as a restraint upon the powers of the Community institutions rather than as a restraint upon Member States. Yet, the jurisdiction of the ECJ covers only the first pillar⁶. The ECJ assesses the compatibility of Member States' laws with fundamental rights in two contexts: firstly, when considering the compatibility of national laws with provisions of Community law which reflect certain fundamental rights or principles; and, secondly, where the States are implementing a Community law or scheme, and in some sense acting as agents on the Community's behalf (Lang cited in Craig and de Burca, 2003: 341). Hence, if viewed as acting in a strategic context (Wincott, 2000) the ECJ's jurisdiction on human rights can be summarised as follows: the Court has jurisdiction to determine the compatibility with human rights in general - as general principles of Community law - of measures of the Community institutions and of national measures implementing Community law or falling within the scope of Community law (Neuwahl in Neuwahl and Rosas, 1995: 1-22).

Last but not least, it has been claimed that the Court's judicial activism in the field of human rights led to the discovery of an unwritten Bill of Rights

against which to check the legality of Community measures (Weiler, 1999: 108). Nevertheless, it should be noted that the EU has no overarching human rights policy applicable within the EU and the Charter of Fundamental Rights of the European Union is not binding at the EU level⁷. The Charter - stemming from the EU Treaty, European Court of Justice case-law, the European Union Member States' constitutional traditions and the ECHR - brings together into a single, simple text all the personal, civic, political, economic and social rights enjoyed by the citizens and residents of the European Union. However, even when the Charter becomes legally binding, it will apply to Member States only when they are implementing EU law⁸ and the Charter does not extend EU's competences in the field of human rights⁹.

III. Different degrees of human rights protection in Member States amount to different hierarchical conceptions of human rights

The lack of an overarching EU human rights policy is rooted, to a certain extent, in the different degrees of protection for human rights in the Member States (Craig and de Burca, 2003: 330). Even if all the Member States were to agree on which specific rights should be recognised, they would still differ on how those rights should be protected. Subsequently, although all the Member States - as

⁶ This might change when the Treaty of Lisbon enters into force.

⁷ At the time of writing, the future status of the Treaty of Lisbon - according to which the Charter of Fundamental Rights becomes legally binding - is unclear.

⁸ Article 51 of the Charter provides that: "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

⁹ Article 6 of the Treaty of Lisbon provides that: "the Charter shall not extend in any way the competences of the Union as defined in the Treaties".

signatories to the ECHR - respect and protect human rights, they have different degrees of protection for different rights¹⁰ which ultimately amounts to different hierarchical conceptions of human rights.

Thus, there are significant gaps in terms of the ratification record of the old Member States of the protocols of the ECHR. For example¹¹:

- Protocol No.4 of 1963, which prohibits imprisonment for breach of contract, guarantees freedom of movement and residence, and bans collective expulsion, has not been ratified by Spain and the UK and has not been signed by Greece.

- Protocol No.7 of 1984, dealing with rights of lawfully resident aliens, and rights arising in criminal proceedings, has yet to be ratified by Belgium, Germany, the Netherlands, Spain, and has not been signed by the UK.

- Protocol No. 12 of 2000 dealing with prohibition of discrimination, has not been signed by Denmark, France, Sweden and the UK and has yet to be ratified by most of the EU Member States, with the exceptions of Finland and the Netherlands.

- Protocol No.13 of 2002 on the abolition of death penalty has not been ratified by Italy and Spain.

The international agreements to which all Member States are party represent a lowest common denominator, and may not necessarily provide satisfactory standard for protection of rights which are particularly important to certain Member States. Consequently, it has been

argued that the ECHR does not provide a suitable charter for the Community in protecting fundamental rights and general principles of law on the ground that it provides too low a standard of protection (Alston and Weiler, in Alston, 1999). However, the international human rights regime established by the ECHR was not implemented to benefit everybody equally. In 1953 when the ECHR came into force seeking to define and protect an explicit set of civil and political rights for all persons within the jurisdiction of its Member States, it was actually the newly established democracies that abided by its provisions (Moravcsik, 2000: 220). Hence the self-binding to ECHR had little support among the established democracies of the future European Community.

In the same vein, the interpretation of the meaning of and scope for human rights varies from State to State and subsequently, not all general principles and rights of Community law – as enshrined in Article 6(1) – will be shared by all States in the same way. For instance, EU Member States differ in the extent to which they will protect private property against governmental authority, which is consonant with the belief that the prevalence of particular fundamental rights is related to the prevalence of particular societal values (Weiler, 1999). Thus, apart from providing a set of core human rights, the ECHR leaves the degree of human rights protection underpinning human rights to its signatories.

