

# **A New Generation of Human Rights Clauses?: The Case of Association Agreements in the Eastern Neighbourhood**

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## **Introduction**

For over two decades human rights clauses (HRCs) have been incorporated in the international agreements of the European Union (the EU or Union). It is therefore not surprising to find such clauses in the new generation of Association Agreements (AAs) concluded with Ukraine, Georgia and Moldova in 2014.<sup>1</sup> At the same time there are a number of reasons why these particular HRCs merit further attention.

Firstly, the Eastern AAs should be analysed within a specific policy narrative. They are a “new generation” of bilateral instruments in the EU Eastern neighbourhood, conceived within the European Neighbourhood Policy (ENP). The latter emerged in 2003 to react to the accession round in 2004 and to advance the EU security objectives across the Union’s borders.<sup>2</sup> The ENP has been a vast initiative in terms of its content and its geographic coverage, aiming to integrate the Eastern and Southern neighbours economically and politically.<sup>3</sup> From the moment of its inception, it has

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<sup>1</sup> Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261; Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260; Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part [2014] OJ L161.

<sup>2</sup> N. Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU: A Legal Analysis* (Oxford, Hart, 2014), pp. 1-5, 23-28.

<sup>3</sup> On ENP more generally see M. Cremona, “The European Neighbourhood Policy: More than a Partnership?” in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford: OUP, 2008); M. Cremona and C. Hillion, ‘L’Union Fait La Force? Potential and Limitations of the ENP as an Integrated EU Foreign and Security Policy’ in Nathaniel Copsey and A Mayhew (eds), *European Neighbourhood Policy: The Case of Europe* [2006 ] 1 *SEI Seminar Papers Series* Number 20; B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence* (London: Routledge, 2014); Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014).

placed an emphasis on human rights and democratic conditionality,<sup>4</sup> finding continuity in the regional branching of the policy.<sup>5</sup>

Secondly, it is important to note that the Eastern AAs were concluded after the ratification of the Lisbon Treaty. When the HRCs became a fixture of EU foreign policy in the 1990s, the EU emphasis on human rights was focused more externally than internally.<sup>6</sup> The protection of human rights in relations with third countries was considered necessary to demonstrate the Union's own commitment to this principle.<sup>7</sup> Currently the EU's external image is more in accord with its internal development, respect for human rights being an entrenched "constitutional principle" of the EU.<sup>8</sup> This is part of a wider political evolution reflected in reinforced commitments to human rights and democratic principles, outlined respectively in art. 6 and arts. 9-12 of the post-Lisbon Treaty on European Union (TEU).<sup>9</sup> In addition, this evolution has found continuity in the post-Lisbon foreign policy framework.

By establishing a common list of foreign policy objectives, Art. 21 creates a multifaceted and positive approach to democracy and human rights promotion demanding action on behalf of the EU.<sup>10</sup> Art. 3(5) TEU supports this rationale by adding further dimensions to the EU's goals, including the "upholding and promoting" of its values. The external policies of the Treaty on the

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<sup>4</sup> Communication on Wider Europe - Neighbourhood: A new framework for relations with our Eastern and Southern neighbours COM(2003) 104 final, p. 4; Communication on European Neighbourhood Policy Strategy Paper COM(2004) 373 final, pp. 12-13.

<sup>5</sup> Communication on Eastern Partnership COM(2008) 823 final, pp. 3-4.

<sup>6</sup> P. Alston and J. Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights" in Philip Alston (ed), *The EU and Human Rights* (Oxford: OUP, 1999), p. 7; E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (Hague: Martinus Nijhoff, 2003), pp. 82-84. On the incoherence of the internal and external human rights policy more generally see A. Williams, *EU Human Rights Policies: A Study in Irony* (Oxford: OUP, 2004), pp. 79-127, 193-204.

<sup>7</sup> M. Nowak, "Human Rights 'Conditionality' in Relation to Entry to, and Full Participation in the EU" in Philip Alston (ed) *The EU and Human Rights* (Oxford: OUP, 1999), p. 698; Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (2003), p. 230.

<sup>8</sup> *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* (402/05) [2008] E.C.R I-06351 at [285].

<sup>9</sup> [2009] OJ C115/19; Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), pp. 95-124.

<sup>10</sup> For further analysis of art. 21 TEU see L. Bartels, "A Model Human Rights Clause for the EU's International Trade Agreements" (German Institute for Human Rights and Misereor, 2014), pp. 15-18; P. Eeckhout, *EU External Relations Law* (Oxford: OUP, 2011), p. 96; Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), pp. 15-23.

Functioning of the EU (TFEU) follow the same objectives.<sup>11</sup> This can be viewed an example of “constitutional fetishism” — “the belief that social reality can effectively be steered by just putting words in a constitutional document”<sup>12</sup> — particularly in the context of criticism of the EU’s political conditionality.<sup>13</sup>

Against this background, it can be seen that there is a certain novelty in the Eastern HRCs, which can be ascribed, inter alia, to the specific legal and political context within which the AAs have been concluded. In this article, therefore, the content of the HRCs with reference to the essential element clause is considered with respect to previous practice. Next, it is argued that the functions of the HRCs have a wider scope than the suspension mechanism. First, the relevant AAs are analysed in order to expose the broader political and legal contexts of the new HRCs.

### **Eastern AAs: Legal and Political Context**

The Eastern AAs are the first post-ENP agreements, concluded in the Eastern neighbourhood in an atmosphere of hostile relations with Russia. This created a new emphasis on the issue of values. From the moment of its inception, the ENP incorporated the concept of value promotion as an indirect means of achieving security and stability.<sup>14</sup> Democracy and human rights promotion have featured as “shared values” on the basis of the enlargement experience.<sup>15</sup> This “value dimension” has been referred to as a significant development, introduced by the ENP in contradistinction to previous EU policies.<sup>16</sup>

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<sup>11</sup> Arts. 205, 207 and 208 TFEU [2012] OJ C 326/47.

<sup>12</sup> B. De Witte, “Too Much Constitutional Law in the European Union’s Foreign Relations” in Marise Cremona and Bruno de Witte (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart, 2008), pp. 12-13.

<sup>13</sup> M. Emerson et al, “The Reluctant Debutante: The European Union as Promoter of Democracy in its Neighbourhood” [2005] *CEPS Working Document* No 223, p. 3; S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union* (Basingstoke: Palgrave, 2008), p. 334; R. Youngs, “Normative Dynamics and Strategic Interests in the EU’s External Identity” (2004) 42 *J.C.M.S.* 415, p. 431; S. Lucarelli, “Values, Identity and Ideational Shocks in the Transatlantic Rift” (2006) 9 *J.I.R.D.* 304, p. 320; K.E. Smith, “The Use of Political Conditionality in the EU’s Relations with Third Countries: How Effective?” (1998) 3 *E.F.A.R.* 253, pp. 254, 272, 273; E. Johansson-Nogues, “The (Non-) Normative Power EU and the European Neighbourhood Policy: An Exceptional Policy for an Exceptional Actor?” (2007) 7 *E.P.E.R.* 181, pp.185-186.

<sup>14</sup> Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), pp. 23-33, 73-84.

<sup>15</sup> Copenhagen European Council Conclusions of December 12-13, 2002, para. 22.

<sup>16</sup> G. Bosse, “Values in the EU’s Neighbourhood Policy: Political Rhetoric or Reflection of a Coherent Policy?” (2007) 7 *E.P.E.R.* 38, p. 39.

The language of shared values implies universality of EU values to avoid accusations of neo-colonialism.<sup>17</sup> The presumption of universality is supported by references to various international and regional documents in ENP instruments, including the Partnership and Cooperation Agreements (PCAs) incorporated within the policy, and the ENP Action Plans — the main policy documents setting priorities for cooperation. However, the vagueness of shared values suggested an inherent flexibility, particularly when monitoring adherence to those very values.<sup>18</sup> Moreover, the notion of values being “shared” with certain autocratic neighbours appeared to discredit the EU and undermine the ENP conditionality.<sup>19</sup>

Although the ENP included negative conditionality, such as withdrawal of aid, economic sanctions etc., its overall approach was predominantly positive in that political and economic incentives were provided for undertaking reforms.<sup>20</sup> Negative conditionality was implied in the HRCs of the PCAs and the Euro--Mediterranean Agreements.<sup>21</sup> It was incorporated also in the ENP

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<sup>17</sup> P. Van Elsuwege and R. Petrov, “Article 8 TEU: Towards a New Generation of Agreements with the Neighbouring Countries of the European Union?” (2011) 36 E.L.R. 688, p. 693; P. Leino, “The Journey towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law” in Marise Cremona and Bruno de Witte, (eds), *EU Foreign Relations Law: Constitutional Fundamentals* (Oxford: Hart, 2008), p. 263.

<sup>18</sup> See further P. Leino and R. Petrov, “Between ‘Common Values’ and Competing Universals—The Promotion of the EU’s Common Values through the European Neighbourhood Policy” (2009) 15 E.L.J. 654, p.659; Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), pp. 154-158.

<sup>19</sup> Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), pp. 76-78.

<sup>20</sup> Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), pp. 76-81.

<sup>21</sup> Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Russia, of the other [1997] OJ L327; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Armenia, of the other [1999] OJ L239/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other [1999] OJ L246/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Georgia, of the other [1999] OJ L205/3; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Moldova, of the other [1998] OJ L181; Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Ukraine, of the other [1998] OJ L049; Euro-Mediterranean Agreement establishing an Association with between the European Community and its Member States, of the one part, and the People's Democratic Republic of Algeria, of the other part [2005] OJ L265; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Arab Republic of Egypt, of the other part [2004] OJ L304; Euro-Mediterranean Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Hashemite Kingdom of Jordan, of the other part [2002] OJ L129; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part [2000] OJ L147; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part [2000] OJ L070; Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part [1998] OJ L97.

