



## **EU Development Cooperation at a Crossroads: The Cotonou Agreement of 23 June 2000 and the Principle of Good Governance**

PETER HILPOLD\*

### **I. Introduction**

On 23 June 2000 a new Partnership Agreement between the EC and the African, Caribbean and Pacific (ACP) countries was signed in Cotonou, Benin. It marks the latest stepping stone in a cooperation process spanning several decades and involving first colonies of EEC member states and thereafter an ever-growing number of Third World countries. This cooperation framework, known under the terms Lomé I–IV (*bis*), became probably the most important development scheme world-wide, even though it was selective in its coverage as it applied mostly to states which shared a common past as former colonies of EC countries. For a long time, the legal basis in EEC law for this cooperation has been rather unsatisfactory; only through the Maastricht treaty was an explicit competence in this field introduced. There can be no doubt that there was a situation of reciprocal conditioning: The development cooperation experience acquired through the EC cooperation with ACP countries ultimately also influenced the legislative development at the level of EC primary law, while the new legislative basis in the articles 177 ss. ECT allowed for a more assertive approach to be taken during the negotiation process for the new Cotonou agreement. The outcome of this process reflects a far more refined understanding of the many factors that determine a comprehensive development policy. In the following, a detailed account of this legislative process – with regard to the EC level as well as to that within the EC–ACP partnership – will be given. On the basis of the Cotonou agreement, the direction of the present development policy will be examined. This document offers also an opportunity to look into the specific bonds that interrelate the single elements of conditionality in development cooperation. Special attention is given in this context to the principle of good governance which has been attributed paramount importance in recent years, not only on the EC level but on a world-wide scale.

\* Professor of Law, Institut für Öffentliches Recht, Finanzrecht und Politikwissenschaft, University of Innsbruck.

## II. Development Cooperation in the EEC: The First Years

When the legislative formation process of development cooperation over the last decades is examined, it has to be kept in mind that the concept of development itself has undergone a profound change during this period. What today may appear as a totally antiquated model may have been in the past an approach fully responsive to the highest demands in this field. One has therefore to be very prudent when assessing whether this whole process has brought about an approachment to the ultimate goal as this goal has continuously shifted and is itself subject to a permanent redefinition process. Analogous considerations have to be made if the larger issue of conditionality in development cooperation is examined. Even here we encounter two sets of elements subject to a permanent transformation process with regard to the content which is attributed to them in the general political discussion. Human rights, democracy, the rule of law etc. are all fields and principles continuously undergoing basic changes. If we consider the aforementioned changes in the concept of development, it is hard to find any yardstick by which the quality of a certain development policy can be assessed over a long time period. On the contrary, these yardsticks have to be readapted to the changing priorities of the relevant policies.

Having introduced the analysis with these cautionary remarks, we can now embark on an evaluation of the historic roots of the EC's development policies.

At the time the EEC was founded, development policies were not part of this institution's competences, nor could they be as they were considered to be part and parcel of foreign policy and this area was left out deliberately of the founding treaty.<sup>1</sup> Nonetheless, the roots for a legislative process which would later give way to an autonomous development policy were already present in the treaty of 1957. In particular, France, in a rather late stage of the negotiations for the EEC treaty, brought to the table the question of her colonies, thereby insisting on a preferential solution which should make the privileged economic relations with those dependent countries compatible with EEC law.<sup>2</sup>

The relevant provisions were set out in Articles 131–136.<sup>3</sup> They were the basis for an interesting process. They first introduced the idea of development

<sup>1</sup> See P. Pescatore, 'The Context and Significance of Fundamental Rights in the Law of the European Communities', in 2 *Human Rights Law Journal* 3–4/1981, pp. 295–308 (296).

<sup>2</sup> See D. Frisch, 'Vorbemerkung zu den Artikeln 130u bis 130y', in von der Groeben, Thiesing and Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* (1999), vol. 3, p. 2015, n. 2.

<sup>3</sup> Article 136a was inserted after Greenland had chosen in a referendum of 1982 to pull out of the EEC and the EEC treaty had been amended by the treaty of 13 March 1984. Greenland was attributed the status of the Overseas Countries and Territories (OCT).

through cooperation, albeit in a colonial context and thereby compromising the concept of development cooperation. As independence of the former colonies did not diminish their need for assistance and privileged cooperation, new policies had to be devised which would continue the early cooperation experience but at the same time remove all colonial connotations while endowing this cooperation regime with all the requisites needed under these circumstances. The circle was closed when the expanding European development policy had repercussions on the very provisions on association of overseas countries and territories which were adapted to the new standards. Whereas originally development of the overseas countries and territories was sought by close association on a permanent basis,<sup>4</sup> this aim was now to be achieved by autonomous instruments applicable between independent countries.<sup>5</sup> Buzzwords such as ‘participation’ and ‘cooperation’ mirrored this new setting. The new cooperation frameworks were to put all participating states on an equal footing. Development was to ensue from privileged cooperation conditions and not – or not primarily – from unilateral aid or from any instrument maintaining and reinforcing pre-existing dependency situations. The first framework agreement aiming to consolidate this idea (i.e. creating the basis for closer cooperation between the EEC and the former colonies of the Member States) was given the name of Yaounde, the capital of Cameroun and place of signature of this agreement. However, neither Yaounde I (in force from 1965 to 1970) nor Yaounde II (in force from 1970 to 1975) could live up to their respective expectations. These agreements could hardly qualify as genuine free trade agreements according to Article XXIV GATT, as they were based on a selective, widely non-reciprocal market opening.<sup>6</sup>

Neither could they be seen as genuine development instruments as they discriminated not only in favour of former French colonies but also – albeit indirectly – in favour of French enterprises doing business with these countries.<sup>7</sup> Therefore, it came as no surprise that, as the termination

<sup>4</sup> See P. Gilsdorf and A. Zimmermann, ‘vor Artikel 131 bis 136a’, in von der Groeben, Thiesingand and Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* (1999), vol. 3, p. 2093, n. 5.