Minority protection covered by the Council of Europe is not adhered to by

¹⁰ For instance, Germany's Basic Law gives strong protection to economic rights and to the freedom to pursue a trade or profession, while the constitutions of other States may reflect different social priorities (Craig and de Burca, 2003: 330).

¹¹ According to the latest updates from the Council of Europe Treaty Series.

EU Member States equally. For instance, the European Charter for Regional or Minority Languages was adopted in 1992 by the Council of Europe and it aims to protect historical regional and minority languages in Europe. Yet, not all the EU Member States have yet signed and ratified the European Charter for Regional or Minority Languages: Belgium, Greece, Ireland, Italy, and Portugal still have to sign the Charter¹².

The Framework Convention for the Protection of National Minorities is the key instrument developed by the Council of Europe in the field of the protection of national minorities. The Framework Convention is the first ever legally binding multilateral instrument devoted to the protection of national minorities in general and it makes clear that the protection of minorities is an integral part of the protection of human rights. However, there are still significant gaps in the signing and ratification of the Framework Convention by some of the old EU Member States, such as: France, Greece, or Luxembourg¹³.

One final point needs to be clarified here. Although the status of the Treaty of Lisbon is not yet clear, Member States like Britain and Poland¹⁴ managed to secure opt-outs of the human rights protection when the Charter of Fundamental Rights becomes legally binding¹⁵. This reinforces the different degrees of human rights protection in Member States, even if the

EU will have its own binding Bill of Rights applicable within the EU.

IV. EU human rights legal controversies

There is a significant gap between the internal and external human rights dimensions of the EU: this paradoxical situation (Alston and Weiler in Alston, 1999) results in an EU which is very zealous in its insistence on the observance of human rights in its relations with third countries, while internally the EU is a human rights laggard. This situation is even more problematic when it comes to agreements – such as trade and cooperation, development, association, accession – concluded with third countries and which contain a human rights clause. In brief, the main contention is that the EU applies a double standards human rights approach, which can be paraphrased as “doing not unto itself as it would have others do unto them”.

The EU’s external human rights dimension is exemplified by the human rights clause included in the agreements concluded between the Community or the Union and third countries. However, there is increasing scepticism about EU’s legal credentials in the field of human rights. There are several reasons for this claim.

First, the European Community is not party to any international human rights

¹² According to data from the Council of Europe web site.

¹³ Supra note 12. s.

¹⁴ According to Protocol No. 7 of the Treaty of Lisbon: “The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms”.

¹⁵ Article 6 of the Treaty of Lisbon provides that: “The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted [at..., on... 2007], which shall have the same legal value as the Treaties”.

treaty, yet it has always stressed the importance of accession to international human rights treaties¹⁶ - of non-EU countries - in its agreements with third countries and the inclusion of a human rights clause in the agreements concluded with third countries. Hence, the absence of a legal mechanism to hold the EC responsible for human rights violations affects the credibility of its plea for universal ratification of international human rights treaties. The reason for this is twofold.

On the one hand, the Community is not party to any human rights treaty and the complete lack of any external mechanism to hold the Community responsible for human rights violations is in sharp contrast with the proclaimed importance of respect for human rights in the external relations of the EU. On the other hand, this state of affairs affects the credibility of the EU's policy to include human rights clauses in agreements as a means to strengthen respect for human rights both in the third countries concerned and the Union itself according to the agreement. The human rights clause has the result that a contracting party can be held accountable for human rights violations by the other contracting party, thus the crux of the problem is the following: how can the EC ask third countries to subject formal relations to respect for human rights, if the Community itself is not subject to external control of its human rights performance? Clapham (Clapham cited in Bulterman, 2001: 72) observes that: "as long as the Community remains unbound in law by human rights treaties, human rights clauses will retain

an aura of lopsidedness. The Community demands respect for human rights, yet remains immune from legal challenges to its own human rights record".

Another crucial issue regards EU's legal personality: does the EU have a legal personality¹⁷, i.e. the capacity to bear rights and duties under international law, particularly when it comes to concluding agreements - with a human rights clause attached - with third countries? First, the policy of human rights clauses included in the agreements concluded by the Union finds itself at the crossroads of the external relations of the EC and the Common Foreign and Security Policy because on the one hand, the human rights clause is a Community law instrument while on the other hand, the human rights clause is a foreign policy instrument which aims to further the respect for human rights in the third country concerned (Bulterman, 2001: 48).

