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The Coherence of the European Union as an International Actor: Facing the Challenge of Immigration and Asylum

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THE COHERENCE OF THE EUROPEAN UNION AS AN INTERNATIONAL ACTOR: FACING THE CHALLENGE OF IMMIGRATION AND ASYLUM

Alicia Cebada Romero[1]

Abstract

The incoherence into which the European Union falls in particular areas might be conceived as weaknesses, which put into question the very conception of the European Union as a civilian power (or "soft power") and cast some doubts about the new logic that would allegedly lie behind this conception. Does a specific European model of external action exist? Are there any differences between the way in which the European Union approaches International Law and the way in which hegemonic States do so? What is the relationship between external action and legitimation in the case of the European Union? All these questions are addressed in this article, being the underlying idea that the European model is clearly delineated in the European discourse. Nevertheless the lines of such a model are being blurred due, at least in part, to the own European Union incoherencies, which are particularly abundant in certain areas, such as immigration and asylum. The need arises for the European Union to completely develop its civil power model, for this will be beneficial for the EU itself, for the international society and eventually for international law.

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I. GENERAL REMARKS

It is not only the so-many invoked lack of military power that undermines the position of the EU in the world but also – and maybe primarily – its own incoherencies in its performance as "civilian power". In this sense, European policies on trade as well as on admission of people (including immigration and asylum) might be conceived as weaknesses, which put into question the very conception of the European Union as a civilian power (or "soft power"[2]) and cast some doubts about the new logic that would allegedly lie behind this conception[3].

Within the above mentioned areas, the EU falls closer to the logic traditionally applied by dominant States, namely a logic mostly based on submission/imposition (linked to power), rather than on recognition/acceptance (linked to reputation-legitimacy[4]), which would better fit the notion of civilian power.

Even though the European Union is firmly committed to multilateralism[5], the truth is that in some areas – such as the mentioned above -, the European policies are reflective of interests that do not match or, what is worse, even collide with the interests reflected in the multilateral

[2] HETTNE, B; SÖDERBAUM, F. "Civilian Power or soft imperialism: the EU as a global actor and the role of interregionalism". In: European Foreign Affairs Review, Vol. 10, 2005, p. 535-582, at p. 536

[3] On the connection between actorness and "the ability to determine the criteria governing eligibility", including "for admission of migrants or asylum seekers", see: BRETHERTON, Charlotte; VOGLER, John. "The European Union as a Global Actor". London; NY: Routledge, 1999, p. 223.

[4] FASTENRATH stresses the relevance of reputation for the subjects within the international legal order, wherein a rule has as many meanings as interpretations yielded by different international actors. FASTENRATH. "Relative normativity in International Law" 4 EJIL, 1993,EJIL, 1993, p. 336.

[5] Article III-292 of the "failed" Constitutional Treaty was very clear to this regard: (1) The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

(2) The Union shall seek to develop relations and build partnerships with third countries and international, regional or global organizations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.

(3) The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(a) safeguard its values, fundamental interests, security, independence and integrity;

(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders;

[...]

(h) promote an international system based on stronger multilateral cooperation and good global governance.

agenda. To not mention the fact that these actions are inconsistent with the own European discourse in which the commitment to multilateralism occupies a prominent position. These incoherencies drive the European Union to a loss of legitimacy, so that its position as a civilian power[6] results clearly undermined.

With regard to these coherence gaps, particularly within the field of the policy on admission of people, the denounced inconsistency might be conceived of as a consequence of the fact that the European Union is shaping its identity through two different ways. In a sense, the formation of identity through the exclusion of the others may be deemed troublesome precisely due to its inconsistency with the values upon which the EU's external action is allegedly founded, an external action which is also a way through which the European identity is defined[7]. Whereas the coherence exists to a greater extent within the field of admission of new members, the incoherence pops up when it comes to determine the criteria for admission of individuals. The resulting landscape is, to say the least, confusing: the European Union follows two different paths with the view, in both cases, to defining its identity and it turns out that the European Union going along one of the paths seems to be different from the European Union that follows the other path.

It might be said that this situation merely reflects the fact that the way in which the European Union approaches international law does not differ from the way in which dominant States do so. We all are pretty aware of how difficult is to combine universal values with the preservation of State's borders. The interaction between powerful States and international law has been examined by Nico Krisch, who has contended that hegemons oscillate between the submission to international law as a legitimizing tool, on the one part, and the withdrawal of international law in the pursuit of short-term unilateral interests, on the other part[8]. From our point of view the difference between the European Union and the dominant States, when it comes to define the terms of their interaction with international law, arises out of the fact that in the case of the

[6] European Commission, Communication: "The European Union in the world" COM (2006) 278 final, 8 June 2006: "Unsatisfactory co-ordination between different actors and policies means that the EU loses potential leverage internationally, both politically and economically"

[7] DILLON, Sara. "Looking for the progressive empire: Where is the European Union's Foreign Policy?" In: Connecticut Journal of International law, 19, 2004, p. 275.

[8] KRISCH, Nico. "International Law in times of hegemony: unequal power and the shaping of the international legal order". 16 Eur. J. Int´l L. 369.

European Union the search for legitimacy is directly associated with the shaping of self-identity and with the entrenchment of its autonomy. To further illustrate this difference, we can refer to particular circumstances arising in the case of the European Union:

a) The definition of the content of the EU´s international legal personality has to be derived from the founding Treaties as well as from the European institutions' acts through which the implementation of the Treaties takes place (it could be said in other words that the definition of the international legal personality derives from the rules of the Organization). This circumstance partly explains the relevance of the discourse in the case of the European Union. Whereas the States constitute a particular and essential category of international legal subjects, with competences and powers clearly delineated from a legal perspective (even though the contours of some of the existing limitations to the State powers remain unclear), the picture is far from being as clear in the case of the European Union as an international organization. The diversity characterizes the universe of international organizations within which, in addition, the European Union constitutes a unique specimen. At this point we might refer again to Fastenrath who contended that through the communicative action it is not only the meaning of the international rule to be defined, but it is also the identity of the subjects engaged in this communicative process that is being shaped[9]. In the case of the European Union the association between discourse and identity is beyond any doubt. The European Union defines itself through its discourse.

b) The European Union, as happens with the States, has to gain both international and internal legitimacy, but the difference is that when we refer to internal legitimacy in the case of the European Union we find two different actors from which the Union has to gain recognition: member states and European citizens. The European Union suffers from the lack of ways to communicate directly with the European citizens; the Member States play a crucial role in this communicative process, so that the communication between the European institutions and the citizens may be somehow distorted by the participation of the States. Under these conditions, the search for legitimacy in the case of the European

[9] FASTENRATH. "Relative normativity in International Law" 4 EJIL, 1993,EJIL, 1993, p. 336.

Union is particularly difficult due to the need to preserve the tenuous balance between the supranational interest and the national interest, being the crucial challenge to persuade the individuals that their personal interests may be closer to the supranational than to the national interest. It might be easier for the European Union to circumvent the Member States in this communicative process with the European citizens should the communication be based on the external action of the EU so that recognition from the citizens is gained through this action[10].

c) The European Union is a framework intrinsically bound to promote cooperation and solidarity and where consequently the unilateral interests of the States might be more easily overcome. And here it is worth stressing that the European Union has the proper tools to display this function. The extent to which solidarity is present within the European process will be further examined in following sections of this paper.

d) The recognition of the basic values upon which international law is nowadays based, as embodied in the notion of *ius cogens*, is a constitutive feature of the European Union's identity. Whereas the existence of a given State does not depend on its attitude towards International Law, the EU, as every international organization, is founded upon the commitment to abide by these peremptory rules, within the parameters established in article 53 of the Vienna Convention on the Law of Treaties[11]. According to this provision, it may be said that the respect for peremptory rules is a constitutive element of the European Union, whereas this is not the case with the States.

As a result of the concurrence of all these circumstances in the case of the European Union, we find a powerful actor, whose roots are firmly buried in the international legal order and which has a paramount interest in supporting multilateralism as a way to see its legitimacy increased. Nevertheless, as we are advocating multilateralism, a disclaimer may be necessary at this point. Multilateralism is incarnated in international organizations, which are supposed to shape and

[10] BRETHERTON; VOGLER draw attention to some analysis, which "indicate a widely held perception that, after its most highly approved function of maintaining an island of peace within its own borders, the EU's most important role is perceived as protecting and promoting European interests in the wider world. This suggests public support for the Union's aim to assert its identity on the international scene", op. cit., at p. 235

[11] Court of First Instance, Judgment 21 September 2005, T 315/01, p. 226-227

promote global or multilateral interest. Even though the interests of both, weak States and their suffering population, find many difficulties not only to be implemented but even to be effectively voiced within these institutionalised multilateral frameworks, it is clear that it would be worse not to have such frameworks. Some voices, such as Chimni´s, have *energically* claimed that the existing international institutions are tools at the service of imperialism and that they suffer from a deficit of both democracy and legitimacy[12]. We partly concur with these criticisms, but also think that it is not less true that the non-dominant countries, particularly within the international institutions, which have reached a certain level of autonomy, might exploit precisely these deficits. It is the case with the World Trade Organization (WTO). Even though it is far from being easy for the least well off countries to forge the alliances which would allow them to effectively voice their claims with a view to obtaining proper responses to their needs, the fact is that the more autonomy the Organization gets, the more clear is the interest of the Organization itself to be responsive to those complaints as a way to gain legitimacy. It is not without difficulties that an international institution gets the level of autonomy required to be able to impose an interest associated with the need to alleviate its legitimacy deficit. The tension between the interest of the Organization and the unilateral interests of the powerful member States will always be present and the result of the underlying struggle will be more or less favourable to the Organization depending on the level of autonomy reached by it.

At this point, it seems necessary to mention the recent failure of the Doha Round, last summer. The recalcitrant defence of the interests, within the agricultural sector, of the two most powerful WTO Members, United States and European Community, seem to have precipitated this daunting result. The Doha Round, as such, may be seen as an attempt on the part of the WTO to alleviate its legitimacy deficit through the clarification of the relationship between trade and development. Eventually, in spite of the efforts of the Director General, Pascal Lamy, who repeatedly expressed in all the possible ways that it was in the vital interest of the WTO to offer

[12] B.S, Chimni. "International Institutions today: an imperial global State in the making". In: 15 Eur. J. Int´l L. 1. It is clear that he is not against International institutions, but against the way in which they are currently shaped and put at the service of what he calls "an imperialist State". The best demonstration that he is not against institutionalization as such is that he preconizes the "institutionalization" of some form of global society through the creation of a global parliament, which would contribute to the realization of the direct democracy in the world. See also: POGGE, Thomas. "Recognized and Violated by International Law: The Human Rights of the Global Poor" En: Leiden Journal of International Law 18/4 (2005), 717-745

a response to the developing countries claims[13], the result yielded is just a disenchanting failure that evokes the landscape described by Chimni: the international institution appears once more as a tool to serve the dominant State's interests. This kind of behaviour prevents us from being excessively optimistic in regard to the "positive" interaction between the European Union and international law.

II ABOUT THE RELEVANCE OF THE EUROPEAN UNION'S EXTERNAL ACTION, AND ABOUT THE "NEW" LOGIC UNDERLYING THAT ACTION.

The definition of the European Union as a civilian power is more than a mere contradiction in terms[14]. Following Nicolaides and Howse, it might be said that when this definition is applied to the European Union it becomes an "oxymoron"[15], indeed it could be deemed as a reference to a new form of behavior within international relations, being this new behavior reflective of an unprecedented rationality.

