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978-0-521-87075-7 - Ethical Dimensions of the Foreign Policy of the European Union: A  
Legal Appraisal

Urfan Khaliq

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## 1 Introduction

In their foreign policies states have historically, in the main, sought directly to protect only their own interests. During the last thirty years or so, various administrations have formally declared that in their foreign policy formulation, acting either individually or collectively, they will take account of human rights, good governance and democracy, among other values. The European Union's current constitutive treaties expressly refer, for example, to the objectives of promoting and protecting human rights and democracy in third states. The Council, Presidency, the European Parliament, various Commissioners and the Commission have all on numerous occasions declared their desire to achieve those objectives and the methodology to be used in their pursuance.

Foreign policies which promote certain 'ethical' values and principles have often been theoretically analysed by International Relations scholars. This work is of interest and value but 'ethical foreign policies' also involve many questions of domestic and international law. Law is, therefore, as important a tool as International Relations in the analysis of such policies. This book analyses the European Union's efforts to this end in legal terms, to understand how and on what basis action (if any) is taken and how effective it has been or is likely to be. This study will focus on the European Union's relations with a number of primarily developing states. As a legal analysis of the European Union's 'ethical foreign policies' and practice, this study does not attempt to engage itself in the International Relations debates, although it does refer to them where necessary. It is concerned with a number of different legal questions.

Chapter 2 assesses 'ethical foreign policies' from a public international law perspective. It first discusses what such policies are and what

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the Union considers them to be. It then investigates which international legal rules, if any, oblige or allow the Union, Community and/or the Member States to promote certain values in third states or in certain circumstances to take action if they are being violated. It further examines the legal constraints on taking such action and whether it may be seen as intervention in the internal affairs of a non-Member State.

Chapter 3 examines legal policy and practice from the perspective of the European Union. Foreign policy powers are likely, in a nation state, to be among the powers exclusively reserved for the central or federal government or an inherent part of the royal or executive prerogative. With a system based on the principle of conferred powers, however, it must be positively established to what extent the Union has competence to act externally to promote and protect certain values and interests and the methods by which it can do so. The aim of Chapter 3 is to determine the scope of this competence, the legitimacy of acting under available powers and the extent to which they have been exercised in practice. Initially, it examines the instruments available to the Union and Community in the pursuance of foreign policy objectives. The main part of the chapter is concerned with the various relevant Community policies in this field as this is most relevant to the case studies which follow. In particular, this part of the chapter analyses how the Community has attempted to use all of its external competences to pursue its objectives, among others, in its development cooperation, trade and humanitarian aid policies.

The next three substantive chapters analyse practice. The litmus test for an 'ethical foreign policy' lies in its application. Policy statements and legal obligations are one thing, implementation quite another. Although a number of general surveys now exist on conditionality and its use in practice, the aim in chapters 4 and 5 is to look at the multitude of instruments and policies that the European Union has used in its relations with particular countries.<sup>1</sup> This allows analysis of the circumstances which are taken into account when acting and also how priorities are identified and furthered in the relationship that exists with

<sup>1</sup> In particular, K. Tomaševski, *Responding to Human Rights Violations 1946–1999* (The Hague: Kluwer Law International, 2000); E. Fierro, *The EU's Approach to Human Rights Conditionality in Practice* (The Hague: Kluwer Law International, 2002); M. Bulterman, *Human Rights in the Treaty Relations of the European Community: Real Virtues or Virtual Reality?* (Antwerp: Intersentia, 2001) and L. Bartels, *Human Rights Conditionality in the EU's International Agreements* (Oxford: Oxford University Press, 2005).

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those states. It also allows the opportunity to analyse the importance attached to ethical values and their relationship with other priorities and objectives. Chapter 4 examines relations with Myanmar, Nigeria and Pakistan.<sup>2</sup> Chapter 5 looks at relations with the Palestinian Authority and Israel in the overall context of the Middle East Peace Process (MEPP).