<sup>5</sup> The provision on association (see now articles 182 and 188) of overseas countries and territories are still in force but have lost their importance to a large extent as there are only few overseas countries – with rather small populations – left. These provisions will therefore no longer be considered here.

<sup>6</sup> On the requirements a free trade agreement has to fulfil in order to correspond to Article XXIV see e.g. R.S. Imhoof, *Le GATT et les zones de libre échange* (1979) and P. Hilpold, ‘Regionale Integrationszonen und GATT – Die Neuerungen der Uruguay-Runde’, in 39 RIW 8/1993, pp. 657–668.

<sup>7</sup> See D. Frisch, ‘vor Artikel 130 u bis 130y’, in von der Groeben, Thiesing and Ehlermann (eds), *Kommentar zum EU-/EG-Vertrag* (1999), vol. 3, p. 2015, n. 3 s.

of Yaounde II drew closer, other Member States were no longer prepared to finance this selective approach,<sup>8</sup> especially as no tangible development progress in these countries was visible. In the first years of the 1970s, the following elements and considerations pushed for a reshaping of the EEC's relations with developing countries:

- While there was wide agreement that special relations should be maintained with developing countries which shared a common history with Member States of the EEC, the enlargement process – and especially the admission of Great Britain by 1 January 1973 – created the need to apply these measures on far a larger scale, i.e. to most of the developing countries which were formerly colonies of Great Britain. This did not impede the granting of concessions of lesser intensity to the developing countries on a global basis through the General System of Preferences.<sup>9</sup>
- Any new cooperation framework had to emphasize the development element more squarely. As this period was characterized on the one hand by a general empowerment of developing countries on the international political scene and on the other by an ever intensifying condemnation of any form of colonization, the new instrument had to be shielded against any possible criticism that it was merely a protraction of an old colonial exploitation scheme in a new, seemingly egalitarian dress.
- The empowerment of Third World countries found its clearest expression in the call for a 'New International Economic Order'. While many elements making up this catalogue of demands in the long run proved to be utopian, in the 1970s they nonetheless could not be totally disregarded; some sort of response was unavoidable should the dialogue between North and South be maintained. The elaboration of a new framework agreement represented an ideal opportunity to test the case for a new development cooperation approach.<sup>10</sup>
- For developing countries, fighting for their due position in international relations also meant underlining their sovereignty. Development cooperation

<sup>8</sup> On the whole, the selectiveness of this approach targeting mainly former French colonies did not significantly change when similar association agreements were concluded with the former British colonies of Nigeria (Lagos agreement, 1966) and Kenya, Tanzania and Uganda (Arusha Agreement, 1969).

<sup>9</sup> This differentiation in the intensity of preferences granted to third countries was continuously solidified leading in the end to a 'pyramid' of different preference structures. See P. Hilpold, 'Das neue Allgemeine Präferenzschema der EU', in *Europarecht* 1/1996, pp. 98–114 (104).

<sup>10</sup> See K.R. Simmonds, 'The Lomé Convention and the New International Economic Order', in 13 *CMLR* 1976, p. 315 at p. 321; T. King, 'Human rights in the development policy of the European Community: Towards a European World Order?', in XXVIII *Netherlands Yearbook of International Law* 1997, p. 51 at 54.

had therefore to be liberated from any patronizing attitude incompatible with a system of relations between equal partners. Concepts such as cooperation, partnership and dialogue became pivotal.

The results of the negotiations between the EEC and the host of developing countries to be included in the new agreement reflected very well these determining elements. Lomé I, named after the capital of Togo where it was concluded in 1975, was based on a rich set of instruments then dear to development strategist, such as preferential trade or tariff reductions, elements of commodity agreements (such as price stabilization programmes for commodities), financial transfer schemes and the creation of special institutions (such as the joint assembly where the development task could be approached as a challenge common to both the North and the South and where the ensuing problems could be tackled in a spirit based on partnership). Based on these preliminaries, conditionality could have no place in this scheme. Once deliberated, all measures should find a nearly automatic application. In 1975, there was not seen any need to provide for the possibility of suspending or terminating the financial flows, as development was considered the ultimate goal while any problem encountered on this way was nothing more than a sign that this goal has not yet been achieved. Furthermore, to attribute to the EEC a right to determine unilaterally the fate of the agreement would have been considered as a violation of the sovereign rights of all participating states.

This position was shown to be untenable during the Uganda crisis in 1977. The gross human rights violations committed in this country on the order or with the consent of Uganda's dictator Idi Amin cried out for a suspension of EEC aid in order to exercise any sanction at hand, but a closer look at the Lomé agreement revealed that the EEC was ill-equipped for measures of this kind. In fact, as the Lomé convention did not even mention human rights or democracy, it was difficult to argue that violations in this field would constitute a material breach of the agreement according to Article 60 of the Vienna Convention on the Law of Treaties (VCLT) or have provoked a fundamental change of circumstances according to Article 62 VCLT. What is more, the EEC was not even interested in questioning the binding force of this agreement and thereby creating a precedent. In the end, a pragmatic, albeit legally not totally convincing, solution was found. The Council deplored in its Declaration of 21 June 1977 the consistent denial of basic human rights to the people of Uganda and agreed to take steps to ensure that any assistance to Uganda under the Lomé Convention would not be misused for a reinforcement or prolongation of this situation.<sup>11</sup> In practice, the EEC was

<sup>11</sup> This declaration is also called as the 'Uganda Guidelines'. See also K. Arts, 'European Community Development Cooperation, Human Rights, Democracy and Good Governance: at Odds or at Ease with Each Other?', in K. Ginther et al. (eds), *Sustainable development and*

able to withhold development funds previously earmarked for Uganda as the Commission remained inactive and did not present any concrete financing proposal.<sup>12</sup> For the future, a more solid basis for actions of the EEC in cases like this was needed. The negotiations for Lomé II, a re-edition of the previous agreement which was required to take into account the experience of the first five years, was seen as an ideal opportunity by the EEC to make the necessary adaptations to the Lomé Convention. This attempt met, however, with strong resistance by the ACP countries: for many, the pledge to protect Western-style human rights and democratic principles was considered an impossibility, not only because it was regarded as too expensive but also because it did not coincide with the political priorities of many ruling elites. Similarly, the EEC Member States did not want to press hard on this issue for a number of reasons.