As said in the previous section of this paper, the lack of statehood in the case of the European Union gives more relevance to the need for it to get recognition (increased support and legitimacy) as a way not only to entrench its actorness but also to define the precise contours of its international legal personality. As is well known the EU may be conceived of as a very *sui generis* international organization[16]. Uniqueness, dynamism and autonomy are its main features. As an international organization the European Union is founded upon an international treaty.[17] The specificity of the European Union arises from the extent to which, even though it is formally a State actor, it can express its own will. The European Union has gone the furthest, within the

[13] These Lamy´s words are sufficiently clear: "trade is the missing piece of the development puzzle – an essential third pillar. (…) the goal is not freer trade for trade's sake. It's about better living Standards for all countries – developing and developed alike". Remarks at the Development Committee World Bank, 25 September 2005. http://www.wto.org/english/news_e/sppl_e/sppl04_e.htm

[14] BULL, Hedley. "Civilian Power Europe: a contradiction in terms". In: Journal of Common Market Studies, n. 1-2, p. 149-164

[15] NICOLAIDES, K; HOWSE, R. "This is my EUtopia…:Narrative as power" JCMS 2002, Volume 40, Number 4, p. 767-792

[16] WEILER J.H.H; HALTERN, Ulrich. R. "The Autonomy of the Community Legal Order – Through the Looking Glass". In: 37 Harv. Int'l L. J. 1996, 411

[17] There is not "autopoesis" in the case of the European Union: NICOLAIDES, K; HOWSE, R. "This is my EUtopia…:Narrative as power" JCMS 2002, Volume 40, Number 4, p. 781

universe of international organizations, in the development of supranational formulas (including the existence of a reinforced supranational legal order), consequently reaching unprecedented levels of autonomy[18]. In this regard, the analysis of the EU as a self-contained regime is particularly attractive[19]. The supranational dynamic coexists with an intergovernmental dynamic, which operates in the areas of EU competence. These two different dynamics give rise to two different legal orders: the EC's legal order and the EU's legal order, which are "integrated but separate"[20], being the basic difference that the EC's legal order is supranational.

After having underlined the European Union's autonomy, it seems necessary also to draw attention to the fact that the States of course still exist within the European Union (we cannot reckon without them). They exert a crucial influence in the evolution of the European process. This influence has been recognized by the European Commission, which in its recent Communication on the role of the European Union in the world, underscores that the success of the EU external action depends on three main factors, being the most important the existence of a political agreement among the Member States on the goals to be achieved through the European Union[21].

Precisely due to the fact that the States are essential pieces within the European process, the strength of the EU's position in the world partly depends on its ability to prove that it is an autonomous entity. And, at the same time, the greater the recognition it gets from other international actors, the more autonomy it might gain vis-à-vis its constituents. Therefore, it comes as no surprise if we see the European Union engaged in an attempt to persuade the rest of the world that it has emerged a new type of superpower[22], one which is at the same time a result

[18] Mattias Kumm. "The jurisprudence of Constitutional Conflict: Constitutional Supremacy on Europe before and after the Constitutional Treaty". In: European Law Journal, Vol. 11, issue 3, 2005, at p. 266.
[19] We have addressed this question: "Algunas reflexiones en torno a la "fragmentación" del ordenamiento jurídico internacional en relación con las Organizaciones Internacionales". IVR XXII World Congress of Philosophy of Law and Social Philosophy. Law and Justice in a global society. May 24-29, Granada (Spain). In the process of being published. See recently: SIMMA, B; PULKOWSKI, D. "Of planets and the Universe: self contained regimes in international law". EJIL, 2006, Vol. 17, n.3, p. 483-529.
[20] Judgment Court of First Instance, 21 September 2005, Case T-315/01, at paragraph 120.
[21] COM (2006) 278 final.
[22] On Europe's identity, see: Von Bogdandy: The European Constitution and European identity: text and subtext of the Treaty establishing a Constitution for Europe". In: 3 Int'l J Const. Law, 295.

of the evolution of the international law and the international society and which can propel this evolution further, in a positive way, by counterbalancing the influence of the dominant States.

After all these considerations, the paramount importance of the European Union's external action seems utterly logical[23]. Grainne de Burca has accurately pointed out that the main result of the Treaty establishing a Constitution for Europe has been the reinforcement of the external side of the European Union's action[24], whereas allegedly the original intention of the drafters was rather to strengthen internal legitimacy. It's undeniable that the external dimension of the European integration process has been steadily gaining relevance over the years in an apparently unstoppable process culminating with the so-called Constitutional Treaty. From the contemplation of this process the idea arises that it is no longer possible to sustain that the legitimacy crisis from which the European Union is suffering "is likely to undermine the credibility of the EU and hence impede its capacity to act externally"[25]. Even if we accept that the lack of internal legitimacy might undermine its ability to project itself on the world stage, it is equally true that the EU is using the external action precisely as a means to alleviate its legitimacy crisis. Therefore, the relationship between external action and legitimation appears very clearly.

What are the ultimate reasons explaining the increasing brilliance of the external face of the EU? From the perspective of the European Union, as has been already said, there is a need to reinforce its identity not only in front of the world but also and maybe primarily, *vis-à-vis* both member States and European citizens.

On the other part, and going back to the role of the Member States we have to refer to the reluctance on their part to accept the broadening of the EC´s competences, which is not new[26] at all. The struggle for the competences has taken place over many years also within the field of the

[23]European Union has already left behind those times when it could be said: "Europe is not an actor in international affairs, and does not seem likely to become one": BULL, Hedley. "Civilian Power Europe: a contradiction in terms". In: Journal of Common Market Studies, n. 1-2, p. 149-164, at p. 151.
[24] DE BURCA, Grainne. "The drafting of a Constitution for the European Union: Europe's madisonian moment or a moment of madness?" 61 Wash. & Lee L. Rev. 555, spring, 2004.
[25] BRETHERTON, Charlotte; VOGLER, John. "The European Union... op. cit., p. 42.
[26] BRETHERTON, Charlotte; VOGLER, John. "The European Union... op. cit. p. 17.

EC´s external relations[27]. Nevertheless, so far the States´ resistance has not prevented the European Community from gradually gaining relevance as an international actor. Our intuition here is that the States might be currently moving from the struggle for the competences within the supranational pillar of the European Union to a more subtle strategy, basically consisting of regaining some control over the external action by reinforcing the intergovernmental pillar through the accomplishment of remarkable progress within the area of European security and defence policy. To put it another way: the States might be trying to shift the focus from the external relations of the European Community (supranational area) to the security and defence field (intergovernmental area). Beyond this rather recent trend, the traditional reason explaining the relevance given by the Member States to the external action of the European Union is basically connected to their will to increase their leverage on the global scene by acting collectively under the umbrella of either the European Community or the European Union[28].

In the account on the relevance of the external face of the European Union, it is also central to point to the need, voiced by several scholars, to counterbalance the power of the dominant States, particularly of the United States[29]. In this contribution it is assumed that an alternative global discourse within the realm of international relations is needed and that it is possible. Furthermore, to be fully honest we have to admit that this research is grounded on our wish to see the European Union firmly articulating and implementing such an alternative discourse (and consequent action), which would hopefully lead to the reinforcement of certain areas of the international legal order, including, in particular, those related to the protection of human rights, development cooperation, the spread of democracy, regional solidarity, etc. One of our primary contentions is that certain types of international organization might be considered as frameworks where the elaboration of this alternative discourse is facilitated, with the European Union being

[27] We have already analysed the struggle for competences within the external action field: "La Organización Mundial del Comercio y la Unión Europea". Biblioteca de Derecho de los Negocios, Madrid: Editorial La Ley, 2002.

[28] This process is well described by CHAYES under the label of "new sovereignty": CHAYES, Abram; CHAYES, Antonia. The new sovereignty Cambridge, Mass. : Harvard University Press, 1995

[29] See Jürgen Habermas & Jacques Derrida, February 15, or What Binds Europeans Together: A Plea for a Common Foreign Policy, Beginning in the Core of Europe, 10 Constellations 291, 293 (2003); FARRELL, Mary. "EU External Relations: exporting the EU Model of Governance?". European Foreign Affairs Review, Vol. 10, 2005, n.4, p. 451-462: "As much as American unilateralism renews the legitimacy of power politics on the world stage, the normative approach in the European management of international relations sustains the relevance of the very notion of global governance". At p. 453

the most advanced model of this kind of organization. As underlined in the preliminary remarks, the European Union is in a perfect position to propel a good evolution of the international legal order, contributing to delineate the contours and the content of the slippery notion of *ius cogens*.

Nonetheless, a recent jurisprudence delivered by the European Court of First Instance (CFI) proves that the European institutions might not be fully aware of the extraordinary influential role that the European Union may play to this regard[30]. This jurisprudence is related to the EU´s implementation of United Nations Security Council Resolutions imposing sanctions to individuals, who are hold responsible for being associated with Bin Laden or Al Qaida. An in-depth examination of these judgments is beyond the scope of this contribution, but we cannot avoid offering some general remarks about them. In this jurisprudence, on the one hand, it is recognized that the international organizations are intrinsically bound to abide by *ius cogens*, according to article 53 of the Vienna Convention on the law of treaties. In spite of the relevance of the recognition of this "constitutive" submission to *ius cogens*, the CFI´s pronouncements leave us unsatisfied for in these judgments the Court proves not to be aware of the role that the European Union can play in influencing the evolution of international peremptory rules. This jurisprudence does not match our expectations for the Court takes a restrictive approach as regards human rights protection, giving precedence to an interpretation of international law in which the interest in security prevails over the interest to properly protect the fundamental rights of the individuals. We do not find in the judgments in point the necessary recognition of the unprecedented development of the international law on human rights that has been taking place in Europe, reference that might have driven the Court to examine the existence of an European (regional) *ius cogens* within this particular field. Instead, we only find recognition of the primacy of the United Nations Charter, and consequently of the Security Council resolutions, over the EC

[30] CFI, Judgments 21 September 2005, T-315/01 and T-306/01; Judgment 12 July 2006, T-253/02. On this juriprudence see: ROLDÁN BARBERO, Javier. "La Justicia comunitaria y el control de legalidad de las resoluciones del Consejo de Seguridad de Naciones Unidas. Comentario a las Sentencia Yusuf/Al Barakaat y Kadi, de 21 de septiembre de 2005, del Tribunal de Primera Instancia de las Comunidades Europeas". I: Revista Española de Derecho Internacional, vol. LVII (2005), n. 2 p. 878; ESPÓSITO, Carlos; BLÁZQUEZ, Irene. "Los límites al control judicial de las medidas de aplicación de la política exterior en los asuntos Ahmed Ali Yusuf/ Al Barakaat International Foundation y Yassin Abdullah Kadi", Revista Española de Derecho Comunitario, núm. 17, 2006, pp. 123-148; SANTOS VARA, Juan. "La indefesión de los particulares frente a las sanciones del Consejo de Seguridad: el reconocimiento de la competencia de los tribunales internos para controlar las resoluciones del Consejo de Seguridad en relación con el ius cogens. Comentario a las sentencias del TPI de 21 de septiembre de 2005, asuntos Yusuf/Al Barakaat y Kadi y de 12 de julio de 2006, asuntos Ayadi/Hassan". In: Revista General de Derecho Europeo, n. 11, 2006, Iustel: Portal de Derecho.

law, according to the same parameters upon which the primacy of EC law over domestic law is articulated[31]. The result is a rather simplistic construction, in which no regard is paid to the fact that the Court of First Instance, when it comes to the implementation of Security Council's resolutions, is in the position that was occupied by the Constitutional Courts when the definition of the relationship between the national Constitutions and the European legal order was into play. Hence, the European Court of First Instance does not take into account that it was precisely the Constitutional Court's reluctance to accept the primacy of EC law as regards to the national constitutional rules enshrining human rights protection, that pushed the European Court to accept the gradual openness of the European legal order to the values enshrined in the national Constitutions, giving rise to a process in which the humanization of EC law was favoured. No due regard is either paid by the CFI to the fact that in contrast to the existence of a judicial mechanism within the European realm, there is no any institutional mechanism charged with the task to monitor the legality of the Security Council's action.