Nigeria, Pakistan and Myanmar have been chosen in Chapter 4 as the Union has a different legal relationship with each of them. There are, however, similarities between some of the domestic problems in each of these countries, in particular, in relation to democracy. Nigeria is a member of the African, Caribbean and Pacific (ACP) group of states and has been chosen as it allows for an evaluation of the role of the Lomé/Cotonou institutions.<sup>3</sup> In the context of relations with ACP states there are a number of examples of those Agreements being suspended and a number of other states could have been discussed: Rwanda, Haiti, Sierra Leone, Fiji, Sudan, Niger and Cote d'Ivoire to name just a few. Nigeria does, however, offer the opportunity to look at relatively recent practice and also consider the circumstances in which all punitive measures have been withdrawn and full relations resumed, something some of the other potential ACP case studies did not offer. Furthermore, Nigeria is politically and economically one of the most important ACP states.

Pakistan has been selected as a developing country which is outside of the Lomé/Cotonou scheme but is covered by the scope of some of the Community's other development cooperation programmes. It has a close trading relationship with the Union and its Member States and has concluded bilateral treaties with the Community. Two military coups and the subsequent suspension and limited reintroduction of the democratic process have occurred while formal relations have been in existence. Pakistan is also in many ways unique. It is in many respects a failing state: it has major constitutional and legal problems as well as widespread problems with human rights, democracy, corruption, good governance and extreme poverty. Military coups, its hugely important role in the 'war on terror' and the resumption of full cooperation with a military regime are distinguishing features. Chile, Brazil,

<sup>2</sup> Although a number of states, such as the United Kingdom, still prefer to use Burma, Myanmar will be used throughout this book.

<sup>3</sup> The Lomé Conventions (as is the case now with the Cotonou Convention) were between, on the one hand, the Community and its Member States and, on the other, the ACP group of states. These conventions are discussed in detail in Chapter 3.

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Columbia, Bangladesh, Sri Lanka, China and India, among others, would have been equally valid case studies.

Myanmar has been selected as another developing state, this time within the ASEAN<sup>4</sup> group of states, but one which has had all assistance, with the exception of humanitarian aid, suspended by the Community and with which the Union and its Member States have very limited contact. It is, however, a part of ASEAN, the other Member States of which enjoy bilateral treaty relations with the Community. It thus poses unique policy and strategic problems for the Union as to the approach to be adopted. The current military government has annulled previous democratic elections and is one of the more repressive regimes currently in power anywhere. Myanmar has also been selected as it is one of the few examples where it is possible to assess the full scope of the Community and Union's spectrum of measures against a state, taken in the absence of a sanctions regime imposed by the United Nations. Where the United Nations takes such action, the implementation of measures through the Common Foreign and Security Policy (CFSP) and/or Community legal orders is primarily intended to enable the Member States to comply with their obligations under the Charter of the United Nations. Myanmar, however, is an example of action taken by the European Union in the absence of measures having been adopted by the Security Council of the United Nations or in other international fora which are binding upon the Member States.

Chapter 5, as noted above, describes the role of the Union in the overall context of the MEPP and more specifically its relations with the Palestinian Authority and Israel. Although the 1995 Agreement between the Community and Israel is not a classic development cooperation-based one (the Community historically has had no definition of 'developing state' to determine which type of instrument it utilises),<sup>5</sup> it does contain an 'essential elements' clause. Israel's problems with its Arab populations both within its internationally recognised boundaries and in the Occupied Territories are well documented. Union relations with Israel and the Palestinian Authority also provide an ideal case study to examine the relationship between the CFSP and the Community legal orders, and other Union initiatives such as the Barcelona Process and the European Neighbourhood Policy (ENP), to assess the promotion of Union objectives.

<sup>4</sup> Association of South East Asian Nations. <sup>5</sup> See further the discussion in Chapter 3.

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In Chapter 5, many of the Maghreb and Mashreq countries could have made suitable case studies, as they are also part of the ENP and the Barcelona Process. Similarly, relations with, for example, Iran, Saudi Arabia and a number of other Middle Eastern states would have offered valid studies for analysis. A central focus of the Union's relationship with many Middle Eastern states, however, is the 'Palestinian issue'. The European Security Strategy 2003 considers resolution of the Arab/Israeli conflict to be a strategic priority for the European Union for this very reason.<sup>6</sup> Thus it was the logical choice to examine the relationship between the Union, on the one hand, and, on the other, Israel and the Palestinian Authority. Furthermore, as noted above, the case study with Israel allows the opportunity to investigate the pursuance of ethical values where the Community does not have a development-based competence and other geopolitical considerations play a role in that dialogue, in particular, the MEPP.