Second, depending on the nature of the agreement, agreements containing human rights clauses can be either concluded by the EU and the Member States or by the EC alone. For instance, the Europe association agreements, the stabilisation and association agreements, or the partnership and cooperation agreements and the Cotonou agreement - to mention just a few- are *mixed agreements* concluded jointly by the EU and the Member States; the others are *pure agreements* concluded by the EC alone (Bartels, 2005: 33). Do the EU and EC have legal personalities?

The European Community has legal personality according to Article 281 EC Treaty which provides that: "The

¹⁶ For instance, the EU candidate countries have to sign the ECHR and ratify all its protocols.

¹⁷ According to the Treaty of Lisbon the EU will have legal personality: "The Union shall have legal personality" (Article 32).

Community shall have legal personality". This provision refers to the international legal personality of the Community since the EC Treaty contains a separate provision on the legal personality of the Community within the Member States (Article 282 EC Treaty). Furthermore, it should be noted that the external Community competence is based on the following Treaty Articles: Article 133 EC (trade), Article 181 and 179 EC (development cooperation), Article 310 EC (association agreements) and Article 308 EC (operation of the common market). Hence, when acting on the legal bases of these Articles, the EC has international legal personality, while the EU is not explicitly provided with legal personality.

Moreover, the EC has international legal personality, yet it is not party to any human rights treaty nor is it bound by any bill of rights. Nevertheless, like any other subject of international law, the EC is bound to respect international human rights obligations, yet it is highly controversial to pinpoint exactly which human rights obligations are imposed upon subjects of international law (Bulterman, 2001). Furthermore, if it cannot be determined what the formal human rights obligations of the EC under international law are, then it is even more difficult to examine what standards or international instruments are employed by the EC in its human rights clauses and ultimately, to what extent the EC can be held responsible for human rights violations.

To sum up, at the moment the EU does not have explicit and formal legal personality at the Treaty level. Additionally, given the EU's active external involvement with human rights and its lack of a similar commitment within the EU, it can be contended that

the EU's human rights credibility has to suffer.

V. Copenhagen human rights conditionality: vague yet credible?

Conditionality with regard to EU membership involves human rights and it is formally enshrined in several Treaty provisions. Hence, human rights conditionality is intertwined at the Treaty level with the concern over democracy, as is the case with Article 6 (ex Article F) which cites democracy alongside human rights as principles of the Union. It should be pointed out that democracy has always been an underlying feature of the Community system and has never been unconnected to human rights concerns. The very wording of the accession agreements signed with CEECs - for instance the Europe Agreements - highlights these concerns on the part of the EU.

Moreover, the boost to democracy and human rights is further reinforced by the requirement for EU applicants to join the Council of Europe and ratify the European Convention on Human Rights and all its protocols. It should be mentioned that the statute of the Council of Europe also requires the applicants to respect democratic principles, human rights and fundamental freedoms. Nevertheless, neither the human rights concerns nor the requirement to be a democracy were explicitly part of the founding Treaties, yet the implicit contention was that only states aspiring to be democracies and which respected human rights could apply for the EU membership: the previous accession negotiations with Greece, Portugal, Spain or Turkey support this claim.

However, after the end of Cold

War the Community's norm-exporting approach entered a new era with the enlargement to the East. The process of exporting a European model to the former communist countries began in the early 1990s and this process was said to be rooted in "a common heritage and culture" underpinned by the rule of law, full respect for human rights, and the principles of the market economy¹⁸. In addition, for instance, on 16 December 1991, the EC Foreign Ministers issued a Declaration stating that formal recognition would be granted to the new states from Central and Eastern Europe provided that they respected the provisions of the UN Charter, Helsinki Final Act and the Charter of Paris "especially with regard to the rule of law, democracy and human rights" and guarantees for the rights of minorities (quote in Bartels, 2005: 51).

At the Treaty level, conditionality about EU membership is enshrined in Article 6(1) TEU as modified by the Amsterdam Treaty. This Article explicitly and formally states that the Union is founded on the principles¹⁹ of democracy and human rights. Article 6 has to be conjoined with Article 49 – which complements Article 6(1) by providing that "only a European state which respects the principles set out in Article 6(1) may apply to become a Member of the Union". Article 49 was first applied in the context of the membership applications of the ten candidates, Bulgaria and Romania. It should be noted that before the entry into force of the Treaty of Amsterdam in 1999, human rights conditionality in relation to membership was not formally enshrined

in the Treaties, although Article O of the TEU stated that in order to become Member, the applicant country had to be a European State, and this was reinforced by Article F, which made a short reference to the democratic nature of the Member States.