This jurisprudence is more worrying as it comes from an institution, which is called to defend the supranational interest. Our hope is that the European Court of Justice, which will have the last say[32], may still deliver a decision suitable to propel instead of reversing the process of humanization of international law. The ultimate intervention of the ECJ is an additional guarantee.

After all these considerations, the question remains about which is exactly the role that the European Union is playing on the international scene. It is true that it seems to be of EU´s interest to appear as a new kind of super-power, whose action does not rest primarily on power and subsequent submission, but on recognition. But we have also generous doses of European action that put the European reputation at risk[33] and that are reflective of the difficulties to conciliate all the different interests in play.

[31] See as example, Judgment 21 September 2005, T-315/01, p. 224
[32] The cases have been brought before the ECJ in appeal: C-402/05; C-415/05
[33] The relevance of reputation in regard to the capacity to exert some influence through interpretation of international rules is stressed by Fastenrath: "Relative normativity in International Law" 4 EJIL, 1993,EJIL, 1993, p. 336.

III SOME REFLECTIONS ABOUT THE RELATIONSHIP BETWEEN THE NEED OF RECOGNITION AND THE DEFINITION OF SELF-INTEREST IN THE CASE OF THE EUROPEAN UNION.

The ascertainment of the need of recognition in the case of the European Union leads us to interesting conclusions as regards the EU´s multilateralism orientation, associated with the definition of "self-interest". As a way to improve its reputation, it is in the interest of the European Union to proclaim certain objectives and values, shared with the international community, as grounds for its external action.

It is of interest to underline that within the EU there exist legal mechanisms to claim for full consistency between the European action and the European discourse. These mechanisms can be utilized by the European institutions and also by the individuals when the necessary requirements are met. In this line we would underscore the role of the European Commission, which, as is well known, is one of the European institutions more clearly representing the supranational interest. The European Commission plays a prominent role within the external action, negotiating with third countries for example. Even though in the implementation of this particular function it must follow the specific mandate issued by the Council, the fact is that the influence of the European Commission is remarkable in any case[34]: the European Commission determines to a great extent the approach to a particular country by drawing up the so-called strategic papers, in which the priorities in the relationship with that country may be established. The European Commission also gathers and manages plenty of information throughout its numerous delegations all over the world and so on. It is through their contacts with the European Commission that the third countries might more clearly exploit the argument of the harmful effects of incoherencies in EU's external action for the EU itself. The European Commission is probably the European institution interested the most in gaining legitimacy by achieving a widespread recognition of the

[34] A reference to the influential role of the Commission in pushing forward the negotiations with MERCOSUR: FAUST, Jorg. "Blueprint for an Interregional future? The European Union and the Southern Cone" In: AGGARWAL; FOGARTY (Ed.) "EU Trade Strategies: between regionalism and globalism", Palgrave Macmillan, 2004, p. 52. In p. 57 he states: "Even if the Commission has not always been either unitary or consistent in the course of the policy process, it has been the body that has pushed interregional trade liberalization more thoroughly. This behavior is consistent with the argument that the EC has an interest in expanding the Union's interregional trade policies as a means of increasing its influence within the EU".

European Union by other international actors[35], although it is not alone in the implementation of this task. We will analyze, below in this paper, the role of the European Parliament within the immigration and asylum fields. As regards to individuals, the recent cases brought before the European Court of First Instance, related to the imposition of "smart sanctions" by the EC in the implementation of UN Security Council resolutions is also paradigmatic. In many cases the European actions are ultimately monitored by the European Court of Justice, which supervises the legality of the impugned actions.

It is worth stressing that in measuring the "legality" of the European action, it is not only the formal fulfillment of International rules that is at stake, but also the solidness of the European discourse, which is based on a particular interpretation of international rules, one which is inspired by the relevance conferred to the people, one which might ultimately propel the humanization of international law. In this line, the European judges have a particularly tenuous role to play for in many cases they will be called to decide whether to give precedence to an interpretation of international rules and EC rules, which might develop to its last consequences the values upon which the European discourse is built up, neglecting the reluctance expressed by the member States; or rather to opt for a more stingy interpretation which might be read as a step back in the process of humanization of international law, an interpretation that, to a certain extent, plays down the solidness of the European discourse. It might be contended that in many cases the European incoherencies are supported not only by the member States, but also by the European population, so that for example as regards immigration, a restrictive approach – even when it is difficult to conciliate with the European commitment to human rights - is well accepted by the Europeans. In other words, it might be said that some incoherencies might have a low cost in terms of internal legitimacy. Nevertheless, we are doubtful about this reading, for the perceptions of the population may change, so that, following the immigration example, a less restrictive approach within the immigration field could be equally accepted as a better way to face the challenge represented by the large movements of people. An alternative discourse might be elaborated within international institutions. This option would require from the European a firm commitment to supporting the creation of a strong international organization tasked with the

[35] AGGARWAL; FOGARTY. "Between regionalism and globalism: European Union Interregional Trade Strategies". In: AGGARWAL, V.K; FOGARTY, E.A (Ed.) "EU Trade Strategies... op. cit, p. 10-12

management of immigration, for example. By favoring the shift of the decision making on the immigration field to the multilateral level, the European Union might contribute to change the European individuals perception that is currently biased towards the short-term interests of the destination States. Nevertheless, in order to avoid naivety, it is good also to recognize that, as has been unfortunately demonstrated by the failure of the Doha Round within the WTO, the existence of an institutionalized multilateral framework does not always guarantee the coherence. On the other hand this *multilateralization* is particularly difficult to accomplish within the immigration field, in this sense it suffices to recall that it has not been long since this area has been integrated into the EC´s realm.

Going back to the analysis of the EU´s institutional structure and of its suitability to propel the European Union interest, we might bring the reader's attention to a concept coined by Slaughter: "disaggregation of sovereignty"[36], referred to the transnational interaction of the different State's power. In the one hand it may be said that what Slaughter calls the "disaggregated transnational judicial, legislative and executive interaction" reaches its culmination in the relations among European States, as well as among States and European institutions, within the European Union. But we are interested in applying this idea of "disaggregation" not only to explain the evolution of the State's sovereignty within the European framework, but also to better understand the rationality underlying the institutional structure of the EU itself. The idea behind this conception of disaggregation is the existence of a (transnational) communication among powers. Within the EU we find a different phenomenon leading to a similar result. If we have a look at the EU´s institutional structure what we find is the unification of different powers within the same Institution. As a consequence, within the European Union the communication among the different traditional powers can take place within the framework of the same Institution. This situation is an illustration of the difficulties encountered in balancing the different interests present in the European integration process. For instance, even though the European Commission is traditionally presented as the institution representing the executive power, it is well known that it possesses also crucial prerogatives within the legislative process and that it is tasked with a monitoring function as well. It is not always easy to balance the different powers that the institution is called to exert.

[36] SLAUGHTER, Anne-Marie. "International Law in a world of liberal States" 6 EJIL (1995) 503-538, p. 527

It may be useful, at this point, to further illustrate the relationship between the European Union's interest and the multilateral interest. The point of departure may be the existing connection between the European Union's multidimensionality and the European Union's suitability to propel multilateralism[37]. In the European Union's realm, conceived of as a multidimensional framework, different objectives and priorities, also present within various multilateral frameworks, are brought together. The added value of the European Union might be the fact that as a comprehensive actor (almost as multidimensional as the States), it could contribute more comprehensively than many multilateral organizations to the achievement of many of these "multilateral" goals, being in a better position to manage the existing interconnection between them. No many States are powerful enough to undertake this kind of action. And whereas powerful States are not usually willing to support multilateralism, the European Union is probably intrinsically bound to promote it[38]. Due attention must be paid to the fact that the EU's leverage on the world stage is certainly larger than the leverage of the vast majority of the states typically interested in supporting multilateralism, which basically are weak states benefiting from its participation within multilateral phora[39]. In this vein, we can make reference to the clear commitment on the part of the Latin-American States to multilateralism, as proclaimed in the Declaration of Mar del Plata issued at the Fourth Summit of Americas (2005): "To achieve our sustainable development objectives, we need international and multilateral institutions that are more efficient, democratic, and accountable" (Paragraph 16)[40]. More recently the commitment to supporting multilateralism has been reiterated within the Fourth European Union/Latin America and Caribbean Summit (Declaration of Vienna, 12 May 2006[41]). It could be said that beyond the fact that through their participation in the European Union the States gain sovereignty, in the

[37] We have developed this idea in: "Regional integration processes and the social dimension of globalization. The European experience: some reflections about its implementation in Latin-America" In: Revista Internacional de Derecho y Ciencias Sociales, September 2006 (in the process of being published).

[38] FASSBENDER. "The better peoples of the United Nations? Europe's Practice and the United Nations" EJIL, 2004, vol. 15, n. 5, p. 857-884

[39] DE BURCA, Gráinne; SCOTT, Joanne. "The impact of the WTO on EU Decision Making, in: "The EU and the WTO: legal and constitutional issues", p. 27; HELD, David. "Democracy and the Global Order", 1995, p. 16. GERHART, Peter M. "The Two Constitutional Visions of the World Trade Organization". U. Pa. J. Int'l Econ. Law, 2003, Vol. 24, n. 1, p. 21.

[40] http://www.summit-americas.org/Documents%20for%20Argentina%20Summit%202005/IV%20Summit/Declaracion/Word%20Format/Declaracion%20IV%20Cumbre-eng%20nov5%209pm%20rev.1.doc

[41] http://ec.europa.eu/comm/world/lac-vienna/docs/declaration_es.pdf

sense that they increase their leverage on the international stage[42]; the European Union itself gains leverage in the world with this orientation towards multilateralism, namely turning to broader frameworks. Therefore, we think that it is possible to say that the EU's multidimensionality coupled with a strong dose of supranationalism, makes the European Union a suitable international actor to propel the fragmented multilateral agenda.

Nevertheless against this rather theoretical backdrop, the fact is that, the incoherence appears in the external projection of the European Union. The disappointment that this incoherence brings about, depends to a great extent on our expectations about the European Union. Precisely owing to its multilateralism orientation, to its high autonomy with regard to the States, to its willingness to support the cause of the least well off in the world, all of these elements clearly and repeatedly proclaimed in its own discourse, the incoherence is more unbearable in the case of the European Union. In other words, even though a certain degree of incoherence is unavoidable somehow, we may legitimately expect certain actors to be less incoherent than others, depending these expectations, partly at least, on the interest of the actor to be coherent. In the case of the European Union when it comes to the benefits arising from a coherent behavior, the stakes are high, connected to reputation, recognition, and legitimacy[43]. Precisely the relevance of the expectations has been acknowledged, very recently, by the European Commission itself in the following terms: "European citizens expect the Union to use its substantial international influence to protect and promote their interests and there is an expectation among our international partners for Europe to assume its global responsibilities"[44]. Actually the European Commission is here mentioning two different kinds of expectations: those from European citizens and those from EU´s international partners and the question arises whether both sets of expectations may be reconciled as well as whether the European Union might contribute to make this reconciliation easier.

[42] CHAYES, Abram; CHAYES, Antonia. "The new sovereignty... op. cit.
[43] We may legitimately ask whether it is sound to consider the European Union as an agent of the multilateral order. On the Agency Theory see for example: EISENHARDT, K. M.: "Agency theory: An Assessment and Review". Academy of Management Review, 1989, vol. 14, nº 1, p. 57-74
[44] European Commission. Communication: "The European Union in the world" COM (2006) 278 final, 8 June 2006.