First, by the mid-1980s the divide between East and West in the definition of human rights and democracy was still alive. Any attempt to criticize a given human rights situation led to a comparable retort by the other ideological camp. Western countries were not interested in overloading this cooperation framework with a human rights discussion characterized by multiple cleavages between North and South and East and West, especially as this was connected to the risk of endangering other far-reaching economic and strategic interests that the EEC Member States had in the ACP countries.

Second, the attitudes of Western countries towards human rights problems in developing countries and to the legitimacy of their government was not unbiased, especially as a result of the ideological conflict mentioned above. This meant that several EEC Member States were in rather a weak position when undertaking the role of a neutral arbiter.

Third, the relationship between development and other aspirations such as human rights, democracy etc. were far from being explored.<sup>13</sup> Following a 'safe' approach, development was considered to be of value per se, thereby leaving all considerations about reciprocal dependencies aside.

*good governance* (1995), pp. 259–273 (268). In reality, it seems somewhat exaggerated to speak in this case of 'guidelines' as they did neither provide concrete guidance for the situation in Uganda nor in general for situations with gross violations of human rights or characterized by the denial of basic democratic principles. It was rather the expression of the principle that the EEC's development policy could not remain indifferent towards situations of the kind described.

<sup>12</sup> By 1979, when sanctions were lifted after the end of Idi Amin's dictatorship, only 5% of the funds for Uganda were effectively attributed to Uganda. See F. Hoffmeister, *Menschenrechts- und Demokratieklauseln in den vertraglichen Außenbeziehungen der Europäischen Gemeinschaft* (1998), p. 11.

<sup>13</sup> For a detailed account of a discussion spanning several decades, see E. Schläppi, *Menschenrechte in der bilateralen Entwicklungszusammenarbeit: Chancen und Grenzen aus völkerrechtlicher Sicht* (1998), p. 223 ss.

In the end, diplomats of both groups felt relieved that the issue of conditionality had been abandoned, even though that did not mean that the discussion itself had ended on a national level or in particular within EEC organs such as the European Parliament. On the contrary, this discussion was there to stay and to gain increasing impetus. Thus, on the occasion of the negotiations of the Lomé III Convention, which was to regulate relations between the EEC and the ACP countries during 1985–1990, it was practically unavoidable to make some reference to human rights. This happened in an albeit prudent and timid way and was as much the result of the broad dissent on fundamental issues as of the uncertainty of how conditionality should be shaped. Article 4 of the Convention made an indirect reference to human rights by highlighting the necessity of respecting people's dignity. Only in Annex I were human rights explicitly mentioned, even though the connection of human rights with development were somewhat contorted and confusing. While Paragraph 1 of this Annex seemed to attribute high priority to human rights issues, Paragraph 2 identified the full enjoyment of economic, social and cultural rights through development as essential to the dignity of people, their well-being and self-fulfilment. This wording could be interpreted as the expression of a consent that development was to be attributed absolute priority, as through this other goals in the field of human rights could be achieved. Paragraph 3 contained a pledge to fight all forms of discrimination, a pledge equally binding on the EEC Member States and the ACP countries. The only specific issue that was explicitly named was the eradication of apartheid, a clear concession by the EEC Member States to the ACP countries in order to make the whole system appear more balanced and to avoid the impression that talk about conditionality was nothing more than an instrument to impose Western values on developing countries.<sup>14</sup>

<sup>14</sup> The whole Annex I reads as follows:

1. The Contracting Parties hereby reiterate their deep attachment to human dignity as an inalienable right and as constituting an essential objective for the attainment of the legitimate aspirations of individuals and of peoples. They reaffirm that every individual has the right, in his own country or in a host country, to respect for this dignity and protection by the law.
2. The Contracting Parties proclaim that ACP–EEC co-operation must help eliminate the obstacles preventing individuals and peoples from actually enjoying to the full their economic, social and cultural rights and that this must be achieved through the development with is essential to their dignity, their well-being and their self-fulfilment.
3. In this respect the Contracting Parties reaffirm their obligation and their commitment under international law to fight for the elimination of all forms of discrimination based on ethnic group, origin, race, nationality, colour, sex, language, religion or any other situation. They proclaim their determination to work effectively for the eradication of apartheid which constitutes a violation of human rights and an affront to human dignity.

An ulterior provision designed to rebalance – at least formally – the system of rights and obligations was contained in Annex IX and regarded the rights of ACP students and migrant workers.<sup>15</sup> It was apparent that these provisions aimed to create the impression that the human rights issue concerned the EEC Member States as much as the ACP countries and that conditionality was not a one-way street. In reality, reciprocity was more apparent than real, as the human rights issue in the ACP countries were of a totally different nature to the problem of discrimination against ACP citizens in Western states. The question of the real implications of conditionality in Lomé III does not lend itself to an easy answer. On the one hand, the relevant provisions were far too general to have an immediate impact on the concrete human rights situation in the ACP countries. On the other, the basis was laid for a more intensive discussion of this issue and clarified that this matter was not totally outside a complex relationship concerned primarily with regulating issues of an economic nature. Notwithstanding the poor substance of the human rights provisions, from then on this issue was a possible object of discussion in the joint bodies of the Convention and foremost in the Joint Assembly.<sup>16</sup> Over the years these discussions proved to be – within the limits naturally set by this Convention – a very effective tool to address human rights issues, particularly in the ACP countries but also within EEC Member States. This discussion was in the end also essential for the further revision of the Lomé Convention. In this way, it was shown that the time was ripe for a stronger commitment and that there was not only the consensus for a more explicit wording of the relevant provisions but an outright need to further refine these norms.