Having justified the selection of the case studies in chapters 4 and 5, it is equally important to explain why some other states, also worthy of discussion, have been excluded. The most obvious category of states not to be specifically discussed are the central, eastern and south-eastern European states. As the majority of these countries have already become or are to be future members of the Union or have a very close or 'special' relationship with the Union, they have by and large been subjected to different legal and political criteria by the Union and its Member States compared to other third states. For the purposes of the Organisation for Economic Cooperation and Development (OECD), World Bank and the United Nations Development Programme (UNDP) many of these countries are considered to be 'economies in transition', as opposed to developing countries, although they have in financial terms been the largest recipients of overseas aid from the Union and its Member States since the early 1990s. The Union and the Member States included human rights guarantees as a condition for the recognition of the statehood of many of the new states which emerged from the Soviet Union and Yugoslavia, following the end of the Cold War. These conditions went beyond the traditional criteria for statehood. Since then the Copenhagen criteria have established the basic requirements for all prospective members.<sup>7</sup> There is also already a very

<sup>6</sup> J. Solana, *A Secure Europe in a Better World: the European Security Strategy*, p. 8. The strategy was approved by the European Council, 12–13 December 2003, Doc. 5381/04, para. 84.

<sup>7</sup> See further the discussion in chapters 2 and 3.

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substantial literature on relations with these states<sup>8</sup> and furthermore the monograph as a whole primarily addresses the relationship between the Union and developing countries and thus it was not felt necessary to discuss relations with these states separately. This also explains the absence of specific discussion of relations with a number of other important third states, such as the United States, Japan and the rest of the Western developed world, including Canada, New Zealand and Australia.

The final substantive chapter on practice, Chapter 6, looks at the issue of humanitarian aid. A study of humanitarian aid is important for a number of reasons. In the first instance, the European Union considers that the humanitarian aid it distributes is clear evidence of its commitment to human rights, protecting human dignity and the upholding of certain other values and principles in relations with third countries. Furthermore, the theory of humanitarianism to which the Union subscribes should allow no influences, other than need, to dictate its actions and funding programmes. Humanitarian aid is, in this context, the ultimate test of the equal application of the principles and policies which are the subject of this monograph.

Chapter 7 draws some conclusions as to the legality and efficacy of the various policies and instruments used by the Union and the approaches adopted in practice.

<sup>8</sup> See, in particular, M. Cremona (ed.), *The Enlargement of the European Union* (Oxford: Oxford University Press, 2003) and C. Hillion (ed.), *EU Enlargement: a Legal Approach* (Oxford: Hart Publishing, 2004).

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## 2 Promoting Values in Foreign Relations: Policy and Legal Issues

### 2.1 Introduction

Foreign policies which have an ethical or principled dimension to them, or more conveniently but less accurately ‘ethical foreign policies’, are closely tied up with ideology and the desire to project a particular identity to the wider world.<sup>1</sup> The decision to promote such values also stems from the desire, or at the least acquiescence, of the domestic constituency to engage in such practices. Prior to the 2004 enlargement of the European Union it was estimated, for example, that 81 per cent of the Union’s population felt that the Union should promote human