Incoherence appears when self-interest drives the EU's actions. We draw attention on the fact that we are using a restrictive definition of self-interest, conceived of as the own interest that either does not suit or even collides with the interests that make up the multilateral agenda. Thus, we are not here conceiving of as self-interest, the own interest that matches the priorities proclaimed within the multilateral phora. In other words, our definition of self-interest does not encompass all possible unilateral interests, but only those that cannot be reconciled with the multilateral interests. Given the EU's proclaimed commitment to multilateralism, whenever we detect self-interest, as just defined, we will be also tracking incoherence to a certain extent.

IV THE PROJECTION OF THE EUROPEAN UNION THROUGH ITS DISCOURSE: JUST RHETORIC?

We can provide examples illustrating that the European Union's discourse goes beyond rhetoric, cases of European action that constitutes a coherent implementation of such a discourse.

Mention may be made to one feature that clearly contributes to shape the EU´s identity: the European commitment to promoting solidarity. The solidarity is expressed both internally (and here we are referring to regional solidarity) and externally. Indeed, one of the most salient features of the regional model that the European Union incarnates is the existence of regional and cohesion policies. There is no other example of a regional process which has gone as far in the implementation of these policies. Nonetheless, solidarity is not easy to implement and even in Europe we have recently witnessed the difficulties encountered in reaching an agreement on the European budget. Solidarity increases cohesion but when more solidarity is required from the States the result could be the opposite: that internal cohesion is put at risk[45]. And it is clear that the recent enlargement has forced the Member States to explore the boundaries of solidarity.

[45] From this "cohesion" perspective, PADOAN acknowledges the existence of limits: "Consensus to the regional agreement, and ultimately its size, will then depend on the degree of cohesion among its members. Cohesion problems will be greater the larger the asymmetric distribution effects, and therefore the larger the impact of scale effects generated by integration. These effects, in turn, will be greater the larger the diversity among members of the integration region. Once the costs for cohesion management (i.e. the costs that must be borne to offset the asymmetry effects) exceed the benefits from integration, the widening process will come to an end. A number will have been determined". PADOAN, Pier Carlo. "Political Economy of New Regionalism and World Governance". In: Teló, Mario. European Union and new regionalism. Regional actors and global governance in a post-hegemonic era. Ashgate, 2001, at. P. 43

In what Slaughter called "cross-fertilization among legal systems"[46] the role of the European Union is remarkable. For instance, with regard to the relevance given by the European Union to the social dimension of globalization we could mention its efforts to export formulas, which are already being successfully used within the European framework, such as the open method of coordination[47].

Another feature characterizing the European Union is its commitment to the promotion of regionalism. The European Union has developed a close-woven network of international agreements with several countries throughout the world. Some of these agreements shelter clauses promoting regional integration among the partner State and its neighbors[48]. In broad terms even the agreements with non-neighboring countries can be conceived of as an example of regionalism[49]. They are certainly an expression of interregionalism[50]. This is particularly clear in the case of the prospective inter-regions agreements, currently under negotiation, with MERCOSUR and the Gulf Cooperation Council (GCC).

The EU'S effort in promoting regionalism could certainly be deciphered as an attempt to exporting the European regional model to other regions in the world (inspiring effect – assimilation effect). That is not to say that the exported product has to be exactly alike the European model. In this line, even though the European Union is perfectly aware that the

[46] SLAUGHTER, Anne-Marie. "International Law in... op. cit. at p. 521

[47] We have analyzed the EU´s attempt to promote the usage of the open method of coordination, particularly within its relations with Latin American Countries. CEBADA ROMERO, A. "Regional integration processes and the social dimension of globalization. The European experience: some reflections about its implementation in Latin-America". In: Revista Internacional de Derecho y Ciencias Sociales, September 2006 (in the process of being published).

[48] Association and Stabilization Agreements with Balkan countries. See below.

[49] JOFFE, George Howard. "European Union and the Mediterranean". In: TELO, Mario. "European Union and new regionalism. Regional actors and global governance in a post-hegemonic era." Ashgate, 2001, p. 208. As regard to the lack of definition of regionalism: "A major problem, however, is to establish precisely what the term regionalism means. Neither a geographical nor a systemic definition alone provides a comprehensive mechanism for the conceptualization of the term. Geographical contiguity is clearly an essential component, but does not, of itself, provide any insights as to what regionalism actually is, although it does imply that a plurality of states is involved. Indeed, other than of the purposes of geographical or economic analysis, the term regionalism is meaningless unless defined in social or political terms as well. In short, the concept essentially relates to a process of political, cultural or social interaction between entities within its geographical bounds, and it is that process of interaction that gives it meaning". See also: HUNG LING, Chun. "Regionalism or globalism? The process of telecommunication cooperation within the OAS and NAFTA". In: International Trade Law Journal, winter 2002.

[50] At least of "hybrid interregionalism": AGGARWAL; FOGARTY. "Between regionalism and globalism: European Union Interregional Trade Strategies". In: AGGARWAL, V.K; FOGARTY, E.A (Ed.) "EU Trade Strategies... op. cit, at p. 5.

European model cannot be simply transplanted into other regions of the globe[51]; it is not less true that certain basic features characterizing the European model are clearly advocated by the European Union when supporting other regional integration process over the world[52].

In this vein we can make reference to the strategy implemented by the European Union towards the Balkan countries as the clearest expression of this purpose so far. Up to now the European Union has signed the so-called Stabilization and Association Agreements with two countries in that region: Croatia and FRY Macedonia, and negotiations with Albania are underway. In these agreements the Balkan countries commit to conclude integration agreements with their neighbors, being that integration in the region considered a precondition to making progress in the process of joining the European Union as Members. In these agreements even a deadline is established for the Balkan countries to conclude the required agreements. In this case the EU is stimulating the inception of regional integration agreements[53]. In other regions the EU offers support to existing interregional integration initiatives: we may mention the support to the Agadir Process in the Mediterranean[54], to MERCOSUR and other integration processes in Latin America, to ASEAN and SAARC in Asia, to the Gulf Cooperation Council (GCC) in the Middle West[55], to the various integration processes in Africa[56], and so on.

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[51] On the various models of regionalism, see: HURRELL, Andrew. "The regional dimension in International Relations Theory". In: FARRELL, M; HETTNE, Björn; LANGENHOVE, Luk. "Global Politics of regionalism. Theory and Practice", Pluto Press: London, p. 38-53.

[52] COM (2005) 311 final, 13/07/2005 Communication from the Commission: Proposal for a joint Declaration by the Council, the European Parliament and The Commission on the European Union Development Policy "The European Consensus": "Development policy is at the heart of EU external action": "Regional integration and the multilateral trade system reinforce one another. Developing countries' commercial policy is increasingly shaped in a regional context. The EU will continue to promote regional integration as a relevant strategy for harmonious and progressive integration of developing countries into the world economy, also in the framework of the economic partnership agreements", at p. 8.

[53] And it can be said that it has been successful in the development of this strategy, for there already exists an Central Europe Association Agreement: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1837&format=HTML&aged=0&language=EN&guiLanguage=en

[54] Nevertheless Telós underlines that for the time being the promotion of regional integration in the Mediterranean area has been pretty unsuccessful. "The EU's strategy to encourage partner to cooperate regionally seems to be particularly unsuccessful in the Mediterranean. The main question is as follows. Is the desired sub-regional cooperation community a matter of voluntary association or rather of a mere external coercion?; TELÓS, M. "The European Union and the challenges of the Near Abroad". In: TELO, Mario. "European Union and new regionalism. Regional actors and global governance in a post-hegemonic era". Ashgate, 2001, p. 183.

[55] http://europa.eu.int/comm/external_relations/gulf_cooperation/intro/index.htm

[56] As a matter of fact, the promotion of regional integration is one of the main purposes of the prospective Economic Partnership Agreements currently under negotiations with ACP countries. To this regard, see the explanatory

In addition, the European Union gets itself involved in integration processes with other States through different kinds of agreements. We have already mentioned the Association and Stabilization agreements with the Balkan Countries where the partners are contemplated as potential candidates to join the European Union as members. We have also the Euro-Mediterranean Agreements within the framework of the Euro-Mediterranean Partnership[57]. In all these agreements a remarkable degree of institutionalization is achieved[58]. We can also mention the strategy implemented with regard to Russia, consisting of the establishment of four common spaces: common economic space, common space of freedom, security and justice, common space on external security and common space on research, education and culture. The road map that should lead to the opening of these common spaces was delivered in May last year[59]. This strategy is by far more ambitious that the strategy enshrined in the current non-preferential agreement (partnership and cooperation agreement) in force as from December 1997[60].

As noted earlier some of these agreements are examples of different levels of integration between the European Union and non-neighboring countries. As has been said these agreements can be considered also as an expression of regionalism in a broad sense. Actually, the agreements with non-neighboring countries and those concluded with neighboring countries can be substantially alike. It is no longer possible to assert that the agreements with countries sharing borders with European Union are always more ambitious than other agreements. We can derive this conclusion from a comparison between Mediterranean agreements and the agreements upon which the relationships with Chile or with Mexico, for instance, are articulated. Nevertheless, the concept of preferential areas (pyramid of preferences) within the external action of the European Union has not been completely banished. It holds true that the amount of the financial support granted to the neighbors clearly exceeds the amount granted to other countries. In addition, there are agreements with non-neighboring countries, which do not set up an association between the

memorandum that sets out the strategy underpinning the negotiating mandate for the European Commission: http://europa.eu.int/comm/trade/issues/bilateral/regions/acp/nepa_en htm

[57] EC has entered agreements with: Algeria, Egypt, Israel, Jordany, Morocco, Palestine Authority. The agreements with Lebanon, Syria and Tunes are in the process of being ratified.

[58] For example in all of them we find a binding arbitral mechanism for dispute settlement. The agreements set up a Council empowered to enact binding resolutions.

[59] http://europa.eu/int/comm/external_relations/russia/summit_05_05/index htm

[60] http://europa.eu.int/comm/external_relations/ceeca/pca/pca_russia.pdf

parties but only a cooperation relationship. Cooperation agreements link the European Community to several Asian countries.

All these agreements suggest that the European Union is an expression of what Padoam defines as "cooperative regionalism" in contrast with other forms of regionalism that could be described as "conflict oriented"[61]. On the other hand, the fact that the European Union is pushing other countries to cluster themselves and consequently to operate according to a regional logic may lead to the surge of a sense of being part of a community in those regions[62]. With its regional approach the EU somewhat obliges these countries to agree in a common definition of needs so as to benefit from funds coming from Europe. The needs have to be defined on a regional basis.

We cannot close this section without mentioning that the accession of new members may be seen as another way to spread and reinforce regionalism. The geographical extension of the European Union itself raises questions about the optimal size of a particular regional integration process. As Telós contends[63], for the determination of such an optimal size questions regarding social cohesion within the region have to be considered. The European Union is at this moment negotiating with Turkey and Croatia with a view to their acceding to the European Union. And we know that some concerns emerge with regard to the opportunity for the European Union to engage in new accession negotiations without having digested completely the last one.

V INCOHERENCIES: IMMIGRATION, ASYLUM.

The difficulties within these fields arise partly from the existence of a conflict between the formation of identity by advocating values, which allegedly underpin the image which the

[61] PADOAN, Pier Carlo. "Political Economy of New Regionalism.. op. cit. p 40.
[62] AGGARWAL; FOGARTY. "Between regionalism and globalism… op. cit., at p. 19: "… the EU may see interregionalism as a means to promote counterpart coherence and institutional mimesis among potential and actual regional blocs, with its own model of regional integration being the exemplar. This too could feed back into the European identity, promoting the view that the EU is at the vanguard of a movement toward a new form of political, economic, and social organization that renders old national identities obsolete (or at least less important)".
[63] TELO: "Introduction…" In: TELO, Mario. "European Union.... op. cit., p. 21- 37

European Union wish to project, and the formation of identity through the exclusion of the others (the "exclusionary dimension of self-identity determination"[64]).