The pace of this development was again boosted by the profound changes in international relations under way at the end of the 1980s. Although the demise of Communism in Eastern Europe and the spreading of Western-style democracy at the time of Lomé IV negotiations was still under way and could therefore not yet have had a full impact on the outcome, anticipatory effects were clearly perceptible. With Article 5 of the revamped Lomé Convention, the human rights issue moved centerstage. The achievement of high human rights standards was no more the necessary byproduct of the development process but an autonomous goal and a constituent element of development itself.<sup>17</sup>

<sup>15</sup> They and their families should benefit from ‘the fundamental freedoms as they derive from the general principles of international law’ and not be subjected to discrimination on the basis of racial, religious, cultural or social differences.

<sup>16</sup> See K. Arts, *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* (2000), p. 245 ss., giving further detail about the human rights activities undertaken by this body from 1984 onwards.

<sup>17</sup> Article 5 of the Lomé IV Convention read as follows:

Cooperation shall be directed towards development centred on man, the main protagonist and beneficiary of development, which thus entails respect for and promotion of all human

By qualifying the respect for human rights as a 'basic factor of real development',<sup>18</sup> it was assumed that, from this point on, efforts to protect human rights within the EEC-ACP relationship was a necessary element of any development initiative. It meant also that the relationship between development and human rights had to be further clarified should this new approach be of any real significance. Apart from the reiteration of the statements particularly dear to the ACP countries (protection of migrant

rights. Cooperative operations shall thus be conceived in accordance with the positive approach, where respect for human rights is recognized as a basic factor for real development and where cooperation is conceived as a contribution to the promotion of these rights.

In this context development policy and cooperation are closely linked with the respect for and enjoyment of fundamental human rights. The role and potential of initiatives taken by individuals and groups shall also be recognized and fostered in order to achieve in practice real participation of the population in the development process in accordance with Article 13.

Hence the Parties reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples. The rights in question are all human rights, the various categories thereof being indivisible and inter-related, each having its own legitimacy: non-discriminatory treatment; fundamental human rights; civil and political rights; economic, social and cultural rights.

Every individual shall have the right, in his own country or in a host country, to respect for his dignity and protection by the law.

ACP-EEC cooperation shall help abolish the obstacles preventing individuals and peoples from actually enjoying to the full their economic, social and cultural rights and this must be achieved through the development which is essential to their dignity, their well-being and their self-fulfilment. To this end, the parties shall strive, jointly or each in its own sphere of responsibility, to help eliminate the causes of situations of misery unworthy of the human condition and of deep-rooted economic and social inequalities.

The Contracting Parties hereby reaffirm their existing obligations and commitments in international law to strive to eliminate all forms of discrimination based on ethnic group, origin, race, nationality, colour, sex, language, religion or any other situation. This commitment applies more particularly to any situation in the ACP States or in the Community that may adversely affect the pursuit of the objectives of the Convention, and to the system of apartheid, having regard also to its destabilizing effects on the outside. The Member States (and/or, where appropriate, the Community itself) and the ACP States will continue to ensure, through the legal or administrative measures which they have or will have adopted, that migrant workers, students and other nationals legally within their territory are not subjected to discrimination on the basis of racial, religious, cultural or social differences, notably in respect of housing, education, health care, other social services and employment.

At the request of the ACP States, financial resources may be allocated, in accordance with the rules governing development finance cooperation, to the promotion of human rights in the ACP States through specific schemes, public or private, that would be decided, particularly in the legal sphere, in consultation with bodies of internationally recognized competence in the field. Resources may also be given to support the establishment of structures to promote human rights. Priority shall be given to schemes of regional scope.

<sup>18</sup> Article 5 para. 1.

workers, students and other foreign nationals from discrimination and the fight against apartheid), the approach was as follows:

- First of all, the traditional thrust, according to which development was essential for the full enjoyment of all economic, social and cultural rights, was maintained. In this sense, development was instrumental to the protection of human dignity and therefore to human rights. Under this perspective, the primary responsibility to act lay with the EEC. It was this group of leading industrial nations which had to contribute economically in order to enhance the developing process in the ACP countries if it wanted the human rights situation to improve.
- Even more emphasis was given, however, to human rights as a goal to address directly and not as a result of an economic development process. In this sense, human rights become the all-important issue. They can be seen as an integral part of a broadly defined concept of development and are to be realized simultaneously and not subsequently to economic progress. If we define development in the traditional and more restrictive manner, then human rights are an issue of at least equivalent (and more probably preponderant) importance. Development without the granting of fundamental rights becomes meaningless; in any case, it is not for the EEC to promote such a process. On a whole, this perspective highlightens the responsibility of the ACP countries in this process and attributes to them the primary duty to create the conditions where the development process can best unfold. Seen in this way, conditionality loses its patronizing touch and transforms itself in a mere request that the conditions have to be created where development cooperation becomes materially possible and meaningful.

This whole scheme was based on the ‘positive’ approach, whereby the respect of human rights should be incentivated and lead to closer cooperation. This seemed to be, at first sight, a very convincing and effective strategy.<sup>19</sup> On closer inspection, however, many questions were left unanswered.

First of all, it remained unclear what should happen to the cooperative relationship when human rights were abused. Even though much more emphasis had been put on the protection of human rights it was still doubtful whether this development entailed the right to unilaterally suspend or even terminate the relationship with the violator.