2006-2014 financial instrument.<sup>22</sup> As far as positive conditionality is concerned, in addition to establishing a positive list of actions, the ENP has assimilated other policy instruments, including CFSP (Common Foreign and Security Policy) political dialogues, human rights dialogues and the operations of relevant sub-committees within the bilateral agreements.<sup>23</sup> A similarly positive approach is found in the Eastern Partnership framework, which added a pluralistic dimension to ENP cooperation by establishing, inter alia, a multilateral platform to promote democracy.<sup>24</sup>

As well as being the first post-ENP agreements, the Eastern AAs were the first post-Lisbon agreements in this region. All three agreements use the novel combination of arts. 31(1) and 37 TEU and 217 TFEU as a joint legal basis.<sup>25</sup> Although the Commission suggested only art. 217 TFEU (together with the relevant provisions of art. 218 TFEU) as a legal basis for the Georgian and the Moldovan AAs,<sup>26</sup> the latter followed the Ukrainian example which already used the novel combination noted above. The specific circumstances of the EU-Ukraine agreement should be highlighted here: the political chapters were signed separately in March 2014,<sup>27</sup> where the CFSP legal basis was viewed as necessary. Its component on the Deep and Comprehensive Free Trade Agreement (DCFTA) was signed in June at the same time as the rushed signing of the Georgian and

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<sup>22</sup> Art. 28, Regulation 1638/2006 laying down general provisions establishing a European Neighbourhood and Partnership Instrument [2006] OJ L310/1.

<sup>23</sup> See further EU Guidelines on Human Rights Dialogues with Third Countries, p. 5; Joint staff working document on implementation of the European Neighbourhood Policy in 2013, Regional report: Eastern Partnership SWD(2014) 99 final, p. 6.

<sup>24</sup> Communication on Eastern Partnership, pp. 3, 4, 9-10.

<sup>25</sup> All three agreements also rely on art. 218(5) and (8) TFEU; Decision 2014/295 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, as regards the Preamble, Article 1, and Titles I, II and VII thereof [2014] OJ L161; Decision 2014/494 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part [2014] OJ L261; Decision 2014/492 on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part [2014] OJ L260.

<sup>26</sup> Proposal for a Decision on the signing, on behalf of the European Union, and provisional application of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part COM(2014) 0157 final; Proposal for a Council Decision on the conclusion of the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part COM(2014) 0149 final.

<sup>27</sup> Decision 2014/295.

Moldovan agreements in spite of these countries' shortfalls in fulfilling the political criteria set out in the ENP documents.<sup>28</sup>

This hastiness could be explained with reference to the political antagonism existing in the region. Just before the Vilnius summit of the Eastern Partnership in November 2013, it transpired that Armenia had opted out of the AA, and Ukraine declared that it would refrain from signing.<sup>29</sup> Both developments were clearly linked to the pressure exerted by Russia to join an alternative integration project, namely the anticipated Eurasian Economic Union.<sup>30</sup> The signature of the AAs in the Eastern neighbourhood was viewed by Russia primarily as an expression of the EU's encroachment on Russia's historic and geographic spheres of influence.<sup>31</sup> Russian concerns were, inter alia, linked to the nature of the cooperation offered by the EU. These became more pressing after the initiation of the Eastern Partnership and the concretisation of the type of agreements on offer.

The AAs imply "special, privileged links" whereby the party "must, at least to a certain extent, take part in the [Union] system".<sup>32</sup> The partaking in the Union one way or the other is indicative of the process of "gradual integration".<sup>33</sup> In this case, it takes the form of political and economic cooperation, including a DCFTA as its trade component. The stated objectives of the

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<sup>28</sup> Joint staff working document on implementation of the European Neighbourhood Policy in Georgia: Progress in 2012 and recommendations for action SWD(2013) 90 final, 20 March 2013, pp. 4-8; Joint staff working document, Implementation of the European Neighbourhood Policy in Republic of Moldova: Progress in 2012 and recommendations for action SWD(2013) 80 final, pp. 5-8.

<sup>29</sup> *European Voice*, September 3, 2013; 27 November 2013.

<sup>30</sup> Declaration on Eurasian Economic Integration 2011; *The Voice of Russia*, May 29, 2014. For the chronology of the Eurasian integration project see R. Dragneva, "The Legal and Institutional Dimensions of the Eurasian Customs Union" in Rilka Dragneva and Kataryna Wolczuk (eds), *Eurasian Economic Integration: Law, Policy and Politics* (Cheltenham: Edward Elgar, 2013).

<sup>31</sup> On the implications of the ENP for EU-Russia relations see H. Haukkala and A. Moshes, "Beyond 'Bing Bang': The Challenges of the EU's Neighbourhood Policy in the East" (The Finnish Institute of International Affairs, 2004), pp. 5-6, 19; R. Dannreuther, "Developing the Alternative to Enlargement: The European Neighbourhood Policy" (2006) 11 E.F.A.R. 183, pp. 185; S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union* (Basingstoke: Palgrave Macmillan, 2008), p. 274; K. Smith, "The Outsiders: The European Neighbourhood Policy" (2005) 81 *International Affairs* 757, pp. 759-760; R. Aliboni, "The Geopolitical Implications of the ENP" (2005) 10 E.F.A.R. 1, p. 14; F. Tassinari, "A Riddle Inside an Enigma: Unwrapping the EU-Russia Strategic Partnership" (2005) 40 *The International Spectator* 45, p. 51.

<sup>32</sup> *Meryem Demirel v Stadt Schwäbisch Gmünd* (12/86) [1987] E.C.R. 3719 at [9].

<sup>33</sup> P. Koutrakos, *EU International Relations Law* (Oxford: Hart, 2006), p. 238; J. Klabbers, "Volkerrechtsfreundlich? International Law and the Union Legal Order" in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Cheltenham: Edward Elgar Publishing, 2011), p. 112.

Eastern AA include “gradual rapprochement” and “close and privileged links” with Ukraine,<sup>34</sup> and “political association and economic integration” based on “close links” with Moldova and Georgia.<sup>35</sup> Thus, these agreements represent the most extensive cooperation offered to the non-candidate neighbours to date.

The extent of the cooperation is confirmed in the preamble, in which the countries are defined as “European”<sup>36</sup> and their “European choice” acknowledged. Although the ENP Action Plans made references to the neighbours’ “European aspirations”, it can be argued that the preambular statements in the AA counter the exclusionary logic of the ENP. The latter also seems to be corroded by the affirmation that the agreements will not prejudice further development in relations between the parties. Taking into account the difficult choice Ukraine, Moldova and Georgia had to make between EU integration and maintaining, improving or stabilising their ties with Russia (as has increasingly become the case with all three states), this can be viewed as a reassurance on behalf of the EU aimed at seeking the neighbours’ engagement in the policy,<sup>37</sup> rather than a serious promise of membership.

The preambles of the Eastern AAs echo the ENP’s and the Lisbon Treaty’s orientation towards value promotion. Although certain distinctions are noted, the agreements have in common the rhetoric on shared values “at the heart of political association and economic integration”<sup>38</sup> or as the basis of cooperation.<sup>39</sup> Unlike the Georgian and Moldovan AAs, the preamble of the EU-Ukraine agreement emphasises the essential element clause and links progress in cooperation, inter alia, to the respect for common values, which has been described as “strict conditionality”.<sup>40</sup> Such a view is supported by a further addition to the preamble in which many values — such as democratic principles, the rule of law, good governance, human rights and fundamental freedoms — are

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<sup>34</sup> Art. 1(2)(a) of EU-Ukraine AA.

<sup>35</sup> Arts. 1(2)(a) of EU-Moldova and EU-Georgia AA.

<sup>36</sup> “Eastern European” in case of Georgia.

<sup>37</sup> It is argued elsewhere that the ultimate aim of the ENP is to seek the neighbours’ engagement, Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), pp. 177-184.

<sup>38</sup> Preamble, EU-Moldova and EU-Georgia AAs.

<sup>39</sup> Preamble, EU-Ukraine AA.

<sup>40</sup> G. Van der Loo, P. Van Elsuwege and R. Petrov, “The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument” [2014] 9 *EU Working Papers*, p. 3.

listed.<sup>41</sup> A reinforced emphasis on the international commitments of the partners in the area of political reform can also be noted as a common feature. Although not novel in itself, the Eastern AAs make more extensive reference to the UN Charter, OSCE documents, the Universal Declaration of Human Rights (UDHR) and the European Convention of Human Rights (ECHR) than do previous neighbourhood agreements.<sup>42</sup> These references constitute part of the so-called “standard” HRC discussed next.

### **The Essential Elements and their Normative Framework**

The EU’s practice has evolved from rhetorical statements to standard HRCs in more than 120 international agreements<sup>43</sup> and to cross-referencing of agreements containing HRCs.<sup>44</sup> Although earlier “programmatically principles” and the “basis clauses” introduced human rights to the agreements,<sup>45</sup> they were not considered to be “essential to the accomplishment of the object or purpose of the treaty”.<sup>46</sup>

A shift towards including HRCs in international agreements in development policy transpired in the early 1990s due to inter-institutional momentum,<sup>47</sup> following the earlier trends of

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<sup>41</sup> Preamble, EU-Ukraine AA.