Whereas the enlargement processes normally have been developed according with the proclaimed values upon which the EU´s image is built up, the incoherence pops up within the realm of the treatment offered to immigrants and asylum seekers. As Bretherton and Vogler state, the "treatment of immigration and asylum issues, involving negative stereotyping of migrants and increasingly restrictive eligibility criteria, appears to support the notion that a process of negative identification, or "active othering" is contributing to the construction of an EU collective identity"[65].

In this line we are to examine the recent Family Reunification Directive case (i). We will also examine in the sections below the so-called "internationalization of the asylum" (ii), as well as the possibility for our partners to resort to the human rights clause (enshrined in the international agreements celebrated by the EC with third countries) as a means to require the European Union to act, within the immigration and asylum field, in a manner fully consistent with the international obligations regarding the protection of human rights (iii).

i) THE DIRECTIVE ON THE RIGHT TO FAMILY REUNIFICATION[66]

This Directive was impugned by the European Parliament before the European Court of Justice (ECJ)[67]. The Parliament lodged an action for the partial annulment of some articles of the Directive on the grounds that they collided with the right for respect of family life and the right

[64] BRETHERTON, Charlotte; VOGLER, John. "The European Union... op. cit., p. 236
[65] Ibidem, p. 238.
[66] Council Directive, 22 September 2003 on the right to family reunification, 2003/86/EC, OJ L 251/12 3.10.2003. This Directive is applicable neither to Denmark, nor to United Kingdom and Ireland. Denmark has probably the most restrictive family reunification system in Europe. This system is examined in: RUBIN, Lindsey. "Love's refugees: the effects of stringent Danish immigration policy on Danish and their non-Danish spouse". In: 20, Connecticut Journal of International law, 319. There is even a report from the former Human rights Commissioner within the Council of Europe denouncing that the system is not consistent with fundamental rights: Council of Europe, Office of the commissioner for Human Rights, Report by Mr. Alvaro Gil-Robles, Doc. N. Comm DH (2004) 12 (July 8, 2004): https://wcd.coe.int/ViewDoc.jsp?id=758781&BackColorInternet=99B5AD&BackColorIntranet=FABF45&BackColorLogged=FFC679 (last visited on 12/July/2006)
[67] 16 December 2003

not to be discriminated as enshrined in international treaties, such as the European Convention of Human Rights or the European Social Charter among others. In short, the impugned provisions authorize the Member States to establish some restrictions for family reunification in the case of children over 12 or 15 years old as well as to require specific waiting periods in order for the sponsor to be entitled to the right to family reunification.

The Advocate General had issued her Opinion at the end of last year[68], recommending the dismissal of the action on the basis that the contested articles could not be severed from the Directive without altering the substantial essence thereof. Nevertheless, even though she was advocating the dismissal of the action, the Advocate General engaged in a substantial analysis of the impugned provisions in order to elucidate whether they respected human rights.

The ECJ, on its part, has just delivered its Judgment[69], in which as regards to the severability argument, it is contended that with a view to deciding whether the contested provisions were severable, the need existed to previously examine the "substance of the case", including a substantive analysis of the impugned provisions. This was, according to the Court, necessary in order to ascertain whether "the annulment would alter the Directive's spirit and substance". In view of its previous jurisprudence on the application of the inseverability argument, it could be said that this contention amounts to a recognition that the provisions at issue do not constitute either "the core" or "one of the principle axes" of the Directive[70]. With this reasoning, the Court avoids taking position on difficult questions which had been raised by the Opinion of the Advocate General, in which, we reiterate, she had recommended the dismissal of the action on the basis that the Directive was a non-severable whole, conclusion that she had reached without the need to previously engage in a substantial analysis of the contested provisions.

[68] Opinion of the Advocate General, Juliane Kokott, 8 September 2005, C-540/03. http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-540%2F03&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100.
The Opinion is not available in English yet. We have resorted to the Spanish version.

[69] ECJ, Judgment 27 June 2006, C-540/03

[70] In two cases in which the ECJ has decided the dismissal of the action on the basis of the inseverability of the contested provisions, the Court has considered without going into the substance of the case, that "the contested provisions constitute the core of the contested regulation" (Case 36/04) or "constitute one on the principal axes of that Directive" (Case 244/03).

In fact, and going into more detail on the Advocate General's contention about the applicability of the inseverability argument as grounds to dismiss the action, it appears that her position was not sufficiently justified. There were many factors that the Advocate General had not taken into consideration and which would have probably driven her to a different conclusion.

It is true that the European Court of Justice has repeatedly stated in previous judgments that a partial annulment is not possible if the provisions at issue cannot be severed from the remainder of the act (C-17/74, p. 21; C-29/99, Commission v. Council; C-378/00, Commission v. Parliament and Council, p. 117; C-239/01, Germany c. Commission, p. 36-37; C-68/4, p. 256; C-244/03; C-36/04, p. 20). Being the central point of the ECJ's reasoning in all these cases, that the impugned provisions must be considered non-severable if they cannot be annulled without altering the substance of the whole act and that this is "an objective criterion and not a subjective criterion linked to the political intention of the authority which adopted the measure at issue"[71].

Nonetheless, as said above, there were circumstances particularly relevant, to which the Advocate General failed to pay due attention in the case of the Family reunification Directive. Firstly, the dismissal of an action for annulment on the grounds that the contested act constituted an indivisible whole, has been decided in rather few cases. To our knowledge, so far only in two cases the ECJ has dismissed the action on that basis[72]: Judgment 30 March 2006, C- 36/04; and Judgment 24 May 2005, C-244/03[73].

As regards to the existence of particularly compelling circumstances surrounding this case, mention must be made to the fact that there existed a crucial difference between the Family Reunification Directive case and the two cases were the action had been dismissed by the Court on the grounds that the impugned provisions were not severable from the remainder of the act. This fundamental difference arose from the fact that the contested provisions of the Family Reunification Directive were being impugned on the grounds that they allegedly failed to protect human rights as was required by EU Law and International Law. Indeed, in the Family

[71] See for example paragraph 37, C- 239/01.
[72] There have been other cases in which the European Court of Justice after recognizing that the contested articles were not severable from the rest of the Act and ruling out the possibility of a partial annulment has eventually decided to annul the whole Act. Examples: C- 68/94; C-376/98.
[73] It is worth noting that in this particular point the European Commission aligned with the European Parliament sustaining the divisibility of the Directive.

Reunification case, human rights protection was at stake, furthermore some of the human rights at issue were rights conferred upon a particularly vulnerable group of people: the children. To put it another way, if the ECJ had been particularly restrictive in its application of the non-severable whole doctrine to dismiss actions for annulment, by the same token it could have been expected an equally restrictive approach in this case, considering that human rights protection was the fundamental issue.

We do not find any reflection on this point in the Judgment of the Court. It is true that the Court deviated from the Advocate General's Opinion but not by saying that the non-severability argument might not have been applied to this case for its connection to human rights protection. The deviation from the Advocate General's Opinion arises out of the fact that the dismissal has not been founded by the ECJ on the application of the non-severable whole argument but on the grounds that the contested provisions were not inconsistent with fundamental rights. As already said, the Advocate General had firstly concluded that the Directive constituted an indivisible whole and then, on the basis of the substantial analysis of the contested provisions she had found that one of such provisions, article 8, might be deemed inconsistent with International law[74]. Thus, if the Court had followed the Advocate General's Opinion, in its integrity, the result would have been that a Directive with at least one provision inconsistent with international law would have remained in force. We, therefore, miss further reflection on the part of the Court, on the application of the non-severability doctrine to provisions related to fundamental rights.

To our view the ECJ has lost a splendid opportunity to shed some light on the blur contours of the inseverability argument. It would have been sound and fully consistent with the relevance accorded by the European Union to the protection of human rights, to make clear that the non-severability argument should not lead to a situation in which a provision infringing human rights is kept in force. Besides, in contrast with the finding of the Court our view is that there was no need to go into the substance of the case to decide whether the severability argument could be

[74] In this vein, it is worth noting that the Advocate General herself contends, in her analysis of the impugned provisions, that Article 8 of the Directive could be deemed inconsistent with the obligations assumed by the EC in regard to human rights protection. As seen above, this provision allows Member States to require 2 years in residence before conferring on the immigrant the right to family reunification. This waiting period might even be extended up to three years.

utilized in this case. Whereas the contention of the Court is that inasmuch as the contested provisions fully respect human rights, there is no need to rule on the severability of such provisions; our point is that even though the Court had found that the contested provisions infringed human rights, the severability argument could not have been invoked as grounds to dismiss the action.

i.1 The European Parliament's role in this case

In this case it is the European Parliament who took the lead, with a view to removing certain articles of the impugned Directive. At first sight it could be deemed as striking that the European Commission was supporting the Council, placing itself far from the EU's interest to project the image of being an international actor primarily committed to the promotion and respect for human rights. From our point of view, the scope of getting more EC legislation enacted as a way to occupy new fields should not be pursued at any price. It seems not to suffice the justification that the harmonization that the Directive brings about, adds a new guarantee because by enshrining the international standards of protection in the Directive, these standards become a parameter of legality also within the European Community legal order, so that theoretically any national action inconsistent with these standards might be contested on the grounds that it infringes EC Law as well. In this sense, the basic idea underlying both the Advocate General's Opinion and the subsequent ECJ´s Judgment reads as follows: the provisions at issue may be interpreted in accordance with the pertinent international obligations and therefore they may be also implemented by the States in a way fully consistent with fundamental rights. But even if this approach is accepted as formally correct, the problem arises out of the fact that it will be certainly difficult to guarantee that the right interpretation will prevail in every case, mainly when the validity of some of the criteria used to restrict the right to family reunification must be established on a case by case basis.

Let's engage in a more detailed analysis of the Judgment of the Court in the next sections of this work.

i.2 The substance of the case

As already said, the European Parliament impugned this Directive before the Court on 16 December 2003. The EP contested more precisely three provisions of the Directive: Article 4.1 (last paragraph)[75], article 4.6[76], and article 8[77].

The Directive at issue was adopted by the Council on the basis of article 63, paragraph 1, point 3 of the EC Treaty. The second paragraph of the Preamble of the Directive expresses the commitment to abide by international law in the following terms: "Measures concerning family reunification should be adopted in conformity with the obligation to protect the family and respect family life enshrined in many instruments of international law. This Directive respects the fundamental rights and observes the principles recognised in particular in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and in the Charter of Fundamental Rights of the European Union".

We find particularly interesting the reference to the Charter of Fundamental Rights. In paragraph 38 of its Judgment, the ECJ refers to the non-binding nature of the Charter, stating that by mentioning this Document in the Preamble, the EC legislator intended to underline its relevance. We might ask whether it is possible to go beyond this reflection about the relevance of the Charter. It might be contended that in spite of the non-binding nature of this instrument, it would be possible for the legislative power to confer binding effect upon it. In this sense, if the express commitment to respecting and observing the rights and principles enshrined in the Charter had

[75] "By way of derogation, where a child is aged over 12 years and arrives independently from the rest of his/her family, the member states may, before authorising entry and residence under this Directive, verify whether he or she meets a condition for integration provided for by its existing legislation on the date of implementation of this Directive.
As regards to this point, paragraph 12 of the Preamble states that "the possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school".

[76] "6. By way of derogation, Member States may request that the applications concerning family reunification of minor children have to be submitted before the age of 15, as provided for by its existing legislation on the date of the implementation of this Directive. If the application is submitted after the age of 15, the Member States which decide to apply this derogation shall authorize the entry and residence of such children on grounds other than family reunification"

[77] Article 8: "Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her.

By way of derogation, where the legislation of a Member State relating to family reunification in force on the date of adoption of this Directive takes into account its reception capacity, the Member State may provide for a waiting period of no more than three years between submission of the application for family reunification and the issue of a residence permit to the family members"

been included in the main body of the Directive, the Charter would have become a parameter for measuring the validity of the latter. In this particular case, nonetheless, the commitment to abide by the Charter is not as compelling for it is included in the Preamble (which as stated recently by the Court of First Instance "has no inherent legal significance"[78]).