Second, it had not been made explicit what the ‘positive’ approach was to consist of. Continuing a predominantly economic cooperative relationship

<sup>19</sup> On the advantages of ‘positive’ measures over sanctions, see B. Simma, J.B. Aschenbrenner and C. Schulte, ‘Human Rights Considerations in the Development Co-operation Activities of the EC’, in P. Alston (ed.), *The EU and Human Rights* (1999), pp. 571–626 (578) with further references.

while demanding at the same time that human rights should be obeyed could result in nothing more than a reactive model, whereby the positive contribution to the creation of a civil society was totally missing.

Third, it was not clear which human rights were to be considered essential in such a civil society and how infractions could be controlled.

Fourth, it was uncertain how these rights would interact and how they could be inserted into a legal system, not as something foreign but as a structural element integrated into the self-controlling and self-adapting processes of that system and which would ensure that the law continuously adapted to social needs.

The whole policy to implant human rights obligations in a development cooperation agreement was bound to remain a failure if it could not be guaranteed that the ideas standing behind these provisions permeated the whole legal order and were applied by the competent administrative and judicial organs as an integral part of the entire system. This meant that the specific role of human rights as a prerequisite and a result of the development of a modern civil society had to be further elaborated. The groundbreaking political events starting at the end of the 1980s and reaching their culmination in the first years of the 1990s doubtless had a major impact on this process<sup>20</sup> and could be considered for the Mid-Term Review Process to Lomé IV. The result, Lomé IV-*bis*, which was in place for another five year period, was, in the field of our special interest, a largely modified agreement.

### III. Lomé IV-*bis*: Conditionality in its Purest Form

As has been shown above, the roots of human rights conditionality in the EEC Convention date back to Lomé III. Only with the Lomé IV-*bis* Convention of

<sup>20</sup> In this context the developments in Eastern Europe have already been mentioned. The success story of democratization and the spreading of human rights went, however, well beyond this fact. The UN acted with much more vigour in the defense of human rights. The Security Council permitted the use of force in cases where human rights were of paramount importance – even though not the principal legal justification for the intervention. See, for example, the intervention in Kuwait 1991 or in Haiti 1994. On this special issue of possible justifications for acts of humanitarian intervention see P. Hilpold, ‘The Right to Humanitarian Intervention – Is it Time for a Re-Assessment’, in: EJIL 3/2001, pp. 437–467. In Europe, groundbreaking contributions to the further consolidation and refinement of human rights and democracy were given by the OSCE; see in particular the document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990).

With regard to the development of a ‘right to democracy’ see the seminal contribution by Th.M. Franck, ‘The Emerging Right to Democratic Governance’, in: 86 AJIL 1/1992, pp. 46–91. See also G.H. Fox, ‘The Right to Political Participation in International Law’, in 17 *Yale Journal of International Law* 1992, pp. 539–609, and J. Crawford, ‘Democracy and International Law’, in LXIV BYIL 1993 (1994), pp. 113–133.

1995, however, did conditionality leave the field of political exhortation to become a fully defined and actionable legal principle.

The relevant provisions, Article 5(1)(3), read as follows:

Respect for human rights, democratic principles and the rule of law, which underpins relations between the ACP States and the Community and all provisions of the Convention, and governs the domestic and international policies of the Contracting Parties, shall constitute an essential element of the Convention.

This provision is to be read together with Article 366a(2) of Lomé IV-*bis*, the so-called non-compliance clause:

2. If one Party considers that another Party has failed to fulfil an obligation in respect of one of the essential elements referred to in Article 5, it shall invite the Party concerned, unless there is special urgency, to hold consultations with a view to assessing the situation in detail and, if necessary, remedying it.

For the purposes of such consultations, and with a view to finding a solution:

- the Community side shall be represented by its Presidency, assisted by the previous and next Member States to hold the Presidency, together with the Commission;
- the ACP side shall be represented by the ACP State holding the Co-Presidency, assisted by the previous and next ACP States to hold the Co-Presidency. Two additional members of the ACP Council of Ministers chosen by the Party concerned shall also take part in the consultations.

The consultations shall begin no later than 15 days after the invitation and as a rule last no longer than 30 days.

3. At the end of the period referred to in the third subparagraph of paragraph 2 if in spite of all efforts no solution has been found, or immediately in the case of urgency or refusal of consultation, the Party which invoked the failure to fulfil an obligation may take appropriate steps, including, where necessary, the partial or full suspension of application of this Convention to the Party concerned. It is understood that suspension would be a measure of last resort.

The Party concerned shall receive prior notification of any such measure which shall be revoked as soon as the reasons for taking it have disappeared.

With respect for human rights, democratic principles and the rule of law being qualified as essential elements, the emphasis in the Lomé agreement has shifted from economic cooperation to the political aspects of this relationship.

In fact, these elements were given such weight that their violation could delink the cooperation partner and bring financial flows and privileged trade to a halt. By stating that these elements underpinned ‘relations between ACP States and the Community and all provisions of the Convention’, it was made clear that they were an integral part of the development concept and their disregard rendered the continuation of a purely economic cooperation obsolete. Although the qualification as ‘essential elements’ would have rendered Article 60 of the VCLT applicable, a specific and precise mechanism was created upon which parties had to rely in case of an infringement of these principles. This procedure regulated in Article 366a reflected in its apparent balance the profound and unresolved conflict between partnership and cooperation within this approach. In fact, on the one hand the application of sanctions required the holding of prior consultations. This provision gave best expression to the partnership element on which the whole agreement was – at least formally – based. On the other hand, this consultation did not necessarily influence the final decision on the sanctions to apply nor did it impede the taking of sanctions in cases of special urgency. Thus, the cooperative process was confined to a first (possible) fact-finding and fact-assessing procedure. The final decisions were to be taken – and carried out – unilaterally.