<sup>1</sup> For example, Jose Pereira, during the Portuguese Presidency of the Council at a conference entitled, ‘The EU and the Central Role of Human Rights and Democratic Principles in Relations with Third Countries’, Venice, 25 May 2000, stated ‘[E]ncouraging respect for human rights and fundamental freedoms is at the centre of the relations between the EU and third countries . . . it is what we are about’, available at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/conf/third/open\\_per.htm](http://ec.europa.eu/comm/external_relations/human_rights/conf/third/open_per.htm). Also see Robin Cook, who as Foreign Secretary of the United Kingdom, in a speech entitled, ‘Human Rights into a New Century’, London, 17 July 1997, stated ‘human rights are at the heart of our foreign policy’. Although the Labour government which came into power in 1997 is widely credited with adopting the United Kingdom’s ‘ethical foreign policy’, a number of Foreign and Commonwealth Office (FCO) policy papers illustrate that previous Labour and Conservative governments had also adopted documents advocating such an approach: see FCO, *British Policy Towards the United Nations*, Foreign Policy Doc. No. 26 (London: HMSO, 1978); FCO, *Human Rights in Foreign Policy*, Foreign Policy Doc. No. 215 (London: HMSO, 1991); FCO, *Human Rights in Foreign Policy*, Foreign Policy Doc. No. 268 (London: HMSO, 1996); and further R. Little and M. Wickham-Jones (eds.), *New Labour’s Foreign Policy: a New Moral Crusade?* (Manchester: Manchester University Press, 2000). Also see J. Carter, ‘Address on Foreign Affairs’, University of Notre Dame, 22 May 1977; ICJ, *Human Rights in United States and United Kingdom Foreign Policy: a Colloquium* (London: International Commission of Jurists, 1978); and Dutch Ministry of Foreign Affairs, ‘Human Rights and Foreign Policy’ (1980) 11 NYBIL 193. Although such policies are generally considered to be a relatively recent development in international relations, the United States, for example, has (very)



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rights abroad.<sup>2</sup> The pursuit of ideological goals that are perceived as being moral and legitimate in domestic policy, such as, for example, protecting human rights, provides an accessible and easily understood rationale in the formulation of a polity's foreign policy.<sup>3</sup> Although foreign policy has many objectives, the pursuit of emotive ideological goals such as the protection of human rights in third states is newsworthy, leading to a pressure to act, whereas many other foreign policy objectives are far less visible and more abstract. Spokespersons for the European Union have made clear on numerous occasions its position on the promotion and protection of certain values in the Union's external relations. For example, Javier Solana, the EU High Representative for the Common Foreign and Security Policy at the Fifty-eighth Session of the UN Commission on Human Rights stated:

the European Union is determined fully to assume ... international responsibilities ... on account of our size, our wealth, our history and our geography. Our Union is set to play a prominent international role in the century to come. Human rights will remain at the heart of that role because human rights are at the core of European integration ... Ours is a Union of values.<sup>4</sup>

In a similar vein, the Council's first *Annual Report on Human Rights* stated:

Human rights ... are the foundations of freedom, justice and peace in the world ... [T]he Union's headway towards integration is paralleled in the field of human rights. In a world where human rights ... continue to be violated daily, the Union's commitment to human rights is continuously being translated into action.<sup>5</sup>

Such sentiments have been, *inter alia*, repeated consistently in the *Annual Report on Human Rights* since 1999. The Laeken Declaration of 2001 has

selectively promoted democracy in third states since the nineteenth century. See M. Light, 'Exporting Democracy' in K. Smith and M. Light (eds.), *Ethics and Foreign Policy* (Cambridge: Cambridge University Press, 2001) p. 75. For a comparative overview of the history of such policies see K. Sikkink, 'The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe' in J. Goldstein and R. Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change* (Ithaca: Cornell University Press, 1993) p. 139.

<sup>2</sup> J. Gras, *The European Union and Human Rights Monitoring* (Helsinki: University of Helsinki, 2000) p. 1.

<sup>3</sup> See F. Berman, 'The Role of the International Lawyer in the Making of Foreign Policy' in C. Wickremasinghe (ed.), *The International Lawyer as Practitioner* (London: BIICL, 2000) pp. 3, 9.

<sup>4</sup> Geneva, 19 March 2002, available at [www.europa-eu-un.org/articles/es/article\\_1232\\_es.htm](http://www.europa-eu-un.org/articles/es/article_1232_es.htm)

<sup>5</sup> Council of the European Union, *European Union Annual Report on Human Rights, 1998-1999* (Luxembourg: OOEPEC, 2000) p. 7.