In paragraph 31 to 33 of its Judgment, the ECJ lists all the international provisions whose violation is denounced by the European Parliament. Basically, this institution contended that the impugned Directive was inconsistent with article 8 of the European Convention on Human Rights, which regulates the right for respect of family life and which had been interpreted by the ECJ as including the right to family reunification (Case Carpenter[79]) and article 14 enshrining the right not to be discriminated, contending that the envisaged restrictions for minors over 12 and 15 years of age were inconsistent therewith.

Other relevant international rules, which we also find listed by the Advocate General in her Opinion, were, along with the already mentioned European Charter of Human Rights, the European Social Charter (article 19), the European Convention on the Legal Status of migrant workers (article 12), International Covenant on Civil and Political Rights (articles 17, 23 and 24), the UN Convention on the rights of the Child (articles 9, 10 and 3), the UN Migrant Workers´ Convention (article 44) and the ILO Convention n 143 (article 13).

i.3 The absurdity arising from the different levels of protection accorded to the family in the cases of removal and reunion.

On the basis of the jurisprudence of both the ECJ and the European Court of Human Rights (ECHR)[80] it can be safely maintained that the protection afforded to the family members against the expulsion goes well beyond the extent to which a right to reunion is recognized to the same individuals. In fact whereas the right to respect for family life, as enshrined in the European Convention, is interpreted as not giving the members of the family a right to enter the territory of

[78] Court of First Instance, Judgment case T-367/03, 30 March 2006
[79] ECJ, C-60/00, Carpenter.
[80] See for instance, ECHR, Judgment 11 July 2002, Amrollahi v. Denmark

the State where the sponsor lives, the removal of the members of the family from the country where they live with the sponsor may more clearly be considered an infringement of the right to respect for family life as established in Article 8.1 of the European Convention on Human rights [81].

For example in the above mentioned Carpenter case[82], the ECJ ruled against the order to expel a woman from Philippines who had remained in United Kingdom after the expiration of her residence permission, being married with a British national in the meantime[83], sustaining that her removal would have amounted to an infringement to the right to respect for family life.

In view of these different approaches applied to the expulsion of the family members, on the one hand, and to the reunion, on the other, we may ask whether the immigrants are not being unintentionally encouraged to evade the law when bringing their family (and particularly their offspring) to Europe. In fact, it would be very difficult to justify a decision to expel a minor once it had been demonstrated that he/she had been living within the European territory, even though the minor had irregularly crossed the European border. In the Judgment in the Akrich case the ECJ ruled in the following terms: "Where a national of a Member State married to a national of a non-Member State with whom she is living in another Member State returns to the Member State of which she is a national in order to work there as an employed person and, at the time of her return, her spouse does not enjoy the rights provided for in Article 10 of Regulation No 1612/68 because he has not resided lawfully on the territory of a Member State, the competent authorities of the first-mentioned Member State, in assessing the application by the spouse to enter and remain in that Member State, must none the less have regard to the right to respect for family life under Article 8 of the Convention, provided that the marriage is genuine[84]"

[81] ECJ, C-109/01, Akrich, paragraph 59
[82] Judgment C-60/00
[83] Judgment C-60/00, paragraph 13
[84] Paragraph 61

In the same line we could draw attention on a very recent judgment of the European Court of Human rights where it has ruled against the order of expulsion from Leetonia of a Russian national. Paragraphs 77-78 of this Judgment are particularly enlightening to this regard[85].

We would also like to bring the readers´ attention to paragraph 53 of the ECJ´s Judgment on the family reunification Directive[86]. In the same sense we might also mention article 10(2) of the Convention on the Rights of the Child: "where national borders separate children from their parents, states must allow sufficient freedom of movement to enable the families to see one another regularly"[87]. With these elements in sight, the difficulties to avoid that the minors, even though not entitled to family reunion, enter the European territory with the intention of remaining, are pretty clear[88].

i.4 The first provision at issue: last sub-paragraph of article 4.1

[85] Judgment 15 June 2006, Affaire Sevanova c. Lettonia:
« 77. La Cour rappelle que la plupart des requêtes similaires que la Cour a examinées jusqu'à présent sous l'angle de l'article 8 de la Convention, concernaient des cas où l'étranger expulsé ou en voie d'expulsion avait commis des crimes ou des délits graves (voir, parmi d'autres, les arrêts *Moustaquim*, *El Boujaïdi*, *Dalia* et *Baghli*, précités, ainsi que *Beldjoudi c. France*, arrêt du 26 mars 1992, série A n° 234-A ; *Nasri c. France*, arrêt du 13 juillet 1995, série A n° 320-B ; *Boughanemi c. France*, arrêt du 24 avril 1996, *Recueil* 1996-II ; *Bouchelkia c. France*, arrêt du 29 janvier 1997, *Recueil* 1997-I ; *Mehemi c. France*, arrêt du 26 septembre 1997, *Recueil* 1997-VI ; *Boujlifa c. France*, arrêt du 21 octobre 1997, *Recueil* 1997-VI, et *Ezzouhdi c. France*, n° 47160/99, 13 février 2001). Dans une partie de ces affaires, la Cour a constaté une violation de l'article 8 de la Convention nonobstant la gravité des condamnations pénales prononcées contre les intéressés. En revanche, dans la présente affaire, les faits incriminés à la requérante ne constituaient pas une infraction pénale au sens strict du terme, mais une simple contravention administrative passible d'une amende relativement modérée –, qui, de surcroît, ne lui a jamais été infligée.
78. En résumé, et après avoir mis en balance, d'un côté, la gravité du comportement reproché à la requérante, et, de l'autre côté, celle de la mesure appliquée à son égard, la Cour conclut que les autorités lettonnes ont outrepassé la marge d'appréciation dont jouissent les États contractants dans le domaine en question, et qu'elles n'ont pas ménagé un juste équilibre entre le but légitime que constitue la défense de l'ordre et l'intérêt de la requérante à voir protéger son droit au respect de la vie privée. Elle ne saurait donc conclure que l'ingérence litigieuse était « nécessaire dans une société démocratique ».
Partant, il y a eu violation de l'article 8 de la Convention ».
[86] Thus, the Court had held that, even though the ECHR does not guarantee as a fundamental right the right of an alien to enter or to reside in a particular country, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the ECHR (*Carpenter*, paragraph 42, and *Akrich*, paragraph 59).
[87] GA Res. 44/25, annex, UN GAOR, 44th Session, supp. N. 49, at 167, UN Doc. A/44/49(1989).
[88] It is of interest to mention that in European countries, such as Spain or Italy the fact that the minor is in an irregular situation would not constitute an impediment to get him/her registered in a public school.

The first provision at issue is, as already said, the last sub-paragraph of article 4.1, which applies to the cases in which the minor over the age of 12 arrives to Europe separately from the "rest of the family"[89].

This provision has to be associated with recital 12 in the Preamble of the Directive, which reads as follows: "The possibility of limiting the right to family reunification of children over the age of 12, whose primary residence is not with the sponsor, is intended to reflect the children's capacity for integration at early ages and shall ensure that they acquire the necessary education and language skills in school"

As the European Parliament denounced, if the goal was to facilitate the integration of the minor, it could have been pursued through means other than just the erection of barriers to the minor entrance. These other means might be rather addressed to facilitate the integration of the minor once he/she has crossed the European borders.

According to the reasoning of the ECJ (paragraph 70), the concept of integration enshrined in the contested provision cannot remain unspecified; on the contrary it has to be further defined by the implementing national legislation. Besides, the Court underlines that the conditions for integration can be used to evaluate the situation of a child over 12 years only when such conditions have been specified in the legislation existing on the date of implementation of the Directive. On the other hand the ECJ stresses the States´ obligation to interpret this "integration" notion in a manner fully consistent with the general principles of Community Law, in particular with fundamental rights. Indeed article 5.5 of the Directive requires the States to take into consideration the best interest of the minor, which can only be properly measured on a case-by-case basis. Therefore, the idea underlying the ECJ´s reasoning is that the wording, interpretation and application of national laws implementing the *conditions for integration* must be necessarily consistent with fundamental rights.

In accordance with the system set forth by the Directive, in order for a minor aged over 12 years to benefit from family reunification he/she will have to demonstrate that he/she meets the

[89] ¨The Directive refers to minors over 12 whose "primary residence is not with the sponsor". See Recital 12.

condition for integration. He or she could be submitted to a test with a view to measuring to what extent he/she knows the language and culture of the country of destination. It is of interest to say that the immigrants, in general, are being submitted to this kind of "integration tests" in some European countries such as Germany or Holland. In view of the way in which these tests have been designed and are being applied, many doubts arise. Let's think, for example, of the difficulty to get proper language training (particularly in the language of some European countries) in some countries of origin. To not mention the cost of this kind of training that may be simply unaffordable for people leaving in acute poverty conditions in their countries of origin. This kind of tests can certainly amount to indirect discrimination because the chance to meet the required conditions will differ depending on the country of origin of the applicant as well as on his/her personal economic capacity[90]. This kind of "integration" measures will be clearly detrimental for minors arriving from low-income countries. Even though it is known that the immigration policy is intrinsically discriminatory, it is difficult to avoid the disappointment arising from the contemplation of a result so harmful for minors, which will have little chance to meet this "condition for integration".

The ECJ also contends that the choice of 12 years as the age to establish the restriction is not arbitrary, and that, therefore, it cannot be considered discriminatory on grounds of age. Its finding in Paragraph 74 reads as follows: "the criterion corresponds to a stage in the life of a minor child when the latter has already lived for a relatively long period in a third country without the members of his or her family, so that integration in another environment is liable to give rise to more difficulties". This contention contradicts recent reports that caveat on the detrimental consequences arising for the minor from being far from their parents. This problem has been particularly analysed as regards Latin-American migrants, who flee their countries leaving their offspring behind with the scope to support them from abroad with the remittances. Even though the remittances are being encouraged and facilitated for their undeniable positive effects for the economy of both the families and the States of origin, further analysis from the perspective of the psychology of migration is needed.

[90] In the rules regulating this integration tests we find also direct discrimination. For example under the Dutch system nationals of high-income countries such as Canada, United States, Australia, New Zealand or Japan are exempted from the tests which are applied to immigrants arriving to Holland from other countries.

The reasoning of the ECJ continues in paragraph 75: “the fact that a spouse and a child over 12 years of age are not treated in the same way cannot be regarded as unjustified discrimination against the minor child. The very objective of marriage is long-lasting married life together, whereas children over 12 years of age will not necessarily remain for a long time with their parents. It was therefore justifiable for the Community legislature to take account of those different situations, and it adopted different rules concerning them without contradicting itself”. We cannot see as clearly as it is perceived by the ECJ that a married couple will live together longer than a parent with his/her offspring even though the children are over the age of 12. On the other hand, and in line with what has just been said, it seems to be more important for the minors (which are shaping their personalities) to live together with their parents than for a partner to live together with his/her spouse. In any case, we think that from the wording of the Directive, some guarantees arise. For example it seems sound to maintain that should the spouse be recognized the right to reunion, the children - whatever their age - could not be forced to remain in their country of origin. To support this contention mention has to be made to the wording of the provision at issue, which contemplates the cases in which the minor arrives “independently from the rest of his/her family”. In view of this reference it might even be maintained that when more than one member of the family is submitting the application for reunification, the applicants, even though they are minors aged over 12, should not be submitted to the restrictions envisaged in last paragraph of article 4.1. Nevertheless we would have to add that the reference in Recital 12 of the Preamble is to minors aged over 12 “whose primary residence is not with the sponsor”. This would be the situation of a minor over 12 even when he/she applies for reunification along with one of his/her parents. So, doubts arise about whether in these cases the derogation envisaged in the provision at issue might be applied. No direct guidance to this regard can be found in the ECJ´s judgment. Perhaps the continuous reference to the need to take due regard to the best interest of the minor (in accordance with article 5.5. of the Directive), might be taken as implicitly discarding the possibility of applying the “conditions for integration” in the case of minors over 12 who apply for reunification along with other members of the family to whom the right to reunion is recognized.