<sup>42</sup> References to international documents can be found in the preambles of other agreements, including the PCAs; or the Stabilisation and Association Agreement between the European Communities and their Member States of the one part, and the Republic of Serbia, of the other part [2013] OJ L278.

<sup>43</sup> Leino, “The Journey towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law” in *EU Foreign Relations Law: Constitutional Fundamentals* (2008), p. 263.

<sup>44</sup> L. Bartels, “The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements” European Parliament, February 2014, p. 7; L. Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements” (2013) 40 L.I.E.I. 297, p. 299.

<sup>45</sup> For this typology see E. Riedel and M. Will, “Human Rights Clauses in External Agreements of the EC” in Philip Alston (ed), *The EU and Human Rights* (Oxford: OUP, 1999), pp. 726-728.

<sup>46</sup> Art. 60(3)(b) of the Vienna Convention on the Law of Treaties 1969, United Nations, Treaty Series, vol. 1155, p. 331. Many provisions of the Vienna Convention are a part of customary international law; *Gabčíkovo-Nagymaros Project* [1997] I.C.J. Reports 66 at [109].

<sup>47</sup> Communication on human rights, democracy and development cooperation policy SEC(91) 61; Luxembourg European Council, Declaration on Human Rights, Bull EC 6-1991; Resolution of the Council on human rights, democracy and development, Bull EC 11 -1991, 122; L. Bartels, *Human Rights Conditionality in the EU’s International Agreements* (Oxford: OUP, 2005), pp. 17-22.



linking development policy to human rights,<sup>48</sup> and reflecting the “international consensus” on providing aid on the basis of conditionality.<sup>49</sup> In the neighbourhood, this was also linked to the collapse of the Soviet Union and the disintegration of the Eastern Bloc,<sup>50</sup> prompting the EU to advance a values agenda through the Declaration on the Recognition of New States.<sup>51</sup> The latter paved the way for the inclusion of HRCs — now the essential element clauses — in agreements with the newly independent countries by demanding respect for 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”.<sup>52</sup> These agreements included most Europe Agreements (EAs) with Central and Eastern European states,<sup>53</sup> and the PCAs.

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<sup>48</sup> Williams, *EU Human Rights Policies* (2004), pp. 27-33; Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), pp. 7-17.

<sup>49</sup> Lister as cited in O. Elgström, “EU Policy on Economic Partnership Agreements: Trade... and Aid?” in D.C. Thomas (eds), *Making EU Foreign Policy: National Preferences, European Norms and Common Policies* (Basingstoke: Palgrave, 2011), pp. 133-134.

<sup>50</sup> Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (2003), pp. 71-80.

<sup>51</sup> Declaration on the guidelines on the recognition of new states in Eastern Europe and in the Soviet Union 1991; General Affairs Council EC-Bulletin 5-1992, 1.2.13.

<sup>52</sup> Riedel and Will, “Human Rights Clauses in External Agreements of the EC” in *The EU and Human Rights* (1999), p. 728.

<sup>53</sup> The first EAs with Hungary and Poland did not contain HRCs. All other EAs concluded after 1992 include such clauses following the 1991 Declarations and the 1992 Council statement on the inclusion of such clauses in the agreements with the OSCE states; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Bulgaria, of the other part [1994] OJ L358; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and Romania, of the other part [1994] OJ L357; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Czech Republic, of the other part [1994] OJ L360; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part [1994] OJ L359; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Estonia, of the other part [1992] OJ L403; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Latvia, of the other part [1992] OJ L403; Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Lithuania, of the other part [1992] OJ L403; Lisbon European Council Bull EC 6-1992; K. E. Smith, *The Making of EU Foreign Policy: The Case of Eastern Europe* (Basingstoke: Palgrave, 1999), pp. 96-98; Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), pp. 22-23.

The essential element clause is at the foundation of the standard HRC, which includes a preambular reference and a provision on the suspension of the agreement.<sup>54</sup> In certain cases, a Joint Declaration accompanies the agreements, linking the essential element clause directly to the suspension mechanism.<sup>55</sup> The “essential” elements in effect transplanted the rationale of art. 60 of the Vienna Convention on the Law of Treaties to EU international agreements in place of the *rebus sic stantibus* principle in art. 62.<sup>56</sup> The standard model can be found in all three Eastern AAs, in which the essential element is found under the Title on General Principles. The international instruments constituting the basis of these provisions should now be discussed prior to analysing the essential elements.

In all three agreements a somewhat extensive list of international instruments constitutes the basis for the essential elements that the parties must respect in their domestic and foreign policies.<sup>57</sup> References to specific international documents are at odds with the so-called *tout court* approach containing no references to international human rights instruments.<sup>58</sup> The latter due to its abstract nature allows a party with more leverage to determine what it is “aimed at” at the stage of implementation.<sup>59</sup> Although references to international instruments vary depending on the country or region concerned, <sup>60</sup> the UDHR, considered a central feature of the standard or “model” clause, is

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<sup>54</sup> Riedel and Will, “Human Rights Clauses in External Agreements of the EC” in *The EU and Human Rights* (1999), pp. 731-732; A. Rosas, “The European Union and Fundamental Rights/Human Rights” in Catarina Krause and Martin Scheinin (eds) *International Protection of Human Rights: A Textbook* (Åbo Akademi University: Institute for Human Rights, 2009), p. 467; M. Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (Cambridge: Intersentia, 2001), p. 157; Bartels, *Human Rights Conditionality in the EU’s International Agreements* (2005), p. 23.

<sup>55</sup> For instance, the PCAs.

<sup>56</sup> Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements” (2013) 40 L.I.E.I. 297, p. 298; Riedel and Will, “Human Rights Clauses in External Agreements of the EC” in *The EU and Human Rights* (1999), pp. 729-730; Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), p. 221; V. Miller, “The Human Rights Clauses in the EU’s External Agreements” [2004] House of Commons Research Paper 04/33, p. 13.

<sup>57</sup> Common art. 2.

<sup>58</sup> Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (2003), p. 231.

<sup>59</sup> Leino, “The Journey towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law” in *EU Foreign Relations Law: Constitutional Fundamentals* (2008), pp. 265, 279.

<sup>60</sup> References to UDHR for instance can be found in Euro-Med Agreements with Algeria, Egypt, Jordan, and Morocco. The PCAs make references to the UN Charter, the Helsinki Final Act and the Charter of Paris for a New Europe.

most commonly referred to, and, as with the UN Charter, it is viewed as a testament to the universality of the principles promoted.<sup>61</sup> As noted above, this indicates the EU's universality approach,<sup>62</sup> also found in art. 21(1) and 21(2)(c) TEU. In addition to the UDHR, the Eastern clauses make references to the ECHR, the Helsinki Final Act, and the Paris Charter of the OSCE – all regional documents. It is noteworthy that, in spite of the multilayered approach to human rights protection in art. 6 TEU, no references are made to EU standards as general principles of law or as established in the Charter of Fundamental Rights of the EU.

Thus, the normative underpinning to the Eastern HRCs is more extensive than in other neighbourhood agreements. For instance, most Euro-Med agreements refer only to the UDHR in their essential element clause<sup>63</sup> – a “compromise” between *tout court* and a very loaded content.<sup>64</sup> As one would not expect to find references to European regional instruments in the Euro-Med agreements, a comparison with other European neighbourhood agreements is more apposite. An analysis of the Stabilisation and Association Agreements (SAA) reveals that the Eastern HRCs are more onerous than their counterparts with existing candidate countries, not all of which contain references to the ECHR.<sup>65</sup> Those with Croatia and Macedonia have no such references, even though

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<sup>61</sup> Rosas, “The European Union and Fundamental Rights/Human Rights” in *International Protection of Human Rights: A Textbook* (2009), pp. 466-467; A. Rosas, “The European Union and International Human Rights Instruments” in Vincent Kronenberger (ed.), *The European Union and the International Legal Order: Discord or Harmony?* (The Hague: TMC Asser Press), p. 61; B. de Witte, “The EU and the International Legal Order: The Case of Human Rights” in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart, 2011), p. 141.

<sup>62</sup> EU Annual Report on human rights and democracy in the world in 2013, COHOM 109, 11107/14, p. 34; Leino, “The Journey towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law” in *EU Foreign Relations Law: Constitutional Fundamentals* (2008), p. 260.

<sup>63</sup> Art. 2 of Euro-Med Agreements with Lebanon, Algeria, Egypt, Jordan, Morocco. The essential elements of the Euro-Med Agreements with Israel and Tunisia make no references to any international documents.

<sup>64</sup> Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (2003), p. 237.

<sup>65</sup> Only the most recent SAAs do; art. 2, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and Bosnia and Herzegovina, of the other part [2009] OJ L107; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part [2010] OJ L108; SAA with Serbia.

both countries were already members of the Council of Europe at the time of the conclusion of the agreement.<sup>66</sup> Hence, there is no obvious rationale for such a lack of consistency.