Despite official declarations to the contrary, the human rights policy of the EU was still largely based on the ‘negative’ approach and this approach fitted well with the unilateral elements in the structure described above. On the whole, this situation was not fully satisfactory as on this basis a lasting success of the single initiatives in the field of human rights could not be guaranteed. The need to broaden the approach was, however, noticed. The qualification of the democratic principles and the rule of law as further essential elements meant that in the societies of developing countries, pillars had to be built which would be able to support human rights on a long-term basis.

The next question arising in this context is whether the concepts of democracy and the rule of law may really form a more suitable basis for the application of the principle of conditionality. A closer look reveals that these criteria give as many answers as they pose questions. Without doubt democracy and the rule of law on the one hand and the protection of human rights at the other are closely interlinked. Further relations exist between these principles and the concept of development, even when defined more restrictively, i.e. in a mainly economic sense.<sup>21</sup> It could be argued that these

<sup>21</sup> Whether a planned economy basically hostile towards private property rights could assure comparable (or better) economic results as (than) a market-oriented democratic system based on the guarantee of private rights was long a hotly debated issue.

Long before the demise of the Eastern Europe planned economies gave a definite answer to this question on a factual basis, a groundbreaking analysis (and prophecy) in this sense was

elements enlarge the basis on which to intervene. Requiring respect for democratic principles and the rule of law enlarges the set of instruments at hand with which the quest for a broadly defined development concept based on the protection of human rights can be pursued. Furthermore, this new strategy that takes into account respect for democratic principles and the rule of law is often not only a necessary but also a sufficient condition for human rights to be sufficiently guaranteed as a consequence.

However, as already hinted, this new approach is not free from ambiguities and could not be seen as the end of the discussion. First of all, it was only partially suited to bring the European development policy closer to the 'positive' side. While there is a point in arguing that requiring the establishment of democracy and the concomitant adherence to the rule of law gives more stability to a legal order, thereby reducing the need for punctual, sporadic interventions, it is not so clear what should happen when these principles are violated. In this case, 'negative' measures would probably remain the only remedy. A second problem relates to the definition of 'democracy' and 'rule of law'. While the developments in the last decade surely contributed in finding some commonly accepted elements for such a definition, there is still much disagreement between North and South in this field. This being so, it was hard to decide which elements of democracy should be insisted upon in order to obtain a lasting improvement of the human rights situation.

Finally, there was the problem that governments might perhaps be able to guarantee the introduction of some rudimentary form of democracy, pledge to obey the rule of law and promise even to observe basic human rights, perhaps enshrining them in a constitutional document, yet the real human rights situation would remain dismal. To put it differently, there was the danger that the formal constitution diverged clearly from the material one and that it would be difficult to nail governments down to a result-oriented policy guaranteeing a minimum level of human rights on a lasting basis. Of course, there was always the option of a return to 'negative' measures, but – in consideration of their drawbacks – this possibility could not justify the sticking to a model which was not totally satisfactory. Now the great challenge was to identify an instrument – or to develop a concept – which would hold

given by Ludwig von Mises in *Die Gemeinwirtschaft* (1922). For further elaborations on this issue, see Friedrich August von Hayek (ed.), *Collectivist Economic Planning* (1935). On the basis of this reasoning the adoption of the main features of western liberal economies is often regarded as a basic requirement to guarantee economic development.

The economic success of a few autocratic regimes in South-East Asia has long been seen as a possible confutation of this thesis. This objection does, however, not only not withstand closer theoretical scrutiny. It has been proven also empirically incorrect as the developments in the last years have shown. See also E. Schläppi, *Menschenrechte in der bilateralen Entwicklungszusammenarbeit* (1997), especially p. 223 ss.

governments directly responsible for negative developments in the human rights area and with regard to the observation of democratic principles without sacrificing the preference for 'positive' measure and without impinging too heavily on the respective governments' sovereignty. It appears that this instrument seems to have been found in the concept of 'good governance'.

#### **IV. The Agreement of Cotonou of 23 September 2000 and the Principle of 'Good Governance'**

By the end of the 1990s, the conditions under which a new development agreement could be negotiated had profoundly changed, not only in comparison to the time the Community first dealt with this matter but also with respect to the situation at the beginning of the decade.

First of all, the special relationship with the ACP countries had come under increasing criticism. This was true primarily for the economic and financial aspects of the agreement but it was also clear that it could not be claimed that these countries adhered to a set of conditions regarding human rights and democratic principles special only to them. The moral right to impose such conditions – and therefore their diplomatic feasibility – could be derived only from the universality of these principles and their general inclusion in all free-trade, cooperation and association agreements. A policy of this kind, already widely practiced in the first years of the 1990s, was in fact imposed as a rule by a decision of the Council from May 1995.<sup>22</sup> This practice has created precedents which had to be considered for a renegotiation of the Convention.

In the meantime, the competence situation within the European Union had changed. By the time of the treaty of Maastricht, a specific competence for development cooperation had been introduced in Article 130u of the EC treaty, becoming afterwards, on the basis of the treaty of Amsterdam, Article 177. While this change in the primary law had shown consequences during the negotiations for Lomé IV-*bis*, its full impact manifested itself only some years later when a successor regime for Lomé IV-*bis* was looked for as a new beginning in EU-ACP relations that would allow for agreement on a more innovative approach.

It is important to note that from the wording of Article 177 ECT (ex Article 130u), it does not appear that developing and consolidating democracy, the rule of law and respect for human rights and fundamental freedoms constitute independent goals of the treaty.<sup>23</sup> They are instead auxiliaries to development which, in the first paragraph of Article 177, remains largely defined in an

<sup>22</sup> See Doc. COM (95) 216, 23.5.1995.

<sup>23</sup> See A. Zimmermann and B. Martenczuk, 'Commentary on Art. 177 ECT', in J. Schwarze (ed.), *EU-Kommentar* (2000), p. 1700, n. 24.

economic sense. This results stem not only from the position of this provision in Paragraph 2 but also directly from its wording. In fact, this provision states that the Community policy *in this area shall contribute* to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms (emphasis added). The area in which this policy applies is defined in Paragraph 1. In addition, only a ‘contribution’ to these goals is looked for. The adoption of such a perspective was not only the result of a free balancing of values but also necessary to justify an EC competence in this field.