At this point we may provide a first general impression about this Judgment. From our point of view, even though the ECJ´s decision may be deemed as formally correct, we would have

preferred to see the Court engaged in a more in-depth analysis of the system enacted by the Directive. The shadow of the doubt pops up when analysing some of the possible results in which the implementation of the Directive might end up. It is true that the Court has stressed that the national implementation rules have to be enacted in a manner fully consistent with fundamental rights, otherwise the possibility exists of contesting those rules on the grounds that they infringe EC Law. But we have doubts about the effectiveness of this alleged guarantee.

i.5 Second contested provision: article 4.6

According to the Council, the scope of this provision is to encourage the parents to bring their children to Europe at early ages[91], when their integration is easier.

The proclaimed scope seems pretty implausible considering that there exist other means to achieve such a goal that are also less detrimental to the children. Indeed, the parents can be encouraged to bring their children to Europe at early ages through positive means instead of choosing the restrictive way, consisting of depriving the minor over 15 years of age of the right to family reunification.

In view of the article 4.6 of the Directive, some reflections arise about the relevance of the wording used to define a legal situation. Even though it is clarified in the contested provision that the right of a minor aged over 15 to join the sponsor might be recognized "on other grounds", the exclusion of such minor from the circle of subjects benefited from the right to family reunification is not deprived of detrimental effects. Under this regime, the minor aged over 15 is not treated as a member of the family. In this line, it is of interest to draw attention to recital 10 in the Preamble of the Directive, from which it may be inferred that the reach of the right to family reunification is directly associated with the definition of family. It is worth reproducing the wording of this recital: "It is for the Member States to decide whether they wish to authorise family reunification for relatives in the direct ascending line, adult unmarried children, unmarried or registered partners as well as, in the event of a polygamous marriage, minor children of a further spouse and the sponsor. Where a Member State authorises family

[91] Judgment, paragraph 79

reunification of these persons, this is without prejudice of the possibility for Member States which do not recognise the existence of family ties in the cases covered by this provision of not granting to the said persons the treatment of family members with regard to the right to reside in another Member State, as defined by the relevant EC legislation".

Last, but not least, we would like to close this section by mentioning the report issued by the former Commissioner on Human Rights of the Council of Europe, Mr. Álvaro Gil Robles, about the regulation of immigration in Denmark. In this Report, the Commissioner declared the following with regard to a Danish provision akin to Article 4.6 of the EC Directive:

> "16. The Convention on the Rights of the Child defines a child as any human being below the age of eighteen years and states that the best interests of the child shall be a primary consideration in all matters affecting the child.[15] The Convention further recognises that the child should grow up in a family environment, and requires that State Parties deal with applications by a child for family reunification in a positive, humane and expeditious manner (Article 10). Whilst this Article does not explicitly spell out an automatic right of a child to be reunited in the parent's country of residence, it clearly assumes that a possibility to apply for family reunification be given to a child.
>
> 17. The Minister for Integration insisted that such a possibility did exist for children over 14 in virtue of the general exception provided in article 9(c) of the Aliens Act. This provision may well formally permit the granting of a residence permit for the purposes of family reunion to minors over 14 years old on the basis of the best interest of the child, as is required under the Convention on the Rights of the Child; indeed, the Government bill stresses that their best interest is to be respected in all decision involving them. It might reasonably be assumed, however, that family reunion will in fact be in the best interest of the child in the great majority of cases. It is rather incongruous therefore, and certainly dissuasive, to establish a general rule presuming the contrary and to leave the expression of the exceptional grounds for awarding family reunification to minors over 14 (under a catch-all clause) to the explanatory notes of a Government bill. Such a situation fails to secure the legal certainty that ought to surround the determination of fundamental rights"

Mr Álvaro Gil Robles´ contentions are particularly enlightening. He finished his report by encouraging both the Danish Government and Parliament "to reconsider the provisions relating to family reunification"[92]. In view of this Report we might ask whether the contested provision of the Directive would resist the scrutiny of the European Court of Human Rights.

i.6 Third Provision at issue: article 8

The contested provision authorizes the Member States "to require a maximum of two years' lawful residence before the sponsor may be joined by his/her family members. The second paragraph of Article 8 authorises Member States whose legislation takes their reception capacity into account to provide for a waiting period of no more than three years between the application for reunification and the issue of a residence permit to the family members"[93]

According to the reasoning of the Court, the scope of this restriction is to permit the Member States "to make sure that family reunification will take place in favourable conditions, after the sponsor has been residing in the host State for a period sufficiently long for it to be assumed that the family members will settle down well and display a certain level of integration. Accordingly, the fact that a Member State takes those factors into account and the power to defer family reunification for two or, as the case may be, three years do not run counter to the right to respect for family rights set out in particular in Article 8 of the ECHR as interpreted by the European Court of Human Rights".

It is worth underlining that here the Court is more complacent with the Council's position than the Advocate General, who had considered in her Opinion that Article 8 might be deemed inconsistent with the human rights standards derived from international aw.

[92]The Report in its integrity can be found in:
https://wcd.coe.int/ViewDoc.jsp?id=758781&BackColorInternet=99B5AD&BackColorIntranet=FABF45&BackColorLogged=FFC679
[93] Judgment, Paragraph 98

Nevertheless, the European Court of Justice introduces some nuances shaped as caveats addressed to the Member States. In paragraph 99, and taking article 17 of the Directive as a basis, the Court maintains that the duration of the residence can be only one of the circumstances that have to be taken into consideration by the national authorities with a view to deciding about reunification. The consequence is that a decision to dismiss the application for reunification must be taken, on a case-by-case basis, paying due regard to other relevant circumstances as well. To put another way, a national law conditioning the right to family reunification to a waiting period of 2 years on a general basis would be inconsistent with fundamental rights: ("a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors": paragraph 99).

The ECJ reaches this conclusion even though the wording of the contested provision is not clear to this regard. The ECJ requires that the provision be interpreted in the context, paying attention especially to article 17.

The ECJ, in paragraph 100, goes further in nuancing its first finding about the consistency of the waiting periods with human rights, by maintaining that the reception capacity cannot be used as a criterion to deprive an immigrant of the right to reunification on a general basis when the condition of three years of residence is not met. On the contrary, the European Court maintains that this criterion can only be used in particular cases and that the absorption capacity will have to be genuinely established at the time of the application. We face again the same problem; it is difficult to cope with the legal uncertainty resulting from these provisions.

The European Court of Justice ends with a call on the States to abide by international rules when implementing the Directive. And recalls (in what seems not to be a very good omen) that the national implementing rules might be contested before the national courts, which on their turn might resort to the ECJ itself.

Finally it is of interest to mention that there exist other provisions in this Directive, which even if not impugned by the European Parliament raise some doubts about their consistency with fundamental rights. As an example, we might mention article 4.5 fixing in 21 years the minimum

age for a partner to be entitled to the right to reunion with the sponsor. Taking into consideration that in none of the Member States there exists a provision fixing the minimum age to get married in 21 years, we can legitimately ask whether this restriction in the case of family reunification is justified. The reason given with a view to explaining or justifying this restriction is the need to both ensure better integration and prevent forced marriages. It is clear that this scope could have been pursued through less restrictive measures, which would have been also more coherent.

i.7 The final reference to the primacy of the European Social Charter and the European Convention on the legal status of the migrant workers.

We have to mention that the ECJ refers to article 3.4 of the Directive, in which precedence over the provisions of the Directive is accorded to these international instruments: European Social Charter and the European Convention on the legal status of the migrant workers[94]. Article 19.6 of the European Social Charter sets forth the obligation for the States parties to: "facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory". The interpretation of this article as provided in the Appendix to the European Social charter revised, reads as follows: "family of a foreign worker is understood to mean at least the worker's spouse and unmarried children as long as the latter are considered to be minors by the receiving state and are dependent on the migrant worker". In sight of these provisions it should be maintained firstly, that the minimum age required in order for the spouse to be recognized the right to join the sponsor and which, as seen above, is fixed in the age of 21 years by the Directive, would not be applicable to the nationals from the State parties to the European Social Charter. Secondly we could also contend, on the basis of the same provisions, that the exceptions envisaged in the Directive for minors aged over 12 and 15 years would not be applicable to minors coming from States parties to the Convention[95] as long as they meet the less stringent conditions established within the European Social Charter framework: that they are considered to be minors by the State of destination and that they are dependent on the migrant worker (this would be the case of the minor sustained by the sponsor's remittances).

[94] The formula used is: "this Directive is without prejudice to more favourable provisions of"
[95] There are some non European Union member States, which are parties to the European Social Charter: Albania, Andorra, Armenia, Azerbaijan, Georgia, Bulgaria, Moldova, Norway and Romania.

Within the European Convention on the legal status of migrant workers, the relevant provision is article 12, whose first paragraph refers to a "waiting period" which "shall not exceed of 12 months". Within the field of "family reunification" and by the reference made in the main body of the Directive, this European Convention becomes binding even upon those Member States that have not ratified it yet. There are non member States of the EU (Moldova, Ukraine and Turkey), which have ratified this Convention. Therefore the nationals from these States will benefit from the more favourable regime envisaged in the European Convention. As a consequence, no more stringent waiting periods might be established, on the basis of the Directive on family reunification, with regard to the nationals of these countries.

Finally, there is also another possibility which has not been expressly contemplated by the ECJ. Indeed, the Directive gives also precedence to more favourable provisions included in bilateral or multilateral treaties between the Community and third countries, including of course mixed agreements. This could be the case with the Association and Stabilization Agreements, within which the regulation of the access of the spouse and children to the labour market is less stringent than in the Directive.

i.8 Global Conclusion

The overall impression after having examined the Judgment might be that the ECJ has left behind the opportunity to force the European institutions to be more coherent in their approach to the immigration issue. Nonetheless, maybe it should be recognized as well that it is not in the Court's hands to change the mentalities of some recalcitrant States, which eventually impose their points of view within the European institutions. We find here another illustration of the relevance of the consensus among the Member States and at the same time an evidence of how costly can be to achieve such a consensus[96]. It is demonstrated on the other hand that the coherence is not always guaranteed when the consensus is reached.

[96] The contested restrictions regarding to minors were included in the Directive to satisfy the aspirations of Germany (which had in force restrictions in the case of minors over 12 year) and Austria (which does not contemplate the minor aged over 15 years as entitled to family reunification).

Even though the European Parliament's arguments have not been backed up by the ECJ and the result may be judged as daunting at first sight; we preserve some doses of moderate optimism. This optimism is grounded on our conviction that this Judgment opens the door to further scrutiny of the implementing national measures and that, at that stage, we will probably witness a more passionate defence of fundamental rights. In this line, it might be said that the ECJ has merely deferred the moment in which it will have to establish more clear limitations arising from the need to respect fundamental rights within this field.

ii) THE READMISSION AGREEMENTS AND THE INTERNATIONALIZATION OF ASYLUM

The resort to readmission agreements[97] in the case of refugees on the basis of the principle that the asylum seeker has to lodge its application on the first safe country he reaches raises some doubts about its consistency with international obligations[98]. Even though this so-called "internationalisation" of the asylum might contribute to the creation of a dynamic of cooperation within the region of origin of refugees, it is undeniable that in order to get this result, it has to be accompanied by the sufficient support from the EU to the so-called "safe countries" in order to alleviate them from the burden arising from the need to provide adequate protection to asylum seekers.