The inclusion of the ECHR is notable in that no other document cited in the essential element clause is directly binding. As part of customary international law, many UDHR clauses would be binding on members of the international community,<sup>67</sup> including the EU.<sup>68</sup> But while not all UDHR clauses are recognised as customary international law, by referring to the latter in the HRC it is ensured that the document is binding in its entirety.<sup>69</sup> The reliance on other non-binding instruments is a means of “an indirect strengthening of international human rights standards, as they add another enforcement mechanism to otherwise ‘toothless’ international supervisory bodies”.<sup>70</sup> However, the ECHR is the only instrument to create directly binding legal obligations. It has its own enforcement mechanisms, and the breach of the ECHR might lead to the loss of the Council of Europe membership. In this respect, the Eastern HRCs are the strictest, particularly in comparison with the Euro-Med agreements, since the scope of the regional European instruments is wider than the UDHR.<sup>71</sup>

While the Eastern HRCs have a clear normative scope, it has been argued in general that a broad normative framework causes uncertainty regarding the precise standard being promoted.<sup>72</sup> Conversely, the inclusion of a phrase on “other human rights instruments” could be considered a positive evolution, allowing the HRC normative basis to be updated in line with the emerging

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<sup>66</sup> Macedonia and Croatia joined the Council of Europe in 1995 and 1996 respectively.

See art. 2, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Croatia, of the other part [2006] L26; Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part [2004] OJ L84.

<sup>67</sup> De Witte, “The EU and the International Legal Order: The Case of Human Rights” in *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (2011), pp. 141-142.

<sup>68</sup> *Racke v Hauptzollamt Mainz* (C-162/96) [1996] E.C.R. I-03655 at [45-46].

<sup>69</sup> L. Bartels, “A Legal Analysis of Human Rights Clauses in the European Union’s Euro-Mediterranean Association Agreements” (2004) 9 *Mediterranean Politics* 368, p. 374.

<sup>70</sup> F. Hoffmeister, “The Contribution of EU Practice to International Law” in Marise Cremona(ed), *Developments in EU External Relations Law* (Oxford: OUP, 2008), p. 114.

<sup>71</sup> Bartels, “The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements” (2014), p. 9.

<sup>72</sup> Noguera and Martinez as cited in Williams, *EU Human Rights Policies* (2004), p. 41.

practice.<sup>73</sup> Such a novel approach can be found in the Ukrainian AA, where the HRC refers to “other relevant human rights instruments” in addition to those mentioned above, thus rendering the list open-ended. This is not the only aspect of the Ukrainian HRC that stands out from its counterparts.

With respect to the essential elements, the Eastern clauses include democratic principles and human rights in line with common practice, while expanding the scope by the addition of fundamental freedoms. In EU human rights jargon the term “fundamental rights” is used,<sup>74</sup> while “human rights and fundamental freedoms” are more in keeping with ECHR jargon.

Essential elements can also include the rule of law,<sup>75</sup> or respect for the principles of international law. The latter can be seen in PCAs with Georgia, Armenia and Azerbaijan, for which an explanation was found in the outstanding conflicts in the region.<sup>76</sup> The PCAs also incorporated the principles of a market economy as an essential element, hinting at not only the communist past of the countries concerned,<sup>77</sup> but also their participation in the OSCE.<sup>78</sup> While the broadening of the scope of the essential elements provisions has been criticised for discrediting the “essential” nature of these elements,<sup>79</sup> it does not deprive the latter of their “essential” status. Instead, it provides a wider ground for claiming a breach of essential element provision from the perspective of the suspension mechanism. One might even suggest that the closer the agreements to the EU, geographically or politically, the broader the scope of the essential element clauses. In contrast to the SAAs (political proximity) and PCAs (geographic proximity), the Euro-Med agreements make

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<sup>73</sup> Art. 1, Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, on the other part [2013] OJ L20; Bartels, “The European Parliament’s Role in Relation to Human Rights in Trade and Investment Agreements” (2014), pp. 9, 14-15.

<sup>74</sup> Art. 6 TEU and Charter of Fundamental Rights of the European Union [2010] OJ C83/389.

<sup>75</sup> See for instance art. 2, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part [2009] OJ L107/166.

<sup>76</sup> See for instance art. 2 of PCAs with South Caucasian countries; Riedel and Will, “Human Rights Clauses in External Agreements of the EC” in *The EU and Human Rights* (1999), p. 743.

<sup>77</sup> Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (2003), p. 235.

<sup>78</sup> Bartels, *Human Rights Conditionality in the EU’s International Agreements* (2005), p. 27.

<sup>79</sup> Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), p. 161.

no references to the rule of law, principles of international law or the market economy.<sup>80</sup> Thus, the expansion of the essential elements in the Eastern AAs represents an interesting variation.

All three provisions feature an essential element of non-proliferation of weapons in line with the 2003 Council Common Position.<sup>81</sup> While this can be perceived as an example of mainstreaming this position in the neighbourhood, no Euro-Med agreement concluded after 2003 has such an essential element. In other agreements the issue of non-proliferation surfaced only as part of the political dialogue.<sup>82</sup> This addition in the Eastern AAs can be explained perhaps by the priority that the EU has given the Eastern neighbourhood, including Russia, in this domain.<sup>83</sup>

The rule of law is another element in the General Principles of the Eastern AAs. Ordinarily, when rule of law is included as an essential element no further explanations are provided as to its meaning.<sup>84</sup> This appears to be the case in the Ukrainian essential element clause, which, with democratic principles, human rights, fundamental freedoms and rule of law emulates most closely the membership political criteria found in arts. 2 and 49 TEU. The Ukrainian HRC is widened further to contain the principles of sovereignty and territorial integrity, inviolability of borders and independence as essential elements. This unprecedented addition can be interpreted as an expression of the EU's support of Ukraine in view of the political situation and the Russian annexation of Crimea.<sup>85</sup> The EU has been unequivocal in its condemnation of the illegal referendum

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<sup>80</sup> See for instance art. 2 of Euro-Med Agreement with Algeria; Euro-Med Agreement with Egypt; Euro-Med Agreement with Jordan.

<sup>81</sup> Common Position 2003/805/CFSP of 17 November 2003 on the universalisation and reinforcement of multilateral agreements in the field of non-proliferation of weapons of mass destruction and means of delivery [2003] OJ L302/34; M. Cremona, "Values in EU Foreign Policy" in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart, 2011), p. 305.

<sup>82</sup> See art. 4, Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Tajikistan, of the other part [2009] OJ L350/3; arts. 4-5 of Euro-Med Agreement with Syria, not signed. *Council of the European Union* <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%209921%202009%20INIT> [Accessed February 13, 2015].

<sup>83</sup> R. Aliboni, "The Non-Proliferation Clause in a Preventive Perspective" [2004] *Conflict in FOCUS* No. 4, pp. 2-3.

<sup>84</sup> Pech finds exceptions in the Cotonou Agreement, L. Pech, "Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law" in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (Cambridge: CUP, 2013), p. 114.

<sup>85</sup> Following a referendum in Crimea on 16 of March on the issue of acceding to Russia, an Accession Treaty was signed to include the Republic of Crimea and Sevastopol as part of the Russian Federation on 18th of March 2014.

on independence and the subsequent annexation of the peninsula.<sup>86</sup> Although the rationale of this addition is obvious, its function is less so: a provision in a bilateral agreement between the EU and Ukraine cannot be relied upon to reprimand a third party. Instead, the essential element in the PCA with Russia could conceivably be deployed, as it binds Russia to “regard as inviolable” the frontiers and to “respect the territorial integrity” of other participating states, including the Ukraine, as established in the OSCE Helsinki Final Act.<sup>87</sup>

In comparison, in the Georgian and the Moldovan AAs the rule of law is not one of the essential elements. Instead it is stipulated in a different paragraph of the same article under General Principles, framed in a language of “reaffirming respect” for rule of law and good governance.<sup>88</sup> In contradistinction to the Ukrainian AA, further clarifications to the meaning of the rule of law are provided with reference to partners’ international obligations in the UN, the Council of Europe and the OSCE. Although in the case of Moldova this is non-specific, the Georgian AA ties the rule of law to a wider international context, linking it to the principles of sovereignty and territorial integrity, inviolability of borders and independence.<sup>89</sup> None of these feature as essential elements, as in the case of Ukraine, but serve merely as general principles, which can be justified by the conflicts in Abkhazia and South Ossetia. Their exclusion from the essential element clause might perhaps be explained by a less pressing political situation around those conflicts. Internally, the commitment to the rule of law is specified in relation to good governance, the fight against corruption, organised crime, terrorism, and so on.<sup>90</sup>

It should be also noted that the Moldovan and Georgian agreements, unlike their Ukrainian counterpart, provide for a commitment to a free market economy, sustainable development and effective multilateralism under the General Principles, albeit outside the scope of the essential elements. Although in the past the principle of a free market economy constituted part of the essential elements in some agreements, as noted above, the reference to sustainable development and effective multilateralism is rather new. In the PCAs and the SAAs, the principle of a market

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<sup>86</sup> Foreign Affairs Council Conclusions of March 17, 2014, para. 1; European Council Conclusions of March 20-21, 2014, para. 29.

<sup>87</sup> The Helsinki Final Act is one of the documents referred to in the essential elements clause in art. 2 of the PCA with Russia.

<sup>88</sup> Arts. 2(3) of EU-Moldova AA and EU-Georgia AA.

<sup>89</sup> Art. 2(3) of EU-Georgia AA.