It was the Copenhagen accession criteria (1993), however, that included formal human rights conditionality and an explicit membership policy applied to EU candidate countries. These accession conditions expressed a political and unilateral act crafted by the Council based on some of the Commission's suggestions (Muller-Graff in Maresceau, 1997:32) and they included no contractual binding commitment on the part of the Union (Muller-Graff in Maresceau, 1997: 34).

According to the Copenhagen accession criteria, human rights conditionality is part of the political criteria for accession as EU membership requires that the applicant country:

"achieved stability of institutions guaranteeing democracy, the rule of law, *human rights* and respect for and protection of minorities²⁰" (emphasis added)

Compliance with the Copenhagen accession criteria was a prerequisite for the opening of the accession negotiations - as the European Council meeting in 1997 in Luxembourg²¹ made clear - but as the Commission put it, compliance with the political criteria was a necessary, but not a sufficient requirement for opening accession negotiations. The conditions were crafted by the Commission and sent to the Council via a Communication in

¹⁸ Special Meeting of the European Council, Dublin, April 28, 1990 E.C. Bull 4/1990.

¹⁹ Renamed "values" in the Treaty of Lisbon.

²⁰ European Council meeting in Copenhagen, 21 and 22 June 1993, E.C Bull 6/1993.

²¹ Conclusions of the European Council meeting in Luxembourg, December 1997, E.C Bull 12/1997.

which the Council was asked to confirm its commitment to EU membership of the associated countries, as was the case for the CEECs in 1993. The conditions crafted by the Commission included the followings: “each country’s capacity to assume ‘*acquis communautaire*’ and the competitive pressures of membership, its ability to guarantee democracy, *human rights*, respect for minorities and the rule of law, and the existence of a functional market economy, as well as the EC’s own capacity to absorb new members” (emphasis added, quote in Williams, 2000: 606).

The crucial question is: what is the meaning of the Copenhagen human rights conditionality? As shown above, the very wording of the human rights conditionality contained in the criteria lacks any clarity in definition. Given the ambiguity and the broad spectrum of what the fulfilment of these criteria may amount to, it was contended that this broadness was deliberate and the large room for manoeuvre implied that any judgment on the part of the Community would be extremely subjective and political (Smith, 1999: 140).

At the same time, the Copenhagen accession conditions also established the procedures by which the meeting of these conditions would be scrutinised by the Commission. These were supposed to take the form of dialogue, rather than “investigation” with an emphasis on “meetings of an advisory nature” undertaken in parallel with the Europe Agreements which constituted the main legal framework of the relations between the Union and CEECs at that time (Williams, 2000: 607). Hence, in spite of the vague and general wording of the Copenhagen human rights conditions, it seemed that the Union was determined

to spell out the meaning and scope of what it meant by human rights via the screening process prior to accession.

Furthermore, human rights conditionality applied to candidates is a *sui generis* process and a new experiment for the EU for other reasons too. Human rights conditionality applied to CEECs does not fit neatly in a rule adoption framework. According to Schimmelfennig’s and Sedelmeier’s (Schimmelfennig and Sedelmeier, 2005) research on the transformation of CEECs via the EU accession, the transformative role of the EU was accompanied by the EU membership external incentive, which was deemed to foster the compliance with the EU accession norms and rules – hence the definition of Europeanisation as rule adoption. Unlike the *acquis* conditionality, i.e. the capacity to assume the ‘*acquis communautaire*’, human rights conditionality did not involve the adoption by the CEECs of some existing EU human rights rules and policies as the Union lacked a human rights policy applied within the EU. Hence, through the evaluation of the fulfilment of the human rights conditions by CEECs, the Union politically spelled out the meaning and scope of human rights.

Additionally, political conditionality is different from *acquis* conditionality for other reasons too. For instance, political conditionality *qua* human rights conditionality is not applicable within the EU: there is a significant diversity within the EU Member States with regard to what the stability of democratic institutions means and above all, Member States have different degrees of human rights protection. For instance, the French legal system does not recognise the protection of national minorities within its territory.

Along the same lines, when it comes

to human rights policies, the EU lacks specific tests of institutional change or compliance with its requirements (Grabbe, in Featherstone and Radaelli, 2003), which impacts on the credibility of its political criteria. Given the diversity of its Member States in the field of human rights protection and given EU's lack of human rights templates and standards, the Union lacked –in its assessment of the human rights situation in CEECs- specific tests of compliance with its human rights requirements. Subsequently, the role played by the Union – via the Commission – is to be envisaged in political rather than legal terms.