It can be argued that resisting the temptation for a stronger shift towards a purely intergovernmental system of development cooperation maintained the ambition for a further strengthening of the positive approach. At the same time, this implied the enhancement of the status of the Commission against that of the Council in this field. In fact, as has been convincingly shown,<sup>24</sup> the Commission is generally more inclined to follow a ‘positive approach’ while the Council prefers ‘negative’ measures.<sup>25</sup> On the whole, this provision was designed to strengthen the EU leadership in a broadly defined, value-oriented development policy started previously on a factual level. However, the exact direction of EU development policy remained open and therefore Lomé IV-*bis* could only constitute a first testing ground or a single step in a longer process.

With the Convention of Cotonou of 23 June 2000, the EU used a concept ‘borrowed’ from the World Bank.<sup>26</sup> It seems that this notion could bring some stability in the long-lasting process directed at arriving at some ‘workable’ concept to effectively apply conditionality in international development cooperation. It is still unclear whether this concept can live up to these expectations. The great challenge for the future will be in finding a commonly-agreed definition of this concept. Despite the existence of a sizeable number of documents and literary contributions to this subject, it is still hard to see a unitary design in this field. It is perhaps no coincidence that this concept is widely used in the documents of different institutions but in very few binding

<sup>24</sup> See M. Fouwels, ‘The European Union’s Common Foreign and Security Policy and Human Rights’, in 15 *Netherlands Quarterly of Human Rights* 3/1997, pp. 291–324 at 315.

<sup>25</sup> *Ibid.* Fouwels points at the specific interests that stand behind this different approaches. In the case of the Commission it is a large bureaucratic structure that is set up to carry out long term programmes and that is therefore not only best-equipped to follow a positive approach but which can justify the need for staff and funds by this way. The Council, on the contrary, is interested in ‘visible’ measures which show immediate consequences, i.e. measures where action and result stand close enough together so that the whole initiative can be sold politically to a public with rapidly changing interests.

<sup>26</sup> This notion was first used in the 1989 World Bank Report. See B. Simma, J.B. Aschenbrenner and C. Schulte, ‘Human Rights Considerations in the Development Co-operation Activities of the EU’, in P. Alston (ed.), *The EU and Human Rights* (1999), pp. 571–626.

instruments.<sup>27</sup> Its vagueness qualifies it for different uses in widely diverging situations where certain goals are to be achieved without it being possible to define detailed standards which have to be respected. This concept is therefore best-suited for integration in soft law instruments which can create an experimental basis for its application on a wider scale through binding instruments. The explicit integration of this notion in the Cotonou Convention implies a further step towards the ‘hardening’ of this concept. For the moment, however, there is an apparent conflict between the binding nature of the Cotonou Convention and the lack of precision of the concept of ‘good governance’.<sup>28</sup> While the prevailing view in the literature still seems to be that the issues of human rights, democratization, good governance and development are interrelated reciprocally to such a degree that it is nearly impossible to distinguish them individually,<sup>29</sup> it cannot be overlooked that efforts are under way to specify these elements. With regard to good governance within the special relationship between the EU and ACP countries, the most detailed clarification has been undertaken by the EU Commission in a Communication to the Council and the European Parliament of 1998<sup>30</sup> – at a time when discussions about a successor regime to Lomé IV-*bis* had already started. In this document, good governance is defined as the management of public affairs in a transparent, accountable, participative and equitable manner showing due regard for human rights and the rule of law: ‘It encompasses every aspect of the State’s dealing with civil society, its role in establishing a climate conducive to economic and social development and its responsibility for the equitable division of resources’.

On the whole, the long elucidation of aspects of good governance and of goals stated in this document and which are to be attained by this principle<sup>31</sup>

<sup>27</sup> See K. Arts, *Integrating Human Rights and Development Cooperation: The Case of the Lomé Convention* (2000), p. 41.

<sup>28</sup> Arguing in the same sense that this concept constitutes more a general term identifying a set of legal principles than a rule or principle of international law per se, see Th. v. Boven, ‘The Emerging Right to Good Governance’, in 13 NQHR 3/1995, pp. 304–311 at 311; K. Arts, *Integrating Human Rights into Development Cooperation* (2000), p. 41.

<sup>29</sup> See P. Nherere, Conditionality, ‘Human Rights and Good Governance: a Dialogue of Unequal Partners’, in K. Ginther et al. (eds.), *Sustainable Development and Good Governance* (1995), pp. 289–307 at 289.

<sup>30</sup> COM (1998) 146 final.

<sup>31</sup> The following aspects of good governance are stated in this document:

Equity and the primacy of law in the management and allocation of resources call for an independent and accessible judicial system that guarantees all citizens basic access to resources by recognising their right to act against inequalities. In the specific context of governance, this involves establishing a legal and regulatory framework that encourages private enterprise and investment.

The institutional capacity to manage a country’s resources effectively in the interests of economic and social development implies an ability to draft, implement and supervise

appears at the same time exhaustive and vague. On the one hand, we find a large number of terms and concepts which have been associated in the past with the notion of good governance. On the other, it is difficult to find a structure in this explanation. All elements indicated represent desiderata in a civil society based on respect for human rights, democratic principles, extensive participation of the public in all decision-making processes and respect for the rule of law. Totally lacking is any indication of the priorities or goals which should be first attained in order to allow for a gradual build-up of a civil society, it being, in most cases, feasible to attain that goal only over a longer process and not in a single step. Undoubtedly, we are confronted here with a comprehensive concept for which a detailed definition is not regarded as possible for the time being. Relying on such a concept means that there are no clear obligations to act as long as the concept has not been specified more closely. While in this way the direction of this development is predetermined, decisions for concrete measures need not to be rushed into. All too often in the past, negative experiences occurred when trendy concepts were hastily embraced and which subsequently lost their attractiveness as soon as an implementation was attempted. The new approach does no more than remove the assumption that the definitive solution in a difficult field has been found. Instead, the new philosophy is a very tentative, prudent one which should allow for the consideration of all the clarifications expected to mature in the next years.