<sup>90</sup> Art. 2(3) and (4) of EU-Georgia AA.

economy as part of the essential element clause was based on the CSCE Bonn document,<sup>91</sup> which sets “sustainable economic growth” – akin to sustainable development – as an objective. As to effective multilateralism, one might suggest it refers to the WTO membership of the parties concerned. Ultimately, these principles are not part of the essential element clause, and, like the rule of law only constitute part of the General Principles. These reiterate the commitments of the parties, but do not have the same status as essential elements. In comparison, the Ukrainian AA provides for a separate article within the General Principles, emphasising the importance of the free market economy, rule of law, good governance, the fight against corruption and trans-national organised crime and terrorism, the promotion of sustainable development and effective multilateralism.<sup>92</sup>

Thus in all three cases the General Principles have been expanded beyond the essential element clause, distinguishing between “hard core common values” and “other general principles” important to the parties.<sup>93</sup> However, the variations between the Ukrainian AA and the Georgian and Moldovan AAs demonstrate the flexible and somewhat arbitrary nature of this distinction. Ultimately, judging by their normative framework and the list of essential elements, it can be concluded that the Eastern clauses impose more onerous obligations than other agreements in the neighbourhood. Moreover, the Ukrainian essential element clause demonstrates that the scope of the provision can be extended to make a political point for the notice of a third party, leading us to question the functions of these provisions.

### **The Functions of HRCs and the Suspension of the Agreement**

The functions of the HRCs are usually linked to the non-execution clause, which provides *inter alia* for the possibility of suspending the agreement in case of a breach of its essential elements. The need for such an intervention mechanism was exemplified in the EU by cases of

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<sup>91</sup> See for instance art. 2 of PCA with Ukraine, PCA with Moldova, SAA with Albania; and SAA with Serbia.

<sup>92</sup> Art. 3 of EU-Ukraine AA.

<sup>93</sup> Van der Loo et al, “The EU-Ukraine Association Agreement: Assessment of an Innovative Legal Instrument” [2014] 9 *EUI Working Papers*, p. 13.



reliance on general norms of international law to reprimand a party to a bilateral agreement.<sup>94</sup> The non-execution clause constitutes an additional mechanism to the restrictive measures adopted under art. 215 TFEU, linking the CFSP to Common Commercial Policy.<sup>95</sup> In a modern HRC the non-execution provision with its suspension element has become so central that the clauses themselves have been considered to be “specific suspension mechanisms”.<sup>96</sup> However, this is rather unjustified when taking into account the positive function of the HRCs. Both functions are considered in turn below.

### *The Negative Function and Treaty Suspension*

In modern HRCs, the rationale of art. 60 of the Vienna Convention is found in the non-execution clause — part of the standard HRC. It should be noted that art. 60 operates subject to specific provisions in a treaty applicable in the event of a breach,<sup>97</sup> that is subject to the non-execution clauses. Previous agreements in the neighbourhood included the “Bulgarian” version of this clause,<sup>98</sup> which first appeared in the EA with Bulgaria ensuring conformity with art. 65 of the Vienna Convention.<sup>99</sup> As opposed to the “Baltic” clause providing for immediate suspension in case

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<sup>94</sup> These included *erga omnes* obligations or the principles of *rebus sic stantibus*; Hoffmeister, “The Contribution of EU Practice to International Law” in *Developments in EU External Relations Law* (2008), p. 94; B. Brandtner and A. Rosas, “Trade Preferences and Human Rights” in Philip Alston (ed), *The EU and Human Rights* (Oxford: OUP, 1999), p. 704; Bartels, *Human Rights Conditionality in the EU’s International Agreements* (2005), pp. 19-21; Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), pp. 26-27.

<sup>95</sup> Williams, *EU Human Rights Policies* (2004), p. 49; M. Cremona, “Human Rights and Democracy Clauses in the EC’s Trade Agreements” in Nicholas Emiliou and David O’Keeffe (eds), *The European Union and World Trade Law: After the GATT Uruguay Round* (Chichester: Wiley, 1996), pp. 70, 75.  
On the role of Art. 215 TFEU see J. Larik, “Much More than Trade: The CCP in a Global Context” in Malcolm Evans and Panos Koutrakos (eds), *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (Oxford: Hart, 2011), pp. 29-30. On economic sanctions particularly see P. Koutrakos, *Trade, Foreign Policy and Defence in EU Constitutional Law* (Oxford: Hart, 2001), pp. 67-91.

<sup>96</sup> Leino, “The Journey towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law” in *EU Foreign Relations Law: Constitutional Fundamentals* (2008), p. 261.

<sup>97</sup> Art. 60(4) of the Vienna Convention.

<sup>98</sup> PCAs, the Euro-Med Agreements, the EAs of the second round with the exception of the EAs with Poland and Hungary.

<sup>99</sup> Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (2003), pp. 101, 218, 223; Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), p. 205.

of a breach of an agreement,<sup>100</sup> the “Bulgarian” clause places an emphasis on consultation by allowing for “appropriate measures” to be taken following a certain procedure, whereby an immediate suspension would only be possible in cases of “special urgency”. Against this background, the non-execution clause in the Eastern AAs should be considered prior to analysing the practice of application of such provisions.

The Eastern AAs involve three identical provisions denoting three stages of performance. First, the parties are required to undertake “any general or specific measure” to fulfil their obligations.<sup>101</sup> Next, a mechanism is provided to settle disputes (with the exception of trade-related disputes) in the Association Council with the assistance of the parties, until a binding decision has been adopted or the dispute comes to an end.<sup>102</sup> The option of suspension, within the possibility of taking “appropriate measures”, appears as the last stage.<sup>103</sup>

Appropriate measures can be taken following a three-month period after a dispute settlement request has been made to the Association Council, and only if the complaining party still finds that the agreement is being breached. Priority is given to measures least disturbing the functioning of the agreement and as a general rule cannot include the suspension of trade relations. Furthermore, the relevant article provides for “exceptional cases”, including violation of the essential elements or denunciation of the agreement not sanctioned by the general rules of international law. The exceptional cases would therefore include all breaches of human rights, democratic principles and all other essential elements incorporated in the Eastern HRCs. Here, the three-month consultation period can be ignored, and “appropriate measures” can include the suspension of trade relations under Title IV of the agreement, in contrast with the non-fulfilment of other treaty obligations.

A number of observations can be made regarding the drafting of the clause. Firstly, the requirement to give priority to appropriate measures which least disturb the functioning of the agreement is common practice,<sup>104</sup> and as noted by Bartels is an odd remnant of the safeguard

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<sup>100</sup> Included in the EAs with the Baltic states and Albania; Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (2003), pp. 218-222; Riedel and Will, “Human Rights Clauses in External Agreements of the EC” in *The EU and Human Rights* (1999), p. 729.

<sup>101</sup> See art. 476 of EU-Ukraine AA; art. 453 of EU-Moldova AA; art. 417 of EU-Georgia AA.

<sup>102</sup> Art. 477 of EU-Ukraine AA.

<sup>103</sup> Art. 478 of EU-Ukraine AA; art. 455 of EU-Moldova AA; art. 419 of EU-Georgia AA.

<sup>104</sup> For instance, art. 95 of PCA with Armenia; art. 98 of PCA with Georgia; art. 98 of PCA with Azerbaijan.

clauses in the EU's trade agreements.<sup>105</sup> However, the Eastern non-execution clause omits references, common elsewhere, to the need to abide by the rules of international law or the principle of proportionality.<sup>106</sup> In general, appropriate measures are said to allow for withdrawal of any commitments under the agreement, particularly if they “would imperil [the EU's] obligation” of value promotion.<sup>107</sup> Examples of appropriate measures are given in EU documents.<sup>108</sup> The agreements themselves do not usually specify the appropriate measures, with the only exception being the suspension of treaty obligations in cases of special urgency, including for breaches of essential elements.

The question left open in the previous drafting practice was whether *any* violation of the essential element could be perceived as having special urgency. Some have interpreted this to imply that only exceptional circumstances of “serious violations” could be considered.<sup>109</sup> Rarely, the agreements themselves provide a qualification, such as art. 86 of the Euro-Med Agreement with Egypt which refers to “grave” breaches. The most detailed and unusual explanation is found in art. 96 of the Cotonou Agreement: special urgency includes “exceptional cases of particularly serious and flagrant violation of one of the essential elements ... that require an immediate reaction”, whereby suspension is a means of last resort and can also be mitigated by consultation.<sup>110</sup> In this respect, the Eastern AAs discard the familiar notion of special urgency in favour of “exceptional circumstances”, which resembles the definition of special urgency in art. 96 of the Cotonou Agreement and therefore supports the presumption that suspension is possible only in exceptional

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<sup>105</sup> Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), pp. 24, 108-109.

<sup>106</sup> These requirements can often be found in the Joint Declarations linking the essential provision with the non-execution clauses. See for instance Joint Declaration relating to art. 104 of Euro-Med Agreement with Algeria; art. 86 of the Euro-Med Agreement with Egypt. According to Bartels the reference to the principles of international law already assumes the principle of proportionality; Bartels, “A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements” (2004) 9 *Mediterranean Politics* 368, p. 383.

<sup>107</sup> Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements” (2013) 40 *L.I.E.I.* 297, p. 311; Bartels, “The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements” (2014), p. 11.

<sup>108</sup> Annex 2 of Communication on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries COM(95) 216 final; EU Annual Report on Human Rights COHOM 29, 13449/03, para. 4.1.5.

<sup>109</sup> Brandtner and Rosas, “Trade Preferences and Human Rights” in *The EU and Human Rights* (1999), p. 707.

<sup>110</sup> Art. 96.1a(b) and (c), Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part [2010] OJ L287.

cases. Nevertheless, the Cotonou Agreement clarifications regarding the gravity of violation and the immediacy of the response required have not been replicated here.