VI. Screening process: *do as I say not as I do*

The breadth of the human rights issues scrutinised by the Commission in the candidates and in which the Union sought to intervene was unprecedented in terms of the EU's external relations. However, the human rights issues assessed in CEECs were not matched by an equivalent EU involvement at an internal level, hence the contention of a double standards approach by the EU via the screening process: the CEECs were expected to do as the Union said and not as it did itself. Hence, the human rights conditions included the civil and political rights associated with democratic systems, but economic, social and cultural rights were also brought to the fore. One of the most salient areas of human rights scrutiny concerned the protection of minorities.

First, it should be mentioned that "the emphasis on minority rights is not anchored in any long-standing EC law tradition "(Brandtner and Rosas, 1998) and such rights have not held any significant position in the activities of the

Union. However, the level of protection for minorities was an important human rights area evaluated by the Commission in its annual Reports.

According to the Copenhagen accession criteria, minority protection rights are not an element of "human rights", as the political condition refers to "human rights and the respect for and protection of minorities". Hence, human rights and protection of minorities form a separate political condition for membership. Nevertheless, in the practice of the Commission's Regular Reports protection of minorities is usually cited alongside or as part of human rights, as is the case with the discrimination against the Roma, which can be ranged under both headings of "human rights" and "minority rights".

However, it should be noted that minority rights are a special category in terms of EU law. While protection of and respect for minority rights is required under the Copenhagen criteria, it is not a formal condition of membership under Article 49 TEU because it is not included among the Union's founding principles listed in Article 6(1) TEU. This is the major difference between the Treaty provision on human rights and the Copenhagen criteria. Consequently, the EU seems to be involved in requiring the respect for minority rights externally, while it fails to enforce them internally. Furthermore, the absence of any corresponding practice of the EU institutions towards the present Member States shows that minority protection is a moot area. Thus, the EU does not impose minority protection standards on its own Member States, which have widely diverging laws in this field, as in the French case mentioned above.

Subsequently, the practice of the

Commission in its Reports and of the Council in the Accession Partnerships could be seen as evidence for the view that rights of the minorities are implied in the “principles common to the Member States” mentioned in Article 6(1) TEU, and hence a condition for membership under Article 49 TEU (De Witte and Toggenburg in Peers and Ward, 2004:68). In the light of this, protection of minorities can be deemed as part of human rights conditionality, although the Member States have different levels of minority protection, which amounts to various meanings and interpretations of the “principles common to the Member States”. Additionally, it should be mentioned minority rights do not feature in the Charter of Fundamental Rights of the EU.

Given that minority issues are part of the political conditionality for EU accession, the Union has been severely criticised for its use of double standards: minority issues constitute an important criterion that had to be met by the candidates, while internally the Community still ignored the issue of minority protection within its own borders (Toggenburg, 2000: 10). Thus, concern for minorities seems to be “primarily an export article and not one for domestic consumption” (De Witte, 2000: 3). Along the same lines, as mentioned above, a number of EU Member States have yet to ratify the most important and regularly quoted minority rights legal text, the Framework Convention for the Protection of National Minorities.

Some examples need to be mentioned with regard to this double standards approach when it comes to minority rights

in the candidate countries. For instance, in the case of Estonia, the “integration of non-citizens” was identified by the Commission as a matter which demands “measures to facilitate the naturalisation process” (Williams, 2000: 610) whereas in Germany, Greece or Belgium little was done on part of the Union institution in relation to similar problems of integration and discrimination. Likewise, the plight of the Roma, especially in countries like Bulgaria and Romania, triggered the attention of the Commission. The Commission requested in the Accession Partnerships of these countries that the “dialogue between the Government and the Roma community” be strengthened “with a view to elaborating and implementing a strategy to improve economic and social conditions of the Roma”²². These diverging approaches at the internal and external levels – given that there are no legally binding instruments for direct institutional intervention in the affairs of the Member States on such matters – amounts to a policy of interference in areas that lie outside the Union’s internal scope.

Similar human rights areas that fall outside the scope and competence of the Union in its internal dealings include the prison conditions, the situation of the institutionalised children or the people with disabilities. All these human rights issues constituted matters of concern in the Commission’s annual Reports and hence very detailed measures were demanded to be taken by the candidate country concerned.