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been significant in both asking questions and providing answers regarding the perception that European leaders have about the Union's values and its role and responsibilities in a globalised world. It states:

What is Europe's role in this changed world? Does Europe not, now that it is finally unified, have a leading role to play in a new world order, that of a power able both to play a stabilising role worldwide and to point the way ahead for many countries and peoples? Europe as the continent of humane values, the Magna Carta, the Bill of Rights, the French Revolution and the fall of the Berlin Wall; the continent of liberty, solidarity and above all diversity, meaning respect for others' languages, cultures and traditions ...

Now that the Cold War is over and we are living in a globalised, yet also highly fragmented world, Europe needs to shoulder its responsibilities in the governance of globalisation. The role it has to play is that of a power resolutely doing battle against all violence, all terror and all fanaticism, but which also does not turn a blind eye to the world's heartrending injustices. In short, a power wanting to change the course of world affairs in such a way as to benefit not just the rich countries but also the poorest. A power seeking to set globalisation within a moral framework.

The Declaration fails to mention, of course, that Europe is also the continent of the Holocaust and the home of states who through colonial empires brutally oppressed and plundered large parts of the world for a number of centuries, but the process started by the Laeken Declaration led to the clearest and most important articulation of the Union's perceived values: Article I-2 of the proposed Treaty Establishing a Constitution for Europe.<sup>6</sup> The fact that at the time of writing the Constitutional Treaty is not in force does not change that.<sup>7</sup> Article I-2 of the proposed Constitutional Treaty identifies the Union's different values (some of which are stated more than once) by declaring:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

<sup>6</sup> [2004] OJ C310/1, 16 December 2004.

<sup>7</sup> At the informal European Council held in Lisbon on 18–19 October 2007, the Treaty Amending the Treaty on European Union and the Treaty Establishing the European Community, which is to replace The Constitutional Treaty, was agreed. See the Table of Equivalences between the Constitutional Treaty and the Reform Treaty.

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In its relations with the wider world Article I-3(4) of the Constitutional Treaty states:

the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

These statements, declarations and treaty texts are a part of the European Union's international identity, whereby it represents itself as an entity constructed on a normative basis. As a consequence, the Union is predisposed 'to act in a normative way in world politics'.<sup>8</sup> It is certainly true that much of the Union's rhetoric in this regard is about external relations inspired by an 'ethics of responsibility' towards others due to its possession of political and economic power.<sup>9</sup> Lucarelli has argued, for example, that the Union is increasingly seen as an actor with principled behaviour in foreign policy, that behaves according to a set of dynamic yet identifiable values, principles and images of the world.<sup>10</sup>

These texts also illustrate, in part, the rationale upon which the Union wishes to legitimise its practices and identify some of the ethical values it considers itself founded upon and those which it wishes to promote. 'Ethical values' in this sense refers to the Union's perception of its disposition concerning a purpose and way of conducting itself in international affairs. Ethics can be encapsulated in a monolithic set of principles, in which case such an approach could amount to a 'morality' but that would narrow its scope.<sup>11</sup> Ethics in this sense concern the

<sup>8</sup> I. Manners, 'Normative Power Europe: a Contradiction in Terms?' (2002) 40 *JCMS* 235, 252.

<sup>9</sup> For an example of where the Union attempts to seduce the Chinese to adopt the same approach see B. Ferrero-Waldner, 'The EU and China: Moving Forward', Beijing, China, 18 January 2007, available at [http://ec.europa.eu/comm/external\\_relations/china/docs/07\\_speech\\_renmin\\_university.pdf](http://ec.europa.eu/comm/external_relations/china/docs/07_speech_renmin_university.pdf). It should also be noted that in the Millennium Declaration, General Assembly Resolution 55/2, 8 September 2000, para. 2, all states declared, 'we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level'.

<sup>10</sup> S. Lucarelli, 'Values, Principles, Identity and European Union Foreign Policy' in S. Lucarelli and I. Manners (eds.), *Values and Principles in European Union Foreign Policy* (London: Routledge, 2006) pp. 1, 2.

<sup>11</sup> J. Wallach, 'Human Rights as an Ethics of Power' in R. Wilson (ed.), *Human Rights in the 'War on Terror'* (Cambridge: Cambridge University Press, 2006) pp. 108, 111.