Neither do the Eastern AAs escape criticism related to the lack of explicitness of the suspension procedures, particularly relevant in the event of a mixed agreement, whereby the involvement of the Member States would be required.<sup>111</sup> In particular, the Parliament has criticised the lack of precision in the implementation procedure, which engenders a slow reaction from the Council and the Member States.<sup>112</sup> An unusually detailed suspension mechanism adopted for the Cotonou Agreement was given a positive assessment on account of its “gradualism”,<sup>113</sup> but this is an exception to the general rule. “Gradualism” refers to incremental steps in the procedure, including the exhaustion of dialogue options, holding consultations, and only then taking any drastic measures with set roles for the Council, Commission and the Member States. Fierro views this procedure to be positive in nature.<sup>114</sup> “Gradualism” applies not only to appropriate measures but also to cases of special urgency: suspension is a means of last resort that can also be mitigated by consultation.<sup>115</sup> There is no similar procedure in the Eastern AAs, which would have facilitated the application of the clause if necessary.<sup>116</sup>

Nonetheless, the possibility of suspension within the Eastern AAs should also be viewed as a means of last resort. Despite the lack of provision of a three-month period to resolve matters in the event of a breach of essential elements, the parties can nonetheless raise objections and resolve the issue by other, less disruptive means in a shorter time frame.<sup>117</sup> Yet the most peculiar aspect of the

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<sup>111</sup> A. Rosas, “Mixed Union — Mixed Agreements” in Martti Koskenniemi (ed) *International Law Aspects of the European Union* (The Hague: Martinus Nijhoff Publishers, 1998), p. 135; Brandtner and Rosas, “Trade Preferences and Human Rights” in *The EU and Human Rights* (1999), p. 721; Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), pp. 238-249.

<sup>112</sup> Resolution of the European Parliament on the human rights and democracy clauses in European Union Agreements [2006] OJ C290E, para 15.

<sup>113</sup> Decision 1999/214 on the procedure for implementing A 366a of the fourth ACP-EP convention [1999] OJ L75/31; J. Czuczai, “Mixity in Practice: Some Problems and Their (Real or Possible) Solution” in Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford: Hart, 2010), pp. 246-247.

<sup>114</sup> Fierro, *The EU’s Approach to Human Rights Conditionality in Practice* (2003), p. 332.

<sup>115</sup> Article 96.1a(b) and (c) of Cotonou Agreement.

<sup>116</sup> Bartels, “A Model Human Rights Clause for the EU’s International Trade Agreements” (2014), p. 34.

<sup>117</sup> Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), p. 29.

non-execution clause is that, in “exceptional circumstances”, trade relations — more specifically the operation of the DCFTA — can be suspended, in contrast to non-fulfilment of other treaty obligations. It follows then that appropriate measures can also include the suspension of non-trade obligations, although, like any other appropriate measure this would be subject to the general rules described above.<sup>118</sup>

From one perspective, the threat of a DCFTA suspension has advantages. It would be a merely partial suspension of an agreement, which is more justifiable under international law.<sup>119</sup> However, even without such a specification, a partial suspension of treaty obligations would still be possible. Furthermore, it is said that the suspension of the agreement is a precondition for trade restrictions for the EU to avoid a breach of its obligations.<sup>120</sup> In the Eastern AAs, the EU essentially does away with the need to suspend the agreement itself by providing for the option of directly enforcing trade restrictions. Nonetheless, the possible suspension of the trade-related part of the agreement would go against the very practice and preferences of the EU. Never before has the HRC been used to justify restrictive trade measures.<sup>121</sup> What is the purpose of this provision, then? One might argue that it creates a direct link between EU values and trade policy. However, an even more convincing rationale might lie in the ENP context within which the Eastern AAs have been concluded.

The significance of the threat of DCFTA suspension lies not so much in the potential interruption of trade relations, as in the possibility that the main incentive of the cooperation — the DCFTA itself — will be withdrawn. A DCFTA suspension would not preclude the political cooperation required to achieve the ENP objectives, but the extent to which a neighbour hopeful of membership would cooperate willingly in political and other spheres when the main incentive is put on hold must be doubted. Such an outcome would therefore go against the very nature of the proposed association and the ENP’s rationale of engagement, whereby sanctions necessarily lead to

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<sup>118</sup> For a comprehensive analysis see Bartels, *Human Rights Conditionality in the EU’s International Agreements* (2005).

<sup>119</sup> Riedel and Will, “Human Rights Clauses in External Agreements of the EC” in *The EU and Human Rights* (1999), p. 726.

<sup>120</sup> C. Portela, *The European Union Sanctions and Foreign Policy: When and Why Do they Work?* (London: Routledge, 2011), p. 27.

<sup>121</sup> “Using EU Trade Policy to Promote Fundamental Human Rights: Current Policies and Practices” Non-Paper. *European Commission*, [http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc\\_149064.pdf](http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf) [Accessed February 13, 2015]; L. Bartels, “The Application of Human Rights Conditionality in the EU’s Bilateral Trade Agreements and Other Trade Arrangements with Third Countries” [2008] Policy Department External Policies, European Parliament, p. 14.

disengagement. Hence, applying the non-execution clauses in the Eastern AAs would be very unusual, particularly in view of past practice.

There have been only 23 recorded cases of negative application of the essential element clause, all concerning the Cotonou partner states.<sup>122</sup> In the EU immediate vicinity, blatant violations of human rights and democratic principles have never led to the suspension mechanism under the essential elements clause.<sup>123</sup> The EU's selection bias can be explained by the likelihood of success of the sanctions<sup>124</sup> or by the economic and security interests of the EU. The suspension mechanism is said to be reserved for countries that are economically or politically weak.<sup>125</sup> However, an analysis by Saltnes of all the cases concerning the Cotonou Agreement suggests that the selection bias is not strictly linked to the aforementioned factors.<sup>126</sup> Saltnes demonstrates that the probability of the application of the essential elements clauses is more closely linked to the particular essential element that is being breached; the majority of cases relate to serious breaches of democratic principles, the most important example of which is a coup d'état.<sup>127</sup> Mere breaches of human rights on their own would not trigger the application of the clause.<sup>128</sup> This is the reason for branding these provisions as "political clauses".<sup>129</sup>

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<sup>122</sup> Halting a technical meeting with Uzbekistan in response to Andijan massacres was the only exception from this; Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements" (2013) 40 L.I.E.I. 297, p. 304.

<sup>123</sup> R.A. del Sarto and T. Schumacher, "From Brussels with Love: Leverage, Benchmarking, and the Action Plans with Jordan and Tunisia in the EU's Democratisation Policy" in Sandra Lavenex and Frank Schimmelfennig (eds), *Democracy Promotion in the EU's Neighbourhood: From Leverage to Governance* (London: Routledge, 2013), p. 49; Ghazaryan, *The European Neighbourhood Policy and the Democratic Values of the EU* (2014), p. 175.

<sup>124</sup> C. Portela, "Aid Suspensions as Coercive Tools? The European Union's Experience in the African-Caribbean-Pacific (ACP) Context" (2007) 3 Rev. of Russian Affairs 38, p 42.

<sup>125</sup> Hoffmeister, "The Contribution of EU Practice to International Law" in *Developments in EU External Relations Law* (2008), p. 114; Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), pp. 37-38.

<sup>126</sup> J.D. Saltnes, "The Human Rights Policy: Unpacking the Literature on the EU's Implementation of Aid Conditionality" [2013] *Arena Working Paper* No. 2, pp. 10-12, 15.

<sup>127</sup> Saltnes, "The Human Rights Policy: Unpacking the Literature on the EU's Implementation of Aid Conditionality" [2013] *Arena Working Paper* No. 2pp. 7-8; Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements" (2013) 40 L.I.E.I. 297, pp. 304-305.

<sup>128</sup> Bartels, "The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries" [2008] Policy Department External Policies, European Parliament, p. 12.

<sup>129</sup> Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" (2014), p. 12; Bartels, "A Model Human Rights Clause for the EU's International Trade Agreements" (2014), p. 10.

Besides, certain logic of “incrementalism” operates in this respect, whereby harsher sanctions would be spared in favour of limited pressure to induce the incumbent government to enter into dialogue and restore to changes.<sup>130</sup> For instance, sanctions targeting individuals are preferred to those targeting the entire country, as seen most recently in relation to Russia,<sup>131</sup> although this is not without problems of its own.<sup>132</sup> Past and current examples, including Russian involvement in Chechnya and in East Ukraine demonstrate that, although informed by the HRC, the EU fell short of undertaking all that was theoretically possible under this provision,<sup>133</sup> preferring instead to rely on CFSP sanctions.<sup>134</sup>

This practice indicates that the application of appropriate measures under Eastern clauses can be expected rarely, and the suspension of the DCFTA even more so. The usefulness of trade sanctions has long been called into question.<sup>135</sup> Trade has rarely been relied upon to achieve other objectives, and, in proposing sanctions, the EU prefers to defer to UN initiatives.<sup>136</sup> On the other hand, as a “cross-sectoral” foreign policy objective,<sup>137</sup> democracy and human rights promotion are binding in all areas of EU external action. Breaches of HRCs can affect any area of bilateral relations, be it political cooperation, development policy or trade links, rejecting the view that essential element clauses are “CFSP clauses”.<sup>138</sup> HRCs therefore provide a basis for using trade restrictions to achieve objectives in other policy areas. The recent imposition of trade sanctions on

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<sup>130</sup> Portela, *The European Union Sanctions and Foreign Policy: When and Why Do they Work?* (2011), pp. 32-33.

<sup>131</sup> Portela makes this observation regarding Belarus; Portela, *The European Union Sanctions and Foreign Policy: When and Why Do they Work?* (2011), pp. 31-34.