Although the ratification by the candidates of the European Convention on Human Rights was seen as a useful

²² Romanian Accession Partnership 1999 DG Enlargement Documents.

step towards their accession to the EU and although it seemed obvious that the ECHR rights would form the primary standard for assessment in the context of accession to the EU, the Commission - in its Regular Reports on Progress towards Accession - did not use compliance with the ECHR as the primary indicator of the applicant states' human rights performance. The Commission referred in its Reports to a variety of sources of human rights protection, including other Council of Europe conventions, e.g. the Framework Convention on National Minorities, and OSCE documents, while leaving open the relative importance it chose to give to these various documents in its assessment. Subsequently, the Commission conceived of its role in political rather than quasi-judicial terms (De Witte and Toggenburg, in Peers and Ward, 2004:66).

Given that the EU lacks any human rights templates, the political conditionality *qua* human rights conditionality required significant EU-level entrepreneurship and a creative role in spelling out the extent and degree of human rights protection. Simply put, the EU, via the Commission, created and eventually transposed into the candidate countries a European normative framework of what the meaning and protection of human rights ultimately amounted to. Thus, the Commission acted as a policy entrepreneur (Grabbe, 2005) especially with regard to political conditionality where ambiguity and vagueness prevailed. The *Comite des Sages* noted in their report on "A Human Rights Agenda for the European Union for the Year 2000" that "the Union currently lacks any systematic approach to the collection of information on human rights" within the Union (quote

in Williams, 2000: 614). However, as far as the CEECs are concerned, the rights scrutiny and information collection employed by the Union developed into a sophisticated policy.

Accession preparation became more systematised and membership criteria have been applied more strictly than in previous enlargements also due to the Commission's crucial function as a "screening actor" (Everson and Krenzler in Hillion, 2004: 13). Unlike the previous accession procedures in which few Commission Opinions were given, the most recent accession involved extensive assessments, leading to Commission Reports being delivered on an annual basis. This strict and systematic evaluation made the conditions more entrenched for enlarging the Union and allegedly made them become a kind of "objective" standards (Hillion, 2004: 15).

Human rights protection becomes, however, problematic following the accession of the candidate countries to the EU. Thus, once these countries have joined, the pre-accession monitoring of their human rights record has to cease as they become subject to the same obligations and procedures as the other Member States. With regard to human rights, the legal regime as from the date of accession is that the new states - like the old states - will have a duty to respect fundamental rights when they act within the scope of EU law. Paradoxically, the accession may lead to a reduction of the European human rights standards for the candidate countries.

This paradoxical situation occurs particularly with regard to those matters which, although duly examined in the human rights pre-accession reports, are not within the scope of EU's internal competence, such as: the rights of

children, prison conditions and protection of minority rights. Additionally, these human rights issues do not fall within the remit of the European Union Agency for Fundamental Rights. Put briefly, “the EU institutions will suddenly have to cease being interested in minority protection in Latvia, children’s rights in Romania and prison conditions in the Czech Republic, once these countries have joined the EU” (De Witte and Toggenburg in Peers and Ward, 2004:69).

Conclusion

This article looked at the EU’s involvement with human rights from the perspective of the EU as a human rights promoting actor and a “normative power” on the international arena. It was argued that a human rights EUtopia has emerged, such that the projected European human rights model in EU’s external relations is not matched by a comparable and enforceable internal counterpart. The gap between the real and normative EU -when it comes to human rights - affects the credibility of the EU’s human rights regime. Secondly, it was contended that the EU lacks a solid legal entrenchment of human rights: it does not have an overarching human rights policy applicable within the EU and the

Charter is not binding. Thirdly, we saw that there are different degrees of human rights protection in the Member States which amount to different hierarchical conceptions of human rights.

The legal shortcomings of EU’s human rights credentials and its use of a human rights clause in agreements with third countries were highlighted and it was demonstrated that the Copenhagen human rights conditionality attached to EU accession was vaguely stated and was not underpinned by EU internal human rights templates. Finally, it was shown that the screening process of CEECs - by the use of double standards - entailed EU’s involvement in matters falling outside its own internal scope. It can thus be concluded that the credibility of the EU human rights regime is jeopardised by its attempt to export human rights externally— hence the normative and utopian claims – without having a real, substantial legal entrenchment of human rights internally. Although this lack of credibility may have little impact on non-EU states’ compliance with European norms, I contend that a non-credible EU in the field of human rights raises serious questions about the legitimacy of the actions of the EU in its role as a normative power in world politics.

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