Of course, this does not mean that the industrialized countries can relax and await the results of a process unfolding automatically. Instead, what is required is a combined effort to give further flesh to the concepts here in question, an effort no less intensive and demanding than that leading to the present situation. Without these efforts at clarification, the tangible risks of two extreme scenarios have to be confronted. On the one hand, there is the

policies addressing the needs of the people. The government and civil society must be able to implement an equitable development model and guarantee the judicious use of all resources in the public interest. Building public and private institutional capacities is vital because it directly determines economic and social development, and especially the effectiveness of development co-operation.

Transparency which entails being accountable and organising effective procedures and systems for monitoring the management and allocation of resources, implies that resource management is open to scrutiny and subject to controls. It is both a key factor in establishing trust between the various agents of development and a guarantee of institutional integrity.

Public participation in the decision-making processes concerning the management and allocation of resources. Development without the participation of civil society is inconceivable. Participation calls for the various agents of development to exchange views on major decisions relating to the management and allocation of resources and development programming. This dimension also concerns the scope to be given to private initiative, enterprise and civil society in development.

risk that a concept such as good governance, in which such far-reaching interpretative controversies persist, remains inapplicable. On the other hand, the scenario in which an ill-understood concept of good governance becomes an easy instrument for all-encompassing interventions looms even more dangerously in the background. Such an approach would conflict squarely with a development philosophy based on cooperation. Good governance as a central steering mechanism in the field of development cooperation requires predictability in its content, coherence in its application and transparency in its evaluation if it is not to de-couple development assistance from any normative foundation. At present, the concept of good governance is far more the expression of a political programme directed at making development cooperation dependent on the respect of certain basic values than expression of such values itself. To apply the concept of good governance as an operative instrument at this stage of its development could create a situation where unilateralism finds an all too easy excuse.

## V. Conclusions

The European Union's development policy is now at a crossroads. While the many attempts of the past to define conditions to apply to measures of development cooperation have constituted a long trial and error process with mostly unsatisfactory results, the approach exemplified by the new Cotonou agreement could mark the beginning of a new philosophy in this field insofar as it is based on the idea of partnership. This concept clearly conflicts with any form of an unilateral definition of the conditions which should govern the reciprocal relationship. Only those criteria upon which common agreement has been reached or consensus can be assumed can be attributed binding force. The prominent role attributed to the fight on corruption in the first attempts to consolidate the concept of good governance can be seen as a confirmation of this rule.<sup>32</sup> In fact, the task of fighting corruption covers only a small field of the broader issue of good governance. It is, however, an agenda upon which there can be found considerable agreement between North and South. Corruption is surely a problem by which industrialized countries and developing nations are equally plagued. To ask the cooperation partners to intensify their fight against corruption cannot be seen as patronizing as the EU Member States (and the European Union herself) are not denying their

<sup>32</sup> It remains, however, to be seen, whether the broad definition of corruption proposed by the Commission in the Communication to the Council and the European Parliament on a Union policy against corruption (COM 97 192 final, 21 May 1997) will find general recognition. In this document corruption was defined as 'any abuse of power or impropriety in the decision-making process brought about by some undue inducement or benefit'.

growing difficulties with this phenomenon. Furthermore, the EU Member States (as the European Union) can contribute to the overall goals of this task by coordinating their efforts with those of the developing countries. It cannot be overlooked, in fact, that corruption within the European Union is also threatening the development cooperation process.

While all these elements are not really contested, it is far less evident that consensus on further issues could be so easily attained. The work on the further refinement of this concept should be seen as a chance for the strengthening of the cooperation process itself. This issue could become a strong unifying bond between North and South within this cooperation framework. In order to achieve this, a very important step could be undertaken by the ACP countries. By enhancing the democratization processes now underway in many of these countries, they could strengthen the moral foundation of their call for a more prominent role in the definition process, overcoming in this way their traditional role as mere spectators in this discussion.

With regard to the economic aspects of the EU–ACP cooperation framework, we are now confronted with the real danger that the whole system could drift apart as bilateral free trade agreements replaces the multilateral architecture erected through the Lomé process.<sup>33</sup> While this new approach may be indispensable to achieve greater WTO conformity, it is not clear whether the new system will be suited to preserve the essential ideas which originally were the basis of this initiative. First among those ideas was the aim to strengthen the bargaining power of the developing countries by uniting them to a single negotiating centre. The diversity in the provisions regarding the field of economic cooperation could be compensated by a strong unifying bond with regard to common values. Success in this field is also of great importance for the reference role the European development policy has to play on a universal stage. The European Union has created an experimental field best suited to test the appropriateness of the new world-wide tendency to attribute central importance to the respect of values and conditions in development cooperation. After the many pitfalls of past experiences, it was therefore pivotal to choose a prudent, flexible approach in order not to imperil the idea of conditional development cooperation itself. Through the Cotonou agreement, the basis was laid for an intense dialogue in this clarification process, not only within the EU–ACP framework but also outside it in the ambit of the global efforts to devise a new all-encompassing value-oriented concept of development cooperation.

<sup>33</sup> On this problem see J. Huber, 'The Past, Present and Future ACP–EC Trade Regime and the WTO', in 11 *EJIL* 2/2000, pp. 427–438; A.K. Dickson, 'The Demise of the Lomé Protocols: Revising European Development Policy', in (2000) 2 *EFA Rev.*, pp. 197–214.