<sup>132</sup> C. Eckes, “EU Restrictive Measures against Natural and Legal Persons: From Counterterrorist to Third Country Sanctions” (2014) 51 C.M.L.R. 869.

<sup>133</sup> Bartels, “Human Rights and Sustainable Development Obligations in EU Free Trade Agreements” (2013) 40 L.I.E.I. 297, p. 305; Portela, *The European Union Sanctions and Foreign Policy: When and Why Do they Work?* (2011), p. 114.

<sup>134</sup> Portela, *The European Union Sanctions and Foreign Policy: When and Why Do they Work?* (2011), p. 163.

<sup>135</sup> P. Alston, “International Trade as an Instrument of Positive Human Rights Policy” (1982) 4 H.R.Q. 155, p. 155.

<sup>136</sup> R. Leal-Arcas, “The European Union’s New Common Commercial Policy after the Treaty of Lisbon” in Martin Trybus and Luca Rubini (eds), *The Treaty of Lisbon and the Future of European Law and Policy* (Cheltenham: Edward Elgar Publishing, 2012), p. 277.

<sup>137</sup> P. Eeckhout, “Delimitation of TEU and TFEU External Competences” in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (Oxford: OUP, 2012), p. 268.

<sup>138</sup> Czuczai, “Mixity in Practice: Some Problems and Their (Real or Possible) Solution” in *Mixed Agreements Revisited: The EU and its Member States in the World* (2010), p. 245.

Russia in response to hostilities in Ukraine demonstrate a more independent stance by the EU on using trade sanctions to achieve wider policy goals,<sup>139</sup> albeit outside the scope of the essential elements clause.

Negative conditionality in general has been criticised due to the flexibility and the political expediency inherent in its application.<sup>140</sup> Disadvantages, such as loss of leverage, punishment of the population and strengthening of the ruling regime in the third country have been associated with negative conditionality.<sup>141</sup> Moreover, suspending trade with WTO members can be particularly problematic.<sup>142</sup> It is hence understandable that the EU prefers to exercise leverage when starting negotiations or concluding a new agreement, while refraining from its suspension after it has been adopted.<sup>143</sup>

Given the complexity of the application of non-execution clauses and of the conditionality of the ENP, it is now worth considering the positive functions of the HRC.

### *The Positive Function of HRCs*

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<sup>139</sup> Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine [2014] OJ L229/13.

<sup>140</sup> Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (2003), p. 113; B. Simma, J.B. Aschenbrenner, C. Schulte, "Human Rights Considerations in the Development Cooperation Activities of the EC" in Philip Alston (ed), *The EU and Human Rights* (Oxford: OUP, 1999), pp. 579-582; R. Rack and S. Lausegger, "The Role of the European Parliament: Past and Future" in Philip Alston (ed), *The EU and Human Rights* (Oxford: OUP, 1999), pp. 830-831; Cremona, "Values in EU Foreign Policy" in *Beyond the Established Legal Orders. Policy Interconnections between the EU and the Rest of the World* (2011), p. 305; Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), pp. 37-38.

<sup>141</sup> Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (2003), pp. 100-102.

<sup>142</sup> For instance there is no exception on the grounds of human rights breaches in the WTO Agreement; Brandtner and Rosas, "Trade Preferences and Human Rights" in *The EU and Human Rights* (1999), p. 705; Cremona, "Human Rights and Democracy Clauses in the EC's Trade Agreements" in *The European Union and World Trade Law: After the GATT Uruguay Round* (1996), p. 73.

<sup>143</sup> For instance, the conclusion of the PCA with Turkmenistan and Azerbaijan, and the SAA with Serbia was delayed, while in the case of Russia the start of negotiations on a new agreement was delayed due to the presence of the Russian troops on the Georgian territory in 2008; C. Hillion, "Introduction to the Partnership and Cooperation Agreements" in Alfred E. Kellermann, Jaap W. de Zwaan, Jenő Czuczai (eds.), *EU Enlargement: The Constitutional Impact at EU and National Level* (The Hague: T.M.C. Asser Press, 2001) 215-228, p. 224; B. Berdiyev, "The EU and Former Soviet Central Asia: An Analysis of the Partnership and Cooperation Agreements" (2003) 22 Yearbook of European Law 463, pp. 469-470; J. Kelley, "New Wine in Old Wineskins: Policy Learning and Adaptation in the New European Neighbourhood Policy" (2006) 44 J.C.M.S. 29, p. 48; Portela, *The European Union Sanctions and Foreign Policy: When and Why Do they Work?* (2011), pp. 120-122.



The positive function of HRCs, particularly in the Eastern AAs, can be asserted for a number of reasons.

Firstly, the idea that the negative function of the essential element clause is its central or only function, based on the judgment in *Portugal v Council*, needs to be revised.<sup>144</sup> The agreement in this case did not contain a standard HRC, and the emphasis on the suspension function was justified due to the absence of a non-execution clause. In this connection, it has been suggested that much of what the Court decided on this matter does not apply to modern HRCs.<sup>145</sup> Reducing the HRC to its suspension function also implies that one does not exist without the other, which is not validated by the pre-existing practice of the EU. Non-suspension mechanisms were a feature of EU agreements prior to the establishment of the HRCs,<sup>146</sup> and their function is much wider than merely serving these provisions.<sup>147</sup> Most significantly, in *Portugal v Council* both the Court and the Advocate General referred to the various EU declarations and documents,<sup>148</sup> highlighting the positive aspects of human rights and democracy promotion in EU foreign policy.<sup>149</sup> Moreover, the Court's main finding, whereby the essential element clause “*may be, amongst other things, an important factor for the exercise of the right to have [an] ... agreement suspended or terminated...*” can itself be seen as an indication of an alternative purpose of these clauses.<sup>150</sup>

Secondly, HRCs originally had a function of informing the relations between the parties as programmatic or basic principles. The “essential element” widened the hitherto positive function of

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<sup>144</sup> *Portuguese Republic v Council of the European Union* (C-268/94) [1996] E.C.R. I-6177; Eeckhout, *EU External Relations Law* (2011), pp. 135-136; Rosas, “The European Union and Fundamental Rights/Human Rights” in *International Protection of Human Rights: A Textbook* (2009), p. 467.

<sup>145</sup> Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), p. 30.

<sup>146</sup> For instance the Cooperation Agreement between the EEC and the Lebanese Republic [1978] OJ L267/2; Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), pp. 162-163.

<sup>147</sup> Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), p. 25.

<sup>148</sup> *Portugal v Council*, para. 25; Opinion of the Advocate General La Pergola (C-268/94), para 27.

<sup>149</sup> These includes Resolution of the Council of June 26-27, 1992 attributing “special importance to positive initiatives designed to ensure active support to those countries which are instituting democracy, improving human rights performance as well as promoting good governance”. It also referred to the Resolution of the Council and the Member States of November 28, 1991 on human rights, democracy and development recognising the duty of the Member States to promote democracy.

<sup>150</sup> *Portugal v Council*, para. 27; E. Fierro, “Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?” (2001) 7 E.L.J. 41, pp. 46, 63.

the HRCs by linking them to the rationale of art. 60 of the Vienna Convention. The non-execution provision therefore “complements” the essential element clauses,<sup>151</sup> rather than defines them. This is supported by Fierro’s literal reading of the HRC, in which “the basis” and “the essential element” parts of the clause are separated by the word “and”<sup>152</sup> (a drafting technique replicated in the Eastern AAs).

Thirdly, EU institutions have long acknowledged the importance of these provisions in creating conditions for positive engagement.<sup>153</sup> This has been part of a trend in political conditionality since the 1990s, of complementing the negative/sanction approach with positive/active measures,<sup>154</sup> providing “contextual support” for the positive function of HRCs.<sup>155</sup> The Commission views HRCs as “instruments for the implementation of positive measures”, increasing the “visibility of [EU] initiatives”.<sup>156</sup> Most recently “[t]he principal value” of a HRC was seen in the shared commitment to human rights and democracy.<sup>157</sup> Various commentators have also made a case for the positive function of the HRCs taking into account the general political conditionality of

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<sup>151</sup> F. Hoffmeister, “General Principles of the Europe Agreements and the Association Agreements with Cyprus, Malta and Turkey” in Andrea Ott and Kirstyn Inglis (eds.), *Handbook on European Enlargement: A Commentary on the Enlargement Process* (The Hague: TMC Asser Press, 2002) 349-368, p. 360.

<sup>152</sup> Fierro, “Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?” (2001) 7 E.L.J. 41, pp. 63-64, 67.

<sup>153</sup> Communication on the European Union’s role in promoting human rights and democratisation in third countries COM(2001) 252 final, , p. 9; Report on the implementation in 1993 of the Resolution of the Council and of the Member States Meeting in the Council on human rights, democracy and development adopted on 28 November 1991, COM(94) 42 final; Resolution of the European Parliament on the Annual Report on human rights in the world 2009 and the European Union's policy on the matter [2013] OJ C169/E, para 108.

<sup>154</sup> Williams, *EU Human Rights Policies* (2004), p. 46; Alston and Weiler, “An ‘Ever Closer Union’ in Need of a Human Rights Policy: the European Union and Human Rights” in *The EU and Human Rights* (1999), p. 11; B. Simma, J.B. Aschenbrenner, C. Schulte, “Human Rights Considerations in the Development Cooperation Activities of the EC” in Philip Alston (ed), *The EU and Human Rights* (Oxford: OUP, 1999), p. 578; Leino, “The Journey towards All that is Good and Beautiful: Human Rights and ‘Common Values’ as Guiding Principles of EU Foreign Relations Law” in *EU Foreign Relations Law: Constitutional Fundamentals* (2008), p. 265.