At first sight many questions arise from the contemplation of this European strategy with regard to asylum. Might Internationalization of protection be conceived of as an additional illustration of the European commitment to promoting "regional solidarity"? What about interregional solidarity? It seems sound to contend that in the name of this interregional solidarity, sufficient support (financial, technical and so on) should be provided to the countries overburdened by the need to offer due protection to refugees. As already said, the idea that the persons should be

[97] So far, there exist readmission agreements with Albania, Hong Kong, Macao, Sri Lanka and Russia. There are negotiations underway with Morocco, Ukraine, Turkey, China, Pakistan and Algeria.

[98] The first safe country rule is based upon a broad interpretation of Conclusion 58 (XL) of the Executive Committee of UNHCR's Programme: "The phenomenon of refugees, whether they have formally been identified as such or not (asylum-seekers), who move in an irregular manner from countries in which they have already found protection, in order to seek asylum or permanent resettlement elsewhere, is a matter of growing concern. This concern results from the destabilizing effect which irregular movements of this kind have on a structured international effort to provide appropriate solutions for refugees. Such irregular movements involve entry into the territory of another country, without the prior consent of the national authorities or without an entry visa, or with no or insufficient documentation normally required for travel purposes, or with false or fraudulent documentation."

attended as closer to their country of origin as possible may be deemed as positive only insofar as it encompasses a serious commitment to offering the necessary support for these regional safety networks become an effective reality[99]. Otherwise, the impression is that the EU is only trying to deflect the burden on others[100]. Should these "others" not be in conditions to abide by the international obligations concerning refugees, the European Union might certainly be held responsible for the resulting breach of international law. So far, specific regional protection programs have been created for Ukraine, Moldova, Belarus and Tanzania, and it has already been criticized that the funds envisaged in these Programs are insufficient to offer a proper support for these countries[101].

According to the Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status[102], there are four criteria used to decide if a country might be considered safe. These criteria, according to article 27.1 of the Procedure Directive are the following: "i) Asylum seekers' lives or freedom must not be threatened on account of race, religion, nationality, membership of a particular social or political opinion; ii) countries must respect the principle of *non-refoulement*; iii) there can be no risk of the person being removed to another country where they may face torture and cruel, inhuman and degrading treatment; and they must be able to request and to be granted refugee protection in that third country in accordance with the Geneva Convention. This so-called "Procedure Directive" raises some doubts about its consistency with international obligations and has been brought by the European Parliament before the ECJ within the framework of the action for annulment[103].

[99] PERAL, Luis. "Límites jurídicos al discurso político sobre el control de los flujos migratorios: non refoulement, protección en la región de origen y cierre de las fronteras europeas". In: Revista Electrónica de Estudios Internacionales, n. 11, 2006. http://www reei.org/reei%2011/L.Peral(reei11).pdf
On the readmission policy see: BOUTEILLET-PAQUET, Daphné. "Passing the buck: a critical analysis of the readmission policy implemented by the EU and its Member States". In: European Journal of Migration and Law 5, 2003, p. 359-377.
[100] See: "An ECRE evaluation of the development of EU minimum standards for refugee protection. Tampere 1999 – Brussels 2004", June 2004: (*www.ecre.org*):: "What we went on to witness was five years of difficult negotiations not driven by the spirit of Tampere, but driven by most European governments' aim to keep the number of asylum seekers arriving as low as possible and by their concerns to tackle perceived abuses of their asylum systems. Countries showed little sense of solidarity and pursued their narrow national agendas at great cost to refugees and to the building of a fair and efficient European protection system."
[101] PERAL, Luis. "Límites jurídicos… op. cit.
[102] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on proceedings in Member States for granting and withdrawing refugee status.
[103] Action brought on 8 March 2006 - European Parliament v Council of the European Union (Case C-133/06)

It seems clear that, as contended by Cathryn Costello further guarantees should be provided for by the European Community as regards the monitoring of the situation of the asylum seeker once she is expelled to a so-considered "safe country"[104]. What happens if the country, labelled as a "safe country" by the EC, defines its own list of safe countries? Is there any possibility for the EC to control this list? May this chain lead to a refugee-in-orbit situation or what is worse to *refoulement*? Furthermore, we have to keep in sight that considering the living conditions in many of the countries qualifying as "safe", it should come as no surprise if the asylum seeker prefers to be an irregular in Europe than a refugee in one of those countries[105].

We are not going to go into more detail on the analysis of this Directive, the point we want to make at this moment is merely that it seems utterly logical to be suspicious about how easy is for the European Union to trust other countries as regards their ability to provide asylum seekers with proper protection according to international standards, whereas the same European Union is to a great deal reluctant to trust maybe the same countries as regards their ability to assess the safety of certain food products[106]. This landscape is deeply disappointing if seen from the point of view of the expectations yielded by the own European Union's discourse.

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[104] COSTELLO, CATHRYN. "Procedures directive and the proliferation of State Country Practices: deterrence, deflection and the dismantling of International Protection? In: European Journal of Migration and Law 7: 35-69, 2005.

[105] UNHCR Global Consultations, Background Paper No 2 The Application of the 'Safe Third Country' Notion and its impact on the management of flows and on the protection of refugees (Geneva: UNHCR, May 2001). Even in Europe, the preferences of the asylum seekers can be frustrated by the application of the first asylum country rule. See to this regard, the information provided by Barry Junker about the situation of refugees in Poland: "Burden sharing or border shifting? Asylum and expansion in the European Union" 20 Geo. Immigra. L.J. 293.

[106] See the current debate on the amendment of the 97 Council Regulation on Novel Food (EC Regulation 258/97). This Regulation has two main scopes: to protect the functioning of the internal market and to protect public health. It sets up a system for granting a pre-marketing approval of novel foods, providing for a single safety assessment regarding the placing on the market of the novel foods. Novel food is defined as a food that has not been used significantly within the EC before 15 May 1997.
According to the EU proposal the exotic traditional food would be considered novel food and consequently subjected to the safety assessment by the European authorities. Many countries in Latin America, particularly the Andean countries, have expressed their concerns. They consider that in assessing the safety of traditional products largely used in third countries, due attention should be paid to the safety statements issued by the authorities in these countries. Similarly, the existence of a long history of safe use should be taken into account.
The Andean Community´s contention is their traditional products, resulting from the bewildering biodiversity existing in their territories, should be clearly differentiated from the so-called novel products. The procedure to get the authorization for marketing should be simplified, the permission should be general (through Regulation instead of Decision) and the spectrum of subjects authorized to apply for authorization should be broadened. It is worth noting that nowadays the proceedings to get an authorization for placing novel foods on the European market can take longer than two years on average. The procedure comprises an initial assessment by the national authorities, an initial assessment report, comments or reasoned objections from all Member States and the Commission, and possible referral to the Standing Committee for Foodstuffs.

iii) THE POSSIBILITY FOR OUR PARTNERS TO USE THE HUMAN RIGHTS CLAUSES ENSHRINED IN THE EC AGREEMENTS

We want also very briefly to point to the possibility, at least theoretical, for our partners to make use of the human rights clauses included in the agreements signed with the EC. We are thinking of a situation in which a partner denounces either the European Community or the Member States (in the case of mixed agreements) for a violation of human rights of its nationals as immigrants in Europe. It was reported very recently in Spain[107] that ten NGOs had publicly complained for the violation of the rights of the minor immigrants. The alleged violations were basically two: firstly, the systematic violation of the right of the minors to be heard during the procedures leading to the issuance of the expulsion resolution, with the minor receiving first notice of the proceedings when the resolution was handed to him by the Spanish authorities. Secondly, the NGOs claimed that in many cases the minors were not being brought back to the places where their families lived.[108] The situation in Spain is particularly serious as regards minors arriving from Morocco and Rumania. In the latter case, there is also an ethnical component, for the minors who arrive to Spain are mostly from the Roma community[109].

The potential resort to the human rights clauses by our partners in these cases might be considered as a mere theoretical hypothesis. As a matter of fact many of the partners who are sources of immigration, have their own problem to demonstrate that they properly respect the international standards as regards human rights protection. In a way it could be said that it would be too cynical for most of them to use the democratic clause as a means to protest against the

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In this case, and now that the project is under discussion and therefore the possibility to get it modified still exists, the European Union has a great opportunity to be more responsive to the needs of the developing countries while ensuring a proper level of public health protection. In our opinion when there is a significant history of safe use in other countries, the assessment of risk should be simplified.
See on this issue: http://ec.europa.eu/food/food/biotechnology/novelfood/initiatives_en htm

[107] EL Pais, 14 April 2006.

[108] Femando Mariño, member of the United Nations Committee Against Torture, expresses the problem in the following terms: "la señalada preocupación sobre presuntos fenómenos discriminatorios (incluidos malos tratos) a inmigrantes, incluso en los trámites de acogida, admisión o rechazo de extranjeros en situación irregular; en particular, el trato y la acogida protectora a menores extranjeros (sobre todo, los no acompañados), objeto de recomendación reiterada en el sentido de la necesidad de mejora de los estándares y prácticas aplicados en tales supuestos". Mariño Menéndez, F. "La participación del Estado español ante el comité contra la tortura de las Naciones Unidas". In: "España y la ONU 50 aniversario. Asociación para las Naciones Unidas en España, Icaria Editorial, 2005, p. 116

[109] Another case: suspension by Senegal of the informal agreement on readmission with Spain due to the alleged mistreatment given to her nationals by the Spanish police. http://www.afrol.com/es/articulos/19562 http://www.elmundo.es/elmundo/2006/06/01/espana/1149182190 html

European Community (sort of clean hands argument). Nevertheless, precisely the fact that these countries might have a not very clean history as regards human rights protection makes these European actions about which complaints might be lodged, particularly harmful because these actions undermine Europe's legitimacy to lodge its own complaints against these countries. It is not so theoretical the possibility that these countries could resort to the clause as response to the use thereof by the EC against them (in a way, Europe's hands get dirty too[110]).

VI FINAL CONSIDERATIONS

It is not easy to be what the European Union says that it wants to be. But it is clear that within the world scene the need exists of an actor playing the role that the EU seems to be keeping for itself.

The European discourse is not only important as a means to shape the identity of the European Union, but also as a point of reference against which measuring the extent to which the European project is plausible. On the other hand, this discourse is contributing to the internalization of the values upon which it is built. The extent to which these basic values are internalized by the European society is probably greater than the extent to which they are internalized by any other society in the world.

It has been demonstrated that there exist many European actions illustrating that the European discourse goes beyond the mere rhetoric. Nonetheless, it has also been demonstrated that within fields of a high relevance, the European actions do not always fit the discourse. In all these cases the underlying logic falls closer to the traditional logic applied by the superpowers, one that is based on imposition/power instead of recognition/reputation. The result is largely detrimental for the European Union itself, undermining its image as a civilian power.

In the search for legitimacy it is essential for the European Union to honour its constitutive commitment to multilateralism. But real life is complicated, also within the realm of an

[110] The "guiding by example" model, advocated by Weiler and Alston, results clearly undermined. A
ALSTON; WEILER. "The European Union and Human Rights" (Florence: European University Institute)

international organization. We have contended that, within certain fields, the European incoherence seems to have a low cost in terms of internal legitimacy. Nevertheless, it is worth stressing also that it might have a high cost if we think of how these incoherencies undermine the reputation of the EU on the world scene. At the same time, from an internal point of view, the position of the EU vis-à-vis their member States results weakened. The EU should always be able to identify a supranational interest, even within these problematic fields, differentiated from the interest of individual States, and subsequently should be able to persuade the European citizens that their personal interest is closer to the supranational than to the national interest. It is not easy to accomplish this goal, because in order to do so the need arises for the EU to circumvent the Member States in its communication with the Europeans. But we also think that if there is a framework nowadays where this result can be achieved, this is no doubt the European Union.