<sup>155</sup> Fierro, “Legal Basis and Scope of the Human Rights Clauses in EC Bilateral Agreements: Any Room for Positive Interpretation?” (2001) 7 E.L.J. 41, p. 67.

<sup>156</sup> 1995 Communication, p. 7.

<sup>157</sup> EU Annual Report on human rights and democracy in the world in 2013, COHOM 109, 11107/14, p. 47.

the EU.<sup>158</sup> In addition, the post-Lisbon legal framework demands active promotion of EU values across all areas of external action, reaffirming the meaning of the HRCs as instruments of positive value promotion.

The positive function of HRCs can be also discerned from a particular policy framework. Bartels, for instance, contextualises the positive policy function of the HRCs in the Euro-Med Agreements within the Barcelona process, linking it to the political dialogue and to the establishment of bilateral subcommittees.<sup>159</sup> A similar link can be traced between the Eastern HRCs and the ENP's political conditionality as discussed above. The latter was not merely restricted to the parties non-breaching of recognised norms, but focused on active involvement in various projects, accession to international conventions, and so on. A similar rationale can be found in the specific provisions of the AAs on the fulfilment of treaty obligations,<sup>160</sup> which have been interpreted to go beyond the negative duty of non-infringement to embrace a positive duty of implementation.<sup>161</sup> This is reinforced by the ENP's previous practice, in which positive actions were stipulated in the bilateral Action Plans to fulfil PCA obligations, including those related to democracy and human rights.

Furthermore, the HRCs should be linked to the objectives of the association mentioned previously. These not only describe the integration process, but also directly link the latter to the "common values" at its core.<sup>162</sup> Additionally, the Moldovan and Georgian AAs provide for the separate objective of "contributing to the strengthening of democracy", and tie cooperation in the area of freedom, security and justice to reinforcement of the rule of law and respect for human

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<sup>158</sup> Bartels, "The Application of Human Rights Conditionality in the EU's Bilateral Trade Agreements and Other Trade Arrangements with Third Countries" [2008] Policy Department External Policies, European Parliament, p. 14; Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), p. 168.

<sup>159</sup> Bartels, "A Model Human Rights Clause for the EU's International Trade Agreements" (2014), p. 14; Bartels, "A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements" (2004) 9 *Mediterranean Politics* 368, pp. 371-373, 375-378.

<sup>160</sup> Bartels, "A Legal Analysis of Human Rights Clauses in the European Union's Euro-Mediterranean Association Agreements" (2004) 9 *Mediterranean Politics* 368, p. 381.

<sup>161</sup> Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), pp. 29-30; 145-150; Bartels, "Human Rights and Sustainable Development Obligations in EU Free Trade Agreements" (2013) 40 *L.I.E.I.* 297, pp. 300-301.

<sup>162</sup> Common art. 1.

rights and fundamental freedoms.<sup>163</sup> This obviates the need for enquiry into whether the preambular references to the promotion of human rights and democracy are “assumptions on which the agreement is predicated or [...] genuine objectives”.<sup>164</sup> It can be argued that the reference to common values as the basis of cooperation is linked to the essential element clause, highlighting the issues of utmost importance for the agreement, among which are certain EU values established in art. 2 TEU. In the Georgian and Moldovan AAs, which have a separate objective on strengthening of democracy, the essential element clause can be seen as a clarification of that objective by adding certain indicators.

Moreover, the location of the HRCs within the General Principles suggests that it underpins the rest of the agreement. Hence, the HRC can be viewed as an umbrella provision informing all other instruments deployed by the EU, rather than as “one of the instruments” promoting democracy and human rights.<sup>165</sup> In this context, other relevant instruments, including the CFSP political dialogues would be based on the essential element clause as their main normative framework. The HRCs thus represent the common shared objective of promoting democracy and human rights in the Treaty, all other provisions in the agreement being means to achieve this end. The objective of political dialogue in the Eastern AAs can be linked directly to the essential elements clause, as it provides for strengthening respect for democratic principles, rule of law and good governance, human rights and fundamental freedoms.<sup>166</sup> While including these issues within the political dialogue could be seen as adding more substance to the essential element clause,<sup>167</sup> the converse is also true. The HRCs would normatively inform the political dialogue between the parties.

A similar positive link can be found in the provision on domestic reform whereby the internal policies of the parties should ensure respect for human rights, guarantee the stability and effectiveness of democratic institutions and rule of law, mirroring to a certain extent the HRC

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<sup>163</sup> Art. 1(2)(c) and (e) of EU-Moldova AA; art. 1(2)(c) and (f) of EU-Georgia AA.

<sup>164</sup> Bartels, *Human Rights Conditionality in the EU's International Agreements* (2005), p. 86.

<sup>165</sup> Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality* (2001), pp. 97-112.

<sup>166</sup> See art. 4(2)(E) of EU-Ukraine AA, art. 3(2)(h) of EU-Georgia AA; art. 3(2)(e) of EU-Moldova AA.

<sup>167</sup> D. Horng, “The HRC in the European Union’s External Trade and Development Agreements” (2003) 9 E.L.J. 677, p. 685.

content.<sup>168</sup> In the Georgian and Moldovan AAs, the call for domestic reform is much more detailed, setting benchmark-like conditions for political reform, including judicial reform, law enforcement, and the fight against corruption.<sup>169</sup> This may reflect the European Parliament's call to include such benchmarks in other agreements in the region.<sup>170</sup> Although such benchmarking might not be ideal in an open-ended agreement,<sup>171</sup> it may have been a means of departing from the previous ENP practice of setting benchmarks in non-binding instruments. The link between such positive conditions and the HRC as a general principle providing the relevant normative framework is obvious. However, it is not clear whether appropriate measures can be taken for breaching these conditions, a suggestion made for future practice.<sup>172</sup> Finally, the positive function of the HRCs is also seen in the procedure to allocate funding, whereby the AA provisions are part of the normative framework for allocating financial support under the ENP 2014-2020 financial instrument.<sup>173</sup>

Ultimately, this analysis suggests that a dual function should be ascribed to the Eastern HRCs. They have a positive function to inform the AAs, as well as other ENP instruments related to democracy and human rights, in the context of the ENP's positive conditionality. Their negative function is exemplified by the non-execution clause, which does not diverge sufficiently from previous practice to address past criticism. However, it does include certain noteworthy variations that can be justified with reference to the ENP rationale.

## Conclusion

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<sup>168</sup> Art. 6 of EU-Ukraine AA.

<sup>169</sup> Art. 4 of Georgian AA, art. 4 of Moldovan AA.

<sup>170</sup> S. 1(f), Resolution of the European Parliament on the negotiations of the EU-Armenia Association Agreement [2013] OJ C258E. As regards Georgian and Moldovan AA, the Parliament's resolution calls on providing "clear benchmarks for implementation of the Association Agreement" in general; see Resolution of the European Parliament of containing the European Parliament's recommendations to the Council, the Commission and the EEAS on the negotiations of the EU-Georgia Association Agreement [2013] OJ C153E; Resolution of the European Parliament containing the European Parliament's recommendations to the Council, the Commission and the EEAS on the negotiations between the EU and the Republic of Moldova on the Association Agreement [2013] OJ C51/E.

<sup>171</sup> Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" (2014), pp. 15, 23-24.

<sup>172</sup> Bartels, "The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements" (2014), pp. 23-24.

<sup>173</sup> Art.3, Regulation 232/2014 establishing a European Neighbourhood Instrument [2014] OJ L77/27.

While reflecting the EU's previous practice on HRCs, the Eastern AAs demonstrate that this practice is not set in stone. The standard model contains amendments to its essential elements and non-execution clauses. The scope of the essential elements clause is widened by the inclusion of additional elements and international instruments in its normative framework. In the case of Ukraine, the provision is also reflective of the political circumstances surrounding the signing of the relevant agreement. The three agreements demonstrate a novel practice of significantly expanding the General Principles beyond the essential elements, albeit in a somewhat arbitrary fashion as the distinctions between the Ukrainian AA and the Moldovan and Georgian AAs clearly demonstrate. The normative underpinning of the essential element clause indicates the most stringent standard in the neighbourhood to date, which might be explained by the level of political and economic proximity promised by the agreements.

The non-execution clause follows the now-standard distinction between taking appropriate measures in the event of general breaches of treaties and possible treaty suspension in cases of special urgency — replaced here by “exceptional circumstances” — for breaches of essential elements. In contrast to other treaty obligations, DCFTA obligations can be suspended in exceptional circumstances. This new practice is at odds with the EU's previous record and is intended to deprive the parties of the ENP's main incentive, the DCFTA. However, the negative application of the HRC clause remains unlikely, taking into account the scarce application of these provisions in the past. Moreover, the negative application would run counter to the very rationale of engagement through the ENP. The predominantly positive conditionality of the ENP, as well as the general trend in EU political conditionality, reveal an alternative, positive role of the HRCs. The content of the agreements, including their objectives, the provisions on political dialogue and the specific articles on political reform all reaffirm the positive functionality of the HRCs. The essential element clause provides the normative framework for any positive engagement in the domain of political reform and therefore underpins all other instruments deployed by the EU. It is this positive function that should be regarded as the added value of these provisions, rather than the unlikely possibility of negative measures in the event of a breach.